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Review Essay

Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question

LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA,
AND INDIVIDUAL FREEDOM. By Ronald Dworkin.[†] New York:
Alfred A. Knopf, 1993. Pp. 262. \$23.00.[‡]

Reviewed by Daniel J.H. Greenwood*

I. Introduction

Life's Dominion, the important new book by philosopher Ronald Dworkin, attempts to provide a unified theory of abortion, euthanasia, and end-of-life medical issues. Along the way, Professor Dworkin offers an elegant recounting of his understanding of the proper way to interpret our Constitution, consisting in large part of a devastating attack on the original intent view. The bulk of the book, however, is a defense of the philosophic underpinnings of the right to abortion guaranteed by *Roe v. Wade*,¹ and it is as such that I consider it.

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[‡] Hereinafter cited by page number only.

* Associate Professor of Law, University of Utah College of Law. A.B. 1979, Harvard; J.D. 1984, Yale. I am deeply grateful to my colleagues, friends, and associates who read (in some cases several times) various incarnations of this piece and critiqued, discussed, and clarified the ideas in it, including Bruce Ackerman, Akhil Amar, Karen Engle, Ed Firmage, John Flynn, Leslie Francis, Terry Kogan, Carol Salem, and Lee Teitelbaum, and to those, too numerous to list, who helped me find often elusive references. Cleary, Gottlieb, Steen & Hamilton and Congregation Kol Ami each provided me with opportunities to present versions of subpart IV(B) ("The Tree of Life") to nonacademic audiences, and it is greatly improved as a result. This Essay could not have come about without the inspiration of my teachers, Michael Walzer and Robert Cover (z"l), or the patience and understanding of my wife and children. Contrary to the suggestions of one of my mentors, even the youngest of infants have an extraordinary capacity for negotiation, especially regarding parental presence.

1. 410 U.S. 113 (1973).

Ironically, Dworkin's effort centers around his recharacterization of the abortion debate to avoid the principal issue of principle that most observers have seen: whether a fetus is a person.² He claims that no one, or almost no one, really believes that a fetus is a person.³ Furthermore, in his view, no serious moral or legal argument can be made that a fetus is a person with rights.⁴ As a result, the claims that abortion must be restricted to prevent murder or preserve the rights of the fetus must fail.

The divisions on the abortion issue, Dworkin claims, result from an entirely different and hitherto little-examined issue. Most people on both sides of the abortion debate, he says, are concerned with the sanctification of life in an abstract sense and not particularly concerned with the fetus in question.⁵

Dworkin's reinterpretation of the abortion debate is based on a view of death that he contends is universally held. He says that "we" (abortion-rights supporters and opponents alike) believe that a late abortion is worse than an early one, just as the death of an adolescent is more tragic than the death of a young child (or an old person who has lived a full life).⁶ To explain this bell-curved view of the tragedy of human death, he develops a theory of "investment" and "frustration," suggesting that people choose to abort in order to avoid frustrating the investments that would otherwise have been made in the aborted fetus.⁷

Thus, Dworkin says we all seek to sanctify life by avoiding unnecessary frustrations of the investment in life. Where we differ is in our views

2. Arguments in favor of criminalizing abortion often seem to assume that establishing the personhood of the fetus would automatically lead to a ban on abortion. *See, e.g.*, 131 CONG. REC. E192 (daily ed. Jan. 24, 1985) (statement of Rep. Luken) (stating that his proposed constitutional amendment would "recognize the unborn child as a person under the laws of our constitution" and would, if adopted, "require that a reasonable effort be made to save the life of the unborn"). Conversely, advocates of a continued right to legal abortion have claimed that the fetus is no more entitled to moral concern than a cancerous growth. *See, e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 31 (1988) ("[When] I learned I was pregnant . . . I was sick in my heart and I thought I would kill myself. *It was as if I had been told my body had been invaded with cancer.* It seemed that very wrong." (quoting Amicus Brief for the National Abortion Rights Action League at 13, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379)) (emphasis in original)). *But see Roe*, 410 U.S. at 150-52 (recognizing that the state has an interest in protecting prenatal life, yet holding that a woman also has a right to terminate her pregnancy); Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48, 56 (1971) (arguing for the right to abortion even assuming that a fetus is entitled to full consideration as a human being).

3. P. 13.

4. *See* pp. 15-19. These two arguments—that no one believes it and that no serious argument can be made to support it—are not the same, although Dworkin sometimes treats them as if they were. Most of us believe many things that cannot be supported by serious argument.

5. *See* p. 84. This concern with sanctification of life is also the tie that binds the second part of Dworkin's book, about euthanasia and related end-of-life issues, to his abortion discussion. *See* p. 194.

6. Pp. 85-87.

7. Pp. 87-89.

of the investments. For some, the key investment is made by God (or nature—Dworkin seems to see the distinction as one of little importance). These people will see the investment as largely complete at conception.⁸ Others see the investment as largely human and so will be willing to contemplate death to avoid further frustrating human relations.⁹ In either case, however, it is life in general, not the fetus's life in particular, that is at issue.

Having moved the rights of the fetus from the center of the debate, Dworkin hopes to show that abortion regulation is barred by a clear and decisive theory of rights—both moral rights applicable to any civilized country and legal rights embedded in our Constitution.¹⁰ Morally, he contends, abortion is an issue with which each individual must struggle based on his or her own view of the meaning of life.¹¹ Legally, he claims, it is a fundamentally religious issue, and, therefore, the Establishment and Free Exercise Clauses of the First Amendment (as well as more conventional Due Process Clause analysis) prohibit the states from legislating in the area.¹²

Dworkin's effort is troubling for three reasons. First, his breathtakingly broad assertions about our shared moral views are wrong. Dworkin describes our views on abortion as sharing a common understanding of what it is to be human, the value to be given to human life, and how one comes to be human. He sees the bitter debate over abortion as a result of no more than a spectrum of views concerning whether to emphasize the "natural" or "human" contributions to human life.¹³ In contrast, I see little consensus on the values Dworkin assumes we all share. The divisions among us are far deeper than he admits; religions, which influence the views even of the nonreligious, vary more than he acknowledges. We are condemned since the Tower of Babel¹⁴ to speak in different languages and

8. See p. 91 (characterizing this view as "treating any frustration of the biological investment as worse than any possible frustration of human investment").

9. See *id.* (describing this view as one where "frustrating mere biological investment in human life barely matters and that frustrating a human investment is always worse").

10. See p. 166 ("The right of procreative autonomy has an important place not only in the structure of the American Constitution but in Western political culture more generally.").

11. See pp. 68-71.

12. See p. 166.

13. P. 93.

14. *Genesis* 11:1-9 (recounting that God feared that humans who could understand one another could not be restrained and so confused them with different languages).

This Essay cites the books of the Hebrew Bible (Torah, Prophets, and Writings) and the characters therein according to their English names as popularized in the King James Version rather than by their traditional names or correct transliteration. Most biblical translations and interpretations are my own. I have checked my translations against and liberally borrowed from the Jewish Publication Society versions, *THE TORAH—THE FIVE BOOKS OF MOSES: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE MASORETIC TEXT—FIRST SECTION* (The Jewish Publication Society of America trans. & ed., 2d ed. 1979); *THE PROPHETS—NEVI'IM: A NEW TRANSLATION OF*

hear different laws. Messiah has not come, Torah does not go forth from Zion, and the Lord does not judge among the nations.¹⁵ As Robert Cover puts it: "[T]he Temple *has* been destroyed—meaning *is* no longer unitary; any hermeneutic implies another."¹⁶ In this post-Babel, post-Temple, and pre-Messianic world, we speak different languages and follow different values. The abortion debate reflects deep divisions on the very issues where Dworkin sees consensus.

Because the divisions among us are so great, we must be especially careful to listen to our opponents. Dworkin, however, refuses to consider seriously the positions of his opponents. Many supporters of state intervention to prevent abortion claim both that the fetus is a person and that

THE HOLY SCRIPTURES ACCORDING TO THE MASORETIC TEXT—SECOND SECTION (The Jewish Publication Society of America trans. & ed., 1978); THE WRITINGS—KETHUBIM: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE MASORETIC TEXT—THIRD SECTION (The Jewish Publication Society of America trans. & ed., 1982); and THE JERUSALEM BIBLE (Harold Fisch ed., Koren Publishers, 1984). However, in some instances my understanding of the Hebrew texts departs significantly from these and other English versions. In part, of course, this is because of the openness of the original text. See Judah Goldin, *Translator's Introduction* to SHALOM SPIEGEL, *THE LAST TRIAL* at xxvi (1979) (noting "how plastic the Scriptural vocabulary remained").

15. *Isaiah* 2:3-4. Isaiah's claim, that in the last days all peoples will hear the law and follow it, emphasizes that today we are still condemned to Babel. While time continues, different people speak different languages, obey different laws, and hear different voices—or none at all—from God. See, e.g., *Psalms* 22:2 ("My God, my God, why have You abandoned me?"); *Mark* 15:34 (describing Jesus on the cross quoting the Aramaic translation of this passage); cf. ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 295 (1975) ("Speak, God.").

Although the silence of God might seem to mean that there is no law, our problem is the opposite: an excess of law. Without a definitive King to unify us, "each [must do] what is right in his own eyes." *Judges* 21:25; cf. Robert M. Cover, *Bringing Messiah Through the Law: A Case Study*, in *RELIGION, MORALITY, AND THE LAW* 201, 204-10 (J. Roland Pennock & John W. Chapman eds., 1988) (describing an attempt to end the proliferation of Jewish law by reestablishing the Sanhedrin high court); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 40 (1983) [hereinafter Cover, *Nomos and Narrative*] (describing polynomia and the jurispathic function of courts); Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229, 1245-49 (describing the search for moral certainties in the absence of knowable law).

The metaphor of a silent God is not precise. As the Oven of Achnai midrash demonstrates, the problem of an authoritative interpretation of the law persists even when God speaks. See TALMUD BAVLI [BABYLONIAN TALMUD], *Bava Metzia* 59b, translated in THE BABYLONIAN TALMUD, 1 *Seder Nezikin* 352-53 (1. Epstein ed., Salis Diches & H. Freedman trans., Soncino Press 1961) [hereinafter SONCINO] (recounting the story of a dispute over the law, where Rabbi Eliezar performed several miracles and finally appealed to the Heavens to support his view, and the Heavenly Voice indeed supported him, but his view was rejected nonetheless on the ground that the Torah provides for a different method of resolving interpretive disputes). As the story makes clear, the problem of determining whether "this is the word of the Living God" exists in all religious and secular moral systems. *Id.*, *Eruvin* 13b, translated in SONCINO, *supra*, 2 *Seder Mo'ed* 85-86 (noting that even though the views of Hillel and Shammai radically differ, both are "the word of the Living God").

For an important and helpful discussion of the Oven of Achnai passage and its use in recent American legal theory by theorists struggling with the absence of authoritative norms, see Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 *HARV. L. REV.* 813, 840-42 (1993). Stone also provides an accessible explanation of the status and dates of the various sources of Jewish law cited herein. *Id.* at 816 n.13.

16. Cover, *Nomos and Narrative*, *supra* note 15, at 60 (emphasis in original).

abortion is murder.¹⁷ Contrary to Dworkin, I suggest that these positions are seriously held and, within their own terms, intelligible. Dworkin's view that they are untenable or dishonest stems, I think, from his incorrect assumption that his opponents share other beliefs that they in fact reject, as well as from his insistence on consistency within each individual's value system.¹⁸

In contrast, I suggest that two opposing views of humanity are at work. One view posits that the value of humanity is the result of a God-given and God-like soul; it is the "breath of God"—the soul—that distinguishes us from the dust of the earth.¹⁹ According to this view, we must value all creatures with souls and none without (since the latter are mere dust of the earth). If fetuses had souls, the anti-abortion position would follow almost inexorably.²⁰

The other, more secular, view of human value focuses on characteristically human traits such as reason, human relationships, love, and creativity. According to this view, we value humans principally because they have the capacity to develop these characteristically human traits.²¹ For people holding this view, the fetus's status cannot be so clear, and many other considerations—ignored by proponents of the first view—must determine the abortion issue. For most people holding this second view, however, the fetus, whatever it is, is not a human being.

Contrary to Dworkin's presumption, then, different participants in the abortion debate start with radically different issues and questions. There is no single spectrum of responses to a uniform set of problems. Instead, the problems themselves will seem quite different to different people.

17. See, e.g., Judy L. Thomas, *Man with a Mission*, CHI. TRIB., Oct. 20, 1991, § 6, at 14 (profiling Operation Rescue founder Randall Terry and his view that abortion is murder).

18. Just as Dworkin sees unity in our collective beliefs, so he imposes a requirement of consistency on each individual's beliefs. In my view, both claims are wrong: After Babel, not only social belief structures but even each individual's views are polynomic, inconsistent, and self-contradictory. See *infra* note 77 and accompanying text.

19. See *Genesis* 2:7 ("And Adonai God made the man from dust of the earth, and breathed in his nose the breath [or soul] of life, and the man became a living breather [or soul].").

20. Certain utilitarian theories may have a very similar structure, even without invoking God. If all morality is devoted to increasing the amount of happiness in the world, all sentient creatures (and no insentient creatures) are entitled to be treated as moral subjects. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch.I, §§ I-II, at 11 (J.H. Burns & H.L.A. Hart eds., 1970) (1789) (stating that the purpose of morality is to increase happiness); *id.*, ch. XVII, § I, ¶ IV, n.1 (treating animals as moral subjects). This might lead to giving the fetus a radically different status at the point at which it is sufficiently developed to be meaningfully regarded as sentient. See *infra* note 132.

21. In this grossly generalized classification, I mean to include under the first view most of those who, following Saints Paul and Augustine, see humans as tainted by original sin. In contrast, most secular philosophers since Aristotle would hold the second view. I do not mean to debate whether reason, sentience, happiness, artistic creativity, or loving relationships are (under the second view) the primary defining characteristics of humanness. Rather, all those who believe that humanness has some defining characteristic that, unlike souls, can be seen and at least grossly measured hold the latter view.

The second troubling aspect is Dworkin's characterization of the views of *Roe*'s supporters. He asks us to believe that *Roe*'s supporters seek to sanctify life by killing;²² that they think of the fetus as a human life (though not a person) which should be allowed to live only if it has a positive expected return (to whom he does not specify) so that human "investment" in it will not be "frustrated";²³ and that general principles of political theory, enacted into law by our Constitution, bar a collective decision on whether these are the right ways to sanctify life.²⁴

Dworkin's investment view treats fetuses, and indeed all humans, as mere means to some external end—the "return" others will receive from them. It is, therefore, a strikingly illiberal concept and one that, on reflection, most liberals will probably reject. Indeed, I suspect that were Dworkin right—that the central issues of *Roe* are the "sanctification of life" and avoiding the "frustration" of investments in that life—many liberal supporters of *Roe* would conclude that they ought to change their positions. Dworkin's notions that we sanctify life by killing, or that we may end a life to avoid frustrating an investment in it, are not persuasive because they are too paradoxical and too offensive to ordinary modes of liberal thought.

Furthermore, Dworkin's description of the moral underpinnings for his bell-curved view of the tragedy inherent in death is equally problematic.²⁵ Many of *Roe*'s supporters do share the bell-curved view. Nonetheless, the bell curve need not result from seeing children as investments that are frustrated if early death precludes others from receiving the expected return. Instead, the bell curve of tragedy is a simple result of the human capacities view²⁶ of human value. Dworkin's insight that the bell curve is related to attitudes toward abortion is clearly correct, at least for some of those holding the human capacities view, because a late-term fetus is more like a human, and more likely to become a human, than an early-term one.

Moreover, Dworkin's account is perversely fetus-centered. Although the core of his argument is that the fetus is not a person with rights and

22. See p. 90.

23. Dworkin's exact words are worth quoting: "[I]f you assign much greater relative importance to the human contribution to life's creative value, then you will consider the frustration of that contribution to be a more serious evil, and will accordingly see more point in deciding that life should end before further significant human investment is doomed to frustration." P. 91.

24. See p. 168.

25. Not everyone agrees that the tragedy of death is bell-curved (that is, that death is more tragic in the prime of life than at its beginning or its end). Indeed, many people—the same people who are likely to take a restrictive view of the permissibility of abortion—believe, I think, either that death is equally tragic at any age or that early death is always more tragic than later. On this view, the distinction between late and early abortion must seem irrational at best.

26. See *supra* note 21 and accompanying text.

that therefore fetal rights are not central to the abortion debate,²⁷ Dworkin's account of the "liberal" position centers entirely on the fetus—a living thing entitled to respect even if not to rights. The index to the book lists no reference to fathers, mothers, parents, or even potential families.²⁸ None of these seems important to his analysis. This neglect of the people involved in childrearing, I think, is symptomatic of Dworkin's disregard for the actual processes by which a fetus becomes a child and a child becomes an adult. Even after rejecting fetal rights, he remains trapped in a classical philosophic model of self-sufficient individuals, a model that makes no sense in this context.²⁹

In contrast, I argue that many supporters of *Roe* view the issue as centering around not the rights of the fetus, but membership in the family and the responsibilities (not, perhaps, rights) that flow from that relationship.³⁰ Neither a fetus nor a child can exist in isolation; a family, if it is functioning, or a single parent or other caretaker, if it is not, must raise the

27. See p. 13; *supra* text accompanying note 3.

28. To be fair, Dworkin does discuss parents and families. But his discussion of the relationship of parents to their actual and potential families is peculiarly abstract. See, e.g., p. 19 (discussing a mother's obligation to care for a fetus to which she intends to give birth). Even his lengthy discussions of Carol Gilligan's work, pp. 59-60 (discussing CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982)), with its emphasis on caring for others and responsibility to the future child, or of Adrienne Rich's telling aphorism, "The child that I carry for nine months can be defined *neither* as me nor as not-me," p. 55 (quoting ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 64 (1976) (emphasis in original)), seem disconnected from his central thesis. Ultimately, he sums up the feminist critique in terms that completely abstract from the actual relationships among parents, children, and possible future children: "Abortion wastes the intrinsic value . . . of a human life and is therefore a grave moral wrong unless the intrinsic value of other human lives would be wasted in a decision *against* abortion." P. 60 (emphasis in original). Instead of a family or real human relationships, he presents a balancing of separate, abstract, and apparently unrelated lives. Rich's "neither me nor . . . not-me" has become a Hobbesian rights-bearing individual: separate, equal, and opposed to its "me [and] not-me."

29. Liberal theory has long founded its accounts of rights on a background of autonomous individuals coming together or cooperating only to the extent mutually advantageous. See, e.g., THOMAS HOBBES, *LEVIATHAN* pt. I, ch. XIV, at 68, 63-66 (Ernest Ryhs ed., 1940) (1651) ("Whosoever a man Transferreth his Right, or Renounceth it; it is . . . for some . . . good lie hopeth for thereby."); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, ch. II, § 4, at 269 (Peter Laslett ed., student ed. 1988) (3d ed. 1698) ("To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man." (emphasis in original)). Whatever the merits of this mode of thought in considering the proper relations of adults to one another, applied to fetuses—or infants—it can only mislead. An infant, much less a fetus, cannot exist except by "the Will [and constant attentions] of any other Man" (or, more often, woman).

30. I do not, of course, pretend that this is the only, or even the main, basis of support for *Roe*. The debate is often framed in terms of a woman's abstract right to control her body (suggesting that perhaps the state could bar abortion so long as there were a suitable supply of "surrogate mothers" and appropriate fetal-transfer technology). See, e.g., pp. 53-54 (addressing Catharine MacKinnon's framing of the debate in these terms, and the extent of the Court's endorsement of this view in *Roe*). Most of my discussion would apply to that theory as well.

fetus and the child if it is ever to become a full human being. Crudely put, the question is whether the family or the state will have the right to decide whether the family will make this commitment and take on this responsibility. The issue is one of admitting a new member and thus more comparable to immigration law than to murder. Just as a state loses the essential attribute of sovereignty if it cannot control its borders, the family's very foundation is threatened when the state may demand that it involuntarily admit another.³¹

The third troubling aspect of Dworkin's project is that he does not consider seriously enough the implications of our widely different views of human value for his First Amendment analysis. Traditional First Amendment analysis assumes that the government, by not taking any affirmative stance in the proscribed area, remains neutral and allows the competing views of individuals to operate without interference. But in the abortion context, the government's abstention is not neutral. The issue is more akin to whether state institutions may constitutionally close on Sunday than to whether the state may use tax dollars to finance a particular church. Simple notions of state abstention and neutrality or a wall of separation between church and state are not very helpful in analyzing this type of deep conflict in world views.³²

As Dworkin concedes, state abstention on the abortion issue is not a legitimate option for anyone who views abortion as murder.³³ If some Americans reasonably believe that abortion is murder, then state abstention from banning abortion does not reflect a neutral decision to leave to the private sector the issue of how best to sanctify life. Instead, state abstention is a decision that abortion is not murder, that those who disagree are wrong, and that they are entitled only to the tolerance a liberal society accords its defeated minorities.

I believe *Roe* must be defended as such a norm-establishing decision, and the defense must include explicit support for the judgment that killing fetuses is morally acceptable (or at least not so immoral as to require that it be illegal). I would not like to have to begin that argument from the positions that Dworkin attributes to *Roe*'s supporters: that to honor the

31. Cf. MICHAEL WALZER, SPHERES OF JUSTICE 31-64 (1983) (discussing a state's rights to determine its membership); *infra* note 35.

32. Similarly, in his due process analysis, Dworkin ignores the ease with which the privacy principle he postulates could be broadened to include matters he surely intends to exclude. See pp. 157-58 (setting out the privacy principle of procreative autonomy). He also does not explain why the principle could not be contracted, even within the limited rules of proper judging he has set out in earlier work (elegantly summarized in chapter 5, especially pages 144-47), to the point where it will not do the work he sets out for it, and he ignores the difficulties of deciding when an issue of "intrinsic values" becomes a religious issue subject to First Amendment protection. In this world of a silent God, his hope for an analysis that will avoid the need for politics is in vain.

33. P. 31.

value of human life, we should view humans as investments to be discarded if the investment is likely to be frustrated, and that killing fetuses is the best way to sanctify life.

Rather, we who believe there is a right to abortion—and sometimes a moral, if not a legal, duty to abort—are thinking about different issues altogether. We³⁴ are seeking to live our lives in a world bounded by the tragedy of finitude, knowing that we have only a limited capacity to do a limited number of things in one short life. We are struggling with an excess of responsibilities—to people to whom we are already committed and to ideals, ideas, and structures that are not human at all.

Most critically, we, unlike *Roe's* opponents, do not believe that we have a responsibility to an unwanted fetus. In our view, that responsibility commences only when the fetus becomes a member of the family. State intervention to ban abortion, then, forces us to assume a responsibility we are not prepared to accept.³⁵

34. "Who is this 'we'?" should be the reader's repeated question, both of Dworkin and of me. Dworkin's essay, I argue, depends on a high degree of inclusiveness in his "we." If some of us disagree with his account and conclude (even after reflection) that abortion is murder, that early and late abortions are equally evil, or that it is repulsive to think of humans (or even potential humans) as investments to be discarded at will, little is left of Dworkin's scheme. Without effective unanimity on these basic points, Dworkin has no foundation on which to build his conclusion that those points of agreement must be enshrined in basic law. My argument, in contrast, depends on a diversity of views. So long as I have described some significant group of *Roe's* supporters, it is irrelevant to my argument whether others think in altogether different ways. Indeed, my view presumes and is based upon the existence of other, sharply diverging views.

35. Key to this argument, of course, is the assumption that the responsibility is a major one. It cannot be fulfilled, for example, by smoking and drinking through the pregnancy and then putting the child up for adoption or parking the child in front of a television. Rather, the understanding must be that once one decides to have a child, one must bring that child up properly. Were the responsibility relatively minor, the argument for assuming it would be relatively stronger. Similarly, a state that sees its role as fostering the development of a specific national culture and economy, providing extensive welfare and health benefits, and generally being deeply involved in the lives of its citizens, would have a stronger argument for imposing such responsibilities upon its citizens than would the "watchman" state of classic liberal theory. Cf. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 89-95, 256-57 (arguing that immigration restrictions are illiberal); WALZER, *supra* note 31, at 37, 50 (describing the view of classical political economists, including Sidgwick, that the state should not "in any way . . . determine who is to inhabit this territory" (quoting HENRY SIDGWICK, *ELEMENTS OF POLITICS* 295-96 (1881))).

I assume that people who take seriously the obligation to rear a child whom one has brought into the world will not easily accept that one may fulfill this responsibility to a family member by throwing that member out of the family, as is done in adoption, just as a state may not fulfill its (far more limited) welfare or education responsibilities by expelling its citizens. Perhaps paradoxically, it is morally easier to prevent entrance into the family (or the state) in the first place. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1992) (holding that aliens intercepted outside United States territorial waters could be deported to countries where their lives or freedom would be threatened for illegitimate reasons); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 324 (1974) ("If you don't like it here, don't join" has more force than "If you don't like it here, leave."); WALZER, *supra* note 31, at 31-64; cf. *infra* notes 207, 224. Once a child enters the family, the family has ongoing responsibilities to that child that cannot be abdicated through adoption. Thus, if the fetus is viewed as

This set of beliefs, however, is grounded in a conviction that fetuses are not children; one who believed a fetus is a child would be unlikely to believe that we have the option of rejecting the responsibility of caring for her.³⁶ The conviction that a fetus is only a potential human, I will attempt to show, is deeply rooted in the view that the value of humanity is in its distinctively human aspects.

Our Constitution is a product of an Enlightenment view that has far more in common with this optimistic view of human value than the sin-centered alternative.³⁷ The Constitution, if not all Americans, sees knowledge as good,³⁸ progress as preferable,³⁹ and humanity as something to be celebrated;⁴⁰ sin is not its major concern. Thus, the Constitution may well embody something like the view that humans are valuable because of their knowledge of good and evil. In that case, *Roe* is clearly correct: To the extent that we already have made the decision that our law will honor humanity for its humanness, abortion is a decision that must be left to individual consciences.⁴¹

The rhetorical power of this justification of *Roe* does not depend on the First Amendment image of removing the state from the fray and leaving the entire issue to each individual's conscience. Rather, it is based on the assertion that the Constitution cannot be understood to be neutral with respect to the two views of human value that underpin the two sides of the abortion debate, and that, as between the two views, the human-centered view is a closer fit. In contrast to Dworkin's view, this view of the

not yet a child (or *our* child), abortion is *less* problematic than adoption: no child will ever come into existence. The complex and often tragic relationships between biological parents and the child they put up for adoption may stem, in part, from this sense that putting a child up for adoption is in some respects abandonment of (rather than an alternative way of fulfilling) parental responsibilities. For a discussion of the difficulties faced by some women who put children up for adoption, see, for example, ROBIN WINKLER ET AL., *RELINQUISHING MOTHERS IN ADOPTION: THEIR LONG-TERM ADJUSTMENT* 58 (1984) (reporting that most subjects described putting a child up for adoption as the most stressful event they had ever experienced). By contrast, women who abort experience much lower levels of distress. See, e.g., INSTITUTE OF MEDICINE, *LEGALIZED ABORTION AND THE PUBLIC HEALTH* 92-93, 98-99 (1975) (finding that the mild depression or guilt feelings experienced by some women after an abortion appear to be only temporary and outweighed by feelings of relief); LAWRENCE LADÈR, *ABORTION* 21 (1966) (describing a Swedish study in which 75% of women who had abortions reported no self-reproach).

36. See *supra* note 35. Of course, for those who view the fetus as already being a member of the family, adoption—however problematic—must be a clearly lesser evil than abortion.

37. For a discussion of the two alternatives, see *supra* note 21; *infra* Part IV.

38. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress power to grant authors and inventors exclusive rights to their respective writings and discoveries).

39. See *id.* art. I, § 8, cls. 1, 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts . . .").

40. See *id.* *prol.* ("We the People . . ."); *id.* amends. IX, XIII, XIV.

41. This justification of *Roe*, unlike Dworkin's, does not require asserting that its opponents do not believe what they say they believe.

Constitution does not falsely pretend to accommodate everyone or almost everyone.

My argument, then, proceeds in a dialectical manner. In Parts I and II, I challenge Dworkin's contention that we all agree a fetus is not a person by relatively technical arguments aimed at reconstructing internally coherent views of those who would criminalize abortion (and to a lesser extent, their opponents) based upon a notion of the fetus as a rights-bearing person, thus demonstrating a far wider variety of consistent, comprehensive views than Dworkin admits. Having established, I hope, that Dworkin has cut off the debate too soon—that the views of at least some opponents of *Roe* are too distant from Dworkin's views to allow his elegant philosophic resolution of the debate to stand—in Part III I shift to the views of opponents of legal bars on abortion. Here, I contend that Dworkin's account violates fundamental principles important to many he considers his allies; that is, his account of the views of abortion-rights supporters is internally incoherent. At least as important, it offers only an untenable base for the necessary political struggle with the proponents of criminalization. I reject Dworkin's solution simultaneously as thoroughly illiberal—in that it devalues existing human lives—and as far too liberal—in that it fails to account for the relationships in which a fetus (whose life, however nasty, brutish, or short, can never be solitary⁴²) is enmeshed or becoming enmeshed. In Part IV, I offer an alternative explanation of the debate. Unlike Dworkin's, this account acknowledges the deep divide among us. By means of a midrash on the Book of Genesis, I seek to elucidate coherent accounts of two radically contradictory views of the worth of human beings—one of which (the more attractive, I hope) leads clearly and easily to legal abortion. Because each of these views relies on central artifacts of our common civilization, I hope both accounts will seem familiar even to those who might consider one of them reprehensible. If we can better understand the views of our opponents, perhaps the way to a political (if not philosophical) resolution (or at least acceptance of our divisions) will follow. I conclude by suggesting that the critical insight of liberal philosophy remains our best hope: liberalism is premised on the assumption that it is more important to live together in peace than to live just as we would like. To do that, however, we must accept the sometimes shocking foreignness of those we consider fellow members of our common enterprise.

42. See HOBBS, *supra* note 29, pt. I, at 13 ("[In the state of nature, the] life of man [is] solitary, poor, nasty, brutish and short.").

II. Dworkin's Reconstructed Abortion Debate: Do We All Agree That the Fetus Is Not a Person?

The first part of Dworkin's argument on abortion insists that the conventional understanding of the debate is wrong. The central issue is not, as a cursory glance at the literature might suggest, whether the fetus is a person. That issue, he claims, has been resolved: We⁴³ are all agreed, whether we know it or not, that the fetus is not a person in any relevant moral or legal sense.⁴⁴ Accordingly, abortion cannot be murder; if it is wrong at all, it is wrong for some other reason.⁴⁵

The argument that a fetus is not a person is essential to Dworkin's project. Were fetuses people, Dworkin argues, killing them would be murder.⁴⁶ Murder, in turn, is the sort of thing that must be regulated by the state. Thus, if there were any question about the fetus's personhood, that question would have to be resolved prior to any discussion of the proper resolution of the abortion controversy. To make matters worse, Dworkin believes that on this issue—the personhood of the fetus—“argument is irrelevant and accommodation impossible.”⁴⁷ Thus, if Dworkin cannot convince us that we *already* believe the fetus is not a person, he does not think he has anything to say at all.

In contrast, if he succeeds in this initial project, he will have a base from which to build a universally acceptable political solution—or so he claims.⁴⁸ Unlike the personhood of fetuses, the sanctification of life is an issue on which reasonable people can agree to disagree, leaving the issue

43. Critically, Dworkin includes in his use of “we” more than the usual, relatively homogeneous audience of literate lawyers thinking as lawyers. He includes religious individuals thinking as such, even fundamentalist Protestants and, in particular, practicing Catholics, and ultimately Americans and Europeans generally. See pp. 35-67. Thus, he is not limiting his argument to initiates of a relatively well-defined canon with its relatively clear norms of argument and reasoning. Instead, he aims to persuade his readers, whoever they may be, that everyone else—even Albanians—also would be persuaded if they read his book with the requisite care and good faith. See p. 238. Furthermore, he cannot so limit his argument because he has undertaken an all-or-nothing exercise: to remove the debate over a fetus's personhood from the political arena altogether.

44. See p. 67 (“[W]e cannot understand the moral argument raging around the world . . . if we see it as centered on the issue of whether a fetus is a person.”); p. 110 (concluding that “all responsible lawyers” accept that a fetus is not a person in the constitutional sense).

45. See pp. 20-21 (claiming that, on reflection, those who claim abortion to be murder would admit that this view is not based on the idea that a fetus has rights, but merely emphasizes the depth of their feelings stemming from other reasons).

46. See p. 94.

47. P. 24. In Dworkin's view, this “pessimistic conclusion” can be avoided only by understanding the abortion debate as not about personhood. *Id.* I disagree. See *infra* Parts IV, V.

48. See pp. 101, 100-01 (claiming that by shifting the debate away from the fetus-as-a-person issue, we might find “a collective solution to the political controversy that all sides could accept with dignity”); pp. 171, 172 (contending that the abortion issue is “central . . . to the idea of freedom” because it concerns the “question of how far government may legitimately impose collective judgments about spiritual matters on individual citizens”).

for purely private resolution without an official state position. Once it is clear that the true issue underlying the abortion debate is how best to sanctify life, the legal question no longer revolves around whether the state is permitting inmurder. Instead, the question for Dworkin is, "Should *any* political community make intrinsic values a matter of collective decision rather than individual choice?"⁴⁹ Intrinsic values, he concludes, are religious values, and so the answer to his question is No.⁵⁰

The first issue, then, is whether Dworkin convincingly demonstrates that we agree a fetus is not a person. Because many abortion opponents⁵¹ claim to base their arguments on precisely this position, Dworkin must show that they do not, or cannot, mean what they say.

A. Arguments from "More Is Better"

Dworkin opens his argument that no one thinks the fetus is a person by discussing several specific instances in which some abortion opponents—including representatives of the medieval Catholic Church—explicitly stated that they did not consider the fetus a person.⁵² As an argument that no one considers the fetus a person, this discussion suffers from an obvious flaw: that some people do not consider the fetus a person teaches little about the beliefs of others. However, these examples of abortion opponents who do not rely on the personhood of the fetus point up a far larger problem for Dworkin's thesis: at least some of these opponents also do not rely on the sanctity of fetal life in an abstract sense.

For Dworkin, life is sacred because we do not consider life an "incremental value" of which more is better, but nonetheless we do think

49. P. 26 (emphasis in original); see p. 171.

50. See p. 101 (stating that his recharacterization of the debate leads to the realization that our disagreements are "at bottom *spiritual*" and thus amenable to toleration rather than collective action (emphasis in original)); p. 172 (arguing that overruling *Roe* would jeopardize the American freedom to follow one's own "reflective convictions").

51. Dworkin calls abortion opponents "conservatives," reflecting the terminology of the popular press. See p. 31. I avoid this term, however, because I do not see anything particularly conservative, in the American context, about advocating state regulation in this area.

The issues involved in abortion changed dramatically with the advent of modern surgical techniques, which made abortion safer than childbirth, and with modern understanding of the natural course of pregnancy and its high rate of natural abortion. See Michael J. Rosenberg & Steven M. Rosenthal, *Reproductive Mortality in the United States: Recent Trends and Methodologic Considerations*, 77 AM. J. PUB. HEALTH 833, 834 (1987) (estimating the mortality rate from pregnancy in 1982 to be roughly 25 times higher than the mortality rate from abortion); *infra* notes 220, 287. Accordingly, there is no specific tradition that a conservative could claim to be conserving.

Nor is there a general tradition. The position abortion opponents propose to enforce by law is not part of a traditional moral view held by Americans generally. Rather, it is one of several hotly contested views, each of which has strong roots in widely held and deeply traditional world views. See *infra* Part IV; see also pp. 35-67 (discussing several religious and feminist views).

52. P. 41.

that every existing instance of human life is precious.⁵³ Many people, however, do not view human—or fetal—life in this way. Instead, they see more humans as better and do feel an obligation to help bring about the next generation. This can lead to an entirely different analysis of the abortion debate, in which abortion—and other forms of birth control, including even celibacy—are rejected without any consideration at all of the fetus, its claims, or its sanctity.⁵⁴ While these views support Dworkin's notion that opposition to abortion need not be based on fetal rights, they directly contradict the second step of his argument, that the abortion debate really is about sanctification of abstract life.

Traditional Jewish law, for example, contradicts both of Dworkin's assertions. It views human life as an incremental value—and it does not view fetal life as a value at all. Like the medieval Catholics Dworkin cites, Jewish law rejects the notion that the fetus is a person. The full extent to which Jewish law devalues even a late-term fetus can be seen in the gruesome directions given to doctors confronted with a difficult birth. The Mishnah rules that until the child's head has emerged in birth, the doctor is obliged to "tear it limb from limb in its mother's womb" if necessary to protect the mother.⁵⁵ Jewish law protects an existing human life over a potential one; until the head has emerged, the fetus remains a potential life, not an actual one.⁵⁶ The fetus simply is not entitled to the respect due a person.⁵⁷ For the same reason, mourning for an aborted pregnancy is prohibited.⁵⁸

53. P. 73. Dworkin contrasts "incremental values," as defined in the text, with "intrinsic values." Incremental values are things of which more is better. Unlike incremental values, intrinsic values like human life are treasured if they exist, but there is no imperative to create more: the Elgin Marbles, for instance.

54. Because this view centers around the next generation of humans rather than the fetus, it is closely related to views that may require abortion under circumstances in which the prospective parents believe they will not be able to raise this fetus properly. See *supra* note 35 and accompanying text; *infra* notes 149-52 and accompanying text; subparts III(D), (E), (F).

55. MISHNAH, *Ohalot* 7:6, translated in THE MISHNAH, *Oholoth* § 7.6 (Herbert Danby trans., 1933).

56. See DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 251-91 (1968); RASHI, COMMENTARY ON THE MISHNAH, *Ohalot* 7:6. In contrast, Maimonides justifies the rule that the fetus may be killed until its head has emerged on the ground that the fetus is a "pursuer" (*rodef*) against whom (or which?) the mother is entitled to defend to preserve her mental and physical health. R. MOSHE BEN MAIMON (RAMBAM), MISHNEH TORAH [CODE OF MAIMONIDES] bk. XI, tr. V, ch. I, § 9, translated in THE CODE OF MAIMONIDES: THE BOOK OF TORTS 196-97 (Julian Obermann ed. & Hyman Klein trans., 1954) [hereinafter KLEIN]. Maimonides's use of the *rodef* (pursuer) theory also appears to be based on an assumption that the fetus is not a person. Otherwise, the same reasoning would require holding that a mother is entitled to kill her children to preserve her mental health. While children, no doubt, occasionally drive their mothers to wishing that such were the law, it unquestionably is not. See *id.* bk. XI, tr. V, ch. II, § 6, translated in KLEIN, *supra*, at 200 (declaring that killing a day-old infant or a person in the throes of death is murder, but killing an unborn or prematurely born fetus is not, until it has lived 30 days outside the womb).

57. See FELDMAN, *supra* note 56, at 251-94.

58. TALMUD BAVLI, *Niddah* 44b, translated in SONCINO, *supra* note 15, *Seder Tohoroth* 307; MISHNEH TORAH, *supra* note 56, bk. XIV, tr. IV, ch. I, § 6, translated in THE CODE OF MAIMONIDES:

Nonetheless, Jewish law traditionally condemned most abortions: first, out of concern for the mother's health in ages when abortion was an extremely dangerous procedure, and second, because of the biblical commandment to be "fruitful and multiply."⁵⁹ The commandment to be fruitful and multiply,⁶⁰ in at least some circumstances, is understood to mean that more *is* better.⁶¹ Abortion, then, is reprehensible in traditional Jewish law for more or less the same reason that celibacy is: it is a *mitzvah*⁶² to have children. Thus, the Jewish law position on abortion

THE BOOK OF JUDGES 165 (Julian Obermann et al. eds. & Abraham M. Herschman trans., 1949). In part because the fetus is not considered a person (and, perhaps, to reinforce psychologically this view), Jews traditionally also do not name a child prenatally. See ANITA DIAMANT, *THE JEWISH BABY BOOK* (1988).

59. *Genesis* 1:28; *id.* 35:11. Despite this general moral condemnation of abortion, Jewish law may require the state to adopt liberal abortion laws. The principle of *pikuah nefesh* mandates that all but three laws must be broken to save a life. See, e.g., TALMUD BAVLI, *Sanhedrin* 74a, translated in SONCINO, *supra* note 15, 3 *Seder Nezikin* 500-03; George P. Fletcher, *Self-Defense as a Justification for Punishment*, 12 CARDOZO L. REV. 859, 863 (1991). Because the fetus would not count as a life but the mother would, *pikuah nefesh* arguably would require legalizing abortions where women predictably would risk their lives in illegal (and unsafe) abortions.

Those of us who have grown up largely since *Roe* need to be reminded from time to time of the terrible toll taken by the illegality of abortion. It is hard to imagine now that in 1972 most major municipal hospitals had an entire ward devoted to emergency surgery on women who had undergone botched abortions; New York City's 10 municipal hospitals were treating an average of 480 women per month at legalization. LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION*, 166-67 (1973); see also INSTITUTE OF MEDICINE, *supra* note 35, at 65, 67-68 (reporting that admissions to various municipal hospitals for incomplete or septic abortions dropped by 50% to 80% in the years following local legalization); RICHARD H. SCHWARTZ, *SEPTIC ABORTION* 7 (1968) (estimating the number of prelegalization hospital admissions for abortion to be roughly one-quarter those for delivery and that at least one-third of women admitted with incomplete abortions were septic at admission). Morbidity rates, of course, are much higher than mortality rates. Nevertheless, the death rate from illegal abortion was shocking. See LADER, *supra* note 35, at 2-3 (estimating that there were about 1,200,000 illegal abortions per year in the late 1950s and early 1960s in the United States, resulting in almost half of all childbearing deaths); LADER, *supra*, at 7 (estimating a minimum of 5000 deaths per year from illegal abortions in the mid-1960s). In comparison, induced abortion now has a mortality rate of "nearly zero" (seven deaths in 1982). Rosenberg & Rosenthal, *supra* note 51, at 835, 834 (Table: Reproductive Mortality and its Components, 1975 and 1982).

60. The commandment (which is found in *Genesis* 35:11) has had varying interpretations. Most commonly, it is held to require a Jewish man to bring to adulthood at least two fertile children, one male and one female. See, e.g., FELDMAN, *supra* note 56, at 48; Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King's Law and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1148-49 & nn.41-44 (1990). However, because one can almost never know whether this commandment will be fulfilled until it is too late, some opinions suggest that Jewish men should seek to maximize the number of their children, subject however to competing considerations of family harmony. See FELDMAN, *supra* note 56, at 49. Since the commandment is directed only at Jewish men, women (and all non-Jews) are free to use all forms of birth control. Since the Holocaust, the children-maximizing view has become extremely influential in some sectors of the Orthodox community. See *id.* at 52 (suggesting that the support for this view is based on the need to replace those lost in the Holocaust).

61. See, e.g., TALMUD BAVLI, *Yvamot* 63b, translated in SONCINO, *supra* note 15, 1 *Seder Nashim* 426 ("He who does not engage in procreation, it is as if he committed murder.").

62. "Commandment."

stems from a rejection of the view Dworkin claims we all hold: Jewish law, like classical utilitarianism, does view life as an "incremental value."

Utilitarian theorists following the classical utilitarian analysis have reached the same conclusion by a different route. If the goal of utilitarian morality is to maximize the sum of human happiness, the theory goes, then we ought to maximize the number of humans who can experience happiness (at least so long as the population does not increase to the point where new lives will be, on balance, unhappy).⁶³

Those who believe that more human life is almost always better may oppose abortion regardless of their views of the status of the fetus. Dworkin claims that opposition to abortion is based on a view that "the deliberate destruction of something created as sacred by God can never be redeemed by any human benefit."⁶⁴ The Jewish law and classical utilitarianism, however, rely on a different notion altogether: they command some people to take affirmative action to bring children into the world. It is the neglect of that duty, not any value of the prehuman fetus, that motivates the Jewish law's opposition to abortion.

Dworkin's account of some Catholics, including Thomas Aquinas, who have condemned abortion without relying on "immediate ensoulment,"⁶⁵ suggests that these thinkers as well believe that any limitation on the number of new humans brought into the world is suspect.⁶⁶ But if some people oppose abortion without agreeing that the fetus is entitled to any respect at all, Dworkin cannot be correct in claiming that the abortion debate is entirely centered around how best to sanctify life. For at least some proponents of criminalization of abortion—and, as I will show later, for many opponents of state regulation as well⁶⁷—the putative sanctity of fetal life is irrelevant.

Furthermore, opposing abortion because some religious traditions and some forms of utilitarianism teach that more humans is always better is not inconsistent with opposing it because fetuses are persons and abortion is murder. One could hold both views simultaneously.⁶⁸

63. For a concise explanation of this classical utilitarian theory, distinguishing it from utilitarian theories that seek to maximize average happiness rather than total happiness, see JOHN RAWLS, *A THEORY OF JUSTICE* §§ 27, 30, at 161-66, 183-92 (1971). The *locus classicus* is HENRY SIDGWICK, *THE METHODS OF ETHICS* bk. IV, chs. 1-2, at 411-22 (7th ed. 1907); see also BENTHAM, *supra* note 20, ch. IV, § V.

64. P. 92.

65. Pp. 42, 39-42.

66. *But see* p. 43 (claiming that the Catholic view is based on the different idea that interference with procreation is an "offense[] against the dignity and sanctity of human life itself").

67. See *infra* subparts III(D), (E), (F).

68. See p. 39 (suggesting that the Church could abandon its theory of ensoulment at conception without changing its opposition to abortion).

Thus, even if Dworkin's examples of abortion opponents who do not consider the fetus a person were representative of the spectrum of anti-abortion views, they could not demonstrate that the debate is focused on how best to sanctify life. At most, they show that in addition to questions about whether abortion is murder, we must also consider questions about the moral status of all forms of birth control—even forms, like celibacy, that uncontroversially prevent a new life from being formed rather than ending an already existing one. Dworkin's examples do, however, demonstrate at least the logical possibility of debate on Dworkin's terms: one can consistently oppose abortion even if fetuses are not persons. Such opposition, however, seems likely to condemn all birth control and other restrictions on the entrance of newcomers into the family, not just abortion.⁶⁹

B. The Importance of Being Earnest: The Inconsistency of the Abortion Opponents

Dworkin's next argument is of critical importance to his project. Here, he seeks to demonstrate that many abortion opponents could not believe that abortion is murder or that fetuses are persons, because to do so would be inconsistent with other beliefs they unquestionably hold. Specifically, he claims that it is impossible simultaneously to believe that a fetus is a person and to allow abortion in cases of rape, incest, or other circumstances in which prohibition forces often are willing to permit legal abortion.⁷⁰

Surely, Dworkin argues, no one believes that it would be justifiable to kill *A*, an adult, simply because *A* is deformed in some way,⁷¹ or to kill *A* because her mother was raped, or to kill *A* to save *B*'s life (assuming *B*'s life was endangered through no fault of *A*).⁷² Because even many abortion opponents routinely do believe that abortions are justifiable when the mother's life is in danger, or the fetus is gravely deformed, or the fetus is the product of a rape, it follows that they do not actually think that

69. The reverse also is true: a respectable argument can also be made for supporting abortion even if fetuses are persons. See Thomson, *supra* note 2 (analogizing the fetus to a famous violinist suddenly hooked up to a stranger's body for life support, and arguing that the stranger has no obligation to continue to keep the violinist alive); cf. *infra* sections II(B)(2), II(B)(3). I suspect, however, that few people would have found Thomson's argument persuasive if she had analogized the fetus to a child and suggested that parents have no obligation to feed their child. Thus, as I argue below, the issue is whether the fetus is a stranger (nonperson) or rather already a member of the family.

70. See p. 32 ("The more such exceptions are allowed, the clearer it becomes that conservative opposition to abortion does not presume that a fetus is a person with a right to live.").

71. P. 98.

72. Pp. 94-95 ("It is morally and legally impermissible for any third party, such as a doctor, to murder one innocent person even to save the life of another one. . . . [A]n exception for rape is even harder to justify . . .").

abortion is murder; and because the killing of people is murder, it also follows that they do not really think fetuses are people.⁷³

1. *Why Be Consistent?*—This argument also seems weak. First, Dworkin does not explain the basis of his assumption that moral views held by ordinary people must always form a self-consistent whole. Dworkin's method celebrates "integrity"—expressed in a moral or legal scheme as consistency—as the highest value.⁷⁴ Many of us, I suspect, would disagree.

In pure mathematics, where internal consistency is more obviously a value than it is in morality or law, Gödel demonstrated that a system cannot be both consistent and complete;⁷⁵ sometimes it is more important to be complete. In ordinary morality, integrity is often subordinate to other values, including, in the case of the white lie, even mere politeness. Indeed, the common-law method of case-by-case adjudication in which only the holding, not the reasoning, is binding, suggests a certain suspicion of elevating consistency over, for example, justice in the individual case.⁷⁶ All of this is only to suggest the possibility that many people hold—and after reflection⁷⁷ would continue to hold—self-contradictory views.

Similarly, Dworkin does not seem to acknowledge the possibility—surely true for at least some vocal opponents of legal abortion—that these concessions are made purely as a matter of political expediency and are not actually part of the belief system.⁷⁸ And Dworkin cannot explain why, if in fact the exceptions contradict the rule, it is the exceptions rather than the rule that would be retained in a consistent system.

73. See pp. 32, 94-95.

74. See pp. 146-47 (summarizing Dworkin's prior work on integrity in legal reasoning).

75. See ERNEST NAGEL & JAMES R. NEWMAN, *GÖDEL'S PROOF* 95 (1958).

76. For the obligatory reference, consider: "A foolish consistency is the hobgoblin of little minds . . ." RALPH WALDO EMERSON, *SELF RELIANCE* 21 (Peter Pauper Press 1967) (1841), reprinted in *SELECTED ESSAYS* 175, 183 (Larzer Ziff ed., 1982). Or, "The life of the law has not been logic . . ." OLIVER WENDELL HOLMES, *THE COMMON LAW* I (Boston, Little, Brown, and Co. 1881).

77. John Rawls's influential notion of reflective equilibrium assumes that with sufficient deliberation, a moral actor will arrive at a consistent set of moral beliefs, much as classical economists assumed that market forces drive markets towards equilibrium. See RAWLS, *supra* note 63, § 4, at 20. I doubt that reflection can bring us to moral equilibrium. Chaos theory, applied to the economic theory that was Rawls's inspiration, has suggested that in many cases, economic markets will tend towards a cascade (like the success of Microsoft, largely a result of its own success) or chaotic fluctuation (the lemming-like airline industry, for example) without ever reaching an equilibrium. See W. Brian Arthur, *Positive Feedbacks in the Economy*, *SCI. AM.*, Feb. 1990, at 92. See generally JAMES GLEICK, *CHAOS* (1987) (providing an accessible account of modern chaos theory). Similarly, my objection to Dworkin's insistence on consistency could be seen as a claim that reflection is as likely to lead to chaotic fluctuation in views as it is to lead to reflective equilibrium. See *supra* notes 14-18 and accompanying text.

78. See, e.g., Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 B.Y.U. L. REV. 403, 478 (arguing that the rape and incest exceptions are unprincipled, but politically expedient, because they are supported by about 85% of the citizenry).

2. *The Murder Contradiction.*—Next, even assuming that (1) on reflection, advocates of legal restrictions on abortion would conclude that they must resolve the inconsistencies in their views, and (2) faced with a choice between “abortion is murder” and the various exceptions to that principle, most⁷⁹ of these advocates would retain the exceptions, Dworkin exaggerates the inconsistency. Many people hold views about the right to life and murder that are considerably less absolute than Dworkin's. These views permit killings of human persons under many circumstances; the permitted abortion circumstances Dworkin cites are not dramatically different.

Dworkin's argument assumes that murder of *A* is never justifiable by claims such as “*A* was crippled,”⁸⁰ or “the murder of *A* would save *B*'s life,”⁸¹ or “*A* was the offspring of her mother's rape.”⁸² Moreover, Dworkin is arguing about the beliefs of actual people rather than about the requirements of some true morality that might exist independent of actual beliefs. Thus, he must be making the strong claim that no one believes that murder⁸³ is justifiable by such claims.

Thus stated, Dworkin's premise is clearly wrong. Many people in many different historical circumstances have accepted precisely these kinds of arguments. For example, some Inuit tribes, like the ancient Spartans,⁸⁴

79. Dworkin is inconsistent about the nature of the claim he is making. He often cites evidence that “many” or “most” people think the way he postulates “we” think. See, e.g., pp. 31, 76, 78, 79, 89. The structure of his argument, however, seems to require the far stronger claim that all, or almost all, of us think that way. Thus, he claims that accommodation of those who believe the fetus to be a person is “impossible.” P. 24. That problem, it seems to me, is equally intractable whether believers in fetal personhood are a substantial minority of Americans, or merely a substantial minority of opponents of legal abortion.

80. See p. 98 (rejecting the idea that the killing of those with “terrible, crippling handicaps” would be justified by their bleak prospects for a meaningful life).

81. See p. 94 (“It is morally and legally impermissible for any third party . . . to murder one innocent person even to save the life of another one.”); accord TALMUD BAVLI, *Sanhedrin* 72b, translated in SONCINO, *supra* note 15, 3 *Seder Nezikin* 494, 492-95 (“One doesn't set aside one life for another.”).

82. See p. 95 (suggesting that an innocent person cannot be killed “for the wrongdoing of someone else”).

83. Dworkin's use of the word “murder” is troublesome. I believe “murder,” in ordinary English parlance, means the deliberate killing of a human being. See, e.g., AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1189 (Anne H. Soukhanou et al. eds., 1992) (listing the definitions “[t]o kill (another human being) unlawfully” and “[t]o kill brutally or inhumanly”); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1488 (Philip B. Gove ed., 1986) (providing the definition, “to kill . . . willfully, deliberately and unlawfully”). It is in this sense that abortion opponents appear to use the term, and it is in that sense that I take Dworkin to use it. See, e.g., p. 94 (using “murder” where “killing” appears to be meant). But to a lawyer, murder has the additional notion of culpability. Thus, in the language of the criminal law, to say that murder is justified is an oxymoron—if the killing was justified it is not murder. Cf. MODEL PENAL CODE § 3.01(1) (1962) (comments published 1985) (defining justification as a defense to murder). If Dworkin's argument is that abortion opponents who would allow an exception for rape do not believe that abortion is culpable in that circumstance, his claim is trivially true.

84. See J.T. HOOKER, *THE ANCIENT SPARTANS* 137 (1980) (describing the Spartan practice of abandoning deformed babies).

apparently have believed that handicapped people, including adults who are unable to take care of themselves, should be allowed to die, should be killed⁸⁵ or even should kill themselves.⁸⁶

Similarly, most Americans probably believe that it is permissible—sometimes even obligatory—to send some eighteen-year-old boys to fight, knowing that some will die and others will kill, to defend the freedom (let alone lives) of other Americans or even some non-Americans. Because it is predictable that some soldiers will die and others will kill innocent civilians, sending soldiers to war may fit the form of “killing *A* to save the life of *B*.”⁸⁷ Regardless of whether the political elite’s decision to enter a war fits this model, clearly any soldier who (when not in immediate danger) kills an innocent opponent—whether a draftee or a civilian—is killing *A* to save the life (or freedom) of *B*. I assume that all nonpacifists believe such killings are justifiable under at least some circumstances.⁸⁸

Indeed, American law accepts precisely the excuses Dworkin says we all reject. It is black letter law, set out in the Model Penal Code, that one may deliberately kill an innocent person in several different circumstances.⁸⁹ Consider the famous mountaineer hypothetical discussed in the commentaries to the Model Penal Code:⁹⁰ A mountaineer is roped to a companion who has fallen off the edge; he cuts the rope to save himself. Even though the companion is entirely innocent, the killing is clearly excused by the law and, I imagine, by most moral theories as well.

85. See DOROTHY J. RAY, *THE ESKIMOS OF THE BERING STRAIT 1650-1898*, at 179, 244 (1975) (claiming that infanticide was a common method of population control among nineteenth-century Eskimos); EDWARD M. WEYER, *THE ESKIMOS, THEIR ENVIRONMENT AND FOLKWAYS 137-38* (1932) (explaining that difficult living conditions may have led to abandonment or killing of unproductive members of society). But see *id.* at 96 (doubting the existence of a widespread practice of killing the old or maimed).

86. See RAY, *supra* note 85, at 244 (discussing the occurrence of suicide among the elderly in some Eskimo groups).

87. I neglect an important philosophical issue here. Some people sharply distinguish between this kind of statistical killing—when it is certain that someone will be killed but unknown who the victim will be—from killings in which the identity of the victim is known. See, e.g., *Johnson v. American Cyanamid Co.*, 718 P.2d 1318 (Kan. 1986) (finding that a drug company was not liable under product liability law when its polio vaccine had caused a statistically predictable number of polio cases). While the distinction appears difficult to justify, it is clearly powerful psychologically. Indeed, Dworkin argues, and I agree, that proponents of legal abortion often view the fetus in an even more statistical fashion: If a fetus is only a potential person, when a fetus is killed, no specific person dies. See p. 19; *infra* subpart III(E).

For a discussion of the related distinction between harm that is intended and harm that is a foreseeable side effect, see SHELLY KAGAN, *THE LIMITS OF MORALITY* 86, 151-65 (1989).

88. See MICHAEL WALZER, *JUST AND UNJUST WARS* at xix-xx (2d ed. 1992) (discussing morally permissible acts of war).

89. See, e.g., MODEL PENAL CODE § 3.04 (allowing use of force for self-protection); *id.* § 3.06 (allowing use of force to protect property).

90. See *id.* § 3.02 cmt. 3.

Similarly, it is permissible for a householder to kill an innocent (in the sense of nonculpable) person whom he perceives, even incorrectly, as a threat to himself or another. Consider for example a psychotic, senile, or infant attacker who is legally incapable of being responsible for his actions. Under the Model Code, like the common law, the householder would be entitled to kill the innocent attacker in self-defense.⁹¹ Furthermore, the law is clear that self-defense is a valid excuse even if the killer was mistaken and the suspect was not actually threatening the killer, so long as the killer's belief was reasonable.⁹² Indeed, the killer need not even think that the suspect is a threat to someone's life; it is often enough that the killer fear an assault⁹³ or loss of property.⁹⁴

This example, however, is precisely parallel to the case of the (innocent) fetus that threatens the health of the mother. Contrary to Dworkin's assertion, the law ordinarily excuses a person who kills an innocent person in the reasonable (even if mistaken) belief that the killing is necessary for self-defense. It is not a large leap to conclude that a woman would have a right to kill an innocent (in the same limited sense) fetus-person who actually *is* threatening her life or health.

Dworkin next argues that, in any event, no one would allow a doctor to kill an innocent person to save the mother. This, he says, is because we all agree that it is "morally and legally impermissible . . . to murder one

91. See *id.* § 3.11(1) cmt. 1 ("[I]t cannot be regarded as a crime to safeguard an innocent person, whether the actor or another, against threatened death or injury that is unprivileged, even though the source of the threat is free from fault.").

92. See *id.* at § 3.09 cmt. 2. There is some dispute over the precise degree of error the killer may make. The Model Penal Code requires the killer's belief to be reasonable. *Id.* § 3.09 cmt. 2; see also *id.* § 3.05 cmt. 1 (imposing a similar reasonableness requirement upon those who intervene to protect others). Glanville Williams, the original reporter, would have gone further: he would have required only that the belief be genuine, not that it be reasonable. *Id.* § 3.09 n.10 (quoting *Id.* § 3.09, at 79-80 (Draft No. 8, 1958)). Some juries seem to take the Williams approach, such as the Louisiana jury that acquitted a man who shot a Halloween partygoer who stopped to ask directions because the householder thought the Asian appearance of the stranger was threatening. See Peter Applebome, *Verdict in Death of Student Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14.

93. See *State v. Wanrow*, 559 P.2d 548, 558-59 (Wash. 1977) (holding that a defendant's actions are to be judged against her subjective impressions and that a small woman was entitled to shoot a large, intoxicated, unarmed man if she reasonably feared an assault); MODEL PENAL CODE § 3.04(2)(b) (allowing the use of deadly force when "the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat"). Some cases even extended the right to use deadly force to protecting oneself from "bodily injury or offensive physical contact." *State v. Anderson*, 51 S.E.2d 895 (N.C. 1949), followed in *State v. Fletcher*, 150 S.E.2d 54, 56 (N.C. 1966), overruled by *State v. Clay*, 256 S.E.2d 176, 182 (N.C. 1979). The doctrine is basic; it is taught to first-year law students. See, e.g., SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 722-25 (4th ed. 1983).

94. See, e.g., N.Y. PENAL LAW § 35.20 (McKinney 1987) (permitting deadly force to prevent arson, burglary, or attempted burglary, without any requirement that the killer feel physically threatened); see also KADISH ET AL., *supra* note 93, at 755 n.b (discussing the New York statute).

innocent person even to save the life of another."⁹⁵ The law, however, is to the contrary. The Model Penal Code commentaries, for example, do not distinguish between the mountaineer example (discussed above) and the case of a person who knowingly kills one person to save others; in each case the key is to save more people than are killed.⁹⁶ Self-defense doctrine goes further, allowing killing even without any net savings in lives: it is widely agreed that if a victim would be entitled to kill in self-defense, other people are entitled to kill to defend the victim.⁹⁷ Not only juries, but also statutes and the common law, would exculpate a husband who killed a psychotic (and therefore nonculpable) burglar who was trying to kill his wife.⁹⁸

While use of deadly force by the police may pose special considerations, it is clear that here is yet another exception to Dworkin's blanket rule that we all agree killing an innocent person to save the life of a third party is never legally or morally permissible.⁹⁹ Even after *Furman v.*

95. P. 94. In using the word "innocent," Dworkin again is playing with the dual meanings of legal words. The fetus, by hypothesis, is threatening the mother's life. Thus, it is not innocent in the sense of being falsely accused. It is innocent only in the sense that it is not a moral agent—it does not know what it is doing—and thus it cannot be culpable even though it is a causal agent.

96. See MODEL PENAL CODE § 3.02 cmt. 3, at 15.

97. See, e.g., *id.* § 3.05 cmt. 1 (assimilating the defense-of-strangers doctrine into the defense-of-self doctrine); see also *People v. Young*, 210 N.Y.S.2d 358, 364-65 (N.Y. App. Div. 1961) (exonerating a defendant who committed an assault under the reasonable but mistaken belief that he was protecting another), *rev'd*, 183 N.E.2d 319 (N.Y. 1962), *overruled by* N.Y. PENAL LAW § 35.15 (McKinney 1987). In *Young*, which was the subject of several law review articles and discussion in the Model Penal Code comments, see MODEL PENAL CODE § 3.05 cmt. 1 n.6, the defendant saw two men beating a youth. He joined in defense of the youth, but it turned out that the two men were police officers making a lawful arrest. *Young*, 210 N.Y.S.2d at 359-60. The New York appellate courts split over whether the defendant was entitled to be excused, given that the youth clearly was not entitled to defend himself. All were agreed, however, that *had* the youth been entitled to the defense, the defendant also would have been. See *Young*, 183 N.E.2d at 320; see also KADISH ET AL., *supra* note 93, at 874-75 (discussing the *Young* case).

98. The common law permits homicide to defend person or property. See *State v. Pugliese*, 422 A.2d 1319, 1322 (N.H. 1980) ("The common-law rule was that a person attacked in his own home need not retreat but could stand his ground and defend himself, even to the point of employing deadly force . . ."); see also WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 466-67 (2d ed. 1986) (noting the common law's allowance of the use of deadly force to protect one's home). While the extent of this privilege varies from jurisdiction to jurisdiction and has been modified widely by statute, it generally extends far enough to cover abortions to save the mother's life, even if the fetus were a legal person and not culpable. California law, for example, is that "[h]omicide is also justifiable when committed by any person . . . when resisting any attempt . . . to do some great bodily injury upon any person . . ." CAL. PENAL CODE § 197(1) (West 1988). This law on its face appears to include a doctor protecting a patient. For further discussion of the defense of person or property and related privileges, see RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 753-60 (7th ed. 1989).

99. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (reasoning that a policeman may use deadly force when it is necessary to prevent an apparently unarmed suspected felon's escape, and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the

*Georgia*¹⁰⁰ restricted a state's right to impose capital punishment on convicted murderers, and *Roe v. Wade*¹⁰¹ established that the Fourteenth Amendment creates a state interest in the life of even unborn (viable) fetuses, the law in many states remained that police officers could kill if necessary to effect the arrest of a suspected felon—even though (1) the underlying felony would not justify anyone's killing the suspect, (2) the suspect was merely fleeing and did not pose an immediate threat to anyone, and (3) the suspect might have been entirely innocent.¹⁰² The same permission to kill was extended to ordinary citizens, at least as long as a felony had actually been committed by someone.¹⁰³

Thus, the law excuses deliberate killings of persons in an assortment of situations not qualitatively different from the situations in which popular opinion demands exceptions to even rigid abortion restrictions. American law excuses killings of people who, like the fetus, are legally and factually incapable of being responsible for their actions. The killer need not be the direct victim of the threat, and the threat need not even be real. This legal consensus that intentional, deliberate, and premeditated killing is often permissible presumably reflects moral views held by at least some of us.

In short, murder is a more complicated concept than Dworkin acknowledges. Many deliberate killings of a person are not universally seen as murder. Included among these nonmurders are killings that commonly—if not necessarily correctly—are justified by precisely the kinds of arguments Dworkin cites as evidence that abortion could not be murder. In contrast to Dworkin, then, I believe that permitting a doctor to kill a nonculpable fetus-person in order to save the mother would take only the smallest extension of existing law. In sum, believing the fetus to be a person and

officer or others). Although *Garner* itself restricted an officer's privilege to kill, its reasoning would allow killing nonculpable "suspects."

100. 408 U.S. 238 (1972).

101. 410 U.S. 113 (1973).

102. See *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975) (upholding the constitutionality of the common-law rule permitting use of deadly force to arrest any felony suspect). But see *Mattis v. Schnarr*, 547 F.2d 1007, 1009 & n.1, 1012 & n.9 (8th Cir. 1976) (en banc) (4-3 decision) (holding that Missouri's statute enacting the common-law rule was unconstitutional, but recognizing that 24 other states also had statutory enactments reaffirming the common-law rule), *vacated sub. nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977).

In 1985, the Supreme Court ruled that a state may not authorize the use of deadly force against an apparently unarmed and nondangerous fleeing suspect, although deadly force may be used where necessary to prevent the escape if the officer has probable cause to believe that the suspect poses a significant threat of serious physical injury to the officer or others. *Garner*, 471 U.S. at 3 (reversing the district court's upholding of the legality of a police officer's killing of an unarmed 15-year-old who had stolen \$10 and a purse). Three Justices voted to uphold the legality of the killing and the "venerable" common-law rule, because, *inter alia*, "a person's interest in his life [does not] encompass[] a right to flee unimpeded from the scene of a burglary" and there was no "deprivation [of life] without due process of law." *Id.* at 23, 29, 30.

103. *United States v. Hillsman*, 522 F.2d 454 (7th Cir.), *cert. denied*, 423 U.S. 1035 (1975).

allowing abortion to preserve the mother's life, health, or safety are not contradictory positions at all.¹⁰⁴

3. *The Rape Exception.*—The rape exception is perhaps the strongest example Dworkin offers for the incoherence of the views of those who claim abortion is murder. How, he asks, could anyone who believes that the fetus is a person condone killing an innocent fetus simply because it is the product of a rape?¹⁰⁵ In this section, I suggest that there are a number of ways to do just that.

Dworkin lucidly summarizes the perhaps most powerful set of arguments for permitting abortion in case of rape, based on the violation of the primary victim of the rape: the woman.¹⁰⁶ However, he sees these arguments as presupposing that the fetus is not a person.¹⁰⁷ That conclusion seems unsupportable to me. Even were a fetus a person, it would not follow automatically that a woman who was forced to conceive the fetus by a criminal act would have a moral responsibility to care for it.¹⁰⁸

Our law—like ordinary morality—recognizes no duty to care for strangers even at minimal cost.¹⁰⁹ Even close family members are not required to give use of their bodies to another person to save the latter's life.¹¹⁰ The rape victim who rejects the fetus as a stranger and a continuation of the original assault on her should have far less obligation to it—even were it deemed a person—than is created by these longstanding family relationships. Thus, even if the fetus were deemed a person with a right to life, it would not follow that it would have a right to live in the rape victim's womb or that the rape victim would be obliged to care for it.¹¹¹ That right and obligation, it seems to me, come only when the fetus ceases to be a stranger and becomes a member of the family.¹¹²

104. One powerful argument in favor of Dworkin's position that many proponents of criminalization do not actually think that abortion is murder is the apparent lack of support (even in such circles) for prosecuting as murderers women who procure them. See Jean Rosenbluth, *Abortion as Murder: Why Should Women Get Off?*, 66 S. CAL. L. REV. 1237, 1263-64 (1993) (recounting the Utah legislature's quick backtrack from the possibility of capital murder charges being brought against women who obtained abortions).

105. P. 95.

106. Pp. 95-96.

107. P. 95.

108. See *supra* note 69.

109. See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1572-74 (1979).

110. *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978) (refusing to order defendant to donate bone marrow to save a relative's life); *Lausier v. Pescinski* (*In re Guardianship of Pescinski*), 226 N.W.2d 180 (Wis. 1975) (holding that because an incompetent was incapable of consenting, the kidney transplant necessary to save his sister's life would not be ordered).

111. Here I am merely repeating Judith Jarvis Thomson's famous argument. See Thomson, *supra* note 2, at 58.

112. See *infra* subparts III(D),(E),(F). The law, of course, does recognize a duty to support family members. While one may, without fear of significant reproach, ignore the homeless beggar on

Thus, some people may believe that abortion is justified in cases of rape because of respect for the rape victim's autonomy. Even though they may acknowledge the fetus's claims to life, they are unwilling to increase the victim's injury by demanding that she assume a massive new responsibility to raise the resulting child. Other people, I think, reach a similar conclusion—permitting abortion without determining that the fetus is not a person—by a very different route. For them, the abortion is permissible precisely because the fetus may be punished for the rape. On this view, as in some others I discuss, moral responsibility appears without any associated individual voluntary act.¹¹³

Individual responsibility for individual acts is one of the cornerstones of modern moral philosophy. Similarly, modern criminal law generally requires intentional acts to establish culpability.¹¹⁴ Clearly, to the extent that responsibility and culpability require intent, a rape victim cannot be responsible and can bear no shame; a fortiori, any fetus resulting from the rape is innocent and free of both responsibility and guilt. Ordinarily, we do not execute innocent victims to repair the effects of a crime; thus, there is some appeal to Dworkin's argument that anyone who would allow abortion in the case of rape does not believe the fetus is a person. Indeed, no doubt that is the case for most proponents of legal abortion.

Nonetheless, some people do seem to blame the victims—including the fetus—of rapes, and may indeed believe that “punishing” a fetus, which they see as a person, is appropriate. The notion that only criminal intent (*mens rea*) can create culpability is far from universally accepted. For instance, the law is quick to impute intentions that never existed, holding people responsible for actions (or consequences) they did not intend in any ordinary sense. Criminal conspiracy law, with its doctrines of transferred intent, is perhaps the most obvious example.¹¹⁵ Tort law invariably

the street, it is a crime to neglect your child's demand for food. MODEL PENAL CODE § 230.4 (“A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection, or support.”).

113. Cf. *infra* notes 211-14 and accompanying text (discussing one's responsibility to care for one's parents).

114. PHILLIP E. JOHNSON, CRIMINAL LAW: CASES, MATERIALS, AND TEXT 1 (3d ed. 1985). Regulatory law, which is sometimes enforced by criminal sanctions, has not always abided by the principal of intentionality, however. See *United States v. Park*, 421 U.S. 658, 670 (1975) (finding that intent is not required for corporate criminal liability under health and safety regulations); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (noting that regulatory law “dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing”). Similarly, conspiracy and aiding and abetting principles, by imputing one person's intentions and acts to others, stretch intentionality to its limits and, perhaps, beyond. See *United States v. Alvarez*, 755 F.2d 830 (11th Cir.) (holding that a member of a drug conspiracy can be held liable for murder committed by co-conspirators even though the murder was not within the intended scope of conspiracy), *cert. denied*, 474 U.S. 905 (1985).

115. See *supra* note 114; see also MODEL PENAL CODE § 2.06 (specifying circumstances under which one person may be held liable for another's conduct). For further examples of fictional intent

ignores the actual mental state of the tortfeasor by restricting its inquiry, even in negligence cases, to a theoretical intent that a theoretical reasonable person might have had in the circumstances.¹¹⁶ Various contract law doctrines similarly hold persons responsible for acts they may never have intended or even known they were taking.¹¹⁷

In the rape situation, the link between voluntary action and moral responsibility often seems to break down. In ordinary American communities, for instance, the rape victim regularly seems to be blamed even when there is no rational basis for imputing responsibility to her.¹¹⁸ Arab notions of family honor sometimes require that the family reject and even kill a woman to expunge the shame of her rape.¹¹⁹ While most Americans would not agree with this method of eliminating the shame of rape, I suspect that many do agree that being a victim of rape is shameful, even when it is completely involuntary.¹²⁰ If some Americans believe that a woman is soiled or dirtied or shamed by being a rape victim, regardless of her responsibility, so too, perhaps, the resulting fetus. Maybe it will seem soiled, cursed, or shamed and less worthy of the protection and care neces-

in the criminal law, set out by an author hostile to the idea that culpability can ever be separated from intent, see generally GLANVILLE L. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 26 *passim* (1965).

116. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 32, at 173-75 (5th ed. 1984).

117. See, e.g., *Aladdin Hotel Co. v. Bloom*, 200 F.2d 627 (8th Cir. 1953) (interpreting a bond contract to permit the issuer to modify any or all of the bond's terms without the consent of the non-insider bondholders, despite the unlikelihood that any bondholder ever knowingly would have agreed to such provisions); JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 9-26(e) (3d ed. 1987) (noting that the unilateral mistake doctrine may obligate a party to a contract to which it would not knowingly have agreed). Indeed, virtually all litigated contracts arguably involve fictional intent. Even leaving aside the parole evidence rule, disputes normally arise—at least in the absence of bad faith—when circumstances differ from the ones in the parties' original contemplation.

118. See Toni M. Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 404, 404-06 (1985) (describing the common myth that "rape victims 'ask for it,' that their actions or appearance cause the rape").

119. KANAN MAKIYA, *CRUELTY AND SILENCE: WAR, TYRANNY, UPRISING AND THE ARAB WORLD* 290-91 (1993). Arab penal codes often contain reduced criminal penalties for crimes of "honor," such as murdering a sister suspected of sexual misbehavior. See Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Difference*, 26 NEW ENG. L. REV. 1527, 1529 (1992). This example may seem utterly foreign to Dworkin's "we." However, one of the problems with his work is the fuzzy composition of "we." See *supra* notes 34, 43. There are many unassimilated persons of Arab cultural background living in the United States and Europe, and I see no basis for categorically excluding them from consideration in this debate.

120. See NANCY C. GAMBLE & LEE MADIGAN, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE RAPE VICTIM* 5-6 (1989) (discussing examples of blaming the rape victim or holding her culpable for the rape); see also SUSAN ESTRICH, *REAL RAPE* 10 (1987) (stating that "rape is the single most underreported major crime"). In other contexts as well we see involuntary acts as shameful. For instance, much of American public discourse is incomprehensible unless many Americans consider being born to a poor, African-American, Jewish, or foreign family to be shameful, degrading, and in some sense blameworthy or culpable, regardless of whether the individual had any say in the matter.

sary to bring it to adulthood. Again, the position Dworkin finds impossible or inconsistent is but a small step from one that is widely accepted.

The profound influence of the Bible in popular culture, and perhaps the law, also may weaken the connection between voluntary action and moral responsibility. The moral actors of the biblical stories are blood lines and families, not individuals. Thus, the biblical text never questions the morality of testing Abraham by subjecting his son to near murder—Isaac seems to be treated as a mere outgrowth of his father, with no independent moral existence at all.¹²¹ Other stories with the same theme of inherited merit or punishment appear throughout the Torah, Prophets and Writings: consider, for example, God's testing Job by killing his children,¹²² punishing David by the defeat of his descendants in war,¹²³ and rewarding David's descendants for his merits, despite their own faults.¹²⁴

As the aphorism cited by Jeremiah puts it, the fathers ate a sour grape and the teeth of the children are set on edge—that is, the children are punished for something that was not their fault.¹²⁵ In each of these

121. See *Genesis* 22:1-14. For a superb account of the Jewish traditions explicating this text, often to avoid the reading I give, see SHALOM SPIEGEL, *THE LAST TRIAL* 93-108 (1967). The central problem of the story is what kind of God would reward Abraham for obeying, rather than rejecting, the order to kill. See *Genesis* 22:16 ("[B]ecause you . . . have not withheld your son, . . . I will bless you . . ."). Contrast Abraham's later reaction to God's decision to kill. See *Genesis* 18:25 ("[S]hall not the judge of all the world do justice?"). The terrible implications of this praise are reinforced by Isaac's failure to return with Abraham. *Genesis* 22:19 ("Abraham returned [alone] to his young men . . ."). One resolution of this tension is as I have suggested in the text: that Isaac is regarded as part of Abraham. Others, however, point out that Abraham appears to have known that Isaac would only be bound, not sacrificed, citing *Genesis* 22:8 ("God will provide the lamb . . ."), and that Isaac appears to have willingly participated in the exercise. See *infra* note 127. In the parallel account in the Christian scriptures, of course, the lamb is identified with the Son, and there is no doubt that the sacrifice was consummated. See *Matthew* 26:26 (describing Jesus's statement that the passover matzo was his body); *John* 1:29 (calling Jesus the "Lamb of God").

122. See *Job* 1:6-22. For a different exploration of other difficulties in this story, see LESZEK KOLAKOWSKI, *Job, or The Contradictions of Virtue*, in *THE KEY TO HEAVEN AND CONVERSATIONS WITH THE DEVIL* 3, 37-44 (Salvator Attanasio trans., 1972).

123. See *2 Samuel* 12:10-14 (recounting how God cursed David and his descendants for David's slaying of Uriah).

124. See, e.g., *1 Kings* 11:11-12 (relating how God, for the sake of David, suspended Solomon's punishment until after Solomon's death and instead visited it on Solomon's children); *1 id.* 15:1-4 (describing how God rewarded Abijam because of the merits of his distant ancestor David); *1 id.* 8:16-19 (recounting how all Judah was preserved for the sake of David in the time of his distant descendant Joram); *2 id.* 20:5-6 (telling how God preserved King Hezekiah and Jerusalem for the sake of David).

125. *Jeremiah* 31:29. The same concept appears in *Exodus* 20:5 (King James) ("I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children . . ."); *Exodus* 34:6-7 (relating that the Lord would visit "the iniquity of the fathers upon the children"); *Numbers* 14:18 (quoting Moses's prayer to spare the Israelites, noting the Lord's transgenerational judgment). *Deuteronomy* 24:16, in contrast, prohibits human law from punishing children for the sins of their ancestors; some authorities have gone further, using this verse to reinterpret the others to require personal culpability in all circumstances. See, e.g., TALMUD BAVLI, *Bereket* 7a, translated in SONCINO, *supra* note 15, *Seder Zera'im* 33; *id.*, *Yoma* 88a, translated in SONCINO, *supra* note 15, *3 Seder Mo'ed* 439-41.

instances, the child (or descendant) is treated as a mere moral appendage of the father. In Dworkin's terms, God treats Isaac as if he were not a person.¹²⁶ But if Isaac at the age of thirty-seven can be treated as a mere moral appendage of his father, how much more so a fetus.¹²⁷ On this biblical view of moral responsibility, it may seem quite reasonable to abort

126. This view of "hereditary" moral culpability (or credit) is hardly restricted to the Bible. In the later Jewish traditions, the postbiblical concept of the "merits of the fathers" (that the current generation benefits because of the righteousness of its ancestors) is widespread and important. A standard Hebrew dictionary, for example, offers citations for the phrase ranging from two tractates of the Talmud, through Rashi (who lived 1040-1105 C.E.) to late nineteenth- and early twentieth-century masters of Hebrew and Yiddish literature. See 2 AVRAHAM EVEN-SHOSHAN, HAMILON HEHADASH 672 (1966) (citing in the entry for "*zkhut avot*" to TALMUD BAVLI, *Avot* 2b, TALMUD BAVLI, *Bava Batra* 80b, Rashi's commentary on *Isaiah* 7:1, Mendelev Mocher Sforim, Bialik, and Nahum Sokolov). In a similar vein, the daily *Shimoneh Esrei* prayer begins by remembering God's promise to the Patriarchs to bring a redeemer to their descendants. THE COMPLETE ARTSCROLL SIDDUR 266-67 (Meir Zlotowitz ed. & Nosson Scherman ed. & trans., 3d ed. 1990) ("Who recalls the kindness of the Patriarchs and brings a redeemer to their children's children . . ."). Similarly, hereditary moral obligation is also central to many explanations of why the Covenant at Sinai should be binding on later generations. See, e.g., MICHAEL WALZER, EXODUS AND REVOLUTION 83-90 (1985) (discussing varying interpretations of the justification of hereditary moral obligation). Jewish law, in contrast, has rigidly rejected the notion that human law may punish children for the infractions of their parents, citing *Deuteronomy* 24:16.

Other ancient laws were not so rigid. See HENRY MAINE, ANCIENT LAW 250 (New York, Charles Scribner & Co., 1st Am. ed. 1871) ("But Ancient Law . . . knows next to nothing of Individuals. It is concerned not with Individuals but with Families, not with single human beings, but groups."); see also U.S. CONST. art. I, § 9 (abolishing, as to the federal government only, the common-law hereditary punishment of attainder). Hereditary responsibility also surely underpins the Catholic concept of original sin, as well as the continuing claims of several Christian churches that "the Jews" are guilty or condemned because of the alleged complicity of their predecessors in Pontius Pilate's execution of the Jew Jesus. See, e.g., Susannah Heschel, *Anti-Semites Against Anti-Semitism*, TIKKUN, Nov./Dec. 1983, at 47, 52 ("In the first Protestant response to the Holocaust, in 1948, lay members of the Lutheran Church issued a declaration stating that the Jews were put to death [by the German government] during the Second World War as a result of their original and continuing crucifixion of Christ.").

The continuing and broad power of the concept is shown by its use in different modern and secular contexts. Hereditary moral responsibility is a powerful element in some discussions of civil-rights remedies. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 372-75, 381-85 (1987) (advocating reparations to native Hawaiians for ancient wrongs, not just current ones); Patricia J. Williams, *The Obliging Shell, in POLITICS AFTER IDENTITY* (Dan Nielsen & Karen Engle eds., forthcoming 1994) ("If the modern white man, innocently or not, is the inheritor of another's due, then it must be returned."). But see BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 8-12 (1973) (arguing that reparations should look only to recent wrongs). Hereditary responsibility has also been used by prominent modern philosophers in a variety of contexts. See, e.g., RAWLS, *supra* note 63, at 128 (positing that in the original position, persons are thought of "as representing continuing lines of claims, as being, so to speak, deputies for a kind of everlasting moral agent or institution").

127. Isaac's age is calculated on the assumption that Sarah's death, in the passage immediately following the *Akedah* (binding of Isaac), was caused by grief when Abraham returned alone from the *Akedah*. *Genesis* 22:19. Compare *Genesis* 17:17 (stating that Sarah was 90 when Isaac was conceived) with *Genesis* 23:1 (stating that Sarah died at age 127). For further discussion, see SPIEGEL, *supra* note 121, at 49, 103.

a fetus conceived in sin (rape, incest, even extramarital sex) for the guilt of a parent.¹²⁸

Indeed, while I cite this concept of collective, inherited responsibility to demonstrate how one could coherently believe the fetus to be a person and simultaneously permit abortion in cases of rape, it is also critical to understanding one important version of the anti-abortion argument. For some opponents of legalized abortion, bearing a child is God's punishment for fornication—or, on one common interpretation of the story of Eve and the tree of knowledge, simply for all women's hereditary responsibility for Eve's sin.¹²⁹ For those who believe this theory, the ruined lives—of both the mother and the child—that could be avoided by an abortion are precisely why abortion should be *banned*. The fathers (in this case, the mothers) ate a sour grape, and the children's teeth *should* be set on edge.¹³⁰ Permitting abortion allows the guilty woman to evade God's punishment for sleeping around (and for Eve's fruit eating).

Significantly, this explanation leads to a different treatment for rape than for extramarital sex. The former is not (except on the most misogynistic views) the fault of the mother, and so, perhaps, God's curse does not apply. It seems highly likely that the belief held by some Christians that childbirth is a punishment for the wayward mother is an important part of the reason why exceptions for rape seem to have more popular support than exceptions for single mothers.¹³¹

In summary, it is not necessarily fatally inconsistent for an abortion opponent simultaneously to hold that a fetus is a person, that abortion is

128. Dworkin does not consider this or the other religious views I have mentioned as possibly coherent—if not necessarily attractive—explanations of opposition to abortion. See p. 97 (claiming that these arguments for the rape exception “would not be pertinent at all . . . if a fetus were a person”). But he does have a strikingly parallel account of “liberals” who advocate legal abortion, he says, for precisely the same reasons other people oppose it: because of the damage failure to abort in instances such as rape or extreme poverty will do to the lives of both the mother and fetus. See pp. 97-99. I find this account of that “liberal” view unconvincing, in part because it seems ethically repulsive to talk about honoring or improving the fetus's life by killing it. See *infra* subpart III(C). Rather, it seems to me, supporters of the right to abortion who think about the fetus's future life must be thinking of a potential, not an actual (even in the most abstract sense) human life. Cf. p. 98 (recognizing this critique and attempting to refute it).

129. See *Genesis* 3:16 (telling of God's curse on Eve).

130. But see *Deuteronomy* 24:16 (barring human law from emulating divine retribution); *supra* note 125.

131. P. 94 (noting that the rape exception has the most popular support). Note that if opposition to abortion is based on the idea that the child is a punishment for the misbehavior of the parent(s), it is perfectly consistent (even if repulsive) simultaneously to oppose abortion *and* to oppose family support programs such as family leave, day care, universal medical care, school lunches, or Head Start. In the view of those for whom the child is a mere instrument to punish the parent and not a moral value in itself, rights *should* “begin at conception and end at birth.” Laurence Tribe has interpreted the rape exception in a similar way. See LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 233-34 (1990).

murder, and that it is permissible to abort in the case of a rape or to save the mother's life, or for other reasons. These may simply be some of the several situations in which many people see homicide as permissible.

If it is possible simultaneously to view the fetus as a person and to allow abortion in these exceptional cases, then Dworkin has failed to prove that abortion opponents do not view the fetus as a person, or that the sole issue in the abortion debate is how best to sanctify life.

C. *No Sentience, No Rights*

Dworkin's other line of argument for why fetuses are not persons is that a fetus is not the sort of being that could have moral or legal rights. This argument also does not seem so clearly correct as to demonstrate that no one could possibly hold the opposite view.

On a moral level, Dworkin claims that a fetus, not being a sentient being in any meaningful sense, is not the sort of thing that can have rights.¹³² But he offers no justification for why sentience should be a condition precedent to having rights. Rather, Dworkin is content with stating that to have rights requires having interests, which in turn requires the ability to feel pain, "to enjoy or fail to enjoy, to form affections and emotions, to hope and expect, to suffer disappointment and frustration."¹³³

But the law uncontroversially deems insentient creations, like corporations and estates, to have interests.¹³⁴ I do not understand why a fetus—

132. See pp. 15-18. The sentience test is quite surprising. Sentience is a natural test to determine who should be considered a moral object in utilitarian theories. Clearly, if—as utilitarians contend—the purpose of morality is to maximize pleasure or minimize pain, the realm of morality should include our interactions with all beings that can suffer or feel pleasure—not merely fetuses, but also (indeed, more clearly) cats, dogs, and rats. PETER SINGER, *ANIMAL LIBERATION* 8 (1975); see also BENTHAM, *supra* note 20, ch. XVII, § I, ¶ IV n.b (arguing that animals are more rational and conversable than infants, and that the contemporary treatment of animals, like the treatment of slaves, was tyranny).

Dworkin, however, is no utilitarian. Furthermore, he firmly rejects the notion, seemingly implicit in any notion that sentience determines moral personhood, that nonhumans might have rights or be the objects of moral concern. See p. 16 (rejecting the idea that plants or animals have sufficient "interests" to be of moral concern); *infra* subpart III(B). In Dworkin's rights-based theory, there is no obvious reason why sentience should be the test for personhood. Why not self-sufficiency, procreative capability, rationality, birth, or conception?

Other liberals have used the ability to bargain as a prerequisite for rights. See, e.g., ACKERMAN, *supra* note 35, at 74-75, 127-28 (arguing that liberal citizenship requires the ability to engage in rational discourse); *infra* note 222. In a recent conversation, Ackerman contended that personhood requires a number of necessary but not sufficient conditions, one of which is the ability to engage other persons in discourse. As I explain at greater length in subpart IV(B), I see becoming a person as more of a developmental process than a simple on/off dichotomy in the manner of the Bar Mitzvah's "today you are a man." One might well be enough of a person to be entitled not to be aborted long before one would be a person for some other purpose.

133. Pp. 17-18.

134. See *infra* text accompanying notes 141-44.

or art, or trees,¹³⁵ for that matter—could not be deemed to have interests too, in either law or popular morality. Indeed, for those who believe a fetus has a soul and is a unique, irreplaceable object of God's affection and human responsibilities, it is hard to imagine how the fetus could not have interests and rights commensurate with those responsibilities. Even from the perspective of those who do not believe a fetus has a soul, a fetus who has been accepted into the family and for whom the family accepts responsibilities should be deemed to have interests.¹³⁶ This is why, without being inconsistent, one can support a right to abortion and simultaneously believe that an assault that causes a miscarriage is a particularly terrible thing.¹³⁷

On a legal level, Dworkin points to the havoc a doctrine recognizing a fetus as a person would wreak in constitutional law because legislatures would be required to protect fetuses just as they protect adults.¹³⁸ Dworkin's legal argument relies principally on the Supreme Court's interpretation of the Fourteenth Amendment. As he points out, no Justice has been willing to contemplate the radical changes in the law that would inevitably follow if it were held that fetuses are persons entitled to equal protection of the law.¹³⁹ Here, as in the murder context, few (adult) people (and no Supreme Court Justices) are willing to treat the fetus as a true equal to its mother.¹⁴⁰

135. Compare CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARDS LEGAL RIGHTS FOR NATURAL OBJECTS* 9 (1974) with pp. 15-16 (rejecting the idea that works of art or plants have protectable interests).

136. Dworkin, in contrast, argues that a creature cannot have interests until it (fully) exists, although retrospectively an act even before then might have been against those interests. P. 18. My view differs because I believe it is helpful to speak of a fetus's interests as soon as the family has accepted responsibility for it, even if it is not yet a person in any meaningful sense. While Dworkin focuses on the fetus as if it were a self-sufficient person in a liberal state of nature, I believe that accounts of fetuses, like accounts of children, must center around the central fact of human development: children can exist only as members of a family or its functional equivalent. Children's rights are meaningless unless some specific person has a commensurate responsibility. See *infra* notes 212, 222 and accompanying text.

137. See CAL. PENAL CODE § 187 (West 1994) (permitting abortion under certain circumstances, but classifying the killing of a fetus without mother's consent as murder); cf. *Exodus* 21:22 (treating an assault causing miscarriage as a serious crime, but not murder). But see *People v. Joseph*, 496 N.Y.S.2d 328, 328-29 (Orange County Ct. 1985) (holding that at common law prenatal injuries could not constitute homicide unless the child was first born alive). The California approach, which predates *Roe*, is sensible on my view that the fetus becomes entitled to consideration as a human being far earlier in the pregnancy when it is wanted and planned than when the family sees it as an unexpected misfortune.

138. Pp. 110-11.

139. See pp. 111-12.

140. On the other hand, few (white) people (or Supreme Court Justices) in mid-nineteenth-century America were prepared to contemplate treating African-Americans as equals. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1856) (holding that African-Americans were no different from property and did not hold the privileges and rights of United States citizenship). But see *id.* at 770-72 (Curtis, J., dissenting) (arguing that all free persons born in the United States should be citizens,

The Supreme Court, however, has shown remarkable agility in altering the rights of Fourteenth Amendment personhood when pressed. Compare, for example, the unexplained ruling in *Santa Clara v. Southern Pacific Railroad*¹⁴¹—that a corporation is a person under the Fourteenth Amendment's Equal Protection Clause¹⁴²—with the established doctrine that a corporation is not a person under the Apportionment Clause of the same Amendment.¹⁴³ Surely extending the rights of personhood to fetuses without requiring that doctors permit mothers to die in order to avoid an abortion would require no more mental dexterity.¹⁴⁴ I am not arguing that this is a sensible position, or that it is the best understanding of the current state of American constitutional doctrine—it is not. Rather, I am arguing only that Dworkin is wrong to believe that no one could coherently believe the insentient fetus has a claim to the legal or moral status of personhood. To the contrary, one could simultaneously believe that such a fetus is a moral and legal person and that abortion should be permitted in numerous circumstances.¹⁴⁵

So far, then, I have argued that Dworkin is wrong to think it incoherent to hold the opinions that polls show almost half of all Americans claim to hold: that the fetus is a person but that abortion should be legal in at least some circumstances.¹⁴⁶ I have argued that these views may be consistent, and in any event, people may simply be able to accommodate, even after reflection, whatever inconsistency does exist. At the same time, I

regardless of color—although without suggesting that segregation was constitutionally suspect or that women should be enfranchised). Public opinion (or Supreme Court opinion) surveys are not necessarily reliable indications of the requirements of true morality.

141. 118 U.S. 394 (1886).

142. *Id.* at 396 (Waite, C.J., speaking on behalf of the Court before argument).

143. U.S. CONST. amend. XIV, § 2. Presumably because no state has ever claimed that it was entitled to more representatives due to its population of corporate "persons," I found no case so holding.

144. The German Constitutional Court, in a decision the reasoning of which is difficult to follow, seems to have done just this. See Judgment of Feb. 25, 1975, Bundesverfassungsgericht, 39 Entscheidungen des Bundesverfassungsgerichts 1, 11 (F.R.G.), translated in Robert E. Jonas & John D. Gorbey, *Translation of the German Federal Constitutional Court Decision*, 9 J. MARSHALL J. PRAC. & PROC. 551, 605, 609-10 (1976) (holding that fetuses are persons and permitting abortion in most circumstances).

145. Dworkin makes an important additional argument that the states may not treat a fetus as a constitutional person if doing so would diminish any other person's rights. Pp. 113-14. As a matter of federal supremacy, this argument seems correct regardless of the validity of the original premise that the U.S. Constitution clearly holds that the fetus is not a person.

146. See pp. 13-14. The polls Dworkin cites show that in 1991, a large majority of Americans thought that abortion involved the taking of a human life; close to half those polled thought it murder. P. 13. He cites other polls from about the same time showing even larger majorities supporting legal abortion under some circumstances. P. 14; see also Wilkins et al., *supra* note 78, at 407 n.9 (reporting a 1989 Gallup poll that showed 94% of the public supported legal abortion in cases where a woman's life is endangered and 85% supported it in cases of rape or incest, but far lower percentages supported legalization in other circumstances).

have attempted to show that the beliefs of at least some proponents of criminalization of abortion are more distant from Dworkin's views than he is willing to acknowledge, since they may simply reject Dworkin's views that all killings of innocent people are wrong and that moral culpability requires personal action. Later, I shall argue that this extreme heterogeneity of our views requires a different type of argument from the one Dworkin offers.¹⁴⁷

III. Investments and the Sanctity of Life

Having argued that everyone agrees that the fetus is not a person and has no right to life, Dworkin next turns to his explanation of what the real debate is about.¹⁴⁸ If, as Dworkin argued in the first part of the book, we all agree that the fetus has no right to the moral respect due a person, why do we worry about abortion at all? Why do we not just treat abortion as if it involved no more important a moral decision than removing an ingrown toenail or a tumor?

Dworkin's fetal-centered question produces a fetal-centered answer. He asks, in effect, What is this fetus that we should care about it? As a result, he does not follow through on the central insight of the book. Having argued that fetal personhood is not the center of the debate, he then creates a theory of a subhuman fetus that still insists on being the center of attention. Dworkin's theory remains focused on the fetus's life.

Thus, Dworkin misses the most powerful point of proponents of legal abortion: Our focus is on the (undisputed) humans involved and their relationships, obligations, rights, and families—not on the fetus. For those who accept any responsibility to plan their life,¹⁴⁹ the issue is serious,

147. See *infra* Part IV.

148. See p. 67 (declaring that the genuine explanation can be found in "the concept of intrinsic value, or of sanctity or inviolability").

149. Many people, of course, reject any such responsibility. If God will provide, it may require sacrilegious doubt of God's providence for people to do so. But see YIDDISH PROVERBS 81 (Hanan J. Ayalti ed., 1963) ("God will provide—if only God would provide until he provides.").

Sociologists and anthropologists have suggested that it is a typically middle class—not a typically human or Western—philosophy to believe that life is something to be taken hold of and controlled. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 60, 84 (Talcott Parsons ed., 1958) ("Since everyone was simply waiting for the coming of the Lord, there was nothing to do but remain in the station and in the worldly occupation in which the call of the Lord had found him . . ."); *Ecclesiastes* 9:11 ("[T]he race is not won by the swift, nor the battle by the valiant, nor is bread won by the wise, nor wealth by the intelligent . . . for time of mischance comes to all."); cf. KARL POLANYI, *THE GREAT TRANSFORMATION* 164-65 (1944) (discussing why precapitalist workers were thought to work less hard when paid higher wages). But see RAWLS, *supra* note 54, §§ 25, 15, at 142, 92-93 (assuming that all people have "some rational plan of life" and that "[a] man is happy when he is more or less successfully in the way of carrying out this plan"); *id.* § 63, at 408 ("[A] person may be regarded as a human life lived according to a plan."). Dworkin elaborates Rawls's point in his beautiful essay on the completion of a life story as determining the proper way to die. Pp. 208-13.

because like all decisions to bring, or not to bring, a new person into the world, it involves the most important commitments human beings can make.¹⁵⁰ And for those of us who also reject the claim that the fetus is human, the decision is not really about a fetus at all—it is a decision about twenty years or more of child rearing.¹⁵¹ It is a decision about the future of our marriages, our careers, our finances, the heritage we will leave, and the family we will have. It is not, first and foremost, a decision about our philosophic views of the meaning of life, as Dworkin suggests, but rather about who we are or wish to be and to whom we are committed. In the terms Dworkin uses in his discussion of dying, it is a decision about the “shape” of one’s life and about “what is really important in life.”¹⁵²

A. *Detached and Derivative Views*

Dworkin distinguishes two ways in which one might be concerned about preserving life. First, one might seek to vindicate the living creature’s right to life. This he refers to as a “direct” or “derivative” concern (depending on whether the creature itself, or another on its behalf, seeks to vindicate the right).¹⁵³ Direct and derivative concerns for the fetus’s right to life would be irrelevant, of course, were Dworkin correct that we all agree a fetus is not a person and therefore has no right to life.

The alternative he calls a “detached” concern, because it exists independent of whether the fetus has rights or not. Here the concern is preserving “life,” not vindicating the right to life of any particular person.¹⁵⁴

150. For a discussion of the possibility of avoiding this responsibility by putting the child up for adoption, see *supra* note 35.

151. Twenty, rather than the conventional eighteen years to majority, because for many middle-class American parents, one of the central financial responsibilities of parenthood is undergraduate education. In any event, neither legal majority nor a bachelor of arts degree consistently represents a sharp break ending the parent-child relationship.

152. Pp. 213, 206.

153. P. 11.

154. *Id.* Dworkin strengthens the contrast between the two views by assuming away “false consciousness” arguments that assume it could never be in a person’s actual interest to die. P. 12. He also ignores positions such as John Locke’s that seek to vindicate a right to life (a direct view) but hold that the right belongs to God, not the living being. LOCKE, *supra* note 29, bk. II, ch. XIV, § 168, at 380 (“God and Nature never allowing a Man so to abandon himself, as to neglect his own preservation: And since he cannot take away his own Life, neither can he give another power to take it.”). For further discussion of Locke’s concept of self-ownership, consider NOZICK, *supra* note 35, at 187-88, and SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 80 (1989).

Locke’s view reflects a common religious perspective. See, e.g., Genesis 9:5 (stating that the life and blood of humans belongs to God alone); cf. *id.* 9:3-4 (describing the Noachide covenant by which God permits Noah and his descendants to eat everything that crawls on the earth, but reserves the blood, which is the life, for God alone). If the right to life belongs to God, not the living, the living cannot waive it. Thus, the individual’s interests and desires are irrelevant, as they are in Dworkin’s impersonal detached view; but the primary issue in the abortion debate remains whether a fetus is the sort of being that has a right to life—precisely the personal derivative view Dworkin seeks to eliminate from the abortion debate.

Dworkin argues that the detached concern for life can even be counter to the rights or interests of the life being saved.¹⁵⁵ This possibility is one reason the book also addresses issues of euthanasia and the right to die. Thus, when a person reasonably concludes that she is better off dead, the direct (or if the person is no longer capable of defending her own interests, the derivative) view clearly directs us to permit suicide, while the detached view may still direct us to preserve life.¹⁵⁶

Dworkin's argument, then, is that "for most people the abortion controversy is not about whether a fetus is a person with a right to live but about the sanctity of life understood in a more impersonal way."¹⁵⁷ That is, the debate is about a detached interest in preserving the life of the fetus, not about a derivative one. This somewhat arcane distinction leads to one of Dworkin's key moves. A debate centered around the particular fetus's (direct or derivative) right to life demands a collective decision and state intervention. If the fetus is a person, abortion is murder, and murder is not the sort of thing that can be left to individual consciences. Rather, the state must actively prevent it.¹⁵⁸ In contrast, a debate about vindicating detached interests in life lends itself to a ready political solution. Dworkin thinks that the "how to sanctify life" debate can be resolved with the traditional liberal solution of a limited state.¹⁵⁹ While we may have radically different views on how best to sanctify life, Dworkin wants to persuade us that we can all agree that the political issue is merely "the state's right to mandate an official interpretation of the inherent value of life."¹⁶⁰ And if that formulation sounds quite religious, it is intentional. Dworkin aims to convince you that the abortion issue is an Establishment Clause issue and should be dealt with just as we have dealt with most issues of religion—by state abstention.¹⁶¹

155. P. 12.

156. Dworkin argues that it often should not, but that is another matter. See p. 11. The key point is that the detached view is based on considerations of how best to sanctify life in general, not on the specific interests of a particular living being.

157. P. 39.

158. As I have demonstrated, this argument is fallacious. See *supra* section II(B)(2). Even if the fetus is a person, not all abortions are necessarily murder. However, to the extent there is a serious argument that abortion is murder, a collective judgment regarding its permissible limits must be made; we cannot leave the definition of murder to each individual's conscience. Still, other legal and moral systems would disagree. See, e.g., *Judges 21:25* (advocating that each person should follow the law as determined by his or her own conscience, not as determined by governmental authority); TALMUD BAVLI, *Bava Metzia* 83b, translated in SONCINO, *supra* note 15, 1 *Seder Nezikin* 473-77, discussed in J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 836-37 (1991) (explicating the view that only God may enforce the criminal law with the aphorism, "Let the Owner of the vineyard come and eradicate His thorns" (author's translation)).

159. P. 15.

160. *Id.*

161. Pp. 19-20.

B. Dworkin's Investment Theory of the Sanctity of Life

Dworkin, then, seeks to build from the premise that the abortion debate is about the vindication of the sanctity of life from a detached view. From this premise, he reaches a conclusion requiring toleration of differing views of how to sanctify life modeled after the First Amendment. But for his premise to have any plausibility at all, he must explain how—if we all agree that the fetus is not a person and that we must vindicate the sanctity of life in an abstract way—nonetheless we disagree so dramatically about abortion. This step in his argument, then, requires further elucidation of the detached view.

Dworkin explains that we—supporters and opponents of abortion regulation alike—are concerned with preserving the “creative investment” in a human life.¹⁶² Dworkin explicates this concern with a peculiar account of the worth of human life: “[W]e treat the preservation and prosperity of our own species¹⁶³ as of capital importance because we believe that we are the highest achievement of God’s creation, if we are conventionally religious, or of evolution if we are not”¹⁶⁴ Having thus based human value in our supposed belief in the creativity and progressivity of God or Evolution,¹⁶⁵ Dworkin argues that this value is based on the “investments” made by Evolution-God on the one hand, and by humans on the other. He then argues that the spectrum of our abortion views results from different weighting of the relative contributions to human life from each of these sources.¹⁶⁶

According to Dworkin, everyone agrees that an early death “frustrates” the investment of the eternal order or of other humans in the decedent.¹⁶⁷ However, some people care principally about the investment of God or deified Evolution, which, in Dworkin’s view, is complete at conception.¹⁶⁸ Others are more concerned with the ongoing human

162. P. 88.

163. As a matter of description of the existing moral views of Americans and Europeans, this account of “our” views seems to come from a different world. How many of us treat the preservation and prosperity of our *species* as of capital importance? In this world of ethnic conflicts and nationalist struggles, particularist and catholic religions, sectarianism, and “not in my backyard” (NIMBY) attitudes, it probably would be more accurate to say that few of us think of the species at all. Much smaller subsets are far more important. Cf. SINGER, *supra* note 132 (arguing that a *larger* unit than the species should be the primary focus of morality).

164. P. 82 (footnote added).

165. Evolution must be capitalized, because Dworkin has deified it: Dworkin’s Evolution, unlike modern biology’s evolution, *see infra* note 175 and accompanying text, is an actor that creates, achieves, and classifies its creations as higher or lower.

166. P. 79.

167. P. 87.

168. P. 90. He offers no explanation for this odd concept. The Enlightenment God-as-prime-mover whom Dworkin sometimes seems to see in conventional religion, *see* p. 91 (describing God as “the author of everything natural”), completed “investing” with the creation of the world and its rules

investment in the living person. If you are among those, you "will accordingly see more point in deciding that life should end before further significant human investment is doomed to frustration."¹⁶⁹ I find this account bizarre for several reasons.

First, neither "conventional religion," whatever that is,¹⁷⁰ nor evolutionary theory consistently teach that "we are the highest achievement of God's creation . . . or evolution." As for "conventional religion," at least some religions teach that the point of the story about God creating everything is that *everything*—not just humans—is God's creation.¹⁷¹ Thus, for those who take the beginning of *Genesis* seriously, Dworkin's anthropocentrism is mere unjustified hubris.¹⁷² In any event, the God of the Hebrew Bible, in most interpretations, creates by fiat, *ex nihilo*, *yesh me'ayin*: God said, "Let there be light, and there was light."¹⁷³ This God is no romantic starving artist laboring long hours to create a masterpiece. Nor does this conventionally religious view maintain that God invested great resources in creating humanity: "And Adonai God created the human of dust from the earth."¹⁷⁴ One does not value God's creations because of the investment and sweat with which they were made, but because of their own value (or their Creator's value). As for evolution, it was a nineteenth-century perversion of evolutionary theory to believe that man is evolution's "highest creation."¹⁷⁵ Modern theorists,

of physics. Cf. RENÉ DESCARTES, DISCOURSE ON THE METHOD 42 (John Cottingham et al. trans., 1988) (1637) (discussing the possibility that God created the world in the form of chaos and then established the laws of nature which remain in force today). More interventionist views of God often consider God's presence and influence to be important throughout life, not simply at conception. See, e.g., Steve Bruce, *The Moral Majority: The Politics of Fundamentalism in Secular Society*, in STUDIES IN RELIGIOUS FUNDAMENTALISM 177, 179 (Lionel Caplan ed., 1987).

169. P. 91.

170. I am unsure who are the "conventionally religious." Americans subscribe to many religions, conventional or otherwise, with many different doctrines.

171. See *Genesis* 1:1 to 2:25. Others derive the same conclusion from an examination of the central tenets of modern physics or evolutionary biology, which are not compatible in any obvious way with an anthropocentric view of creation.

172. I do not mean to suggest, of course, that there are no conventional religions that share Dworkin's anthropocentric views. But that some religions continue to reenact the Inquisition's attack on Galileo or the Scopes Monkey Trial, *Scopes v. State*, 289 S.W. 363 (Tenn. 1927), does not mean all (or even all conventional) religions view modern science as incompatible with faith or morality. See *id.* at 367 (noting that amici briefs indicated that "Protestants, Catholics and Jews are divided" on the issue).

173. *Genesis* 1:3; accord *id.* 1:26-27 (describing how humans were also created by fiat).

174. *Id.* 2:7.

175. See HERBERT SPENCER, THE DATA OF ETHICS ch. II, § 4, at 10 (1887) (describing evolution as proceeding from the "lowest types [of animals] to the highest"). Darwin, who borrowed from Spencer the phrase "survival of the fittest," 1 HERBERT SPENCER, THE PRINCIPLES OF BIOLOGY pt. III, ch. XII, § 167, at 457 (1897), made the key move to a modern conception by explaining that the only thing the fittest are fittest at is survival. STEVEN J. GOULD, EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY 36 (1977) [hereinafter GOULD, DARWIN] ("Darwin reminded himself never to say 'higher' or 'lower' in describing the structure of organisms—for if an amoeba is as well adapted

however, almost uniformly agree that evolution does not come with higher and lower creations: what survives, survives.¹⁷⁶ Humans have survived, so far; the only conclusion evolutionary theory draws from this fact is that we exist, as of the moment. Dworkin's romanticized preservationists who "say that the extinction of a species is a waste of nature's investment,"¹⁷⁷ apparently paid remarkably little attention in their evolutionary biology class.

Nature, then, does not invest any more than it creates—it just is.¹⁷⁸ Similarly, none of the widely held conventional religious views, so far as

to its environment as we are to ours, who is to say that we are higher creatures?"). Many species, notably cockroaches, seem better at survival than humans. Cf. STEVEN J. GOULD, *THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY* 142 (1980) [hereinafter GOULD, PANDA] (asserting that humans are as unlikely to last as long as most invertebrates); *id.* at 266 (contending that humans will not endure as long as the dinosaurs).

176. See, e.g., GOULD, DARWIN, *supra* note 175, at 34-38; GOULD, PANDA, *supra* note 175, at 54-58. But see EDWARD O. WILSON, *SOCIOBIOLOGY* 565-74 (1975) (arguing that behaviors that might have been adaptive sometime in the course of human evolution are therefore morally superior).

177. P. 79.

178. Preservationists' views can be understood as depending on two quite different explanations of the values underlying their mission. One sees species, if not individual animals, as having an inherent value. Thus, even though a species surely is not sentient or a person, it should be treated as having a right to life. This may be grounded in aesthetic considerations (the world is a richer, more beautiful, more complex, or more attractive place for having half a million species of beetles rather than one species fewer). See STEPHEN J. GOULD, *WONDERFUL LIFE* 47 (1989) (discussing large numbers of beetle species). As the famous geneticist J.B.S. Haldane is said to have replied when asked what his studies had taught him about God, "He must have an inordinate fondness for beetles." BETTY DEVINE & JOEL E. COHEN, *ABSOLUTE ZERO GRAVITY* 32 (1992).

Or it may be grounded in a *Genesis*-like view, or its secularized equivalent, that all God's creatures are worthy of protection. See *Genesis* 2:18-19 (stating that God thought any of his creatures might be a proper spouse for man). Dworkin's view appears to be a version of the latter. P. 75 (arguing that people try to protect an individual species not because they "want the pleasure of continuing to see animals of each species," but because they "think it would be a shame if human acts and decisions caused it to disappear").

The second explanation is more anthropocentric and instrumentalist, but it also relies on an awareness of the limits of human knowledge and the dangers of arrogance. This justification emphasizes first, the possibility that even the seemingly most unimportant species might turn out to be useful to humans, and second, the odds against accidents of evolution (or human efforts) being able to duplicate a species that has been destroyed. See, e.g., STEVE F. SAPONTZIS, *MORALS, REASON, AND ANIMALS* 269 (1987) (arguing that acknowledging the value animals and insentient entities can have for us obviates the need for an independent moral basis for environmental protection). Much of the rhetorical power of this explanation stems from its implicit use of the quasi-religious view that all God's creatures must have a place in God's anthropocentric plan. See, e.g., *THE STATUS OF ANIMALS: ETHICS, EDUCATION AND WELFARE* 41 (David Patterson & Mary Palmer eds., 1989) (explaining the notion of "theos-rights" for animals). The anthropocentrism, however, may be based simply on the fact that we are humans concerned foremost with our own welfare; it need not rely on Dworkin's notion that "we are the highest achievement of . . . evolution." P. 82; cf. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 53 (Thomas Mahoney ed., 1955) ("To be attached to the subdivision, to love the little platoon we belong to in society . . . is the first link in the series by which we proceed toward a love to our country and to mankind."); WALZER, *supra* note 31, at 50 (justifying greater moral concern for those closer to you).

I am aware, treats human life as a matter for discounted present value analysis.¹⁷⁹

C. *Killing to Save Them*

Regardless of whether anyone (much less all of us) actually believes Dworkin's investment account of human value, no one should. Dworkin's metaphor urges us to think of human lives or relationships as an investment, to be commenced only if the discounted present value of the expected return exceeds the investment. Thus, it contradicts the principal virtue of the liberal (in the philosophic sense) tradition: treating humans as ends in themselves, not as means to some other end.¹⁸⁰

When Dworkin applies his investment theory to explain the views of "liberals," the results are stranger still. Liberals, he says, think that abortion is permissible when birth would have a "very bad effect on the quality of lives."¹⁸¹ The strongest case for abortion, then, is where grave physical deformities "would make any life deprived, painful, frustrating . . . and in any case short,"¹⁸² or where "family circumstances are so economically barren, or otherwise unpromising"¹⁸³ that the investment people will make in the life will inevitably be frustrated, and it is therefore appropriate to kill. In Dworkin's view, the liberal makes a "more impersonal judgment: that the child's existence would be intrinsically a bad thing, that it is regrettable that such a deprived and difficult life must be lived."¹⁸⁴

Like Dworkin's basic position that human worth is the result of investments, this is an astonishingly illiberal—and dangerous—view. Personal or impersonal, judgments regarding whether a "child's existence would be intrinsically a bad thing" emit the faint odor of the gas chambers. If it is better that such a life not be lived, why ever allow it to come into existence or to continue after it begins?

Abortion as mercy killing is an ugly sight indeed—a third party with no knowledge whatsoever of the future child's views on the matter (because a fetus can have none yet) plays God and ensures, by killing it, that the child never comes into existence to second guess this judgment regarding

179. Dworkin offers no citations to the beliefs of any religion, conventional or otherwise, to support his investment interpretation. See pp. 81-84.

180. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 434-35 (H.J. Paton trans., 3d ed. 1956) (1798); RAWLS, *supra* note 63, § 29, at 179-83 (discussing the liberal tradition, associated with Kant, that people should be treated as ends rather than as a means to an end); see also *supra* note 24 and accompanying text.

181. P. 97.

182. P. 98.

183. *Id.*

184. *Id.*

how best to honor its life.¹⁸⁵ Were liberals to adopt this understanding of abortion, they would probably be compelled to reverse their commitment to *Roe*.¹⁸⁶ In this post-Holocaust era, liberals at least should know to avoid judgments regarding which lives (of other humans) are or are not worth living.

D. Fetal-Centeredness or Family Responsibilities?

Dworkin offers his investment theory to explain why people who conclude that abortion should be legal—or even that it is morally required under some circumstances—nonetheless feel regret. Almost no one, he says, treats abortion as a morally indifferent act,¹⁸⁷ and he is no doubt correct. The explanation, however, has little to do with future returns.

The problem is that Dworkin continues to focus on the fetus. His discussion seems primarily concerned with the tragedy of an unnecessary fetal death.¹⁸⁸ I believe many people focus on a different issue altogether: the disrespect for our responsibilities toward the living demonstrated by giving birth to a child who will not be raised properly or whose birth will leave the parents unable to fulfill other responsibilities.¹⁸⁹

I believe these people see a human being, a soul, a citizen, or a mensch¹⁹⁰ as something that must be created by the joint work of the

185. Dworkin would contest this reading: he seeks to distinguish the "more impersonal judgment" he describes from a judgment regarding best interest. See pp. 98, 97-99. In either case, however, the notion that early death is the best way to show our commitment to life is too paradoxical for ordinary liberal thought.

186. Dworkin convincingly argues that the future child—if it never comes into existence—has no basis for complaint: until it exists there is no "it" to assert rights. See p. 18. My complaint is not with that argument but with his judgment regarding the life this child would have if it were to have one.

187. Pp. 34-35.

188. See, e.g., p. 239 ("We think that an unwarranted or frivolous abortion shows contempt for all human life, a diminished respect for everyone, and we want everyone to die, when they have a choice, in a way we think shows self-respect, because that bell, too, tolls for us.").

189. Dworkin appears to accept this description. P. 59 ("Gilligan's subjects . . . sometimes talked of responsibility to the child, but they meant the future hypothetical child, not the existing embryo—they meant that it would be wrong to have a child one could not care for properly."). But Dworkin's theory concentrates on abstract sanctification of life, not concrete responsibilities to either future hypothetical children or existing ones. See pp. 81-84.

190. Mensch, in its Yiddish (and Yiddish-influenced English) rather than German usage, is a morally laden term meaning not merely an adult, but an adult who has accepted the responsibilities of adulthood and who acts in a way adults should act. See SAMUEL ROSENBAUM, A YIDDISH WORD BOOK FOR ENGLISH-SPEAKING PEOPLE 49 (1978) (defining "mentsh" as a "person, human being; a decent person"); SOL STEINMETZ, YIDDISH AND ENGLISH: A CENTURY OF YIDDISH IN AMERICA 133 (1986) (defining "mentsh" as a "decent person; good human being"); cf. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 67 (1987) ("[T]o be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community."). Some republican usages of "citizen" may have a similar flavor. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (defining "citizenship" as "participation as an equal in public affairs, in pursuit of a common good").

child and the parents over five, thirteen, or eighteen years after birth.¹⁹¹ On this view, a prospective parent who cannot or will not make the necessary commitment should not be a parent. These Americans, I believe, consider it immoral—not just inconvenient—to carry a pregnancy to term when the potential parents are unable or unwilling to then raise the child properly. For them, “an unwarranted or frivolous choice”¹⁹² *not* to have an abortion is at least as immoral as the opposite decision, the decision on which Dworkin focuses.

This liberal view, then, is based on the premise that one can properly raise only a very limited number of children in a lifetime.¹⁹³ Therefore, one must carefully consider before accepting the responsibilities of a new one. The focus of thought is not on the fetus as an individual being, but on the parents' family—an institution with a pattern and demands of its own.¹⁹⁴

Thus, for some people, the central issue in a decision to give birth or not (whether by abortion, contraception, or abstinence) is one of responsibilities, not rights:¹⁹⁵ responsibilities first and foremost to one's family,¹⁹⁶ to existing children, to a career, to oneself and one's spouse, and to one's religion and its traditions; even responsibilities to beings that

191. I take it that Dworkin has something like this in mind in his description of “human investments.” P. 84. But the creation of a mensch is not an investment, a deferral of current consumption in the hope of a future return. It is, rather, the mission itself.

192. See *supra* note 188.

193. Cf. ARISTOTLE, THE NICOMACHEAN ETHICS IX.10.1171a (D.P. Chase trans., 1911) (addressing the comparable limitations on the number of true friendships: the essential nature of friends (like children) is that one can have only a few).

194. Thus, the decision is not necessarily whether to have children. It often is whether to have a child *now*. See Brief for the *Amici [sic] Curiae* Women Who Have Had Abortions and Friends of *Amici Curiae* in Support of Appellees at 32, 33, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605) [hereinafter Brief of Amici] (stating that “most of the women who have abortions choose at some time to become mothers, but they choose to do so at times when they are . . . prepared properly to care for a child”); cf. *Ecclesiastes* 3:1-2 (“To everything there is a season, and a time for every purpose under heaven: a time to give birth . . .”).

195. See Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 81-83 (1990) (arguing that the abortion issue should be examined in terms of responsibilities rather than rights). Dworkin discusses West's theories, but only to establish that West assumes fetuses are not persons. Pp. 57-58. Other important recent writings on the rights/responsibilities debate include Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY 74, 77 (James D. Hunter & Os Guinness eds., 1990); Cover, *supra* note 190, at 67-68 (noting that responsibilities, not rights, are the focus of Jewish law and of traditionalist attempts at reform in such areas as changing the role of women).

196. The family is practically invisible in Dworkin's account. Fathers and other children—already existing or planned—are scarcely mentioned in his description of the controversy. Even the mother's life barely counts; it is not *her* life that is being sanctified. But cf. pp. 93, 96 (discussing how an unwanted pregnancy can be destructive of the mother's investment in her own life).

do not exist yet: to the children one might have someday.¹⁹⁷ Will we be able to take care of those (future) children properly?

Thus, despite the political rhetoric about choice, many people who decide to have an abortion talk not about choice, but about obligations to themselves and others.¹⁹⁸ They confront not a choice, but a conflict of responsibilities in which it may be perfectly clear which responsibility prevails—pre-existing commitment over commitments not yet made—and yet terribly painful to refuse to accept the new responsibility.

If this account is generally true, prochoice supporters do not think of the decision to have an abortion as a free choice in the manner of a choice to go swimming or bicycling this weekend. Rather, they view the decision to abort as an important moral or life decision that may be *compelled* by life circumstances and existing obligations. A better label for the position of abortion-rights advocates accordingly might be “freedom of conscience” rather than “freedom of choice.” The most important objective of abortion-rights advocates is not to vindicate the individual’s right to self-fulfillment through a voluntarily chosen life plan or the right to freedom from interference in decisions (like the type of clothes one wears) that are of little importance to others. Rather, their focus is on the right to live according to one’s most important values, to obey the dictates of conscience, or to follow a higher (moral) law.

Dworkin claims that the regret of abortion is, for all of us, the regret of a frustrated investment.¹⁹⁹ In contrast, I suggest that for those who focus primarily on the responsibilities of raising a child, the regret of abortion (when there is regret) comes from the knowledge that the world is a tragic place where desires and responsibilities often conflict. People who want children, now or in the future, may have a sense of loss when a child is not brought into the world—whether by abortion, contraception, or celibacy—even if it is also clear that it would be utterly irresponsible to give birth now. This feeling of loss may grow after conception, and continue to grow later in pregnancy, as the potential becomes closer to realization—not because an embryo is more human than an unfertilized egg, but because it is more likely to become a human, just as it is more painful not to get a job after six interviews than after merely sending out a resumé. Nor is investment the issue here in any normal sense of the word. It is more painful to lose the lottery on a recount after you thought

197. Responsibilities in this way are quite different from rights. Dworkin makes this point well. He persuasively argues that a being that does not exist yet can have no rights or interests. See pp. 18-19. Elsewhere, he points out one can easily have responsibilities to a nonexistent being. P. 59.

198. See, e.g., Brief of Amici, *supra* note 188, at 7; pp. 58-60 (describing interviews conducted by Professor Carol Gilligan for a study on women and moral issues).

199. Pp. 88-89.

you had won than in the usual way. The former seemed so much closer to realization, though the investment was equally minimal.²⁰⁰

Thus, the loss and pain of an abortion is the loss of a child that someone wanted, even if only on an instinctual level reflecting the demands of a presocial biology, or that we wish someone wanted, if only on that same instinctual level. But we generally do not live our lives according to our biological urges, and that loss, as painful as it sometimes is, is not an ultimate value.²⁰¹ All sorts of things may outweigh it. Most clearly, a child is not something one can simply "have." Children must be brought up, and a proper upbringing must begin with freely given love, love that may be hard to give except when the child is wanted, even desperately wanted. For others, the problem may be not bringing up this child, but fulfilling other commitments: raising a (or another) child necessarily means giving up many other possible ways to spend a brief life.²⁰² Nonetheless, the loss remains, although it is outweighed by other aspects of an unhappy, because finite, reality.²⁰³

E. *Are Fetuses People, Redux*

Oddly, Dworkin has not only failed to take seriously the views of those who believe the fetus is a person, he seems as well to have failed to understand the extent to which many supporters of legal abortion deny the humanity of the fetus. Dworkin's "investment" picture does not distinguish clearly between fetuses and children.²⁰⁴ In contrast, the responsibility-based reasoning I outlined in subpart III(D) allows legal abortion only if you believe—more than Dworkin seems to—that the fetus is only a *potential* child, not yet an actual child.

200. Cf. Bob Drogin, *Bottle Cap Flap Riles the Masses: After a Pepsi Promotion Went Awry, Thousands of Filipinos Mistakenly Thought They Were in the Money. Now the Firm Is Trying to Cool off Protests That Have United Rebels, Generals and Matrons*, L.A. TIMES, July 26, 1993, at A1 (describing lawsuits and violent protests after Pepsi mistakenly announced as the grand prize winner a number held by 800,000 people).

201. On the loss felt from abortion, see the excerpts from Professor Gilligan's interviews, pp. 58-60; LADER, *supra* note 35, at 21.

202. Cf. *Ecclesiastes* 6:12 ("For who knows what is good for man in this life, all the days of his vain life which he spends like a shadow."). Life is short and hard choices abound.

203. Some anti-abortionists have an answer to the decisionmaking problem. Do not balance, they say. Do not think about the life you are bringing into the world; do not consider your responsibilities to yourself, to other existing people, to your family, or to your career; and do not consider whether you will be able to fulfill the deep responsibility to the child you are about to bring into the world. In some cases, this answer may seem clear precisely because they denigrate these responsibilities, especially the last. "God will provide" suggests that the parents need not. See *supra* note 149. But like most simple answers, not balancing is simply wrong. This anti-abortion position simply does not take seriously the obligations of childrearing. See *supra* note 35.

204. Cf. pp. 87-88 (describing a single bell-curved continuum of the value of life that begins at conception and ends at death).

An actual child is an individual enmeshed in existing relationships, not an abstract idea or potential. With real people, one must live with their deformities, work to love or at least tolerate their deficiencies, and appreciate who they are rather than some abstract ideal they do not meet.²⁰⁵ If their lives are "deprived and difficult," the family must try to improve what can be improved and cope with what cannot. With real children, it would be shocking or worse were a parent to "regret that such a deprived and difficult life must be lived" in Dworkin's sense of wishing the child were dead and taking steps to fulfill that wish.²⁰⁶

I distinguish sharply, then, between the sorts of decisions that may be made about potential family members and those that may be made about actual, existing ones. Potential members may be rejected for many reasons and perhaps for none at all, much as a sovereign state may reject potential immigrants on virtually any basis, including racial and ethnic bases barred in all other areas of domestic law.²⁰⁷ The same reasons, however, carry

205. This distinction explains why politicians who oppose abortion can also support their child's decision to have one: loyalty and love for an actual child is more important than the principle. See, e.g., R.W. Apple, *Behind Bush's Mixed Abortion Signals*, N.Y. TIMES, Aug. 15, 1992, at A1; Kevin Sack, *Quayle Insists Abortion Remarks Don't Signal Change in His View*, N.Y. TIMES, July 24, 1992, at A1 (both quoting Dan Quayle and George Bush's statements that they could support a daughter or granddaughter who had an abortion against their advice). Similarly, parents may find themselves abandoning principles for relationships when a child turns out to be, to do, or to represent anything else the parent finds abhorrent—adopting a foreign religion, a "sinful" lifestyle, or strange politics—all the things that children do and become despite their parents best efforts.

206. See p. 98.

207. See *supra* note 35. For example, our own immigration laws clearly discriminated on racial and ethnic bases that would be barred by the Fourteenth Amendment with respect to citizens. See, e.g., *Matthews v. Diaz*, 426 U.S. 67, 80 (1976) (holding that in the exercise of its power over naturalization and immigration, Congress may make "rules that would be unacceptable if applied to citizens"); *Fong Yue Ting v. United States*, 149 U.S. 698, 728 (1893) (holding that Congress "might have directed any Chinese [alien] laborer, found in the United States . . . to be removed out of the country . . . without judicial trial or examination," notwithstanding the 4th, 5th, 6th, and 8th Amendments); *The Chinese Exclusion Case*, 130 U.S. 581, 611 (1889) (upholding the Chinese Exclusion Law, The Act of Oct. 1, 1888, 25 Stat. 504, ch. 1064). The United States immigration laws have a long history of unabashed racism. See, e.g., SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST STAFF REPORT 92-93, 161-216 (1981), reprinted in THOMAS A. ALENIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 40, 51-53 (2d ed. 1991) (recounting racist and anti-Semitic origins of immigration restrictions culminating in the 1924 National Origins Act). While revisions of the INA from 1965 to 1990 have slowly eliminated the most blatantly racist provisions, discrimination in immigration law has not ended. See *Immigration and Nationality Act*, § 202(a)(1), 8 U.S.C. § 1152(a)(1) (1988 & Supp. IV 1992) (barring, *inter alia*, racial and national—but not religious—discrimination except in listed instances, creating a national quota system); *id.* §§ 202(a)(2), 203(b)(6)(C), 8 U.S.C. §§ 1152(b), 1153(b)(6)(C) (1988 & Supp. IV 1992) (discriminating on the basis of national origin in applying and setting national and regional quotas). But cf. *Jean v. Nelson*, 727 F.2d 957, 967-71 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) (explaining that excludable aliens have only very limited rights to due process or relief from discretionary pre-deportation detention); *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2564 (1992) (holding, based on a narrow construction of The United Nations Convention Relating to the Status of Refugees, that a naval blockade did not violate the ban on the "return or exclusion" of Haitian refugees); *infra* note 275.

no weight with respect to those already admitted: International law bars virtually all expulsions of citizens, and the same family that would not have hesitated to abort a severely deformed child will devote themselves to the child once born.

Hidden in this analysis are two analytically separate issues: (1) when the child begins to exist, and (2) when the child becomes a member of the family. However, "child" is not a preexisting analytical category: In practice, I think it is usually a label applied to indicate our conclusion that the time has passed to make the membership decision. That is, we all agree that children are members of the family already, regardless of whether they came to be there by fully informed choice, gross coercion, or something in between.²⁰⁸

Thus, the decisions whether or not to accept a new child, to abort a pregnancy, to have sex, and to use birth control can only be made before the child enters the world (or at least, in the case of adoption, before it enters the family). Once a child is accepted into the family, the family must care for her; parents cannot rethink their decision to raise a child when she turns out to have colic or an extreme case of the "terrible twos," or when she becomes a rotten adolescent. Opponents of criminalization must therefore believe (as Dworkin says we all believe) that the fetus is not a person, or at least that it is not yet a member of the family.

In sharp contrast to this antiregulation view, some who support banning abortion really do believe that the fetus is human, that the soul enters full born at the moment of conception, and that the fetus is already the family's child.²⁰⁹ For them, humanity is not an evolutionary process—it either is or is not. For these people, too, the abortion issue may center around assuming responsibilities, but the responsibility attaches earlier. If the fetus is already a child, the time to decide whether to admit it into the family already has passed.

The essential difference between the pro- and antiregulation views, then, is that in the proregulation view, one makes the commitment to accept a new child into the family, with all the attendant consequences, when one chooses to have sex in the first place.²¹⁰ For the principled

208. See *infra* note 211. Here I generalize as broadly as Dworkin and with as little empirical support. If I am right, supporters of a legal right to abortion will use the term "child" earlier in a wanted pregnancy than an unwanted one. Listen and hear.

209. See *supra* Part II (arguing that belief in fetal personhood is genuine).

210. This notion of choice seems quite strained. Perhaps the people who are willing to place so much weight on the choice to have sex do so because they share the hostility to sex, especially outside of marriage, traditional in some Christian sects. See, e.g., Daniel Sullivan, *A History of Catholic Thinking on Contraception*, in *WHAT MODERN CATHOLICS THINK ABOUT BIRTH CONTROL* 54 (W. Birmingham ed., 1964) (reporting that Pope Innocent III and others proclaimed that "the sexual act was itself so shameful as to be inherently wicked"). If sex itself is evil, it is natural to assume that by engaging in it, one deserves all the possible bad consequences that may follow, however unlikely they

abortion opponent, backing out on the fetus after the amniocentesis is no more a possibility than backing out on the teenager after a motorcycle accident.²¹¹ In short, the divisive question is whether the fetus is a child for whom one is already responsible.

Unlike Dworkin's investment account, this explanation of the anti-abortion position gives a plausible account of the logic behind the widespread willingness of those who call the fetus a person nonetheless to allow some abortions. It may be eminently sensible to view the fetus as a person—that is, something to which responsibility has already attached²¹²—

may be. Cf. *Dulieu v. White & Sons*, 2 K.B. 669, 679 (1901) (applying a variant of the "eggshell skull" doctrine to hold a defendant liable for the plaintiff's miscarriage that resulted from a fall when the defendant's carriage narrowly missed colliding with her); *KEETON ET AL.*, *supra* note 116, § 43, at 291-93 (5th ed. 1984) (discussing the analogous situation in tort law's "eggshell skull" cases when a defendant is liable for all physical injuries to the plaintiff, even when the extent of injury was not foreseeable).

Other Americans and other traditions have different views regarding the merits of sex. For example, Jewish law teaches that sex is holy and pure, best performed on the Sabbath, and that to believe otherwise is to "blaspheme God who made the genitals." See *FELDMAN*, *supra* note 60, at 99-100 (translating and quoting R. MOSES BEN NAHMAN (NAHMANIDES), *IGGERET HAKODESH* [EPISTLE OF HOLINESS] cii.ii, translated in *THE HOLY LETTER: A STUDY IN MEDIEVAL JEWISH SEXUAL MORALITY ASCRIBED TO NACHMANIDES* 43 (Seymar J. Cohen trans., 1976)); *ZOHAR, Bereshith* 55b, translated in 1 *THE ZOHAR* 177 (Harry Sperling & Maurice Simon trans., 1949) ("A human being is only called 'adam' ['human'] when male and female are as one." (author's translation)). If the sexual act is holy or even—as many Americans from varying backgrounds appear to believe—just natural and normal, unintended consequences (such as birth control failure) are less likely to be seen as choices or assumed risks.

211. Dean Lee Teitelbaum tells me that this "conservative" position often is held by "liberals" with respect to child support. Exam answers in his family law course indicate that many students who support *Roe* nonetheless believe that a father is responsible for child support even if he engaged in sexual relations in reliance on the mother's deliberately false representation that she was using effective birth control. These students often argue, he reports, that the father assumes the (risk of this) responsibility by having sex in the first place.

I suspect that the issue for these students, and for the abortion "conservatives," has little to do with choice. Under ordinary principles of contract law, the father in Dean Teitelbaum's hypothetical did not choose to assume any responsibility (except that of contraceptive failure, perhaps), and the mother, in any event, is clearly estopped from claiming otherwise. See E. ALLAN FARNSWORTH, *CONTRACTS* 272 (2d ed. 1990) (explaining that, under the doctrine of equitable estoppel, the maker of a misrepresentation is precluded from asserting facts that contradict the misrepresentation). Similarly, given the effectiveness of modern contraceptive techniques, it is difficult to argue seriously that having sex is, in and of itself, a "choice" to rear a child. See Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 *UCLA L. REV.* 1, 86-87 (1992) (listing the efficacy rates for modern contraceptive techniques from 99.6% for tubal ligation to 79% for spermicide).

However, responsibilities do not always arise from choices; some are created simply by uncontrollable circumstances. Many people, for instance, acknowledge an obligation to honor and support their aged parents, despite never having chosen them as parents. Both Dean Teitelbaum's students and many abortion opponents may be reflecting a similar view about children: parents are responsible for their children because they are their children's parents, not because they "chose" to be parents. The issue dividing supporters and opponents of legal abortion, again, is simply whether the responsibility attaches at conception, birth, or somewhere in between.

212. Dworkin uses "person" to mean a being with rights, specifically a right to life. See p. 23 (explaining his use of the term "person"). But a fetus, like a child, cannot survive on its own. Its

and yet have many exceptional situations in which abortion would be permitted. Where there is no "real" choice to have sex—such as in cases of rape, incest, or statutory rape—there is no moment at which responsibility could have been rejected by the woman.²¹³

However, for other abortion opponents, the entire issue of choice may be irrelevant. Not all responsibilities are a matter of choice. Responsibilities and obligations are sometimes thrust upon us without any voluntary act of our own—when a parent becomes sick, for example. Regardless of their views on abortion, virtually all Americans would agree, I suppose, that parents have an obligation to continue caring for their two-year-old child even after they discover it has a major deformity. Those who see the fetus as a full individual could, consistently with this view, believe a pregnant woman has a similar obligation to the fetus inside her, even if she is a victim of rape or knows the child is going to be born severely retarded. It is not a matter of choice, but simply one of the tragedies of life.²¹⁴

right to life, even more than that of adults, extends only so far as someone has a responsibility to care for it. When discussing adults, the distinction between a right not to be killed and a right to be supported at another's expense sometimes may be useful and important. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1357, 1354 (2d ed. 1988) (explaining that because "only the pregnant woman can respond to and support her fetus' 'right' to life," to outlaw abortion is to "conscript women as involuntary incubators"). In any event, the distinction is routinely employed in the law. See, e.g., *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that the Constitution does not require the government to provide affirmative protection from private acts even for those rights the government may not constitutionally violate); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (holding that a constitutional right to an abortion does not include a right to receive Medicaid funding for one). In the context of fetal "rights," however, that version of the action/inaction distinction is meaningless because a lack of support means death for a fetus. A fetus is a person, therefore, only if its parents have positive responsibilities to care for it. See *infra* note 222.

213. Indeed, one could justify even broader exceptions on the same logic: the mother should not be viewed as choosing to accept responsibilities that are not reasonably foreseeable. Assuming the risk of childbearing and its attendant responsibilities, thus, could be distinguished rationally from assuming the risk of rearing an extremely deformed child. This logic could also serve to distinguish the responsibilities assumed by unprotected sex from those assumed when birth control is used, making abortion a more justifiable option when the pregnancy results from birth control failure than when it results from mere carelessness. Note that people who focus on the responsibilities of childrearing are likely to have the opposite intuition: anyone who is so irresponsible as not to use birth control certainly should not be raising children.

214. The right to privacy, then, is irrelevant once the parents' responsibility to the child attaches. After responsibility attaches, it is the underlying responsibility to their child, not the state, that is dictating the course of the parents' lives. As a result, the same state regulation of abortion that appears as an egregious interference with personal autonomy to those who believe the unwanted fetus is not yet a member of the family, will appear as an unproblematic extension of ordinary family law (and homicide) doctrine to those who believe family membership comes at conception. However, despite the disputes over when responsibility attaches, everyone should agree that once the responsibility attaches, the state's enforcement of it can no longer be viewed as violating a "right not to have the course of one's life dictated by the state." Jed Rubenfeld, *On the Legal Status of the Proposition That "Life Begins at Conception,"* 43 STAN. L. REV. 599, 611 n.71 (1991) [hereinafter Rubenfeld, *Conception*] (citing Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 807 (1989));

F. *The Implications of the Responsibility Approach*

If the issue is whether responsibility attaches at conception, the fetus-as-person argument returns. But the issue is somewhat different from Dworkin's framing of it. His claim that the fetus has no interests because it is not sentient²¹⁵ seems almost irrelevant. We—and here I do mean “we” in the broadest sense—surely all believe that we have responsibilities toward many things that are not currently existing sentient beings: work, morality, ancestors and their traditions, our country, the People, integrity, religion, Art, even trees. The issue is not whether the fetus has rights, but whether it is the object of a full responsibility or only a developing, partial one.

It seems clear that those who feel obligated to have an abortion do not feel they have a responsibility to the aborted fetus, or at least not as great a responsibility as they have to other family members or even to the not-yet-conceived child of the future. This is a fundamental difference, deeper than Dworkin acknowledges, from those who believe the commitment is complete and responsibility has attached at conception because the fetus is a fully formed soul.

Dworkin's investment account of the abortion controversy, then, fails on two important levels. First, in its attempt to describe our views, or our views as they would be in reflective equilibrium, his investment account fails to take seriously the actual views of many participants in the abortion debate, because it is based on his incorrect theses that we all agree the fetus is a person and are concerned with the sanctification of life in an abstract sense. Second, to the extent that Dworkin intends this theory to be prescriptive and persuasive—an alternative to, rather than an exposition of, existing views—it is simply unattractive. Human relationships and human lives should not be valued based on the return they provide to others' investments.²¹⁶

In addition, under the responsibility approach, the state is left with fewer “neutral” options than Dworkin imagines. On his account, the central issue in the abortion debate is how to sanctify life.²¹⁷ Dworkin concludes from this that the state should largely abstain from interfering in an

Neuman, *infra* note 275, at 334-35.

Accordingly, Rubinfeld misses the point when he argues that a state may not protect fetal interests because to do so would destroy the right of privacy. See Jed Rubinfeld, *Usings*, 102 YALE L.J. 1077 (1993). If the fetus were a member of the family, the right to privacy would be inapplicable; the right to privacy cannot be used as an Archimedean fulcrum from which to conclude that the fetus is not a family member (or person).

215. Pp. 15-18; see also *supra* subpart II(C).

216. For a more detailed analysis of why humans should be treated as ends in themselves, see KANT, *supra* note 180, at 434-35.

217. See *supra* text accompanying note 157.

essentially religious issue. But almost everyone would agree that one way to sanctify life is to think seriously before taking it. Thus, Dworkin's account suggests that the state would be entitled, and perhaps required, to take steps such as instituting a mandatory waiting period designed to ensure that women do not frivolously decide to abort.²¹⁸ In contrast, if the issue is one of assuming a tremendous responsibility, the state should be at least as concerned with women who frivolously decide to *bear a child*. Waiting periods designed to persuade women not to abort are not neutral between the two views.²¹⁹ Most importantly, however, the "neutral" First Amendment abstention approach is not available. The state must decide either that fetuses are already members of the family for whom the family must take responsibility, in which case it surely must regulate abortion just as it must regulate infanticide or refusal to feed a child, or that fetuses are not yet part of the family, in which case it has no business forcing a citizen to assume life-changing new roles and obligations without her (or his) explicit consent.

IV. Two Views of Human Nature

The central issue in the abortion debate, then, is the status of the fetus, notwithstanding Dworkin's claims to the contrary. In this Part, I explore two different ways of understanding the various views of fetal status.

First, in subpart IV(A), I consider the problem as one of fungibility. If the fetus is a replaceable, undifferentiated mass of cells, the extensive responsibilities one has to it can be shifted to its replacement. Conversely, if it is an irreplaceable, unique soul or human being, it is hard to see how one can treat it very differently from a child.

Then, in subpart IV(B), I examine the notions of humanity that seem to underlie the abortion debate. Some people see humanity as essentially developmental and progressive: something that must be created and re-created in each individual's life over a course of many years. Others see humanity as something that was created in the Garden of Eden; nothing is left for us. These two views of humanity lead to different conceptions of

218. See pp. 151-53. The German Constitutional Court struck down an abortion-on-demand law on just this ground. See Jonas & Gorby, *supra* note 144, at 660 (determining that legalization of abortions was unconstitutional, in part, because a woman could receive the abortion immediately following mandatory counseling, and hence no "serious exchange" about the decision could be undertaken).

219. I find it hard to believe that many women decide to abort or give birth "frivolously," or that if there were such a woman, a brief waiting period would affect her thinking. Waiting period regulation is difficult to understand except as reflecting a paternalistic and insulting view that women (the fathers are not normally required to participate) make such important decisions with no thought. Alternatively, this kind of regulation may simply be an arbitrary stumbling block in the path of those who, after due consideration, have decided to terminate a pregnancy.

why human life is valuable and, correspondingly, to radically different understandings of the issues in abortion and childrearing.

A. *Fetal Nature: The Problem of Fungibility*

Some people view a fertilized egg at two or three months as relatively undifferentiated and easily replaceable. If this egg is lost, another functionally identical egg can replace it a few months later. Indeed, some common practices in our culture seem designed to further that perception: some of us conceal our early pregnancies and do not name the fetus, thereby promoting a sense of its fungibility and lack of individuality and, not incidentally, mitigating the pain that would result from losing the fetus.

People who hold such a view recognize that a newly fertilized egg has only a small chance of coming to term.²²⁰ In their view, this month's egg, even fertilized, is not much different from last month's or next month's until it has shown that it is likely to survive. But if the blastula is fungible, then any responsibility the parents have to it can easily be shifted to another one. The responsibility the parents have is to bring a loved, whole child into the world in a situation where the parents can properly help it to become a mensch,²²¹ not a responsibility to this particular mass of cells, any more than to a particular sperm or egg.²²²

220. Indeed, it appears that only a fraction of fertilized eggs survive to term. John D. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. MED. 336, 339 (1981) (estimating that only about one-third of pregnancies survive to term: half end before recognition and 26% of recognized pregnancies fail to result in live births); Allen J. Wilcox et al., *Incidence of Early Loss of Pregnancy*, 319 NEW ENG. J. MED. 189, 191 (1988) (estimating that about half of all pregnancies survive to term: 22% are lost prior to recognition and "a total of 31 percent of all detected pregnancies . . . did not progress to delivery").

221. See *supra* note 190.

222. In cultures with high infant mortality, one sometimes sees the same response to *children*: even after birth, the parents may struggle not to treat them as individuals. Thus, Philippe Ariès reports that in premodern Europe, children sometimes were not named until there was a high likelihood of survival. See PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 38-40, 128 (Robert Baldick trans., 1962). Even the seemingly most fundamental instinctual moral value—preserving the life of one's child—varies based on perceptions of whether children are replaceable or unique. Thus, infanticide is more widely practiced in societies that have high mortality and low individuation. See HUGH D.R. BAKER, *CHINESE FAMILY AND KINSHIP* 5-6 (1979) (describing traditional Chinese use of infanticide to eliminate children born to families that could not support them); CHINA'S ONE-CHILD FAMILY POLICY 10-11 (Elisabeth Coll et al. eds., 1985) (describing the extremely high infant mortality and the practice of female infanticide in pre-revolutionary China); Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada*, 34 U. TORONTO L.J. 447, 447 & n.1 (1984) (declaring infanticide to be ancient and widespread); Kathryn Moseley, *The History of Infanticide in Western Society*, 1 ISSUES L. & MED. 345 (1985) (describing the infanticide, especially of girls, that was widely practiced and largely ignored in pre-nineteenth-century Europe). Recent research suggests that infanticide, particularly of girls, is still widely practiced in several parts of the world. See ELISABETH CROLL, *CHINESE WOMEN SINCE MAO* 98 (1983) (noting the modern reappearance of female infanticide in China); Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 COLUM.

For these people, any responsibilities they may have are to a sort of abstraction—not so abstract as Dworkin's life in general,²²³ but abstract nonetheless. The responsibility is to a fetus that will become one's child, but not necessarily to this particular fetus.

This distinction explains an apparent contradiction in the judgments of some people who strongly support a right to abortion-at-will and even believe that a woman who becomes pregnant before finishing basic schooling has a responsibility—to herself and her future family—to abort. When the pregnancy is planned and wanted, the same people may expect the mother to carefully abstain from coffee, alcohol, and activities that pose even slight threats to the fetus. On a fetal-centered view, the two positions are clearly contradictory: surely if the mother has a right to kill the fetus deliberately, she also has a lesser included right to risk injury to it. But on a responsibility-centered view, the judgments are consistent. The mother's responsibility is to the future child, not to the fetus. Only in the latter case has it become clear that the fetus will likely become that future child.²²⁴

HUM. RTS. L. REV. 249, 256 (1992); Amartya Sen, *More than 100 Million Women Are Missing*, N.Y. REV. OF BOOKS, Dec. 20, 1990, at 61, 65 (mentioning evidence that China's one-child policy has led to female infanticide).

In the realm of theory, several modern theorists' arguments seem to parallel these social practices. Bruce Ackerman, for example, does not consider the child a full rights-bearing individual until he or she can understand and be persuaded by Ackerman's imaginary dialogues. Accordingly, Ackerman appears to permit not only abortion but infanticide as well. See ACKERMAN, *supra* note 35, at 129, 127-29 (stating that the relevant considerations regarding infanticide are largely indistinguishable from those permitting abortion, as "a day-old infant is no more a citizen than a nine-month fetus"); see also STANLEY I. BENN, *A THEORY OF FREEDOM* 236-40, 252-55 (1988) (distinguishing rights from needs by reasoning that only those capable of making choices relating to their projects and interests can have rights, so fetuses and young children may be proper objects of benevolent concern but have no rights); H.L.A. Hart, *Are There Any Natural Rights?*, in *THEORIES OF RIGHTS* 77, 81-82 (Jeremy Waldron ed., 1984) (arguing that not every duty gives rise to a commensurate right, and that infants are objects of duty but have no rights). Susan Okin has demonstrated that Robert Nozick's position, see NOZICK, *supra* note 35, also leads to permitting infanticide for the different reason that Nozick does not see rights (to life, for example) as including any commensurate responsibility of anyone to care for the rights-bearer. OKIN, *supra* note 154, at 84-86. Without care, infants die. Based on my recent personal experiences, I believe that Ackerman and Benn underestimate the degree to which even very young infants engage in projects, (preverbal) dialogues, and negotiations. However, any such extension of their arguments to grant infants rights might also require granting rights to chimpanzees and some household pets.

223. See *supra* text accompanying note 180.

224. This feeling of responsibility to the child rather than to the fetus also helps explain why people use amniocentesis when abortion is the only possible remedy for any defects that are discovered. As long as the fetus remains fungible and replaceable, there is nothing morally troubling about replacing a defective one with a better instance. In contrast, something is shocking about voluntarily imposing defects on a not-yet-born child by allowing a defective fetus to come to term. Similarly, it is shocking to start a family voluntarily so early that poverty and poor parenting are practically guaranteed. It bears repeating that this mode of analysis, which assumes that the fetus is replaceable, must be utterly unacceptable to anyone who sees the fetus as a person. See *supra* text accompanying notes 204-09 (describing the position that when a fetus exists, it is too late to consider not having a child).

For others, in contrast, the fertilized egg is an individual from the beginning. Anyone who accepts the Catholic doctrine that a unique soul (itself identified as the valuable, God-like part of a not-yet fallen human) enters the protoblastula at conception,²²⁵ should, if consistent,²²⁶ fall into this category. For these people, the fetus cannot be fungible. The responsibility attaches at conception, and the obligation is not to a future, hypothetical child but to this one.

Should fungibility or uniqueness matter? In the sense in which I have been discussing it, the answer is almost automatic. Something replaceable cannot have the same value that something irreplaceable does, if for no other reason than that the replaceable may be replaced.²²⁷

But in another sense, the fungible/unique distinction is empty. Fungibility is not an aspect of the physical world. In a world in which time runs in only one direction, everything is unique because each moment and each object will never again be just as it is. Only our judgment that the differences between two items in four-dimensional space-time are unimportant allows us to call them substitutes for each other, or even to refer to an object as existing through time. As Heraclitus's aphorism has it, the river never runs twice.²²⁸ Indeed, if the particular eddies of the river were important to us, we might not think of it as a river at all: Even the unity of the object is a human decision that this eddy (last week) and that eddy (next week) are part of the same thing.²²⁹

Fungibility and uniqueness, then, result from how we perceive the adequacy of a replacement or continuation of something that no longer exists. Arguments to sanctify something will often include claims that the object of the sanctification is unique, while the opposition will claim that it is more or less fungible. Preservationists, for instance, may find uniqueness in an endangered species that is irreplaceable, such as the snail darter, or in a 3000-year-old sequoia with its own particular, irreplaceable history. Their opponents see only a small fish or a large tree, fungible with many other small fish or large trees.²³⁰ Similarly, when human beings are

225. See JOHN CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* 305-06, 310 (1977).

226. But see *supra* section II(B)(1) (arguing that people need not be consistent).

227. This principle may underlie some of the respect Dworkin notes for great art and endangered species. See pp. 74-78.

228. See FRANK J. YARTZ, *ANCIENT GREEK PHILOSOPHY* 7 (1984).

229. Cf. JORGE LUIS BORGES, *Funes, the Memorious*, in *FICCIONES* 107 (Anthony Kerrigan trans., 1962) (describing a character who was rendered incapable of thinking by his perfect recall and ability to see all things, and each moment of each thing, as unique); JORGE LUIS BORGES, *Pierre Menard, Author of Don Quixote*, in *FICCIONES*, *supra*, at 45 (explaining that a modern repetition of *Don Quixote* is dramatically different from the original, even though the words are identical).

230. See James J. Jackson, *Nature's Gifts or Developers' Scapegoats?*, *ST. LOUIS POST-DISPATCH*, June 8, 1992, at 3B; cf. *The Squirrels Versus the Telescopes*, *CHI. TRIB.*, Oct. 1, 1990, at C1

viewed as merely "masses" or "quarrel[lers] in a far-away country between people of whom we know nothing,"²³¹ rather than unique individuals, their lives no longer seem to require sanctification.²³²

But if a perception that something is unique often leads us to value it, the reverse is equally true. Only by deciding that something is significant can we even see it as unique. When we decide something is important, by that very decision we make it, at least to some extent, irreplaceable. Is a sequoia a replaceable tree or a 3000-year-old individual? Is a snail darter a fungible fish or a unique species? Are people who die statistics on a chart (highway accidents) or individuals (a child stuck in a hole)? Are the victims of war distant people of whom we know nothing or a mother holding her dead child on the television news? These are all differences of moral classification, not physical reality. The distinctions are in the realm of "ought," not "is."²³³

The result for the abortion debate is that the two sides will often be speaking at cross purposes. Some see the fetus as a unique individual human, a person to be sanctified. Others see something of little importance—just the raw materials from which a human will be constructed at some later date, easily replaced by other materials. Rather than Dworkin's picture of a consistent, universally held view that human life must be sanctified, with a spectrum of views regarding how best to achieve this common goal,²³⁴ I see only a shared abstract philosophy with radical divisions in the moral content. Surely most Americans agree that unique individuals are in some sense sacred. That principle offers no hope for

(diminishing preservationists' argument by claiming that the protected Mt. Graham red squirrel is little different from other, abundant red squirrels).

231. Neville Chamberlain, National Radio Broadcast (Sept. 27, 1938), in NEVILLE CHAMBERLAIN, *IN SEARCH OF PEACE* 173, 174 (1939). The same principle applies closer to home as well: Surely I'm not the first law professor to notice that it is far easier to hand out low grades to an anonymous (and, because characterless, fungible) exam number than to a student with an individual name and face. Cf., e.g., Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1938 & n.77 (1993) (observing that the "fungibility" of Asian-Americans makes violence against them more acceptable to their attackers).

232. However, it has become customary to refer to genocidal murder as a Holocaust, as if the desanctified victims were sacrificed to some indecent God by their priestly murders.

233. Sometimes the ought/is distinction may become quite fuzzy, as when an objectified enemy becomes a friend. Think of Jody, the British soldier captured by the IRA in the recent movie *The Crying Game* and his successful ploy to force his captors to see him as an individual, not just "soldier." *THE CRYING GAME* (Miramax Films 1992). It is far easier to kill faceless "Huns," "Reds," or "Imperialists" than a particular individual victim. Perhaps this is why international law protects individual captured soldiers more than masses of uninvolved enemy citizens. International law requires that the detaining power must, among other duties, keep the detainees in good health, by providing medical treatment and sufficient food, as well as supplying adequate clothing, underwear, and footwear. Yoram Dinstein, *Prisoners of War*, in 4 *ENCYCLOPEDIA PUB. INT'L L.* 146, 148 (1982). In contrast, such obligations arise with regard to enemy civilians only if they are interned. Alfred M. DeZayas, *Civilian Population, Protection*, in 3 *ENCYCLOPEDIA PUB. INT'L L.* 96, 99 (1982).

234. See *supra* text accompanying notes 163-69.

universal agreement, however, because it is empty: Only those things that are in some sense sacred have any hope of qualifying as unique individuals.

B. *Human Nature: The Tree of Life and the Abortion Question*

In this subpart, I suggest another way of analyzing the abortion debate. In my view, the strongly conflicting political views of the proper role of the state in regulating abortion reflect deeper divisions in the way we view humanity and value human life. By means of a midrash, or parable, on the biblical story of the tree of knowledge of good and evil,²³⁵ I hope to elucidate two—inevitably caricatured, ideal type—views of humanity.

1. *Genesis*.—The story of the apple²³⁶ in the book of *Genesis* divides the account of the origins of humanity into two radically different parts. The beginnings of the biblical story tell how man and woman were created from the dust of the earth and the spirit of God.²³⁷ But it is the spirit of God that seems to predominate—the description of life in Eden seems most unearthly. In the Garden of Eden, it is not man but God who works: God plants the Garden, God irrigates it, and God makes food grow on trees.²³⁸ The first man and woman apparently live without labor, without needs, and without wants. They are unconscious of sexuality or of the differences between the sexes.²³⁹ They do not live by laws, because nothing, or almost nothing, is forbidden them. In any event, they would have no need for law, since nothing is lacking them.²⁴⁰ As far as we are told, they do not work, play, create, destroy, love, hate, pray, or have sex. They do not even have individual names or identities: Adam is referred to as “the man” and Eve as “the woman” until after the apple.²⁴¹

235. See *Genesis* 2:17, 3:1-24.

236. I follow a Christian literary tradition in referring to the fruit of the tree of knowledge as an apple, despite the clear error of this identification. The text does not name the fruit; apples as we know them require frost and therefore would not grow in gardens where humans as we know them could walk around naked. In any event, the modern sort of apple does not give moral knowledge. The Talmud quotes R. Hisda's tradition (which also defies biology) that the fruit was grapes—not because grapes do give knowledge of a sort, but because “nothing but wine brings woe to man.” TALMUD BAVLI, *Sanhedrin* 70a-b, translated in SONCINO, *supra* note 15, 3 *Seder Nezikin* 478. But see *id.* at 476 (“Raba said, ‘wine and spices made me wise.’”). Others speculated that the fruit was wheat, because children have no knowledge until after they eat wheat. *Id.* at 478.

237. *Genesis* 2:7, 2:22.

238. *Id.* 2:8-10. But see *id.* 2:15 (“God put the man into the Garden to work (or worship) it and keep it.”). Whatever this task involved, it must have been significantly different from Adam's post-Eden earning of bread by the sweat of his brow.

239. See *id.* 2:25 (“And they were both naked, the man and his wife, and were not ashamed.”).

240. Cf. RAWLS, *supra* note 63, § 22, at 126-28 (maintaining that justice is not a relevant notion except in conditions of scarcity).

241. Compare *Genesis* 3:8-9 with *id.* 3:10-21. The Hebrew term for the man, *ha'adam*, has the ambiguity inherent in the English word “man”: it can mean one man, or all mankind (including

Indeed, the text suggests that Adam and Eve are immortal. God tells the man that on the day he eats the fruit of the tree of knowledge he will die,²⁴² yet Adam lives for several hundred years after the apple incident.²⁴³ Thus, unless God's threat was empty, the curse must have been not that Adam would drop dead on that day, but that he would become mortal on that day.²⁴⁴

After the apple, all this changes. Now mortal, Adam and Eve are forbidden for the first time to eat the fruit of the tree of life.²⁴⁵ They are exiled from Eden and forced to work for a living.²⁴⁶ Instead of eating the fruit of trees planted and tended by God, they must eat the produce of the earth, which until then had been barren for lack of a man to work it.²⁴⁷ Adam, now with a proper name and not merely "the man," must earn his bread by the sweat of his brow; Eve will give birth in agony.²⁴⁸ Their eyes open, and they see that they are naked—knowledge of sex, embarrassment, and fear appear for the first time.²⁴⁹ In short, Adam and Eve, now knowing mortality and morality, begin to acquire the status—so clearly important to the biblical author—of neither God nor animal, a status fully achieved only after the Flood, when laws are first introduced.²⁵⁰ Eating the apple makes them into humans.

2. *Exile v. As One of Us: Was the Apple the Fall or the Rise of Humankind?*—The biblical story suggests at least two different views of what makes humans human, of what happened when man and woman ate the apple. One view is probably more familiar to those who learned Christian Bible stories as children. While it may be implicit in the Jewish sources, this view is fully developed only through the Christian concept of original sin.²⁵¹ The apple of knowledge, by this view, marks the fall of man. Man started out God-like, but by eating the apple, sinned and ceased to be God-like. The sin is a matter of some difficulty: It is not clear how

women), or a generic individual human being (male or female). In addition, it is Adam's proper name—the only difference is the presence of the definite article *ha*. 1 AVRAHAM EVEN-SHOSHAN, *supra* note 126, at 25.

242. *Id.* 2:17.

243. *Id.* 5:3-5.

244. See ZOHAR, *Bereshith* 57b, translated in 1 THE ZOHAR, *supra* note 210, at 184-86 (telling a midrash that assumes that human mortality is the fault of Adam).

245. *Genesis* 3:22.

246. *Id.* 3:23.

247. *Id.* 2:5.

248. *Id.* 3:16-19.

249. *Id.* 3:7-10.

250. See *id.* 9:1-17 (describing the giving of the Noachide laws).

251. See FREDERIC R. TENNANT, *THE ORIGIN AND PROPAGATION OF SIN* 4-5 (1902) (crediting St. Augustine with elaborating the ecclesiastical dogma of original sin); see also PIET SCHOONENBERG, *MAN AND SIN* 157-68 (1965) (tracing the doctrinal roots of the concept of original sin).

God-like creatures could sin, and even if they could, why choosing mortality and morality over unquestioning obedience to authority would be sinful. In any event, the result of sin was knowledge, the knowledge that they were naked and had sinned. By eating the apple, Adam and Eve lost their innocence and lost their godliness.

This view suggests that the valuable part of humanity is whatever remains of Eden. We should aspire to be like the man and woman before the fall, when they were still godly and apparently without law, love, knowledge, lust, moral responsibility, or sin. Those parts of us that are most like Adam and Eve in their days of innocence are the parts most worthy of respect and protection.

There is a radically different interpretation at least equally implicit in the biblical text, and it too is familiar to students of Western philosophy, although not often studied in the context of *Genesis*. I will refer to it as the humanist view.²⁵²

In the humanist analysis, as well, eating the fruit of the tree of knowledge is what makes Adam and Eve into humans. The essence of humanness, however, is not sin, but self-knowledge; eating the apple separates us not from God, but from the other creatures.²⁵³ In short, the understanding that we are naked²⁵⁴ differentiates humans from the other creatures and makes us worthy of special consideration. Indeed, knowledge leads God to fear that Adam and Eve, if they were to regain their immortality, would be gods themselves.²⁵⁵ Similarly, on this view, creative work is not merely the result of our fall and exile from God in Eden; rather it is another way that we, after eating the apple, become like God, the first Creator.

Both views agree, then, that only after Adam and Eve attain self-knowledge are they fully human; but according to the humanist view, in sharp contrast to the apple-as-fall view, being fully human is good, not bad. We have been exiled from Eden not because we are fallen, but because we have risen frighteningly close to the level of gods ourselves. One way to view the distinction might be that the first interpretation sees knowledge as causing the fall of man—as separating man from God—while the second view sees knowledge as making humans unique and worthy—

252. Bruce Ackerman suggested this terminology to me.

253. Prior to the apple, God had thought that any of His creatures might be a proper spouse for the man, thus suggesting man was not significantly different from the other creatures. *See Genesis* 2:18-19. The full distinction between humans and beasts does not come until after the Flood when humans first begin to eat other creatures (and other creatures begin to eat meat, as well). *Compare id.* 1:29-30 (explaining that humans, birds, and animals were created vegetarian) *with id.* 9:3-4 (permitting humans to eat all creatures, so long as the meat is blood-free).

254. Socrates expressed a similar thought in his repeated affirmations of the value of knowing that we know nothing. PLATO, *APOLOGY* *23a-c; PLATO, *MENO* *84.

255. *Genesis* 3:22.

both as separating humans from the other animals and as constituting the God-like component of humanity. On the first view, knowledge leads to mortality and exile from God's Eden; on the second, it is knowledge that makes us truly "as one with God, knowing good and evil."²⁵⁶

The two views lead to two fundamentally different understandings of the worth of human beings. Implicit in the notion of the fall is that the worth of the human is the breath of life, the spirit of God that makes the dust of the earth into a man. The soul is what we must treat with respect, for all the rest is just earth.²⁵⁷ Indeed, on a strong version of this view, the spirit of God is the very antithesis of knowledge; after all, knowledge of morality originates in sin. On the humanist view of the apple as the rise of man, in contrast, knowledge is what makes us distinctly human, and it is knowledge—and particularly the knowledge of good and evil—that we must honor and value. It is wisdom, not innocence, to which we should aspire.

Furthermore, the two views give rise to radically different views of God. The first God is the authoritarian known from Christian readings of the Old Testament. The second God, alienated from man precisely *because* He is like man, has the more complex relationship with His creatures (or creators) implicit in the biblical story of Abraham trying to convince God to behave like a mensch at Sodom or its Hasidic and modern variants, such as Rabbi Levi-Yitzhak of Berdichev's tailor who should have refused to forgive God on the Day of Atonement until justice was done, or Amos Oz's story of a Jewish refugee arguing with and losing God on the way to Palestine.²⁵⁸ In this Essay, however, I do not wish to further enter that thicket.

256. *Id.* 3:22. Thus, it is moral knowledge, or wisdom, rather than scientific knowledge, that is at issue here.

257. Oddly, however, in the original Hebrew, human (*adam*) is just earth (*adamah*) with God (*h'*) removed. See *Genesis* 2:7; 3:23.

258. See *Genesis* 18:23-33 (describing Abraham trying to convince God to behave like a mensch at Sodom); *Genesis* 32:25-33 (recounting Jacob's wrestling with God); THE HASIDIC ANTHOLOGY 57 (Louis I. Newman ed., 1968) (retelling the Levi-Yitzhak story); AMOS OZ, BLACK BOX 153 (1987). For another version of the tale of Levi-Yitzhak, see GATES TO THE OLD CITY 729 (Raphael Patai ed. & trans., 1988). Levi-Yitzhak, who surely epitomizes the humanist believer, once stood at the *bima* (pulpit) from morning to night, refusing to pray, and explained, "If You refuse to answer our prayers, I shall refuse to go on saying them." ELIE WIESEL, SOULS ON FIRE 108 (1982). It is also said that after Levi-Yitzhak died the angels had to use force to push him into paradise; he refused to enter, saying, "I shall annoy and go on annoying the Judge of all judges . . . I shall tell Him what his duties are toward His children, who are less stubborn than He." *Id.* at 140-41. For similar stories, see *id.* at 158 (relating how the Rhiziner questioned God's wisdom in waiting to send the Messiah); *id.* at 165-66 (relating how Mashe of Ujhely chided God for His delay in sending the Messiah). As the proverb has it, "Thou hast chosen us from among the nations"—why did You have to pick on the Jews?" YIDDISH PROVERBS 31 (Hanan J. Ayalt ed., 1963). Other modern classics in this genre include YEHUDA AMICHAI, *El Malei Rahamim* [God Full of Mercy], in SHIRIM 1948-1962, at 69-70 (1967); Chaim N. Bialik, *Levadi* [Alone], in THE MODERN HEBREW POEM ITSELF 25-27 (Stanley Burnshaw et al. eds. & trans., 1965).

3. *The Fall of Man and the Abortion Question.*—Both views of humanity are powerful influences in Western thought, and each of us, no doubt, accepts parts and implications of each one. Nonetheless, examining them separately may help to elucidate some of the more difficult philosophical questions we face today. One case in which the two stories lead to opposed results is abortion.

In the first view, humans after the fall have two essences: a good and valuable one, which is the spirit of God that Adam and Eve had in their innocence, and a bad and deplorable one, namely, the sin they acquired with knowledge. Simple arithmetic shows that the "innocent children," in this view, are the most valuable humans of us all. They have the full God-like component—a soul, or the dose of breath of God that gives them life—while they are still lacking in knowledge, and thus in the capacity for moral responsibility. Like Adam and Eve before the apple, they do not know good and evil. Children are thus *closer* to God and *more* worthy than normal adults.²⁵⁹ This theory leads further to placing a high value on innocents of all varieties, even the unborn, once they are determined to be living humans (and thus possessed of the spirit of God).

It is the soul that is uniquely valuable and that makes us of God and not merely the dust of the earth. It seems to follow, then, that the most valuable human is the one with the most soul. The Jewish and Christian traditions, however, generally have insisted that all humans, but no non-humans, have a soul and that all souls are equal.²⁶⁰ The only variable between individuals, then, is the negative side of the balance, knowledge and sin. It follows inexorably that the most innocent and the least responsible, that is, those with the least knowledge and the least ability to sin, will have the most positive balance and be the most valuable. Because the worth of a human is in the God-like part, the less human one is, the better.

Clearly, then, this system puts a great deal of weight on the boundary between human and nonhuman or, in its own terms, on determining who has a soul and who does not. Any creature that has a soul but does not have the postfall human capacity of self-knowledge and responsibility is innocent of sin and thus more valuable than all postfall self-aware humans. Under this view, the most valuable creature will often be the one who—on any other view—is the least human because he is the least capable of post-apple work, love, desire, or knowledge.

259. Cf. *Matthew* 18:3 (King James) ("Except . . . ye be converted, and become as little children, ye shall not enter into the kingdom of heaven.").

260. See, e.g., MISHNAH, *Sanhedrin* 4:5, translated in THE MISHNAH, *supra* note 55, *Sanhedrin* § 4.5; TALMUD BAVLI, *Sanhedrin* 38a, translated in SONCINO, *supra* note 15, 3 *Seder Nezikin* 239-40 ("Why was man created unitary (i.e., only one Adam)? So that no one might say my father was greater than yours."). This theological point is made in a secular fashion in our Declaration of Independence: "We hold these Truths to be self-evident, that all Men are created equal . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Of course, I do not mean to suggest that all Jews and Christians have always believed in this fundamental form of equality. See *infra* note 266.

The response to abortion by those who see eating the apple as the fall, then, will focus on one key issue: When does a fetus enter the category "human"—when does it have a soul? We can now explain President Ronald Reagan's otherwise nonsensical comment that he would support a right to abortion only if it were proven that embryos are not "alive."²⁶¹ Clearly, whether embryos are alive is in itself irrelevant, because, in this society at least, almost no one believes that all life (cockroaches, for instance) has such great value that it outweighs all the claims of a pregnant woman and her already existing family. If President Reagan believes the soul enters the human with the beginning of life itself, however, then his concern begins to make sense.

The misconception that the answer to the abortion problem depends on when life begins is not President Reagan's alone. The Court in *Roe v. Wade*²⁶² incomprehensibly stated, "There has always been strong support for the view that life does not begin until live birth."²⁶³ To the contrary, ordinary scientific definitions of life clearly include not only embryos but unfertilized egg cells (which probably are not considered to be humans by anyone) and human skin cells (which, unlike the egg, at least contain a full set of human genes).²⁶⁴ The question is not the factual one of whether embryos are alive, but the legal and moral one of whether they are "persons":²⁶⁵ independent, full, human lives; children; members of the family; and beings for whom we have accepted a responsibility to care or for whom we are morally obliged to accept that responsibility.

261. See RONALD REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* 21 (1984) ("If you don't know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for all of us to insist on protecting the unborn.").

262. 410 U.S. 113 (1973).

263. *Id.* at 161.

264. See, e.g., THOMAS L. STEDMAN, *STEDMAN'S MEDICAL DICTIONARY* 865 (William R. Hensyl et al. eds., 25th ed. 1990) (defining life as simply "the state of existence characterized by active metabolism").

265. Outside the abortion debate, "persons" include corporations: organizations that generally are viewed as having no moral claims whatsoever, but that do have certain legal rights. The term "persons" may, therefore, be a useful reminder that the issue is whether the law shall deem this entity, whatever it is, worthy of legal protection—much as the underlying moral debate is over when familial responsibility to children attaches to this particular fetus.

The apple-as-fall view has certain resemblances to the Supreme Court's approach toward the rights of corporations. In each case, a formalistic approach to a conclusory label turns the analysis upside down. Thus, the apple-as-fall view states that responsibility attaches when the soul enters the conceptus, or when the fetus becomes a "person"—but the explanation adds nothing. The question still remains, in the absence of clear and unique directions from a silent God: When should we consider the fetus a person and why? Similarly, the Supreme Court's classic decisions regarding the constitutional rights of corporations have focused on the label "person" rather than on the underlying issue of how the rights in question apply to this situation. See, e.g., *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (stating without discussion that corporations are entitled to protection equal to the protections afforded humans); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (holding that corporate speech is entitled to essentially identical protection as individual speech without considering who is actually speaking).

Of course, nothing in the concept of a soul dictates that the soul must enter at conception, birth, bar mitzvah, or age thirty-five (when one may become President), or even that all biological humans have souls and no nonhumans have them. Christian slave owners on occasion sought to exclude their slaves from the consideration due to humans by deciding that the slaves lacked souls;²⁶⁶ dog owners on occasion act as if they believe dogs do have souls.²⁶⁷

Some theory of who does and who does not have a soul, however, is essential. If the soul entered a child only at birth, the fetus would be of no importance. It would be simply dust of the earth, with no claim on our consciences at all. But if the soul enters at conception, the fetus is more valuable than its mother. By hypothesis each has the same valuable element, the soul, but the fetus, unlike the mother, is innocent and without responsibility for its situation. The decision as to how to value these two creatures if their interests conflict is clear under either view—clear, but radically different.

This view of humans as fallen gods, combined with a second theory that the soul enters a human embryo at conception, underpins the equation of abortion with murder. Indeed, if applied consistently, this theory must lead to the conclusion that abortion is a particularly heinous kind of murder—a murder of a fully innocent, more godly, prehuman, still in Eden. For a consistent holder of this vision,²⁶⁸ the problem of abortion can have only one solution: The rights of the fetus must be paramount, even at the cost of the mother's life. For how could we have the right to sacrifice an innocent person to save a less innocent one?²⁶⁹

The position that animal rights theorists like Tom Regan have taken also follows directly from this view. Regan postulates a group of creatures, including various humans and a dog, on a raft; all will drown unless one is thrown overboard. He asks whether one should be sacrificed and if so, which one.²⁷⁰ One might consider the relative responsibility of each one for the predicament that they are in. Those who are more responsible should have to suffer the consequences of their actions before those who were less able to influence the outcome or who less freely chose to put themselves in the predicament (perhaps this is the logic behind the ancient seafaring principles that the captain should be the last to leave the sinking ship or "women and children first").

266. For an example of this strain of extraordinary racism, see, for example, BUCKNER H. PAYNE, *THE NEGRO: WHAT IS HIS ETHNOLOGICAL STATUS?* 22 (1867), reprinted in *5 ANTI-BLACK THOUGHT 1863-1925*, at 1, 22 (John D. Smith ed., 1993) (arguing that "the Negro" is not a descendant of Adam but rather of a beast created on the fifth day without a soul and not in the image of God).

267. See La Toya Jackson, *She's an Animal Lover*, N.Y. *NEWSDAY*, Aug. 25, 1991, at 35 ("As a pet owner, my heart went out to these people [whose pets had died] and to the souls of their pets.").

268. People may hold inconsistent views, however. See *supra* section II(B)(1).

269. But see *supra* subpart II(B) (discussing some ways one might conclude there is such a right).

270. TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 324-25 (1983).

It should be clear that if you consider the dog to be a full moral subject, that is, if you conclude a dog has a soul, the dog is going to have the strongest right to be saved of the whole group. A dog, like a fetus, is not capable of making a moral decision. It, unlike the humans, did not *choose* to purchase a ticket on the boat or to live in a house by the flooded river. Unlike the humans, the dog has no responsibility for its situation. Thus, only the dog is innocent; it has not eaten of the apple and thus cannot have sinned. Because it has the least responsibility, if the dog also has a soul, it has the strongest claim to be saved.²⁷¹

4. *The Rise of Humanity and the Abortion Question.*—The interpretation that views the eating of the apple as the beginning of wisdom differs dramatically. Here, humanity and godliness are not contradictory. Experience, knowledge, productivity, and *menschlichkeit*,²⁷² not innocence, are our valuable qualities. According to this view, humanity does not simply come on receipt of a soul; rather, the more one has eaten of the apple, the more self-knowledge and responsibility one has, the more one is truly human, the closer one is to God, and the more one is created in God's image.²⁷³

271. Regan concludes the dog should be thrown overboard, but only because he assumes that the humans are equally lacking in responsibility for their fate. *Id.* at 324-28. When he lifts that strained assumption, he concludes by the logic outlined above that it is wrong to use animals in research experiments that will save human lives. *Id.* at 378-85.

272. The mentality of a mensch. *See supra* note 190.

273. Several readers of this Essay have resisted the notion of a gradual entry into personhood, arguing that one either is, or is not, a person. In their view and my terms, when one has eaten enough of the apple, one suddenly becomes a person. This reading of the humanist view would bring it closer to the apple-as-fall view of ensoulment, because again there would be a sharp, if sometimes difficult to identify, boundary between person and nonperson.

However, the characteristics to which the humanist looks are all continua rather than black-or-white, on-or-off switches. Thus, for example, there is no precise moment at which a fetus becomes self-aware. Rather, a fetus developing into a child and then into an adult becomes more aware of self and the distinction between self and others as it grows older. The psychiatric profession is predicated on the belief that even adults still have trouble separating themselves from their parents. Humanists likewise should see eating the apple as a lifelong enterprise.

The humanist view, then, more naturally thinks of personhood as something into which one grows, rather than a sudden moment of ensoulment. The boundary between fetus and person is like the boundary between acorn and oak. The acorn is not an oak tree; yet how to classify a sapling, which is neither an acorn nor an oak tree, will depend on our purpose.

For purposes of the abortion debate, the distinction within the humanist view between the gradualist view I present in this Essay, in which a fetus becomes more and more like a human, finally reaching full "manhood" only after childhood, and the view that there is a moment of secularized ensoulment at which the fetus (or child, in Ackerman's version) becomes a human person, is probably unimportant. Under almost any variant of the humanist view, the fetus, especially at early stages of development most relevant to the abortion debate, *see* Brief of Amici, *supra* note 188, at 51-52, has not developed enough to count as a human person for purposes of a right to life. A fetus, like the man and the woman in Eden, does not love or create, nor does it acknowledge the distinction between self and others. Thus, regardless of whether the transition from the prehuman fetus to the full person is instantaneous or gradual, the fetus is clearly prehuman.

The ability to know right from wrong and the accompanying responsibility to act rightly make Adam and Eve moral subjects and therefore moral objects. Since responsibility and knowledge are the essence of humanity and being human is a good thing, acquiring self-knowledge is not the fall of man but the origin of humanity.

This view clearly leads to a different analysis of boundary problems such as those in the debates surrounding abortion and terminally comatose patients, which the first view sees primarily as problems of determining who is or is not human. For those who view the apple as the rise of humanity, moral worth is not the result of a definitional category with a sharp, if difficult to defend, boundary. Rather, because responsibility, productivity, and knowledge of good and evil are what make us God-like humans, groups such as fetuses, the terminally comatose, and dogs all present only minimal claims for treatment as full human beings. Indeed, embryos and fetuses are valuable primarily as *potential* responsible humans, not as full-fledged bearers of the essential human value.²⁷⁴ Similarly, the terminally comatose command respect because they *were* full humans, not because they have returned to Eden's innocence.

Thus, this view may result in a gradualistic approach—no rights at conception, many at quickening, and a full right to life equal to that of others only at viability or birth.²⁷⁵ As the fetus comes closer to birth, it becomes more human, the potential that it will become fully human and a responsible moral being becomes greater, and the fetus must be given greater consideration as a potential future member of the community.²⁷⁶

Similarly, even after birth, when infants obviously are sufficiently human to have a full right to life, children will acquire more rights as they become more responsible and thus more fully human. Full civil rights

274. Those who perceive personhood as an either/or proposition and who reject the notion that potential humans should be treated differently because of that potential will take a different view. They will give the fetus no consideration at all, because it clearly is not yet a human. See, e.g., Rubenfeld, *Conception*, *supra* note 214, at 611-13 (arguing that there can be no justification for limiting a woman's right to an abortion if a fetus is only a "potential" human being).

275. Similarly, adults who immigrate to a new political community may be given an intermediate status in which they are neither fully aliens nor fully citizens, but something in between. Once the immigrant is part of the community, however, this intermediate status becomes morally indefensible: Germany's practice of denying citizenship to third-generation *Gastarbeiter* ("guest" workers) is comparable to retaining the right to abortion even well after birth. See Gerald L. Neuman, "We Are the People": *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 334-35 (1992) (discussing the problem of "[d]iscrimination against aliens as a class," which occurs in the context of inherited alien status); see also WALZER, *supra* note 31, at 58 (criticizing the guest worker system).

276. If abortion is an option, an unwanted fetus has no potential to become a full human being. I assume this is part of why many humanists simultaneously believe in a right to abortion and in the duty of parents to protect their (wanted) unborn children. See *supra* text accompanying note 224. Roe's reasoning, to the extent it is based on a postulated state interest in protecting potential life, see *Roe v. Wade*, 410 U.S. 113, 153-54 (1973), is flawed for a similar reason. See Rubenfeld, *Conception*, *supra* note 214, at 599.

(which we often refer to as human rights) come only at age eighteen. By this reasoning, the question of voting age is an extension of, not completely separate from, the problem of abortion. Each is a question of determining when a biological human has eaten enough of the apple to be enough of a mensch to merit this particular right of humanity.

Regarding abortion, the humanist view gives dramatically different answers from the apple-as-fall view. The mother is a fully responsible human, and the fetus is merely a potential human. Thus, when a choice must be made between the life of one or the other there can be no question of sacrificing the mother. A human life must be worth more than a non-human one, even if the nonhuman is potentially human.²⁷⁷

The humanist view offers no easy answer, though, for abortions in non-life-threatening situations. The balance in these cases must depend on the value given to the parents' reason for the abortion and the value given to the life of a potential responsible human. Determining these values is a problem to which this view gives no clear answer—only that the value of the potential life is more than zero and less than that of a full human who has eaten of the apple.²⁷⁸

Unlike the first view, which presumes there is a specific moment when dust is transformed into a human and which gives clear answers on either side of the human/nonhuman boundary, the humanist view must make difficult choices between competing interests, when the stakes become higher (and more troubling) as more and more apple is eaten. Indeed, it may lead even those who value the potential humanity of the embryo most highly to conclude that the particularized, fact-dependent balancing necessary to solve the dilemma is too difficult for the clumsy apparatus of the law and therefore should be left to individuals and their consciences.²⁷⁹

5. *Learning from the Tree of Knowledge.*—On a broader view, the two understandings of the tree of knowledge of good and evil point to two fundamentally different views of man. By the logic of both views, however, God only began the process of creating what we call humans. In each case, by eating the apple, by discovering self-knowledge, morality, and their nakedness, Adam and Eve took a basic step in finishing the job.

277. This suggests an alternative way to characterize the contrast between the humanist view and the apple-as-fall view. If the fetus is not human, it does not matter whether it is innocent and the mother is not: A "guilty" human is worth more than an "innocent" potential human.

278. However, if the fetus is not yet human, the abortion decision need not be based on any consideration at all of the fetus's interests and rights. Rather, the central issue may be the responsibilities of the existing human beings. See *supra* subparts III(D),(E).

279. Similarly, on the responsibility-centered view outlined in subparts III(D) and (E) above, the state can never have a role. The question of how a family should balance the competing claims on its finite capacities is far too fact-specific to permit sensible legislation, even were it not offensively intrusive.

The most basic characteristics of the human condition, both views agree, are the result of human, not heavenly, actions: scarcity of resources, human production, sex, envy, aspirations, work, and play—all exist only after the fateful decision to acquire knowledge.

The two views differ, though, in their evaluations of the entrance into the world of humanity as we know it. On one view, people are fallen gods, valuable only because they still retain traces of something that this view itself identifies as essentially *inhuman*. What is good in man comes from God; it is only evil, knowledge, and sin that we have created for ourselves. On the other view, humanity is celebrated precisely because, like God, it has taken into its own hands the capacity for creating itself and the responsibility for the consequences. Humanity is celebrated precisely because we collectively have eaten the apple and because each one of us, in growing up, eats the apple.

I doubt that philosophic techniques could persuade all of us to choose one of these views. To me, celebrating humans because they are human is clearly more attractive than celebrating them because they are not, but I do not know how to persuade those who disagree. For the foreseeable future, however, one thing is clear: We, as Americans, will have to live with both views. The task before us is to find a way to live with each other despite such different views of the nature of humanity—and the first step must be understanding the depth of the chasm between us.

On the abortion issue specifically, three conclusions follow. First, for those who accept that knowledge, rationality, loving relationships, work, or similar attributes of humanity are the reasons we value humans, the issue of abortion will be too complex to leave to the clumsy hands of the law. The law's role should be simply to defer to the consciences of the women and families involved. The balancing and weighing that must be made in any decision to abort or to bear an unexpected child are simply too important and too complex to be left to the Supreme Court or the state legislature.

We (those who deny the fetus full personhood) must accept that abortion is an issue of conscience that must be left to the conscience. After excluding the law from this area, our task as neighbors and fellow citizens is to seek to inform those consciences. We should discuss openly when and under what circumstances abortion is right or wrong—not just when it should be legal or illegal. We should also consider the other issue, one about which we are too often silent: When is it wrong to give birth to a child because no one has made (or is able to make) the necessary commitment to help it to eat the fruit of the tree of knowledge? The law, to be sure, has no place regulating such decisions, but morality has something to say nonetheless.

Second, we must understand that freedom of conscience will seem wrong, radically wrong, to those who truly believe that humanity is

inherently bad. We should not, it seems to me, pretend that freedom of conscience is a neutral position to which others would agree were they only less anxious to impose their particular moral code on us.²⁸⁰ Unless we can convince them that the soul does not enter at conception, or that humanness has value even apart from the breath of God, or that the knowledge of good and evil is something to be celebrated, they cannot accept our position. If, as they claim, the fetus has all that is valuable in humanity, they must try to prevent us from following our different consciences, whatever the cost in the lives of the parents and families of unwanted fetuses. Let us all, instead, acknowledge that abortion is an issue on which a perfect compromise is impossible. We cannot satisfy everyone.

Finally, if no neutral solution is possible, we must choose between two alternatives. One is the *Kulturkampf*.²⁸¹ We, or they, may conclude that we are right and they are wrong, period. The resulting political battle is a bitter one, in which the losers surely will feel they have been wronged and seek to struggle on, while the winners will try by every means available to suppress the minority view.

The alternative solution is toleration, but a more limited form of toleration than the image of a neutral solution suggests. We have no choice as a society but to either ban or permit abortion—there is no neutral path. On that issue, then, we must debate and decide by the usual political means: constitutional adjudication, electoral campaigns, and polemic articles. Ultimately, the majority's view—as filtered through our decidedly nonmajoritarian political system—should prevail.²⁸² But respect for the dissidents demands that we allow them to continue their struggle to insist that we are wrong.

So, if the apple-as-knowledge view wins there can be no possibility of a legislative ban on abortion. Those of the apple-as-fall view must be

280. This is what Dworkin has done. After asserting that no one could possibly believe that a fetus is entitled to be treated as equal to a human being, he proceeds to claim that the "actual" beliefs of *Roe*'s opponents are merely opposite ends of a common spectrum of concern over how best to sanctify (born) human life. P. 150. Because this issue is intensely personal, he argues, the state should stay out of it and simply allow abortion. Pp. 154-55. But if, as I have argued here, his premise is wrong and *Roe*'s opponents actually do mean that fetuses are humans (in the morally relevant sense), his conclusion cannot stand. Freedom of conscience does not extend to matters of homicide.

281. The term *Kulturkampf*, or "culture war," first appeared in Germany in the 1870s as a description of the political battle between the National Liberal Party of Germany and the Catholic Church. Philip Rief, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions*, 3 YALE J.L. & HUMAN. 315, 326-27 (1991).

282. I do not mean to suggest that the Court is wrong in finding that the Constitution decides the question. The Constitution is part of the political system, and constitutional adjudication is part of the political debate. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1042 (1984) (distinguishing ordinary politics from rare constitutional politics in which Americans "mean to present themselves to one another as citizens" (emphasis in original)); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5-10 (1979) (endorsing the primary role of the judiciary in the debate regarding the meaning of our common values and constitutional principles).

allowed, however, to try to convince us that we are wrong. And if their view prevails, legislatures may restrict abortion, but only in a way, if such a way is possible, that respects the rights of others to have other views.²⁸³ In any case, fully consistent principle should give way to the deeper necessity of real citizens' continuing to live with each other.

V. Conclusion

Chapter Five of *Life's Dominion* summarizes concisely and elegantly Dworkin's famous view of constitutional adjudication. He argues that original intent theory is a chimera, and that a court must interpret the meaning of the text before it, not the (even more difficult to determine) meaning some group of people in the past gave to it.²⁸⁴ The Fourteenth Amendment requires the government to provide due process, not nineteenth-century due process. Thus, he argues, the specific beliefs of nineteenth-century political actors regarding due process are irrelevant to the interpretive process.²⁸⁵ This argument seems especially persuasive in the abortion context. The adopters of the Fourteenth Amendment could not have had any view regarding its applicability to abortion in its modern sense, because the only equivalents in their day were radically different.

First, in the mid-nineteenth century, abortion was extremely dangerous to women—even more dangerous than childbirth, which took the lives of many women.²⁸⁶ Today, legal abortion is safer than childbirth, and childbirth itself, though still quite dangerous, is unrecognizably safer than it used to be.²⁸⁷ Thus, a nineteenth-century legislature reasonably could have banned abortion as a health and safety measure relating only to adult

283. Ireland might serve as an example of this type of limited toleration of those who believe that abortion is sometimes warranted. Ireland has perhaps the most restrictive abortion law in the West, but it freely allows travel to nearby England for abortions. In 1983, the abortion ban was made part of the Irish Constitution following a referendum in which it received 67% support. See Jeffrey A. Weinstein, Note, "An Irish Solution to an Irish Problem": *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 173 (1993). Less than a decade later, following a highly controversial decision of the Irish Supreme Court permitting a 14-year-old rape victim to travel to England for an abortion only because she threatened suicide, voters approved—again by large majorities—two amendments to the constitution permitting travel abroad for abortion and domestic dissemination of information regarding the availability of abortion abroad. See *id.* at 190-96 (discussing *Attorney General v. X*, 1992 I.L.R.M. 401 (Ir. S.C.)).

Alternatively, the Irish compromise may simply be internally inconsistent, another example of how unrealistic the notion of reflective equilibrium is. See *supra* note 77 and accompanying text.

284. Pp. 133-36.

285. Pp. 138-41.

286. See *Roe v. Wade*, 410 U.S. 113, 148-49 (1973) (noting that as late as the turn of the century, mortality rates for abortion were much higher than they are today). Mortality rates dropped sharply after the introduction of antibiotics and continued to decline until, after legalization, dropping to virtually zero. See INSTITUTE OF MEDICINE, *supra* note 35, at 79-80 (stating that a "first trimester [legal abortion] is far less dangerous to [a woman's life] than is carrying a pregnancy to term"—1.7 deaths per 100,000 as opposed to 14.1 deaths per 100,000); *supra* notes 51, 59.

287. See *supra* notes 51, 59.

women and their already existing families without ever considering the fetus at all. That rationale makes no sense today.²⁸⁸

Second, the social meaning of family and childrearing today bears little resemblance to meanings that confronted a mid-nineteenth-century legislature.²⁸⁹ Issues of two-career families, paying for college, or the possibility of divorce with its attendant financial consequences, to name just a few central factors in modern (conventional, middle-class) family-planning decisions, simply did not exist.²⁹⁰ Nor could the legislatures that criminalized abortion have contemplated the meaning of the choices couples—married or not—face today when generally effective birth control fails or when they learn their baby will be born deformed—the issues were yet to arise.

In short, the basic conflict addressed in the modern debate—between the obligation of a family to determine its membership in a responsible fashion on the one hand,²⁹¹ and the putative claims of the fetus on the other—did not exist. Accordingly, even if we were inclined to replace democracy with “necrocracy”—the rule of the dead—we could never know how the original adopters of our Constitution and its amendments would have applied the general principles they enacted to the situations we face.

As Dworkin convincingly argues, the fact that the adopters had no view on modern abortion does not imply that they meant to *authorize* it.²⁹² Ours, he says, is a constitution of principle, not historical details. Paradoxically, the plain meaning and the original intent of the Constitution are that the original understanding is irrelevant: The Constitution bars violations of due process, not violations of nineteenth-century notions of due process.²⁹³ Dworkin thus argues that the Court has no choice but to interpret the Constitution's Due Process Clause, that it cannot simply

288. See *Roe*, 410 U.S. at 149 (pointing out the obsolescence of the argument that criminal abortion laws are justified as a consumer-protection measure to prevent women from submitting to a life-threatening procedure). In addition to its no longer correct assumption that (legal) abortion is extremely unsafe, the argument also falsely assumes that making abortion illegal will prevent it from happening. In fact, however, many women were prepared to risk their lives to obtain even illegal abortions. Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982) (estimating that there were 200,000 to 1.2 million illegal abortions annually in the United States in the 1960s). As a result, the criminalization of abortion unquestionably was a public health disaster. *Id.* at 1586-87 (reporting that legalization resulted in dramatic declines in morbidity and mortality associated with abortion).

289. See generally Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (describing distinctive state intervention in many areas of family life and childrearing during the late nineteenth century).

290. See, e.g., Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801, 805 & n.19 (noting that most states still retained the common-law view that the wife had no separate legal existence); Teitelbaum, *supra* note 289, at 1161 (noting the virtual absence of divorce).

291. In the days before effective family planning, this obligation must have had a very different shape, if it existed at all.

292. See p. 144.

293. *Id.*

abdicate to an illusory original intent, and that it must interpret in accordance with "our" sense of right and wrong—not that of some deceased Founding Father. History or original intent offers no neutral position on the interpretive issue; the Court (and the citizenry) must attempt to decide (and redecide) for themselves the meaning for the abortion debate of the Due Process, Equal Protection, and Religion Clauses. To this point, his arguments are persuasive and his demolition of original intent conclusive.

But having insisted that we must struggle with the interpretive issue, Dworkin abandons his own insight in his proffered interpretation. As we have seen, he argues that only one resolution of the abortion debate is legitimate. Positions on abortion, he claims, result from different views of "intrinsic values" only, and so, the Constitution bars the state from intervening.²⁹⁴ The lesson of the Tree of Life, I believe, is that this second issue, of the role of the state, is like the first, of the role of the Court. The promise of original intent theory to rescue the Court from indeterminate interpretation is false, because there is no neutral historical answer. But Dworkin's promise to rescue the state from the political indeterminacy by neutral philosophy is little different. Here too there is no neutral resting ground. Here too we have no choice but to engage in the interpretive enterprise, trying as best we can to make sense for ourselves of a philosophic system that offers no more clear answers than the original intent Dworkin so eloquently disparages. Dworkin's proposal that the state simply abstain from legislating is as illusory as original intent theory's proposal that the Court abstain from interpretation.

Prophecy is over, God is silent, and detailed moral truths are not, contrary to our Declaration of Independence, self-evident.²⁹⁵ Even after reflection, too many moral truths evidence themselves (like the prophecies) differently to different people (and even the same person). Collectively and individually, we reach not a reflective equilibrium, but chaotic disequilibria.²⁹⁶ Dworkin's efforts to articulate the argument to allow constitutional law to replace politics seems futile. Constitutions, as he brilliantly argues, must be interpreted in accordance with philosophic norms, but we cannot agree on the content of these norms.

However, the impossibility of a theory of rights does not lessen our need for one. Majority approval (even leaving aside public choice theory problems)²⁹⁷ cannot suffice to make a sufficiently immoral law legitimate,

294. See pp. 113-14.

295. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

296. See *supra* notes 77, 283 and accompanying text.

297. Public choice theorists including Kenneth Arrow, E.E. Schattschneider, and Mancur Olson have suggested that the notion of majority will is incoherent. The results of a majoritarian political process, even assuming that each individual has an internally consistent set of beliefs, will depend on the order in which questions are presented and the effects of problems of collective action, free riders,

at least absent a convincing explanation of why oppression by a majority is morally different from oppression by a minority. Surely, thus, the minority status of African-Americans in the United States did not by itself make Jim Crow less oppressive than its equivalent in South Africa, where Blacks are a majority.²⁹⁸ Accordingly, we must have some theory of rights limiting majority rule, and we must have a constitution embodying those limitations. In short, the paradox underlying the failure of one of our greatest philosophers in his attempt to apply his theories to one of our most pressing issues is this: While there must be "rights," we have no "right" answer for how to determine them. Dworkin's efforts notwithstanding, we have no satisfactory account of which rights can stand in the face of the majority or when.

The distinction between law as the realm of right and majoritarianism as the realm of will, then, has broken down. The right is created, at least in part, by our collective will: Neither Dworkin nor anyone else has found a base for political philosophy that does not require near unanimous consent. Since that consent does not (in fact) exist, it must be created; we must engage in politics, not merely imagine it, to create the right.²⁹⁹ Correspondingly, the majority's will, if it is to have any right to govern, must be an educated will, engaged in the struggle to hear the words of a silent God. Neither rights nor majoritarianism can stand without the other.

If there is any lesson to be learned, it must be at least that the abortion debate is too important to be left to lawyers and the Supreme Court. It should return to the mainstream of politics. The abortion controversy ultimately should not be resolved in the Court or even in Congress, but in the public forum by a great debate, an exchange of arguments, and ultimately a compromise. This compromise, I imagine, in substance will look

and capture. As a result, the same issue may be resolved differently by the same group, with no change of individual opinions, in chaotic fluctuations that do not approach any equilibrium. For a recent law journal discussion of some of these issues, see generally Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-40 (1990) (discussing the implications of public choice theory for majoritarian systems).

298. On the American system of apartheid, see Justice Douglas's opinion in *Bell v. Maryland*, 378 U.S. 226, 254-55 (1963) (Douglas, J., concurring). On the issue of the need for a constitution, see Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 427 (1981) (arguing that oppression by a majority is still oppression).

299. Liberal theory has often claimed that imaginary politics could eliminate the need for actual discourse. For a sampling of imaginary agreements, consider LOCKE, *supra* note 29 (debating governmental structure based on an imaginary social contract); NOZICK, *supra* note 35 (arguing for a limited role of government based on an imaginary sequence of voluntary contracts); RAWLS, *supra* note 63 (basing a concept of justice on imaginary debates behind the veil of ignorance); ACKERMAN, *supra* note 35 (basing politics on imaginary dialogues instead of actual ones). One part of my argument in this Essay is that Dworkin, despite his avoidance of the rhetorical form, remains within that tradition. He too is imagining a dialogue he thinks others ought to have, rather than listening to what the others are actually saying. And he too would like to eliminate any need for the messiness of actual politics by his imaginary one.

much like the suggestion of *Roe* or Dworkin, adopted not because it is the only correct analysis of our constitutional texts, but because it is the only compromise that offers any promise for mutual respect in a political community—respect for the women and men who must rear the next generation, for the children who will be born (and hopefully reared, educated, and loved into full human beings), and for the many and various religious and nonreligious traditions to which the American people are the proud heirs.

This debate, though, must look quite different from that suggested by Dworkin's book. The debate must take seriously the arguments of proponents of state intervention: abortion is a form of murder; the time for choice has already passed; a fetus—sentient or not—is at least as worthy of governmental protection as an endangered species, for it is in the relevant sense a human, and perhaps even an especially worthy (because innocent) human.³⁰⁰ It must take seriously the counterarguments of opponents of state intervention: the responsibility of rearing a child is too great to force women to take it on involuntarily; in the modern era (with safe and fairly effective birth control), it is ludicrous to equate having sex with a choice to have a child; it is immoral to bring a child into the world if you are not capable of or willing to bring it up lovingly; and—underpinning of all these arguments—the fetus is not yet a child or a member of the family in the relevant moral sense.³⁰¹

Dworkin accuses those who oppose legal abortion of incoherence. On the contrary, they are not incoherent, but wrong. At the same time, Dworkin's approach diminishes the political position of conscientious supporters of legal abortion. His ultimate conclusion, after all, is that all sides on the abortion controversy are simply seeking to sanctify life,³⁰² but that is an astomishingly weak basis to defend a right to abortion. For while people may differ on how best to sanctify life, the burden of persuasion surely must fall on those who would sanctify life by promoting death. Even if he is right that the issue of how best to sanctify life is ultimately religious, it does not follow that the government must avoid taking the cautious approach of at least discouraging, if not banning, killing.

Ultimately, the debate centers on the status of the fetus. If we care enough about the fetus to view it as having absolute rights, or as being the object of responsibilities that may not be denied, or as being irreplaceable and unique, then we must see abortion as, at a minimum, a great moral tragedy that cries out for state intervention. If, in contrast, we see the fetus as no more than a potential—realizable only with great effort, resources, and luck—or as a fungible mass of genetic material not yet

300. See *supra* notes 91-103 and accompanying text.

301. See *supra* notes 132-46 and accompanying text.

302. See *supra* notes 149-63 and accompanying text.

developed enough to qualify for our concern, then we have no choice but to focus on our obligations to the already living and breathing adults and children who will suffer the consequences of obstacles to legal abortion. Because we hold both of these opinions and many more, the controversy must—and should—continue.

Dworkin claims that if this is the debate, if it is about whether a fetus is a person, then "argument is irrelevant and accommodation impossible."³⁰³ I disagree. First, this is the debate, and pretending it is not will not make the issues before us any less difficult. More important, argument is far from irrelevant. If our values are right, they may also be persuasive. At least, one hopes so. Those who believe in state abstention must explain why morality requires seeing shades of gray, not the false dichotomy of those who would regulate. They must explain why difficult decisions must be made in life, why giving birth to children is not enough, and why rights should not begin at conception and end at birth. They must explain that conflicts between moral values exist, that life and morality are not as regulationists see it, and that the other side's simplistic vision of "bad girls" willfully making babies in sin so they can cold-bloodedly and heartlessly murder them has little to do with the true decisions facing American families. They must explain the effects on society of a law that flies in the face of the moral beliefs and needs of the majority, or even a large minority, and they must remind people of the weakness of the law when it attempts that type of social reform. Let them remind people, who are now used to abortions safer than childbirth, of the old days when entire hospital wards were devoted to repairing botched abortions and of myriads of women maimed and killed by the pre-*Roe* system. And let them explain, as Dworkin does, how strange it is to think of a potential human as if it were human already. These explanations are not "irrelevant"; they are the essential beginnings of a conversation.

In the meantime, the debate no doubt will continue, at least until RU 486³⁰⁴ or its successor makes abortion easy, safe, and private enough to put early abortions into the same category as birth control and eliminate the need for most later ones. But even in the absence of an agreement, accommodation is possible. In a country like the United States, where the majority believes in the need to love children and not just bear them, the

303. P. 24.

304. RU 486 is an orally administered, synthetic 19-Norsteroid that interacts strongly with the progesterone receptor and serves as a progesterone antagonist. Progesterone is essential for the maintenance of pregnancy, and its withdrawal causes interruption of gestation. See generally Beatrice Couzinnet et al., *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 NEW ENG. J. MED. 1565 (1986). Critically, it appears to allow safe abortions to be performed without surgery and without special clinics. Thus, its commercial advent will further blur the distinction, if there is any, between contraception (generally accepted by American law and public opinion) and early abortion.

accommodation would require the state both to allow abortion and allow reasonable attempts at persuasion (but not intimidation) by opponents. If abortion opponents have a persuasive argument for why needlessly adding to the misery and hatred in the world will make us a better people, let them articulate it. If it is convincing, there will be little need for abortion regulation anyway.³⁰⁵

Were the majority to conclude that the choice must always be to have a child regardless of the circumstances, I believe that regulation would be required. Nonetheless, accommodation is still possible: Ban abortion, but allow those who disagree to opt out (by travelling out of the jurisdiction, for instance³⁰⁶).

These are majoritarian solutions. They depend for their legitimacy primarily on a lively debate and on the willingness of the majority to listen to and understand the arguments of the minority, and to attempt to persuade, not merely dominate, the minority. It is that debate that Dworkin, in the classic manner of the rights tradition, characterizes as "irrelevant."³⁰⁷

These solutions depend, too, on a shared understanding among all the participants that this is not the sort of issue over which we are prepared to split the country. At the center of the debate are matters of principle, and Dworkin notwithstanding, deeply conflicting principle. But for the sake of peace, principles must sometimes give way. That is the true lesson of the liberal tradition.

305. If the pro-regulation position were persuasive, induced abortions would be rare indeed—far rarer than homicide, since it is hard to imagine killing a fetus in the heat of passion.

306. For discussion of Ireland's example of this type of limited toleration, see *supra* note 283 and accompanying text. It is, of course, a very limited and unsatisfactory accommodation, especially for those of limited financial means. But were a majority to conclude that abortion is fundamentally immoral, I see no alternative. I leave aside the issue of the appropriate jurisdiction to make the decision, for I see no clear a priori reason why abortion must be regulated at the state, rather than the federal or local, level. I also leave aside the interesting issue of hypocrisy, or in my terms, individual disequilibrium: it is at least possible that the Irish compromise is not an accommodation of a minority position, but an attempt to make a public statement of the evil of abortion while keeping it available in the event of necessity. This is a common educational use of the law and as a general rule not an unsound one; in the abortion context, however, the human misery created by this seemingly symbolic obeisance to half-forgotten moral imperatives could only be justifiable if we truly believed the fetus to be human.

307. See *supra* text accompanying note 303.