The Legal Enforcement of Morality: A Three Case Study

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ABSTRACT

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The purpose of this Senior Honors Thesis is to research the relationship between morality and the law. The breadth of this study makes it an impossible task to research in one paper, therefore, this paper will be an overview of America's history of the legal enforcement of morality. Three case studies: the colonial Blue Laws, the nineteenth and turn of the century Prohibition movement, and the contemporary abortion issue, are representative of the evolution of a legal-ethical philosophy in American law. The research focuses upon determining the historical background of the dilemma, the influence of pressure groups, and the implications of changing attitudes within our society.

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INTRODUCTION

In the first chapter of the Old Testament book of Isaiah, the prophet condemns the people of Judah as "a sinful nation, a people laden with iniquity, a host of evildoers, children that are corrupters" and then continues on to threaten the punishment of this nation of sinners which had transgressed against the laws of God. The attitude that the community as a whole suffers because of the immoral actions of its citizens continues in today's society. Not only does a man worry about the morality of his own actions, but about the morality of his neighbor's actions as well, and of the consequences these acts could have for himself, his family, and his society. The question of whether the morality of the citizen should be controlled to protect the society as a whole has been a traditional study of political philosophers and historians. In recent years the urgent need for a comprehensive legal policy on a number of controversial issues has led various organizations to put pressure on the court systems and legislatures to decide what role, if any, ethical values should play in the legal system.

Theoretically, modern legal philosophy contends that the law is morally "neutral," that in the United

States we have a separation of ecclesiastical and secular affairs, a separation of political and moral authority, and a separation of law and personal conviction. However, our legal system contains an inescapable paradox: in its foundation is both a belief in the principle of individual rights and a heritage of our forefathers' ethical values. Despite our supposed separation of church and state, it is an undeniable face that we live in a Judeo-Christian society. Recent polls indicate that ninety-nine percent of all American citizens believe in some sort of diety or guiding moral force in the universe.[1] These beliefs must have an impact on both our value and legal systems. If laws and morality are interdependent, then at what point does a court infringe on the rights of the individual in deciding issues of "right" or "wrong", "good" or "bad", "acceptable" and "unacceptable"?

The breadth of this controvery extends into all disciplines. The medical student confronts the issues of is abortion murder, are people dead when their brains stop functioning? Military personnel decide issues of the morality of developing atomic weapons. The psychologists and sociologists explore the nature of homosexuality, trying to determine if its practice is a crime subject to criminal law or simply an alternative lifestyle. American writers and artists face the dilemma of one man's art being another man's pornography.

The purpose of this Senior Honors Thesis is to search for the historical background of the dilemma,

the influence of pressure groups, and the implications of changing attitudes within our society. The subjects studied in this paper cover three topics: the colonial Blue Laws, the nineteenth and turn of the century Temperance movement, and the nineteenth and twentieth century abortion issue. These particular subjects were chosen because they reflect the basic progression of the legal-moral debate in American history. From the introduction of this controversy in the American legal system to its present status covers a very broad range of topics; yet, though the issues change, the rhetoric on both sides sounds amazingly familiar through the years. In this study of the evolution of our legal philosophy, the research has focused upon several major points. The most important focus is upon the impetus behind the legislation, particularly the personal motives, group attitudes, and changing social factors which might have motivated reformers. Secondly, this study will appraise the effectiveness of punitive measures in obtaining the desired behavior from citizens in the community. Finally, the changing role of the courts in settling constitutional questions and the changing attitude of the public in response to these decisions will be examined.

The primary sources for this paper were the statutes, regulations, and judicial opinions in the relevant court cases. Law review commentaries, philisophical essays, and journal articles were also used to provide insight into the social, political, and pressure group influence upon the legislature and court system. One of the most

beneficial sources was John S. Mill's essay "On Liberty," which advocated a "simple principle" of government. Simply stated, Mill's principle was "That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."[2] This philosophy of a government whose only function was to protect its citizens was diametrically opposed to the puritan heritage that viewed citizen and government interaction. This paper is the history of the struggle between the two philosophies.

I

A study of the colonial Blue Laws, legislation aimed at rigidly controlling public and private morals, is a good starting point in investigating the legal enforcement of morality in American history. These acts included strict laws against Sabbath breaking, drunkenness, and sexual misconduct. The term "Blue Law" was first found in the writings of the loyalist clergyman, Samuel A. Peters, who in 1781 condemned these acts as "bloody" laws and the people of Connecticut as being "without virtue and honesty."[1] The actual history of the term is that the first printed laws in the New Haven colony were recorded on blue paper. From the very inception of the colonial charters, these laws provided an ethical standard for citizens of the New World. The Virginia Charter of 1606 required that all inhabitants should have the faith preached unto them "according to the doctrines, rights, and religion established within the realm of England."[2] And five years later, in 1611, the Code of Sir Thomas Dale made church attendance compulsory. Punishment for a first offense was public whipping, a second offense called for two whippings and an acknowledgement of the offense in front of the church congregation, and a third offender was whipped

until he asked for forgiveness.[3]

The impetus behind the Puritan blue law regime was the doctrine of a church-state partnership. Settlers of the American colonies did not come to America in search of religious freedom, but came to America in search of a land where they could establish their own church as the official state church and fulfill their desire to restore the Bible as authority.[4] With the exception of Rhode Island, all the colonies eventually had a recognized state church which was supported by taxes, whose sanctions were enforced by the civil authorities, and which guaranteed full political rights only to members of the recognized church.

Although church attendance was required of all inhabitants, only a minority of the population actually retained an official membership in the church. The explanation for this fact is that only a small elite qualified for membership and these were chosen on the basis of a personal conversion experience. Despite the fact that non-members had no chance for salvation, punishment for infractions of the Lord's Day, the Puritan Sabbath began at 3 p.m. on Saturday, and the laws which governed its observance began at a comparitively early stage. For a trivial act of Sabbath breaking, John Barnes was sentenced by the court at New Plymouth, on October 5, 1636, to pay a fine of thirty shillings and required to sit in the stocks. However, on that same day in 1636, Edward Holman was let off with only a fine of twenty shillings;

apparently the courts did not concern themselves with the unfairness of their punishments.[5]

Church attendance was made the greatest test of piety and character. All activity was ordered in this manner. An interesting case of dissension was that of Webb Adey who preferred working in his garden to attending the monotonous church services. On his first offense he was put in the stocks for an afternoon, but a few short Sundays later he was again reported by his neighbors for working in his garden and was again brought before the court at New Plymouth on June 5, 1636. At this time, witnesses testified against his atrocious behavior and the court records read "Censured and whipt." Yet, less than a month later, on July 7, Webb was again haled before the New Plymouth court, convicted, and this time severely punished to the point that he never again committed such a folly.[6] Webb Adey is but one of the many transgressors who tried to rebel against the system, but was unsuccessful. And though some of these rules were repealed, other, tougher measures continued to take their places in the statute books.

Another example of the lack of religious freedom found in Calvinist New England was the abundance of laws against dissenting religions. Samuel A. Peters records that Connecticut law provided that "If any person shall turn Quaker, he shall be banished and not suffered to return upon the pain of death." In addition, "No priest shall abide in this dominion; he shall be banished, and

suffer death on his return. Priests may be seized by anyone without a warrant." Punishing dissenters by whipping, branding, maiming, banishing, and actually executing, was the norm within the Puritan community.[7]

The Puritan ideal of society was a theocracy, with powerful ministers and absolute control of individual conduct. The family was the center of godliness, and life was to be lived in strict adherence to the detailed laws of God as read in the Bible. The clergy increasingly became privileged characters. For example, in Virginia in 1623, Anglican ministers were using their powers to extort money from their parishioners. In some instances they stopped mid-way in a marriage ceremony to demand payment for the service. The Virginia clergymen reveled in amusements, often joining the planters in drinking and gambling-bouts, as well as sheer immorality. In fact, many carried these practices to the extreme of actually failing to appear in their pulpits on Sunday mornings.[8] The Virginia General Assembly then took action by passing punitive measures designed to prevent this sort of behavior. However, the clergy had gained so much power that it simply used its influence to pass gag rules in 1624. These laws kept any person from saying anything bad about a member of the clergy under penalty of law. In 1631, these ministers even gained the power to have legislation passed which confined civil rights exclusively to church members.[9]

In the chronicles of every statute book in every colony there is abundant evidence that the Blue Laws and other suppressive measures governed the lives of the average colonial citizen. But what about the upper class citizen? Was he subjected to the same harassment and oppressive guidelines? The answer to this question is discernable after a quick review of the record of enforcement of these measures. The punishment was clearly administered with a class bias. The people charged and convicted of immorality were always members of the lower and middle classes.[10] This fact is important because it provides an explanation for the failure of resistance to the repressive measures and the longevity of the Blue Laws. The upper class did not conform to these measures; however, its members, like the clergy that they supported, approved of and used the measures to control the rest of society. The legislating of morality in colonial times appears to have been a means of subjugating the working class and forcing its members to conform and act like a single, homogeneous group.

The attempts to control the working man's lifestyle failed miserably in many respects. A good example of this was the move to prohibit tobacco products. The First General Letter of 1629 limited the use of tobacco products to "purely medicinal purposes." The General Court of Massachusetts, which made the laws, followed up the decree with severe statutes punishing

all offenders. However, it soon became apparent that both masters and laborers had developed the tobacco habit, so new laws passed in 1638 began to allow smoking, but severely fined anyone caught smoking in barns, fields, or forests, and also forbade the use of these products in inns or public houses.[11] It is apparent that this law was designed to allow only the elites and clergy to enjoy the use of tobacco products. However, even the threat of punishment could not deter the servants from picking up the habit because as a rule, no procession of laws can keep people from doing what they feel they are entitled to do.

Indeed, these periods of repression were marked by a lack of chastity, a disregard for the traditional marital vows, and the frequent occurrence of bigamy. Also, despite the severe punishments for public intoxication, there is much evidence that alcoholism reached epidemic proportions in the colonial period.[12] Obviously, something was wrong with the Puritans' approach. In 1714 the Connecticut legislature gave the Connecticut General Association of Churches permission to make an inquiry into the situation. The thought that perhaps the repressive measures were in themselves a source of the problem obviously never even crossed the committee members minds because the results of their inquiry was as follows:

1. A want of Bibles in particular families.
2. Remissness and great neglect of attendance of the public worship of God upon Sabbath days and other seasons.
3. Catechizing being too much neglected.
4. Great deficiency in deomestical government.
5. Irregularity of commutative justice...
6. Talebearing and defamation.
7. ...contempt for authority...both civil and ecclesiastical
8. And intemperance...

Thus the conclusions of their surveys called for more and stricter laws than those already on the statute books. "Decay in religion" had to be prevented.[13] So new laws were passed which required selectmen to go from house to house in the communities and make inquiry into "how they are stored with Bibles." Regardless of financial insufficiencies the families were forced to procure a minimum number of Bibles per household. In addition, these families were required to have a suitable supply of orthodox catchisms and other godly books.[14] By legislating against immorality, the clergy were merely bypassing the true roots of discontent within the community. The gap between the theocracy and the people widened as one group made rules for conduct and tried to enforce them, while the other revolted against these excessive efforts to constrict their freedom in a society whose cultural and economic values were slowly beginning to change.

A major contributor to this transformation in the public's perception of the clergy was the development of a more personal religion. One of the positive outcomes of the great religious revivals which swept the nation in the eighteenth century was the idea of individual conscience being superior to theological doctrine. The decisive way the American people deposed the ministerial hierarchy stands out as a major achievement of this period. The intolerance and hypocrisy of the clergy caused the public to lose respect for the religious community. And laws such as Virginia's gag rules and Connecticut's anti-defamation acts only served to antagonize the citizens. The most popular reason for the hostility toward the clergy was the association between the church's ruling class and the aristocratic class. The subservient behavior of the church toward these elites aroused much opposition from the working class parishioners. Retributions began to follow. For example, in 1777 the state of Virginia passed a provision which excluded all ministers from membership in their legislature.[15] The ministers recognized this public hostility but did not inquire into its causes; they merely bewailed their situation.

The colonial period was marked by these repressive measures; indeed the word puritanism has today come to denote some form of repression. The laws were not effective because they sought to treat the populace as though it were a homogeneous unit, a single group which

shared similar ideals and beliefs and could be controlled through these measures. However, America was changing. The system had evolved because the society no longer possessed a traditional mentalité; it was ceasing to be an agrarian, stable society which espoused communal responsibilities and deferred to elites. As more liberal ideas of economic and political freedoms took hold in American philosophy, they naturally influenced the culture as well. During the eighteenth century the society took a more secular outlook upon government's role in the individual citizen's lifestyle, and the emphasis moved away from crimes of immorality to crimes against property.

It is interesting to note that some states still retain Blue Law, or Sunday legislation, though in a much subtler form. The Warren Court confronted the constitutionality of Maryland's Blue Laws, which banned a variety of Sunday retail business activities, in a 1961 case, McGowan v. Maryland.[16] Chief Justice Warren's majority view dealt with two constitutional questions: whether or not the laws in question violated the equal protection clause and whether or not they constituted an establishment of religion. The court dismissed the first question because the states had discretion in enacting such laws. The court addressed the second question by examining the history of Maryland's Blue Law and concluded that while such legislation had originally been religious in purpose, its modern objective was secular--

to provide "a Sunday atmosphere of recreation, cheerfulness, and enjoyment." Thus the disputed laws were found constitutional and this precedent has been upheld in similar disputes since the 1961 decision.

II

The Blue Laws of pre-Revolutionary America had promoted ethical unity and moral offenders still appeared before the courts as late as 1770. However, the pressures of a more capitalistic society forced the legal system to spend less time punishing the sins of moral transgressors and more time on crimes against property. By the 1820's,

> proprietors (had) turned their workshops into little factories, moved their families away from their place of business, and devised standards of discipline, self-control, and domesticity that banned liquor...drinking became part of an autonomous working-class social life, and its meaning changed.[2]

The movement for temperance was a major social, political, and religious movement of America's nineteenth century attempt to reform the basic beliefs, customs, and institutions which were predominant in the nation's heritage. "By 1810, whiskey, rum, and other distilled spirits ranked behind cloth and tanned products as the third most important industrial product."[3] Yet reformers were alarmed by the shoddy work, broken families, health problems, crime, and poverty which they claimed were a result of the rise in liquor consumption in post-Revolutionary America. The ranks of these organizations were filled with citizens concerned with the increase in

violence, businessmen faced with employee absenteeism, as well as religious zealots and humanitarians who wanted to perfect society. The anxiety caused by the apparent loss of traditional norms within the society caused these reformists to search for a panacea. Thus the nineteenth century saw the birth of organizations which blamed everything from slavery to social disorder on the consumption of alcohol.

The Massachusetts legislature took the first steps toward regulation when it banned the sale of distilled liquor in quantities under fifteen gallons. The 1838 15 Gallon Law experiment resulted in mob violence, harassment, and the eventual repeal of the law by the 1840 legislature. The opposition to the 15 Gallon Law was led by those businessmen who faced a significant financial loss if the law was enforced. These men argued that states had power to regulate, but not prohibit, commerce. Furthermore, the issue of class discrimination was leveled against this law because it excluded wine, the beverage that only elites enjoyed, from regulation. In response the Temperance men pointed to recent decisions by the Supreme Court, for example Gibbons v. Ogden and Commonwealth v. Kimball, which affirmed the broad scope of police powers. "There are no immoral rights. What is immoral in itself, or what leads to immorality cannot be right."[4] The political battle raged on, but the final blow to the law was the inadequacy of enforcement caused by the difficulty of

obtaining evidence of an illicit sale, and the lack of convictions, caused by the overload of license cases in the court systems.

The stringent no-license policy adopted by the Massachusetts county commissioners as an alternate to the 15 Gallon Law also had flaws. In order to secure an indictment, a complainant had to charge the accused with an illegal sale to a person whose name would also appear on the indictment. The methods for obtaining evidence were, to say the least, unreliable. The police could not be held responsable for prosecuting sellers, but rather this task fell to Temperance men who volunteered to serve as informers. Oddly enough, a large percentage of the complainants were related to the defendants. The court records from 1834 to 1845 record cases of fathers turning in their sons, brothers turning in brothers, husbands their wives, and even daughters their mothers.[5] Other alternative methods of enforcement were experimented with by Temperance men. For example, some towns formed enforcement committees to gather evidence. Other towns published the names of accused persons in attempts to embarrass offenders. The annual Attorney General's Report showed an increase in convictions in Massachusetts from 39% in 1845 to 57.8% in 1849.[6] This crackdown on licensing sellers did not decrease the immoderate use of alcohol. Drunkards became more common and those convicted often consisted of people who were predominantly alien, vagrant, and poor.

As the Temperance men of Massachusetts gained more and more of their demands, they began to push for complete prohibition. Reformist Lucius Sargent wrote in 1851, "...patience has had its perfect work...(we) have tried grass long enough, and that it is not time to see what virtue there is in granite."[7] This policy was implemented in 1852 when Maine passed a harsh prohibitory law. The long and detailed law forbade the sale of liquor, except for medicinal purposes, and outlawed the liquor traffic within the state.

After the Civil War, the push for temperance increasingly became a national political movement. In 1869 the Prohibition Party was formed primarily as an organization to pressure for legal prohibition of the manufacturing, transportation, and sale of alcoholic beverages. From 1872 on, the party has run candidates in every presidental election. The most popular support for the party came in the 1892 election when the Prohibition candidate received 271,000 votes. The next year, the Anti-Saloon League organized in Ohio. Other national reform groups were the Women's Christian Temperance Union, formed in 1874, and the Methodist Board of Morals. Temperance in the nineteenth century emerged as a movement of the native, Protestant, reputable American citizen.

Profiles of Temperance men compiled by Robert Hampel reveal that pro-law petitioners figured prominantly into local politics, generally supported anti-slavery, and had great representation in the local

Masonic lodge.[8] From 1812 to 1815 the forty-one towns with Temperance societies returned Federalist majorities in elections. The Temperance cause appealed to men of property. For example, in Concord the twenty-two wealthiest men belonged to Temperance societies and members tended to be more socially mobile than other citizen in Concord. Those who pushed for moral reform belonged to the Federalist party, a party whose own status was declining. And while the percentage of Temperance society members who belonged to churches was high, 30.4%, this still left a significant number of Temperance men without religious affiliation.[9]

The farmers and less well-educated urban class were rejecting the moral supremacy of the Federalists. Thus, Temperance represented an attempt of a social elite to retain its social and moral leadership within the society, despite the fact that this class was losing political control. "The transition from irregular work rhythms of preindustrial society to the clockwork discipline of labor in a maturing economy also explains the popularity of temperance... Factories, mills, and offices would not tolerate the start/stop schedules of men accustomed to noon drams and unexcused absences on 'Blue Monday.'" As in the colonial Blue Law period the elites were faced with a changing social structure. Formerly the employee had served as an apprentice to the master craftsman, he had lived with his employer in an extended family, and had been under the moral influence of his

employer. One consequence of employees moving into areas populated by other laborers was that the relationships between peers began to take precedence over traditional relationships, thus increasing social stratification. Drinking and abstinance became social symbols used to identify social levels within the society.

One ambitious sociologist, Joseph Gusfield, in his book, The Symbolic Crusade, studied the conflict between the rival subcultures associated with the temperance and anti-temperance forces. He pointed out that sobriety was a virtue in a middle-class, Protestant society. An ambitious worker knew that a temperance pledge would further his career opportunities. He adhered to a culture which held self-control, industriousness, and impulse renunciation as virtues worthy of praise and reward. In other words, Temperance was a symbolic movement of a "doomed class" attempting to create artificial restraints upon other classes, in order to maintain its coveted position of respect and importance within the average American community.[11]

Gusfield points out that Temperance was not just a movement to reform society. Despite the fact that spokesmen urged citizens to save the drunkards, the numbers of which had reached epidemic proportions, there is little evidence of any successful programs being established on behalf of the besotted. These organizations rarely sought out intemperate members. Despite their rhetoric, the elites did not fraternize with the

people they were supposedly fighting to save. Any attempts to reclaim the drunkard usually ended with the societies becoming divided over the issues.

The Temperance movement also took on nativist overtones. Prejudices against the intemperate Irish began to manifest themselves in support of Temperance organizations. One spokesman of such an organization said, "There should also be a law compelling deportation of every foreign born person convicted of violation of the prohibition laws, as soon as they have served their sentence."[12] Throughout the nineteenth century more and more supporters flocked to the Temperance ranks out of fear of the hordes of Catholic immigrants flooding the country. The Eighteenth Amendment, in a sense, was the ultimate backlash of white, middle-class, Protestant Americans against the social upheaval and degeneration they thought was transferring America's cities into violent slums. By seeking government prohibition of alcohol, a symbol associated with the lower classes, "respectable" citizens were seeking confirmation of their own social status.

A new wave of Prohibition campaigns began after 1906. The new movement was decisively rural and isolated itself from other political movements. From 1843 to 1893, fifteen states had passed legislations prohibiting the sale of alcohol within the state. By 1906, only three, Iowa, Kansas, and Maine, had not repealed these laws. Yet, within the next six years, seven states

had renewed prohibition laws and by 1919, an additional nineteen states had used the referendum to pass restrictive legislation.

The legal battle over prohibition was debated in a Congress divided between "dry" factions which urged Congress to make prohibition effective and "wet" factions which were strong enough to prevent more than nominal restrictions on the production, shipment, or sale of alcoholic beverages. The Wilson Act of 1890 had authorized states to prevent the sale of liquor in original packages which had been shipped in interstate commerce. As interpreted by the courts, the act did not allow the states to assert jurisdiction however, until the delivery of packages to consignees.[13] In March of 1913, the Congress went a step further in its move toward national prohibition with the passage of the Webb-Kenyon Act. This law forbade the shipment of liquor in interstate commerce into dry states. Many opposed the Webb-Kenyon Act, including Attorney General George W. Wickersham, who thought it unconstitutional because it delegated various powers to the various states. The bill was passed over President Taft's veto despite his warning that "I cannot think that the framers of the Constitution...had in mind for a moment that Congress could thus nullify the operation of a clause whose useful effects are deemed so important."[14]

In 1917, the Supreme Court upheld the constitutionality of the act in Clark Distilling Company v.

Western Maryland Railroad Company by a seven-to-two vote. Disagreeing with Taft, who had appointed him and would later succeed him as chief justice, Chief Justice Edward D. White argued that the act did not delegate powers to the states because Congress had presented the conditions under which the law could be enacted.[15]

In 1917 Congress adopted the Lever Food Control Act which adopted prohibition as a wartime food-control measure. In this same year, the Eighteenth Amendment was submitted to the states for ratification. Twenty years of campaigning was rewarded when on January 16 1919, a war-frenzied nation, caught up in patriotism, when three-fourths of the states had approved the Eighteenth Amendment. Immediately, a complaint was filed because Ohio, one of the states that had ratified the amendment, had substituted action by referendum for an act of the legislautre to ratify a constitutional amendment. This act appeared to violate Article V's stipulations of how states could amend the constitution. The decision in the case, Hawke v. Smith, agreed that the procedure must follow the constitutional guidelines; however, the point was moot because the amendment clearly had more than the required three-fourths majority to be considered legal.[16]

One week after its decision in Hawke v. Smith, the Supreme Court decided seven other important cases contesting the validity of the Eighteenth Amendment. Two of these suits were brought by states, Rhode Island and New Jersey, against the Attorney General to prevent him

from enforcing the law. The National Prohibition Case, Rhode Island v. Palmer (1919), was the first time that a part of the Constitution itself was challenged for being "unconstitutional," a seemingly impossible contradiction. Yet, the case was supported by three arguments. In the first two contentions, counsel argued that the amendment had been illegally adopted on two grounds. First, the legality of Ohio's ratification had not been decided in Hawke v. Smith. The second was that the amendment had been passed in each state by a two-thirds majority of those present; counsel contended that the Constitution actually required passage by a two-thirds majority of the total membership of each house. This was a weak argument because the amendment had been passed overwhelmingly in all but two states. Counsal presented a third argument contending that the substance of the amendment was illegal because it was a radical invasion of the original police powers of the state. It thus violated the Tenth Amendment, bringing about a fundamental alteration in the distribution of powers between states and national government. This contention's weakness was obvious: the Thirteenth, Fourteenth, and Fifteenth Amendments had all previously altered the relationship between state and federal government. Moreover, the U.S. Constitution placed no stated or implied limits on the content of an amendment except in Article V, which prohibited altering the equal representation of a state without its consent, or abolishing the slave trade before 1808.[17]

In June of 1920, Justice Van Devanter handed down the decision on the case. Without presenting any reasoning whatsoever to support its conclusions, Van Devanter said that the amendment could be ratified by a two-thirds quorum in both houses of a state legislature, although a state could not ratify by referendum. The court did not analyze any of the arguments and completely ignored the issue of the constitutionality of the amendment.[18] The apparent reluctance of the courts to decide whether or not the substance of an amendment was constitutional is a reflection of the attitude toward the court's powers of judicial review.

Obviously, the Temperance organizations had the political support to get their implementation measures passed. However, the rules would mean little if they could not be fully enforced. The law could be used successfully only if the average law-abiding citizen acknowledged the value of that particular law. If a large minority felt that the government was intruding into its sphere of private morality, as many did feel, they were likely to protest. This reaction occurred nationwide in states which attempted to legislate and enforce prohibition. Such resistance would have been applauded by John S. Mill who had had definite ideas about what the sphere of government control should encompass;

> When there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of motive...he ought, I perceive, to be only warned of the danger, not forcibly prevented...[19]

Mill's thesis denied the social philosophies of the times which sanctioned collective, rather than individual, responsibility. Mill reproached the idea that men in a society should not be allowed to participate in an activity because other men saw these actions as self-destructive or degrading. He applauded each man's right to live his own life without unnecessary restrictions upon his behavior.

The major reason for the failure of the Eighteenth Amendment was the same one which doomed earlier prohibition laws. Enforcement was almost impossible because citizens rejected the law as illegitimate. As Mill had written, "...different people require different conditions for their spiritual development; and can no more exist healthily in the same moral environment, then all variety of plants can in the same physical atmosphere..."[20] Obviously the American public agreed because in the period before World War I and during the wave of state prohibition the consumption of alcohol in America peaked. In no years since this period of dissent has the rate risen to these levels.

Mill attacked the prohibitory spirit of his day when he accused it of being without marked character, a force which suppressed individuality and genius. He claimed it maimed every part of human nature which stood out prominently and tended to make all people similar in outline, even going so far as to compare its effects to that of compression to a Chinese lady's foot.[21] In

applying this attack to the twentieth century Prohibition movement, it could be argued that the new wave of reform was an attempt to force cross-cultural conformity upon the cities. It was an effort to enforce an artificial homogeneity thought less threatening to a rural populace who sensed that the country was moving in a direction which would leave their agrarian society far behind.

Proponents of the amendment considered it a proper exercise of social control over individual actions which, if left uncontrolled, would be harmful to the general community. Opponents questioned the social philosophy which championed man's responsibility for everyone's behavior except his own. Many of this second group looked more favorably upon strict regulation and heavy taxation of alcohol as a means to curb alcoholism. One country which had confronted a similar problem in the nineteenth century was Sweden. The Scandinavian System sought to regulate the spirit traffic, yet not interfere with individual liberty. For this purpose, spirits licenses were given to limited liability companies managed by a community's leading citizens. Seventy percent of the profits of alcohol sales were paid into the town chest, thus taking the profitability out of the trade.[22] This solution did not solve the problem totally, but its pragmatic approach appealed to those who wanted a legal solution which would infringe less upon the individual's rights.

Congress's attempt to enforce the Eighteenth Amendment came in the 1919 Volstead Act, a federal prohibition act which gave federal agents a wide range of powers to enforce the amendment. Law enforcers, under the protection of the Volstead Act, consistently infringed upon the civil liberties of American citizens. Federal agents were guilty of violating Fourth Amendment rights and frequently used evidence uncovered in illegal searches. In attempts to detect evidence of manufacturing, storage, transportation, or sale of alcohol, these law enforcement officers conducted widespread searches in hotels, restaurants, warehouses, offices, and autos.[23] In a 1928 case filed against the federal agents, Olmstead v. U.S., the Supreme Court upheld the use of wire taps by government agents. One of the dissenting justices, Justice Holmes, wrote: "For my part, I think it less evil that some criminal escape than that the government should play an ignoble part."[24]

Attempts to salvage the Eighteenth Amendment and revamp the Volstead Act led to W.C. Durant's generous offer of a $25,000 cash prize to the individual who could give expression to the best and most practical plan to make the laws effective. Mr. Durant believed that "individual liberty...must be subordinated to the common good when the stake is large enough."[25] Apparently Durant believed Prohibition to be a large stake, whatever his reasons he did reward the prize money on December 25, 1928, but to no avail. The bootlegger

was not stopped. Of the one hundred essays judged in the contest one complaint recurred frequently, the problem of prosecuting offenders. William B. Smith, a township judge in Kernville, California, complained that "The weakest link in the chain of enforcement is our boasted jury system. In this county...a jury conviction has not been obtained in a liquor case in the last two years..."[26] Suggestions ranged from requiring an oath of obedience before voter pre-registration to imprisoning lax enforcers. The plan submitted by Bishop James Cannon, Jr., chairman of the Board of Temperance and Social Service would settle for nothing less than complete enforcement. "If hundreds of millions are spent for army and navy to protect our country from external foes, no sum is too great to protect from nullifiers and traitors at home."[27] The Methodist clergyman considered the bootlegger to be the nation's greatest enemy.

The increasing degree of emotions involved in the whole Prohibition experiment suggest that Gusfield was correct in asserting that the issue was symbolic and not pragmatic. Issues which generate such irrational zeal and seem to harp upon some impractical idea, for example the anti-Masonic move of the 1830's or the Red Scare of 1950, reflect a fear of change. In such a situation the conditions which are alleged to give rise to evils are mistaken for the evils. In this case alcohol was blamed for slums, poverty, social strafication, and a host of other evils, and the schemes which were meant to be

means to an end became the end itself.

As the cultural and social tensions between native, rural Temperance supporters and Catholic, working-class immigrants began to ease, the importance of the issue of alcohol diminished. A general decline in alcohol consumption per capita and an increase in the number of consumers were indications that both abstinance and alcoholism were considered to be deviant behavior in modern American Society. Today alcohol is still a problem, but our society realizes that it is a condition which exemplifies evils within our social structure and not an evil itself. The increasing divorce rate, pressure-filled job markets, and fast-paced lifestyle of the modern era are some of the social factors which now cause people to misuse alcohol. If we were today to legislate against alcohol, we would have no greater success in alieviating society of these tensions than a preceding generation had of ridding their society of cultural conflicts.

The turmoil of the Prohibition experience has passed and most Americans wonder how the Eighteenth Amendment lasted the fourteen years (1919-1933) before its repeal. This law was inconsistent with our system of constitutional law because it served as a mandate instead of a framework, thus attempting to rigidly maintain a law passed in the fervent war time environment. The inflexibility of the law was a bad

constitutional precedent. The hesitation of the Supreme Court then to recognize this fact and to denounce the amendment is significant when contrasted with judicial interpretations implemented by the present Supreme Court.

III

The contemporary issues of moral reform, whether one discusses anti-nuclear movements, pornography, or a host of others, evoke the same highly emotional response that their predecessors did. The attempt to control abortion by law was a nineteenth century movement which began as early as 1821. Before this time, the law was totally indifferent to the issue and did not formally recognize the existence of a fetus until quickening, the first perception of fetal movement by the mother. Until this point in gestation, usually occurring about the fourth or fifth month of pregnancy, abortion was not considered a criminal act. Even after quickening, efforts to terminate a pregnancy were punished with a great deal more leniency than other crimes. Sir William Blackstone, author of Commentary on the Laws of England, summarized the common law view of the rights of the unborn as:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[1]

Therefore, in order to convict on charges of abortion, the prosecution had to prove both that the woman was pregnant and that the child she carried had surpassed the moment of quickening.

Thus the key to all legal controversies was the quickening doctrine. In 1812 the Massachusetts Supreme Court upheld this common law precedent by making any abortion early in pregnancy beyond the scope of the law. In this particular case, charges were dismissed because the court could not ascertain that the woman was quick with child at the time.[2] This case, Commonwealth v. Bangs, served as a precedent for other cases which dealt with the abortion issue until the court's decision was overturned in 1850.

The British Parliament made an abrupt departure from its common law precedent when it passed the 1803 statute forbidding abortion. The first wave of anti-abortion legislation did not begin to appear in America's criminal codebooks until the first appeared in 1821. The nature of this new trend in legislation was an attempt to ban all abortions after quickening, except to save the mother's life, and to protect desperate women from unsafe abortion practices. During this period, ten states enacted legislation which for the first time made explicit restrictions upon certain types of abortions. However, the punishments were aimed to deter abortionists from jeopardizing their patients' health. For example, in 1834 the Ohio legislature made the death of either the mother or a quickened fetus a felony.[3] Other states ruled against the use of certain methods, instruments, or poisons to cause abortions. The law was no longer indifferent to the life of the fetus. The law enacted

in this initial time period made attempted abortion of a fetus an offense regardless of "whether such child be quick or not."[4] This revised code, commonly referred to as the Eastman-Everett Act, threatened a punishment of $1000 fine or up to five years in jail to offenders.

By the time this last statute was passed, the character of abortion had drastically changed. Beginning in the 1840's, abortion became publicly visible as members of the medical profession, though not necessarily trained medical doctors, began to competitively advertise. One abortionist who called herself Madame Restell incorporated modern business techniques into her trade by reportedly opening branch offices and using traveling salesmen to become a millionaire. Her lavish advertising expense alone was estimated to be $60,000 a year.[5] In the face of such blatant expenditures and profit-making in abortion clinics it was difficult for legislators to ignore the fact that young women were obtaining abortions and at a dramatically increasing rate. In addition to the increase in the sale of abortifacient during the period 1840-1880, there was a proliferation of written materials describing ways for a woman to abort herself. The Ladies Medical Guide (1833) recommended ingesting aloes, black hellebore, savine, or using a vaginal syringe. Other publications of the period carried similar advice.[6]

Before 1840 abortion had been viewed as a "last resort" of desperate women. However, the public was alarmed with the growing realization that the social

make-up of those seeking abortions began to include a high percentage of married, Protestant, middle-to-upper class women. These women were turning to abortion as a means to limit their family size, thus insuring themselves against the expense, health hazards, and responsibility of having children. An 1854 issue of The Boston Medical and Surgical Journal claimed that abortion was:

> "...not exclusively performed upon unmarried women, who fly to the abortionist in hope of being able to conceal from the world their shame and degradation, but even married women, who have no apology for concealment, and only desire to rid themselves of the prospective cares of maternity, also submit themselves, far more frequently than is suspected, to hazardous manipulations, alike injurious to their bodies and subversive of all the finer sentiments of the mind. In some instances husbands have been known to aid and abet their wives in this wicked expedient, on the plea that they have children enough already, or their circumstances forbid an increase of family expense and responsibility.[7]

Repeatedly physicians were confronted with cases similar to the following account relayed by one nineteenth century physician:

> Arrayed in gorgeous silks, satins, and velvets, covered with flashing gems-mine is but the common story of every physician-I have had unknown women walk into my office, and inquire, "Are you a doctor?" and upon an affirmative reply, without further preface say, "I want you to produce an abortion for me," as coolly as if ordering a piece of meat for dinner.[8]

By the 1860's doctors concurred that a vast majority of the abortions performed in America involved married women. Physicians viewed abortion as a compelling problem, and pamphlets of the period warned women that their declining rate of reproduction would eventually result in

the demise of middle-class Protestant supremacy.[9] The physicians were most motivated by a desire to prevent any loss in their status and resented both women's attempts to enter the medical profession and the proliferation of abortionists and self-trained practicioners who competed with those who had received formal training.

In response to these changes in the social character of abortion, the American Medical Association led its most successful campaign in an effort to lobby against abortion. The spokesman of the AMA's campaign, Horatio Storer, both a doctor and a lawyer, used the issue to unite the medical profession and exclude outsiders from practicing medicine. His bestselling books Why Not? A Book for Every Woman (1866) and Is It I? A Book for Every Man (1867) were personal attacks against families who used abortion as a method of birth control. As a strong anti-abortion lobby force the physicians were extremely successful.

This propaganda campaign was accompanied by a set of sensationalized criminal trials involving abortionists. The first, Commonwealth v. Luceba Parker, involved a female abortionist who was indicted for using instruments to abort married women.[10] The second case involved the death of a young unmarried girl, Maria Aldrich. The indictments were against a man named Fenner Ballou, the person responsible for Miss Aldrich's pregnancy, and Dr. Alexander Butler, the doctor hired by Ballou to perform an abortion upon Miss Aldrich. Butler operated and

delivered a four month fetus; however, Miss Aldrich eventually died an agonizing death from a massive infection of the uterine cavity.[11] Both cases ended in acquittal of the defendants because unquickened abortions were not statute crimes in Massachusetts under the common law. Five days after the Ballou decision, William T. Bradbury successfully proposed the first bill in American history which dealt exclusively with an abortion policy.[12] The Bradbury Act made attempted abortion punishable by a $2000 fine or a prison sentence of one to seven years.

Similar combinations of lurid sensationalism and pressures from medical associations continued to influence other state legislatures. Already states had attempted to stifle advertisement of abortions by enacting ethical codes for medical practicioners. In New York, the legislature had been upset by the falling birthrates and countered this trend by removing the women's common law immunity from criminal prosecution for obtaining an abortion. Other states followed this example and continued drafting regulations against abortion.[13]

In the summer of 1871 the emotional issue peaked when the prestigous New York Times, having just recently broken up the Tweed Ring, sought to campaign against abortion. On August 23, 1871, an article entitled "The Evil of the Age" revealed lurid stories of barbers, cobblers, and horse-shoers masquerading as physicians to unsuspecting women. These reports were gained by the undercover work of female reporters who approached the

abortionists under the pretense of obtaining an abortion. The descriptions of their encounters provided reports of "Human flesh, supposed to be remains of infants, found in barrels of lime and acid, undergoing decomposition."[14] The story became a real news item when, fourteen days after the expose was published, one of the reporters for the story became the star witness in a murder trial involving one of the abortionists mentioned in the story. The reporter was actually able to identify the victim, a beautiful blond woman found bound and gagged in a railroad trunk, as a patient of Jacob Rosenzweig on the day that the undercover interview was held. Another story which made national headlines was the arrest of the most successful of the commercialized abortionists, Madam Restell. The news that she had committed suicide only hours before her well-publicized trial was to begin was trumpeted by the press.[15]

Because of this mounting anti-abortion pressure, the American public shifted its beliefs. In State v. Slagle (1881), the North Carolina Supreme Court accepted as law that "it is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature."[16] The next year the North Carolina legislature made abortion after quickening a felony and, more importantly, abortion before quickening was made a misdemeanor.[17] In 1882, the Massachusetts Supreme Court made a symbolic decision in Commonwealth v. Taylor. In this case the judges ruled

that the prosecution no longer had to prove that an alleged abortee had actually been pregnant.[18] By 1900 abortion was illegal in every state except Kentucky. This legislation remained relatively intact until the 1960's and 1970's.

The forces desiring to reform America's common law abortion policy succeeded in this endeavor after a half century of campaigning and lobbying. The issue went unchallenged for almost another century, yet polls taken in the 1960's revealed that America's strict anti-abortion policy was not in line with popularly held beliefs of the public.[19] In the abortion issue, both major trends and some specific events once again focused the public's attention on the need for change.

One general trend which softened public attitudes about the abortion issue was the Malthusian fear that an unchecked population would destroy America's standard of living, not to mention further threaten the world's dwindling resources. Another trend was the growing status of the women's rights movement, an organization which favored a woman retaining the right to maintain a reasonable amount of control over her future. A third trend was the evolution of the doctrine of individual privacy, a right which was being upheld by the court system.

A specific issue which brought international attention to the abortion cause was the celebrate case of Mrs. Robert Finkbine.[20] Mrs. Finkbine, hostess of the

television show "Romper Room," discovered that during the early part of her pregnancy she had injested a tranquilizer containing thalidomide, a drug which had recently been connected with severe birth defects. After consulting a doctor, she was warned that the chances were indeed great that her child would be born severely retarded and physically deformed. In 1962 a panel of hospital doctors agreed to grant Mrs. Finkbine a therapeutic abortion, but later withdrew the offer when the publicity generated by the proposed abortion threatened the hospital's reputation. Mrs. Finkbine then sought a court order to be allowed to abort her damaged fetus. The motion was denied by the Arizona Supreme Court and Mrs. Finkbine eventually secured a legal abortion in Sweden. Another incident of this sort occurred during this same period, from 1962-1965, when a German measle epidemic swept the nation. An estimated 82,000 pregnant women contracted the disease, many unsuccessfully attempted to obtain abortions, and 15,000 deformed children were born as a consequence.

Pro-abortion forces began to form a litigation campaign and set out to change public opinion. A series of "test" cases resulted in the revolutionary change in precedent in the Roe v. Wade decision. From 1969-1970 the lower courts were flooded with cases filed by women claiming to have a constitutional right to obtain abortions, physicians claiming to need an uninhibited right to practice medicine and advise their patients, poor

people claiming a need to lessen their population problems, and even a claim by a Methodist minister, Reverend Jesse Lyons of the New York abortion referral service, that the laws were unfair. From 1967-1972 most state legislatures were considering a change in their abortion laws, and nineteen had already liberalized them.

The climactic case for the pro-abortion forces was Roe v. Wade. In this case, an unmarried, pregnant woman took class action against Henry Wade, the District Attorney of Dallas County, in an effort to prevent his enforcement of the Texas anti-abortion laws. Roe, a pseudonym, alleged in her complaint that she wanted to have an abortion performed by a competent doctor despite the fact that her life was not in danger. Her case was a hardship because she was unable to afford the expense of traveling to another state where an abortion could be legally attained. She argued that the Texas law was an unconstitutional infringement on her personal privacy. The state court ruled that the abortion restrictions were indeed an infringement upon the constitutional rights of Roe; however, the court refused to issue a formal order enjoining the enforcement of the abortion laws. Both parties appealed the decision.

On January 22, 1973, the Supreme Court in a 7-2 decision ruled the Texas anti-abortion law unconstitutional. Justice Harry Blackmun wrote the opinion for the court and based his argument on the emerging movement for the protection of privacy as constitutionally

protected by the fourteenth amendment. He discounted the argument that a fetus was a person with constitutionally guaranteed rights by concluding that the writers of the Constitution sustained the popular beliefs of their era and did not consider the fetus to be human until the point of viability, thus the word "person" as used in the Constitution can not be applied to the unborn.[21]

In the companion case, Doe v. Bolton, the court was presented with a variation on the abortion issue which challenged the constitutionality of a Georgia statute. Georgia, unlike Texas, allowed some abortions in the cases of rape, defects of the child, or to preserve the mother's health. However, the statute made it difficult for a woman to actually obtain an abortion because of the great amount of red tape involved in the process. Mary Doe had applied for an abortion claiming to be a woman who had been advised that her health would be impaired if she had a child. Nevertheless, she was denied an abortion and sought a declaratory judgement holding that the Georgia law was unconstitutional. The case eventually reached the Supreme Court and, with both Justices White and Rehnquist still rigorously dissenting, the court reached a decision similar to the Roe decision and declared the law unconstitutional.[22]

These two court rulings effectively invalidated any conflicting laws which existed in the United States. The trimester rule, devised by Justice Blackmun, attempted to reconcile the states' desire to protect potential

life and yet not violate the woman's right to privacy and due process as guaranteed in the Constitution. During the first trimester the woman has the right to decide her future privately, without government interference, because the woman takes greater health risks in continuing the pregnancy than in obtaining an early abortion. In the second trimester, when these risks are reversed and it is in the woman's best interest to continue the pregnancy, the state can insist upon reasonable medical procedures to be followed. In the third, and final, trimester the states' right to protect potential life overrides the pregnant woman's right to privacy, except in cases where the mother's life would be endangered if the pregnancy were continued.

The first negative reactions came quickly. In February the Roman Catholic bishops called for civil disobedience to any law legalizing abortion.[23] Pro-life groups sprang up nationwide in an effort to start a counter-litigation campaign to combat the pro-abortion forces. Politically, these groups cut across party lines and could not be classified as either Republican or Democrat. The anti-abortion forces suffered a heavy blow when their candidates for Congressional seats suffered at the polls. Lawrence J. Hogan (Maryland), Harold V. Froelich (Wisconsin), and Angello Roncallo (New York), were three Republican candidates with anti-abortion sentiments who were defeated in the next election. In Pennsylvania, a gubernatorial candidate running on an anti-abortion

platform, suffered a landslide deafeat in 1974 when he lost in every county.[24]

Although the abortion issue was hotly debated, 1974 polls taken by the National Conference of Catholic Bishops revealed that only a small group were affected enough by the issue to let it influence their political behavior. In this particular poll, 13% of those surveyed said they would vote against a candidate who favored abortion while 15% took the opposite view and said they would vote against any candidate who favored anti-abortion policies.[25] To most of the nation, the issue was debatable but not of primary concern, but to the small minorities who felt strongly one way or another the 1976 presidential campaign was a chance to gain support for their movements. All of the candidates were reluctant to take a stand on the issue. President Ford supported a local option by each state and Ronald Reagan had earned a reputation as being an anti-abortionist because he had fought to prevent liberalization of abortion laws while governor in California. The Democrat candidates were also split: Sargent Shriver, despite his Catholic background, was opposed to a Constitutional amendment prohibiting abortion, Henry Jackson was a Pro-life supporter, and Birch Bayh held a liberal view. Jimmy Carter baffled everyone by saying he did not favor a Constitutional amendment, that he might favor a limited amendment, and that he would support a "national statute" against abortion all on three separate occasions.[26] With the candidates reluctantly choosing

sides the issues were represented equally in both parties. At this point, a New York housewife, Ellen McCormick entered the presidential race as a Pro-life candidate. By the end of the primaries, McCormick had run in seventeen states and had received her greatest support of 7.2% of the vote in the South Dakota primary.[27]

The greatest political debates over abortion have taken place in congressional battles over the public financing of abortions. The controversy started in 1972, before the Supreme Court decision legalizing abortion, when the Nixon administration had updated the Social Security Act and had included a family service provision which neglected mentioning abortion. By the end of 1973, the Department of Health, Education, and Welfare was reportedly funding 220,000 abortions a year and by 1976 the estimated costs of federally funded abortions was approaching fifty million dollars a year. In 1976, these figures were quoted by Representative Henry Hyde, a Republican from Illinois, who proposed the Hyde Amendment, designed to cut off Medicaid payments for abortions.[28] The bill eventually passed in both houses, was vetoed by President Ford, and Congress subsequently overrode the presidential veto. The constitutionality of the Hyde Amendment was questioned in a court case filed by Planned Parenthood. On June 20, 1977, the Supreme Court decided in Beal, Maher, and Poelker that there was no inherent obligation for government financing.[29]

On December 7, 1977, Congress accepted the Hyde Amendment with the following compromises:

1. Payment be permitted for rape or incest victims.
2. Payment be permitted when a continuation of the pregnancy would result in severe and lasting damage to the woman's physical health.

This amended bill is still in effect and in 1981 an additional piece of legislation, the Bauman Amendment, was made effective. This new amendment allows states which participate in Medicaid to refuse to fund abortions to any extent which they deem appropriate. However, both these laws, the Hyde Amendment and the Bauman Amendment, are substantive law and must be reintroduced, redebated, and repassed on an annual basis. So the question of whether or not abortions will be federally funded is still very much unresolved.

Another hotly debated issue arising from the abortion issue is defined in the following footnote from Roe v. Wade:

> Neither in this opinion nor in Doe v. Bolton... do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances, North Carolina, for example,...requires written permission for the abortion from the husband when the woman is a married minor...; if the woman is an unmarried minor, written permission from the parents is required.[30]

These questions, which the Supreme Court left unanswered, are significant because one-third of all abortions are performed upon minors, and one-fourth of all abortions

performed are obtained by married women.

The constitutional rights of parents and spouses have been virtually ignored by the courts. With the exception of public funding, there have been more lawsuits filed to challenge laws which required parental or spousal permission requirements. There are three reasons the courts have invalidated such requirements. First, the pregnant woman has the greatest stake in the situation and should have the right to make the ultimate decision regarding whether or not to bear a child. Second, one of the key arguments in legalizing abortion was the need to protect a woman's right to privacy, a principle which would be violated if a woman were forced to disclose her condition to a parent or spouse. And finally, in many cases the courts feared that a disclosure of pregnancy would prove to be detrimental to a relationship, in particular a child-parent relationship, and would do more harm than good.

The first major Supreme Court case to deal with both these subjects was Planned Parenthood v. Danforth.[31] In its decision, the Supreme Court reversed a lower court ruling that a spouse must give consent because this regulation gave the spouse the ability to veto the woman's decision, a violation of her constitutional right to obtain a pregnancy for any reason within the first trimester. In regards to another Mississippi statute which required parental consent for a minor to obtain an abortion, the Supreme Court was consistent

and again refused to extend authority to a third party to go against the physician's and patient's desire to terminate a pregnancy. However, the courts did distinguish between how much responsibility would be given to make a decision to a "mature" and an "immature" teenager. Despite the ruling that consent statutes were unconstitutional, in subsequent decisions the court has upheld the right of the state to merely inform a parent or spouse that a woman is having an abortion. Ironically, as the law now stands, it is an easier matter for a minor to receive an abortion without parental consent, than it is for her to participate in a school function which would require mandatory consent forms.

Another twist to the abortion issue is the right of a hospital or medical personnel to refuse to participate in an abortion. The University of California Medical School informed conscientous objectors to abortion that "competition would be intensified" for them, terrifying words to hopeful pre-med students. One survey revealed that 63% of medical schools questioned applicants on such beliefs and that 3% would look upon an anti-abortion viewpoint as a negative factor when reviewing an application.[32] Similar results were found in nursing and osteopathic schools. Forty-four states have already adopted conscience clauses to prevent such discriminatory activity. This protection does not extend beyond medical personnel to clerical or other related jobs. In

Spellacy v. Tri-County Hospital the court held that clerical work did not cause a dissenter to accomodate their beliefs.[33]

The attempts to reverse the Roe v. Wade decision has proven to be a great disappointment to the Pro-life forces. The legislature is unable to make any significant changes in doctrine because it faces the probability that the law will be declared unconstitutional by the courts. The surest way to bring about a change in constitutional law is to change the Constitution itself by amendment. It is to such an end that the 1980 Republican platform officially "affirms our support of a Constitutional amendment to restore protection of the right of life for unborn children."[34] This task is easier said than done, for in the last two hundred years of American history 10,000 attempts have been made to amend the Constitution and only sixteen have been successful.

The abortion issue has already undergone two major reform movements. The first, a move to stiffen penalties against unsafe medical practices and attempt to maintain the status quo of antebellum America. The second, a move to protect women's mental and physical health against unsafe or unwanted pregnancies and to remove the traditional restraints placed upon women. To the people who wish to return to the more conservative approach to abortion regulation, the Roe v. Wade decision presents a challenge to their belief system. They contend that

abortion is immoral and thus should not be allowed. Perhaps they are right in contending that abortion is immoral, but it should not necessarily follow that the law should be responsible for preventing such behavior. Their arguments are based solely upon religious and ethical values and are difficult to support in a court of law.

Conclusion

From the introduction of legal-ethical philosophies into the American legal system to the present is too broad a span of history to cover effectively in one research paper. The purpose of this paper, however, was to provide a historical overview of some major social and political movements surrounding the issue, an analysis of the memberships of the groups for and against the legislation of morality, and a reflection upon the shift in the Constitutional balance of power in favor of the court system. The three topics researched, the Colonial Blue Laws, the Prohibition movement, and the abortion controversy, are all subjects which have created a large amount of emotional turmoil within our legal systems. The irrationality of some of the decisions which were made during these heated debates are best understood when the historical perspective is taken in observing the motives of each side. The personal stake which individuals within pressure groups felt toward the problem left little room for accomodation and compromise; thus, the true issues were often clouded with unrelated rhetoric.

The major conclusion drawn about the historical backgrounds of the three reform movements is that these issues were most controversial during periods in which

a traditional elite group perceived a threat to their powerful role within the society. The Puritan ministers toughened their policies and issued gag rules when their original statutes were ignored and they felt that their authority was being challenged by other denominational leaders and rebellious working-class citizens. The Temperance movement was led by a traditional management elite which was faced with losing the personal control of employee conduct because of the impersonal structure of the new industrial system in manufacturing; thus, they attempted to avoid a breakdown in the vertical structure of social deference within a community. And the nineteenth century businessmen and physicians wanted to prevent a change in the conventional woman-belle ideal and preserve the traditional standing of the trained physician within the community.

An analysis of reformist groups reveal a parallel array of attitudes within the membership. A certain degree of class bias, nativism, and prejudice can be found in the arguments of Puritan policy-makers, Temperance reformists, and anti-abortion crusaders of the nineteenth century. Both the Temperance and abortion reform campaigns were aimed at protecting the middle-class, Protestant majority from losing its numerical advantage within the society. Furthermore, the groups were all successful in getting legislation passed which prevented the extension of a disputed liberty to the general public by using the press, or the pulpit in the colonial period,

as a means to obtain support.

A third question addressed in this paper was the changing role of the court system in the balance of power in the federal government. In 1831 Alexis de Tocqueville wrote "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."[1] This observation accurately describes the shift in power toward the judicial branch. As late the the 1920 Supreme Court decision in Rhode Island v. Palmer, the case in which the court refused to strike down the Eighteenth Amendment as unconstitutional, the courts were following their traditional role of not overturning public policy. However, the courts have rapidly asserted their role in policy-making at a rate which alarms many critics. The Roe v. Wade decision led dissenting Justice White to criticize the decision as "an exercise in raw judicial power."[2] This trend toward judicial supremacy is a recent development and promises to cause even greater controversy if it continues in its present direction.

In his essay "On Liberty", Mill proposed three rights as essential elements within a free society; liberty of conscience, liberty of tastes and pursuits, and liberty of combination among individuals. He wrote "No society in which these liberties are not, on the whole, respected is free..."[3] This philosophy is the direction that the Warren court had been turning toward in its decisions involving civil rights, gay rights, and womens'

rights. The general trend in the Supreme Court's holdings has been that the acts of an individual may be distasteful, harmful, or destructive to others, yet this individual is under no obligation to account to others for injury unless he violates the constitutional rights of the injured party. In other words, the court has decided that what is legally allowable is not synonymous with that which is morally permissable.

The underlying premise of this paper has been an attempt to prove that true moral reform should not be substantiated by legal restraints because of both the impossibility of enforcement and the failure of the public to respect a law which will infringe upon their concepts of personal rights, individual privacy, and the liberties of conscience, taste, and association which are essential to a free society. It is not surprising that the reformers have usually had a personal interest in preventing a liberty from threatening the status quo. Repeatedly the reformists have had direct or indirect concern for the outcome of a reform movement because of the effects it could have on their social, financial, or some other related role within a society. Because of this fact, they have hidden behind a stand on the side of morality, though this facade was probably unconscious and unintentional. The movement away from legislating morality is a movement toward a more free society which is less susceptible to the threat of oppression by an elitist class.

Endnotes

Introduction

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Conclusion

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