THE CONCEPT OF "PERSON" IN AMERICAN LEGAL THEORY

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In a sense there is no such thing as American legal theory. Like science, legal theory transcends national boundaries. The legal theory regnant in the United States is plural and has deep roots in classical and medieval philosophy and immediate sources in the British common law.

To seek the roots of the current legal meaning of "person" is to open the history of Western political thought. For it is the political theory of a given period that gives flesh to the term. Consequently my approach will necessarily be both historical and philosophical.

The Greek and Roman sources of the Western concept of person are well known. Boethius' famous definition has been repeated ever since the sixth century where in the context of a discussion of the Trinity he defined person, using Aristotelian terminology, as a supposit of a rational nature.[1] Throughout most of Western history, discussions of the concept of person usually took place within a philosophical or theological context. This remained unchanged until the 20th century, when a shift occurred from the ontological to the psychological, a shift reflected in the dicta of the courts as they began to place more confidence in psychology and the social sciences than in philosophical discussion. Given this sequence of events to approach the topic historically is to approach it metaphysically but only up to a point. The distinction

between the psychological and the ontological is noted because, as we shall see, it makes a great deal of difference which perspective is embraced.

At least five distinct usages of the term "person" can be identified in American legal theory. The first arises in discussions of justice for the person is obviously the focus of rights and duties. The second is found in property law where the right to possessions depends for its rationale on an amplified notion of person. The third is the extension of the notion of "person" to the corporation. The fourth arose historically in debates concerning the legal status of the slave. And the fifth arises in the context of Roe v. Wade overturning statutes in Texas and Georgia prohibiting abortion.

It is evident that a concept of "person" cannot be a mere technical or legal one. Concepts of person are grounded in considerations of human nature. The beliefs, for example, in the absolute moral worth of the individual, in the spiritual equality of individuals, and in the essential rationality of man, all legacies from the Middle Ages, have their roots deep in Christian and Greek thought. The repudiation of these ideas would entail the repudiation of much of our common law. It is the belief in the absolute moral worth of the individual that prevents the individual from being submerged, if not obliterated, in a conception of race, class, nation, or some other collectivity that regards the individual as means rather than as an end in himself. This is reflected in discussions of justice where a basic distinction is made between that which an individual owes to other individuals by virtue of contractual obligation and that which he owes to

the community by virtue of the benefits he enjoys through membership. These debts are envisaged as reciprocal. Not only is the individual bound to honor the contracts into which he has entered, but the community itself is obligated to the members whose allegiance it commands. Obligation implies adherence to a norm and a norm logically presupposes a rational being as the addressee or subject of the norm. Otherwise it would make no sense to distinguish between laws of nature which one cannot fail to obey and law based on moral adherence. Presupposed obviously is the doctrine that man is self-determining, that personal moral virtue is not only attainable but normal and that human needs are multiple and not confined to the material order. Other philosophical notions are obviously implied, too. Concern for the moral worth of the individual entails a recognition of the values of personal autonomy, privacy, and integrity, all distinct notions which are transformed into their legal counterparts.

It can be argued that the recognition of personal autonomy is the ultimate ground of one's legal standing, that is, of what ought to be done or respected by others. Autonomy means that a person can never become a mere means for the community. The acceptance of this principle is the recognition that there are certain rights possessed by the person independent of community. The American republic was founded on the assumption that the state safeguards rights which it recognizes but does not confer. No matter how rights are conceived or how numerous they are proclaimed to be, they appear as claims against the positive law. They are presented as personal entitlements which the community, while it may have the power to do so, is not free to abrogate. The recognition of rights is clearly based on a concept of the person and a judgement with respect to what leads to personal

fulfillment. From this starting point, the law goes on to recognize other aspects which this conception of person logically entails. The right to one's own life is expanded to include the integrity of one's self-generated character. This is the root of the legal recognition of honor and of one's good name.

Property law is the natural outcome of the recognition that one has the right to the means of a livelihood. Life's aims cannot be achieved without a personal liberty. Materially, personal liberty is bound up with legal dominion over external things. The use of things is obviously required for self-maintenance, but more subtly the concept of private property is the direct outcome of the concept of self. Just as the expression "mine" and "thine" occur in every Western language to indicate ownership, so the consciousness of the self contains the consciousness of property. In virtue of his reason and will, man makes use of external things to create about himself an ambience that is traceable to, and is the direct outcome of, his perception of himself. Hence property is no arbitrary idea but is founded on man's natural impulse to extend his own personality. "One's own" denotes not merely a physical tie, a material causal connection, but can also mean a goal or a destination which the person has recognized and to which he has subordinated material achievement. "Mine", with respect to property, presupposes an "I", a person whose aims and ends the things serve and whose goal others must respect by reason of his being a person. The recognition of a right does not consider the inner moral quality of the person to whom the consideration is due. Whereas the citizen does not owe obedience to civic authorities because of their interior moral goodness, so too, respect for

the person and property of others does not depend upon their meeting standards which we might apply to ourselves.

Just as legal reason sees in a person a subject of right, legal reason can confer personality upon groups of persons or associations which serve permanent human goals as bearers of rights and duties. Recognizing that the person is the coordinating center of things and actions, legal reason similarly confers judicial freedom upon human associations and recognizes in them the independence and autonomy commonly conceded to the person. In the history of the West, this has not always been the case. The source of the juridicial treatment of the corporation as a person is interesting though largely unknown to textbook writers who take up the subject.

The private charters of commercial enterprises in early American constitutional thought clearly mirrors certain medieval theories of corporate structure with roots in canon law. In medieval theory a prelate was regarded as the head of a corporate body over which he presided. He entered upon an established office with its own inherent powers and dignity. By virtue of office he acquired a unique status as a virtual representative or personification of his ecclesiastical body, although he was still required to rule with the council and consent of the members in gross matters. In this manner a large scale society could be ruled by a collegiate head. One man was preeminent but sovereignty inhered, not in him alone, but in the whole corporate body. This way of conceiving structure was opposed to hierarchical conceptions where power flowed downward from the ruler who possessed it intrinsically and not as a representative. Brian Tierney can trace this notion

through English common law to modern corporate law.[2] It is worth noting that the Romans did not develop a general concept of juristic personality in the sense of an entity with rights and duties. They had no terms for a corporation or for a legal person. But they did endow certain aggregations of persons with particular powers and capacities. Classical law, according to Tierney lacked a doctrine of agency. Plena potesta and plena auctoritas were medieval terms coined to express the doctrine of representation. In Roman law an individual or a group could appoint an agent to negotiate with a third party, but the result of the transaction was to establish an obligation between the third party and the intermediary. In canon law, by contrast, when a corporate group established a representative with "full power", the group was directly obligated by the representative's acts even when he had not consulted them in advance. Much of the canonist's day to day work dealt with legal affairs of corporate ecclesiastical bodies that could act only through fully empowered agents. The chief executive office of the modern corporation functions in most day to day operations with plena potestas.

I turn now to the fourth mentioned use of the term "person", namely to judicial treatments of slavery. This discussion has to be seen in the context of certain basic constitutional principles. In American legal theory, the government is conceived as men and women acting according to laws they have made to serve the community and its members. The government is not to be regarded as sovereign with a will above the law. The government cannot by fiat create rights and duties. The theory is that human beings exist before the government exists and are the reason why the government exists. The treatment of slavery is one area of American law which has constituted

an exception, that is, until the adoption of the 14th Amendment's equal protection clause. It was assumed by the founders of the American Republic that the law could ignore the biological character of blacks as human beings and treat them as things. That blacks were persons like whites was never put directly to the Supreme Court, so that the legal theory underlying the division was not articulated.

A case that was argued before the Court under the tenure of Chief Justice Marshall involved the fate of 281 blacks rescued from an illegal slave ship.[3] They were claimed as property by representatives of Portuguese and Spanish slave traders. Francis Scott Key argued on their behalf, claiming that he represented persons who could not be treated as property under the American law against the slave trade. The Court under Marshall did not agree. In a subsequent decision, Dred Scott V. Sanford, Judge Taney treated the issue as one not of personhood but of citizenship and held that the descendant of black slaves could never be a citizen of the United States.[4] In the Marshall and Taney decisions there was the implicit principle that law, not nature, determined who would count in the American constitutional scheme.

It is interesting to compare these nineteenth century attitudes toward slavery with Roman law on the same subject. The Roman law, as digested by jurists under Justinian in the sixth century, recognizing the unity of the race, asserted the equality of all men by the natural law, and undertook to defend slavery on principles not incompatible with that of equality.[5] Justinian law represents slavery as a commutation of the punishment of death, which the emperor has the right to inflict on captives taken in war, to perpetual servitude; and since servitude is less severe than death, slavery

was really a proof of imperial clemency. The question that is begged, of course, is the right of the emperor to put to death prisoners taken in war.

The slavery issue apart, cases can be cited to show that before abortion became an issue, the Supreme Court consistently avoided ruling in cases pertaining to marriage. While marriage, procreation and education were recognized to have civic consequences and it was acknowledged that some legislation might be required, civil laws enacted by the states were measured by the nature of marriage and the rights of persons independent of the State. When in 1970 the New York legislature by statute permitted abortion on demand for the first six months of pregnancy, Robert Byrn obtained appointment as guardian ad litem for the unborn and won a court order restraining New York municipal hospitals from performing abortions except to save the life of the mother. The court which appointed him treated the New York statute as an unconstitutional infringement on the right to life of the unborn. On appeal the highest state court rejected the notion that the unborn were persons. Speaking for the majority Judge Charles Breitel granted that the unborn were "human" and "unquestionably" alive but "it is not true that the legal order corresponds to the natural order".[6] Who is and who is not a legal person is for the law to say. Such determination is a policy decision and not a question of biological or "natural correspondence".[7] A dissenting opinion was filed by Judge Adrian Burke who citing the Declaration of Independence, reminded the Court that all men are "endowed by their Creator with certain inalienable rights". These inalienable rights, he argued, precede the state and arise from a source superior to the state. The state cannot deny these rights by classifying "a group of living beings as fit subjects for annihilation." Calling on the Declaration of Independence, Burke invoked a higher

law above the Constitution.[8]

Chief Justice Blackmun of the Supreme Court in Roe v. Wade subsequently described the unborn as less than "persons in the whole sense", adopting as principle the Marshall-Taney position that the legal and natural person need not coincide.[9] Every jurist grants that persons have rights, but in Roe v. Wade, the Supreme Court decided that an unborn human being is not a person. One can ask what evidence did the Court have that there is a substantial difference between a prenatal human being and a postnatal one? The Constitution itself does not define "person", nor does it define terms such as "rights", "powers", "freedoms", and "privacy". As we have seen, years after the adoption of the Constitution many men were prepared to count the freed slave as three-fifths of a person for voting purposes and there were many others who doubted that the slave was a person at all.

Concerning the meaning of the word "person", a change was brought about by invoking a so-called psychological definition. If we attempt to define "person" empirically we are likely to insist that at least two classes of attributes are essential: one class containing some number of purely physical features, and a second class containing some number of psychological or mental features. Yet definitions commonly invoke one class to the exclusion of the other. Such attempts veer off in opposite directions but after consideration one is left believing that philosophical presuppositions are yet controlling, either determining the physiological and psychological traits selected for consideration or determining what is made of the data produced for analysis. Rom Harré in his Personal Being is representative of one viewpoint. Harré writes: "Personal beings...must be thought of as social productions if we are fully to understand their nature."[10] and again, "By 'person' I intend

the socially defined, publicly visible embodied being, endowed with all kinds of powers and capacities for public, meaningful action."[11]

Such a definition settles a lot of questions and contrasts sharply with the notion of "person" embodied in American law until Roe v. Wade. One can give a long list of cases where a common sense notion of what it means to be a person was accepted by American courts. Most often "person" was defined for legal purposes as "a human being, especially as distinguished from a thing or lower animal." Other formulations are found: "The natural and obvious meaning of the word 'person' is a living human being", "an individual of the human race" and a "human being, body and soul". Courts commonly recognized that an unborn child falls within this meaning and ruled accordingly. One can cite cases such as Rainey v. Horn, William v. Marion Rapid Transit and Mitchell v. Couch, where the Court found on behalf of the child en ventre if it sustained harm as a result of negligent injury done to its mother.[12] In the last mentioned case the Court said "A viable unborn child is an entity within the meaning of the general word "person" because biologically speaking, the child is a presently existing person, a living human being."[13] On Harré's definition such rulings would not be likely.

The issue of course is by no means settled. Others are equally insistent that an empirical definition yields the opposite conclusion. Arguing from the unity of physiological processes, they point to the predetermined sequence of development and decline: a period of growth when assimilation prepares for maturity; a period of maturity when metabolic processes primarily subserve maintenance, repair and procreation; and a period of decline when metabolic exchange lags behind the needs for renewal and leads to death. From a biochemical point of view, the fertilized ovum contains

within it the genetic program for all that the organism is to become. The color of one's skin, one's hair and one's eyes; the future magnitude and condition of one's body; the physiological basis of one's native intelligence; and one's probable life expectancy, are all determined in the instant of conception. While physiological evidence may make a difference if one is attempting to determine whether the organic structure in question is a member of the species homo sapiens, if one has decided that to be a person one must have thoughts, feelings, plans and a language such physiological evidence is largely irrelevant. Even psychological descriptions of what it means to be a person may not be determinative, if the court is free to decide who and who is not a person before the law.

Physically the difference between the prenatal and the postnatal is only a difference between intrauterine and extrauterine sources of nourishment and oxygen. Psychologically there is no measurable difference at all since the progress of mental abilities is too gradual to admit of daily discrimination. The famous criterion of viability is a shifting one that depends on advances in science, bioengineering and medicine.

My purpose here is not to explore in depth the Roe v. Wade decision, but to exemplify some of the principles which seem operative in that decision, that is, the legal theory which enabled it to be reached. Blackmun begins his majority decision from the principle that the allocation of rights from within the constitution cannot be decided in terms of any knowledge of what is good. Blackmun quotes Oliver Wendel Holmes to the effect that the law must be properly agnostic before any claims to knowledge of the moral good.[14] The Constitution according to Holmes is based on the acceptance of moral pluralism in society. The state itself must be neutral concerning moral

values. In political terms Holmes would have to be described as a pure contractarian.

In Roe v. Wade, Blackmun interprets rights under the Constitution as concerned with the ordering of conflicting claims between persons and legislatures.[15] Though the case before the Court in Roe v. Wade was the legitimacy of a statute that permitted abortion, the issue as framed by Blackmun was really whether a legislature could prohibit, that is, interfere with a woman's choice to terminate a pregnancy up to the third trimester. On Blackmun's interpretation, the members of a given legislature may have been persuaded by conceptions of goodness, but such conceptions are irrelevant to the judge's responsibility. The judge must adjudicate between the rights of the mother and those of the legislature. The individual who would seem to have the greatest interest in the legislation, the unborn human being, is not in Blackmun's view a party to the legislation. The unborn, up to six months, are not persons in the whole sense, and as such can have no status in the legislation. The right of the mother is defended in the decision against the power of the majority in the legislation.

The skeptic might ask, since mother and child are undoubtedly of the same species, on Blackmun's principles, what is it about any members of our species which makes the rights of justice their due? Does the recognition of rights have any basis in what human beings actually are? If the state can decide that the unborn are not persons, why should the state not be able to decide that a week old infant or a senile eighty year old is not a person in the whole sense? On what basis can the court draw the line? Why are the retarded, the criminal, or the mentally ill considered to be persons and not the unborn child at five months? What is it which divides adults from the unborn when the latter have only to cross the bridge of time to catch up?

The fundamental question, does justice belong to the order of things or is justice a man-made convention?

While the concept of "person" presupposed by the majority in Roe v. Wade is important if it remains operative in American legal theory, it is by no means certain that is will stand. Roe v. Wade reversed centuries, one could almost say millenia, of thinking on the subject. As recent as 1948, the World Medical Association adopted what is known as the Declaration of Geneva. Adhering to that declaration the young physician pledges, "I will maintain the utmost respect for human life, from the time of conception: even under threat, I will not use my medical knowledge contrary to the laws of humanity."[16] In this and other respects the statement echoes the ancient Hippocratic oath which calls upon the physician to pledge: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give a woman an abortive remedy. In purity and holiness I will guard my life and my art."[17]

Given a sentiment almost as wide as the medical profession few were prepared for a court decision which would be at such great variance to common moral perception. Most legal scholars regard the decision as completely gratuitous, even though it was pressed upon the court by organizations such as The American Civil Liberties Union and The Planned Parenthood Federation. To most court observers, the outcome was determined in advance by considerations other than the law. Moral reason served only the role attributed to it by Hume, namely, the instrumental one of justifying ends given on the effective side.

Now is is quite possible that the court both reflected and contributed to the ongoing discussions of what it means to be a person. That Blackmun

was able to draw upon certain psychological concepts was due to the fact that they had already gained currency. It could be argued that Roe v. Wade was based on a refinement of the notion of "person", that it came not in response to a misreading of practical exigencies but in response to modern psychological theory. If one can read in a popular moral text book, now in its fifth edition, that "The person is not wholly a person if alone" perhaps the court can be forgiven for reversing a time honored conception of person.

Interestingly, philosophers of diverse persuasion have been more inclined to hold the ontological high ground than moral theologians. John Dewey, who may be considered a barometer of the intellectual climate of the first half of this century, was reluctant to abandon an ontological notion of person. The psychologist, Gordon Allport, accused Dewey of not having worked out a theory of personality.[18] Dewey, who conceived the person in traditional terms as the subject of moral rights and duties, was reluctant to define the person in purely social terms. He was willing to distinguish between individuality and personality. "Individuality is what one uniquely is; personality is what one has, a property that one may acquire." Organic behavior, says Dewey, becomes "personal" in the process of certain kinds of cultural interactions. Dewey finally makes a concession, but one thinks, almost against his better instincts. In an unpublished manuscript, "Things and Persons", he concludes "'Person' stands for something more than 'man' does; it stands for man plus a special representative power that has evolved in social groups in which jural relations have received a fairly high degree of emancipation."[19] He continues, "a person must be a human being, a man or woman, but must also possess additional

capacities that exist (operate) only in a group in which there exist such relational functions as formulate liabilities, rights, duties and immunities."[20] Clearly on such an account an unborn human being is not a person. This is not to say, however, that Dewey would sanction the Blackmun decision of the Supreme Court.

One contemporary author who doesn't budge from the Boethian account is Roderick Chisholm. In his Person and Object he gives this definition: "X is a person" is the equivalent of "X is an individual thing such that it is physically possible that there is something which it undertakes to bring about." By physically possible, Chisholm prescinds from potentialities which are variable and dependent upon circumstances at any particular time. "Physically possible, as that which is not precluded by the laws of nature, is invariable. Our definition has the consequence that if an individual thing X is a person, then in every possible world in which X exists, X is a person from the moment it comes into being until the moment it passes away. The definition would seem equivalent in intent to that proposed by Boethius: 'A person is an individual substance of a rational nature.'"[21]

Blackmun could cite diverse philosophical opinions, but no philosopher would use disagreement as evidence of the lack of intelligibility. Suffice it to say that the Court's endorsement of a particular view does not close the issue. The notion of "person" in American legal theory is far from settled. Whether one believes that ideas have consequences or holds that desired outcomes dictate rationale, one has to concede the non-vacuousness of the debate. Many lives hang in the balance.

One aspect of the conflict, mentioned only in passing, is the grounding

of rights and obligations. The current debate is not between those who hold to a theistic source of the moral order and a naturalistic mentality which affirms the human source of all that is prescriptive. The debate is between the utilitarian and the rights theorist. Both have implications for the legal standing of the person. Rights theorists seem to be returning attention to the ontological roots of the notion of person.

Between the two outlooks, one can identify an irreconcilable tension. Utilitarianism tends to ignore the moral importance of the separateness or distinctness of human persons. If utilitarianism is identified with the doctrine that takes the maximization of the aggregate or general welfare for its goal, rights theory by contrast emphasizes the protection of basic liberties and the interests of individuals. Rights theorists talk of "equal concern and respect". Unqualified utilitarianism, by contrast, fails to recognize or abstracts from the separateness of persons. In its political form it calls upon governments to maximize the total of the average net happiness or welfare of their subjects. Rawls has argued that utilitarianism does not take seriously the distinction between persons.[22] Bentham, in fact, enunciated his principle of the greatest happiness of the greatest number in opposition to the doctrine of natural rights. In Bentham's view, individuals are of no intrinsic importance. One's individual happiness or pleasure may be sacrificed to procure a greater happiness for the group. But the happiness of the group is always located in other individuals. Such replacements of one person by another are not only allowed but required.

It is evident that in this unqualified form, contrary to what is sometimes thought, utilitarianism is not an individualistic or egalitarian doctrine. It is true that everybody is to count for one and nobody for more

than one, but in the interest of aggregate happiness the grossest forms of inequality may be sanctioned so long as happiness is more equally distributed.

At the time of the American Revolution the doctrine of natural rights had many supporters. But when independence was won from Britain and the colonies began to fashion constitutions, first for themselves and then for the Union, their efforts were inspired by principles which fell short of those announced in the Declaration of Independence. As we have seen, slavery was accepted by the United States Constitution and by the constitutions of most individual states without any serious attempt to show how this could be reconciled with the theory that all men are created equal and are equally endowed with a natural inalienable right to liberty. Even among the free, white, male population in America the advance after independence to a full democratic franchise was very slow. The promotion of general welfare seemed to take precedent over the promotion of liberty.

Bentham wrote at the height of the Jacobian Terror that advocates of natural rights were "subverters of government" and "assassins of security." According to Bentham, there are no rights anterior to law and no rights contrary to law. Rights claims may express a speaker's feelings, wishes or prejudices, but the doctrine of natural rights cannot serve, as utilitarianism can, as an objective limit rationally discernible and discussable on what the law may properly require. Men speak of their natural rights, said Bentham, when they wish to get their way without having to argue for it.[24]

John Stuart Mill disagrees with his mentor on this and expresses a view in accord with the U.S. Constitution. Bentham argued that natural

rights are either impossible to reconcile with ordered government, since the exercise of governmental powers always involves some limitation of freedom or property, or they are empty and useless since they can always be abridged by the action of government. Mill reached the conclusion that unless the idea of a moral nonlegal right is admitted, no account of justice as a distinct segment of reality could be given. Justice consists principally in respect for fundamental moral rights. This entails a measure of liberty which Bentham would not have sanctioned. "Liberty", as defined by Mill, is autonomy.[25] Liberty consists in every person being left to pursue his own good in his own way. What in our day has come to be designated the "open society" is presented as the operative ideal of Western democracies. In such a society government is conceived as neutral with respect to metaphysical and moral issues. Some would say that the actual result of realizing Mill's open society is a combination of reduced civic virtue and increased political activity such as to make effective democratic government impossible. What is moral to some is positively immoral to others. What is sacred to some is unimportant and even absurd to others, what is in good taste to some is offensive to others. Political advantage thus becomes the order of the day, and this extends to judicial appointments. But such a conclusion flies in the face of the intent of the formers of the Constitution.

In the American legal tradition judicial review is conceived as a countermajoritarian force in society and in its way the Constitution is countermajoritarian. Legislative majorities are assumed to be capable of violating the provisions of the Constitution and American society has come to depend on the Supreme Court to keep them within constitutional bounds. Americans have

done so, however, with the understanding that the Court will enforce the provisions of the Constitution and not its idiosyncratic notions of how the country ought to be governed.

Until this century, American legal theory took it for granted that there is in the law a core of principles which are knowable and applicable in specific cases by judges. This assumption was undermined by the legal activism of Holmes and his disciples who maintained that law is not so much found by judges as it is created by them as they attempt to remedy specific wrongs. According to the legal realist, the judge should rule, in the light of the Constitution or legislated statute, not strictly, but with the question in mind, "what would the framers of those laws have intended were they legislating with the present before them?" The extreme of this position is the nihilistic one which denies that there is such a thing as a rule of law. It maintains that constitutional or statutory law does not have constraining force because the rules mean only what those interpreting them want them to be. On this view, a judge is obligated only to bring about a more human, egalitarian and just society. Given this development in American legal theory, discussions of rights and the grounding of rights become important, because conceptions of what is right obviously determine outcomes as activist judges create new law.

If contract theory and utilitarianism are not sure guides, one must look elsewhere for a justification of rights. On Bentham's principles the rights of any individual, including the unborn can be overridden in the interest of communal objectives. And on Mill's principles the right to privacy can be made into such an absolute that no communal effect of private choices

can be recognized before the law. That neither conclusion was in fact drawn is perhaps due to the fact that both Bentham and Mill philosophized in a period when certain social and personal moral standards could be taken for granted. Enlightenment morality, though proclaimed, had not yet taken hold on the populace. It is doubtful that either Bentham or Mill would have sanctioned a reinterpretation of the meaning of the word "person" to rule out the child en ventre. But the intellectual climate of their day, the intellectual climate which prevailed at the founding of the U.S. republic, no longer exists. Today intellectual elites war against the principles on which the Constitution was founded. Lord Devlin has remarked that if the laws of society are based on a common morality and that morality crumbles, the law itself will crumble.[26] If correct the prognosis is a dismal one.

But there are some bright signs. The interest in rights theory has led many to classical philosophy and to the recognition of the prescriptive character of nature. In attending to the best of Greece and Rome, a collegial effort may yet yield a morality which from a religious perspective may be incomplete but which the religious mind nevertheless would recognize as the natural foundation of its special witness. The alternative is the doctrine that "might makes right".

FOOTNOTES

[1]Liber Contra Eutychen et Nestorium c. 3, ll. 4-5 found in Boethius, The Theological Tractates, ed. H.F. Stewart and E.K. Rand, The Loeb Classical Library (Cambridge, Mass.: Harvard University Press, 1918).

[2]Religion, Law and the Growth of Constitutional Thought (Cambridge: Cambridge University Press, 1982), pp. 23-24.

[3]The Antelope, 10 Wheat. 66 (1825).

[4]Dred Scott v. Sanford, 19 How. 393 (1857).

[5]cf. W.W. Buckland and A.D. McNair, Roman Law and Common Law: A Comparison in Outline (Cambridge: Cambridge University Press, 1936).

[6]Byrn v. New York City Health and Hospital Corporation, 31, N.Y. 2nd 194, 286; NE 2nd 887 (1972).

[7]Ibid., 889.

[8]Ibid., 893.

[9]Roe v. Wade, 410 U.S. 113-167 (1972)

[10]Personal Being, (Cambridge, Mass.: Harvard University Press, 1984), p. 21.

[11]Ibid., p. 26.

[12]Rainey v. Horne, So. 2nd 434, 440, 221, Miss. 269; William v. Marion Rapid Transit, 89 NE 2nd, 334, 340, 152 Ohio St. 114, 10 ALR 2nd, 1051; Mitchell v. Couch, Ky 285, SW 2nd. 901, 905, 906.

[13]Mitchell v. Couch, 906.

[14]Roe v. Wade, p. 117. For a detailed analysis of the Roe v. Wade decision and the facts which led to it see John T. Noonan Jr., A Private Choice (New York: The Free Press, 1979).

[15]Roe v. Wade, p. 129.

[16]World Medical Association, "The Hippocratic Oath Formulated at Geneva," in Experimentation With Human Beings (New York: Russell Sage Foundation, 1972) p. 312.

[17]"Hippocratic Oath," The Encyclopedia Americana, Vol. 14 (New York: Americana Corporation, 1975), p. 218.

[18]cf. Darnell Rucker, "Selves into Persons: Another Legacy from John Dewey," Person and Community in American Philosophy (Houston: Rice University Press, 1980).

[19]As quoted by Rucker from Dewey's unpublished manuscript, "Things and Persons," p. 35.

[20]Ibid.

[21]Person and Object (London: George Allen and Unwin, 1976), p. 137.

[22]A Theory of Justice (Cambridge, Mass.: Harvard University Press), pp. 22-24.

[23]Anarchial Fallacies, ed. Browning 1838-43, 493-502.

[24]"Supply Without Burthen," Jeremy Bentham's Economic Writings, ed. W. Stark (London: Allen and Unwin, 1952), Vol I, p. 335.

[25]Utilitarianism, The Collected Works, Vol 10 (Toronto: University of Toronto Press, 1963), p. 203, p. 240.

[26]The Enforcement of Morals (London: Oxford University Press, 1965), Chap I, pp. 1-25.