

# BOOK REVIEW

## THE EMPEROR WEARS NO CLOTHES: LIFE'S DOMINION AND DWORKIN'S INTEGRITY

LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM By Ronald Dworkin. New York: Alfred A. Knopf, 1993. Pp. 273. \$23

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I rather tell thee what is to be feared  
Than what I fear: for always I am Caesar.<sup>1</sup>

Someone acts against my interests when he [sic] . . . writes a bad review of my book . . . .<sup>2</sup>

There is a point in every philosophy when the philosopher's "conviction" appears on the stage — or to use the language of an ancient Mystery: *Adventavit asinus, / Pulcher et fortissimus.*<sup>3</sup>

## I

### INTRODUCTION:

#### HERCULES<sup>4</sup> VISITS THE REPRODUCTIVE HEALTH CENTER

Ronald Dworkin, Professor of Law at New York University School of Law,<sup>5</sup> holds forth in his newest book, *Life's Dominion*, on what seems to be the single most divisive and politically charged issue for America today: abortion. Dworkin purports to explain how and why the nation is so divided and what outcome of the conflict is philosophically mandated. Dworkin concludes that the trimester framework of *Roe v. Wade*<sup>6</sup> is correct, as is the majority opinion in *Planned Parenthood v. Casey*.<sup>7</sup> The public fanfare with which this book's publication was met is a sign of the great expectations created by a work with such lofty goals.<sup>8</sup> To the extent that

1. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, lines 211-12 (Marvin Spevack ed., Cambridge University Press 1988).

2. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 17 (1993). Professor Dworkin disregards the policy, adopted by this and other New York University School of Law journals, of using feminine pronouns for the generic third person singular.

3. "The ass arrived, Beautiful and most brave." FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 15 (Walter Kaufmann trans., Vintage Books 1966) (1886).

4. Hercules is Dworkin's figure for the ideal judge. RONALD DWORKIN, LAW'S EMPIRE 239 (1986) ("I must try to exhibit that complex structure of legal interpretation, and I shall use for that purpose an imaginary judge of superhuman intellectual power and patience who accepts law as integrity. Call him Hercules."). His selection of a mythological figure whose chief attribute was brawn rather than brains is an interesting reflection on his view of the judicial role. The paternalism implicit in this choice has been criticized. Alan Hunt, *Reading Dworkin Critically*, in *READING DWORKIN CRITICALLY* 1, 6-7 (Alan Hunt ed., 1992) (arguing that theories about what "prevents Dworkin from fulfilling his radical promise" of democratic equality find a common core in a "shared critique of Dworkin's legal paternalism, personified in his fictional hero Hercules[, and] in his apprehension of allowing full play to democratic politics").

5. Dworkin is also University Professor of Jurisprudence at Oxford University.

6. 410 U.S. 113 (1973) (holding unconstitutional a Texas statute prohibiting abortions at any stage of pregnancy except to save the life of the mother).

7. 112 S. Ct. 2791 (1992) (reaffirming *Roe* but rejecting *Roe's* trimester framework).

8. For example, on Sunday, May 16, 1993, the *New York Times* featured *Life's Dominion* on the front page of its Book Review section, Laurence H. Tribe, *On the Edges of Life and Death*, N.Y. TIMES, May 16, 1993, § 7 (Book Review), at 1, and also printed an excerpt adapted from the book in the magazine section. Ronald Dworkin, *Life is Sacred. That's the Easy Part*, N.Y. TIMES, May 16, 1993, § 6 (Magazine), at 36.

Dworkin is able to persuade even a few readers that a woman's right to choose should be maintained, he may perform a national service.<sup>9</sup>

Dworkin frames the abortion debate around the question of the sanctity of life. His innovation, in his view, is to reject the current, almost universal, focus on the rights and interests of the fetus.<sup>10</sup> In his analysis, a

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9. This seems unlikely, however. In spite of advance publicity for the book, Dworkin may learn why the "argumentative essay" is a "neglected genre." DWORKIN, *supra* note 2, at 28. Though professional pro-choice advocates have understandably embraced his efforts, see, e.g., Nadine Strossen, *Pro Bono Legal Work: For the Good Not Only of the Public, But Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2126-28 (1993), pro-lifers are unlikely to read or be persuaded by this book. As Stephen Carter has noted, *Life's Dominion* "will probably leave pro-life activists smoldering with rage." Stephen L. Carter, *Strife's Dominion*, NEW YORKER, August 9, 1993, at 86, 87 (reviewing DWORKIN, *supra* note 2).

10. "Combatants and commentators alike talk as if the abortion controversy . . . centered on the rights and interests of the fetus." DWORKIN, *supra* note 2, at 24. In fact, Dworkin's rejection of the fetus as a starting point for analyzing abortion regulation is not at all innovative. See, e.g., BARBARA MILBAUER, *THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY* 306 (1983) (arguing that the right to abortion flows from fundamental right to privacy and society must respect the woman's own moral balancing of all related interests):

If potential human life is really the entity sought to be protected by those who would wish to limit access to abortion, then where is the clamor against sterilization, contraception, divorce? And if we honored that logic with legal consistency, what right to privacy would be left and what realistic guarantee against further incursions would there be?

*Id.*; PETER S. WENZ, *ABORTION RIGHTS AS RELIGIOUS FREEDOM* 189-90 (1992) (arguing that prior to the twenty-first week of fetal development, antiabortion laws constitute establishment of religion in violation of the First Amendment because "beliefs about the personhood, right to life, intrinsic value, and inherent worth of young fetuses are as religious as are beliefs about the existence of God. No legislation can be predicated on any such belief."); Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011, 1074 (1989) (analyzing abortion from a feminist theological perspective, giving credence both to "arguments about how women's well-being is affected by abortion legislation and to arguments about how [society's] valuation of life is affected by abortion policy"); Rhonda Copelon, *Losing the Negative Right to Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 49 (1990-91) (maintaining that a woman's privacy right should encompass an "equity principle [that] would require recognition that forced pregnancy is involuntary servitude and that abortion is essential to [a] wom[a]n's full personhood and participation in all spheres of life"); Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985) ("The [abortion] conflict . . . is not simply one between a fetus' interests and a woman's interests, narrowly conceived . . . . Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."); Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 U.C.L.A. L. REV. 1597 (1991) (arguing that women have a Fifth Amendment property right in their bodies and thus decisions to exclude fetus/embryo from their bodies should be analyzed in language and theory of licensor-licensee relationship); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Analysis*, 84 NW. U. L. REV. 480, 483-84 (1990) (arguing that compulsory pregnancy deprives women of constitutionally guaranteed liberty and equality by subjecting them to "involuntary servitude" in violation of the Thirteenth Amendment); Sylvia A. Law, *Rethinking Sex and the Constitution* 132 U. PA. L. REV. 955, 986 (1984) (articulating a sex equality defense for abortion rights and explaining that such sex-based equality claims have been improperly ignored because "women's struggle for control of their bodies

person's position on the permissibility of abortion derives from or is in some way related to her views on the sanctity of life. He analogizes his discovery of this "truth" to the discovery of Neptune by astronomers gazing up at Uranus,<sup>11</sup> implying that the debate's fundamental roots in views about the sanctity of life can be proved by analyzing the character of the debate itself.<sup>12</sup>

In relying on this proof, he ignores a feminist argument that the furor over abortion is fundamentally related to a contest over women's roles in society. Dworkin's location of the abortion controversy in views about the sanctity of life makes possible his claim that differences of opinion about abortion are essentially religious differences.<sup>13</sup> We argue instead that the feminist interpretation is superior: conflicting opinions about abortion at least in some cases arise from differences of opinion about women's roles in society, differences that sometimes manifest themselves through religious beliefs.

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has been transformed into debates about medical practice and moral and religious views of the personhood of the fetus. In the abortion debate, women's lives and sex-based equality have become distinctly secondary issues."); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1315 (1991) (advancing sex equality approach to issues of reproductive control and arguing that "the only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus *against* the pregnant woman"); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 327-29 (1991) (rejecting privacy-based abortion defense because it allows state intercession on behalf of fetus against mother and arguing instead that forced pregnancy violates woman's fundamental right to bodily integrity ("If the physical indivisibility of a pregnant woman is acknowledged, hypothetical abstractions about the rights of the 'independent' fetus become irrelevant.)); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569-70 (1979) (viewing abortion controversy through perspective of "samaritan law," and concluding that antiabortion laws impose unacceptable "good samaritan" burdens on women and are thus precluded by the Equal Protection Clause); Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 790 (1989) (viewing antiabortion laws as totalitarian because they "exert power productively over a woman's body and, through the uses to which her body is put, forcefully reshape and redirect her life"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 354 (1992) (analyzing abortion-restrictive regulation "from both antidiscrimination and antisubordination perspectives" and arguing that state action compelling motherhood injures women and is thus forbidden by the Equal Protection Clause); see also Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049 (1994) (reviewing DWORKIN, *supra* note 2).

11. DWORKIN, *supra* note 2, at 68. As Dworkin explains:

Scientists sometimes cannot explain their observations about the known universe except by assuming the existence of something not yet discovered—another planet or star or force. So they assume that something else does exist, and they look for it. Astronomers discovered the planet Neptune, for example, only after they realized that the movements of the planet Uranus could be explained only by the gravitational force of another celestial body, yet unknown, orbiting the sun still farther out.

*Id.*

12. *Id.* at 9-11, 13.

13. *Id.* at 155-57.

Though colleagues of Dworkin's have reviewed *Life's Dominion*,<sup>14</sup> this Review provides a sustained analysis of the claims Dworkin advances about abortion from the feminist perspective. We take issue with his methods of arguing his case as well as with the substance of his argument. We believe that the book's attempt to resolve the national debate over the regulation of abortion is fundamentally unworkable and misguided.

As we will demonstrate below, Dworkin uses several techniques of argument that undermine the value of his conclusions. First, he relies on broad and vague concepts, defining them so as to prove his argument, thereby rendering it circular. This method drives his arguments regarding both personhood and sacredness. Second, he caricatures the positions he opposes, presenting them as either completely implausible or internally inconsistent.<sup>15</sup> He then conveniently reinterprets his opponents in order to save them from the pitfalls of their own caricatured positions. This tendency is particularly apparent in his discussions of Catholicism and feminism. Third, he presupposes the existence of a mythical unified human community that can generate consensus on difficult issues; unsurprisingly, the community Dworkin imagines has pretty much the same intuitions on which he himself relies to advance his argument. This mode of reasoning underpins his argument about sacredness and consequently underlies his constitutional argument. Finally, he frequently presents his argument as empirically grounded and thus puts himself at risk of critique from a social-scientific perspective more rigorous than his own.

Before we begin our discussion of Dworkin's thesis, we will briefly outline the argument of *Life's Dominion*. As we have noted already, Dworkin claims that most people wrongly believe that the great abortion debate centers on conflicting opinions about whether the fetus is a person with rights and interests of its own from the moment of conception, including a right not to be killed. But in his view, the argument over abortion is really about how and why human life has "intrinsic value"<sup>16</sup> and whether

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14. See, e.g., Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993); Carter, *supra* note 9, at 86; Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559 (1994) (book review); Book Note, *Inside Out, Within and Beyond, Or Backwards?*, 107 HARV. L. REV. 943 (1994); Elizabeth Mensch & Alan Freeman, *The War over Abortion: Seeking Better Ways to Think About an Issue That Divides the Country*, CHI. TRIB., May 23, 1993, at C3 (book review); Rakowski, *supra* note 10; Jeffrey Rosen, *A Womb with a View*, NEW REPUBLIC, June 14, 1993, at 35 (book review); T.M. Scanlon, *Partisan for Life*, N.Y. REV. BOOKS, July 15, 1993, at 45; Tribe, *supra* note 8, at 1.

15. See Tribe, *supra* note 8, at 41 ("Mr. Dworkin's approach to such issues depends heavily on posing stark dichotomies that ignore intermediate options.").

16. Dworkin explains that something is "intrinsically valuable . . . if its value is independent of what people happen to enjoy or want or need or what is good for them." DWORKIN, *supra* note 2, at 71. See *infra* part III for a fuller description of "intrinsic value" and its tenuous relation to Dworkin's sacredness argument.

abortion is wrong, not because it violates fetal rights and interests, but because it “denies and offends the sanctity or inviolability of human life.”<sup>17</sup>

Dworkin suggests that people are confused about the true core of the abortion debate because they have failed to recognize the “absolutely crucial distinction” between “derivative” and “detached” moral values that may be used to frame various objections to abortion.<sup>18</sup> In his scheme, derivative values flow from the rights and interests possessed by each individual human being. A “derivative objection” to abortion assumes that fetuses have the same rights and interests as other human beings from the moment of conception. Under this view, abortion is wrong because it violates a person’s right not to be killed, and government therefore has a “derivative responsibility” to protect the fetus by banning or regulating abortion.<sup>19</sup>

Detached values, on the other hand, do not flow from individual rights or interests, but rather reflect judgments about the inherent or intrinsic worth of a thing. A “detached objection” to abortion assumes that human life has an intrinsic, innate, and fundamentally sacred moral value that begins with biological life and predates the acquisition of rights and interests. Under the detached view, “abortion is wrong in principle because it disregards and insults the intrinsic value, the sacred character, of any stage or form of human life.”<sup>20</sup> Accordingly, the government may have a detached responsibility to protect the intrinsic value of life by banning or regulating abortion.

Armed with this background distinction between detached and derivative objections, the eight chapters of *Life’s Dominion* each make separate points to develop Dworkin’s thesis that the abortion debate really revolves around detached moral arguments “about how and why human life has intrinsic value, and what that implies for personal and political decisions about abortion.”<sup>21</sup> While the skeletal structure of the argument may be stated succinctly, the individual chapters are more complex and obscure than this summary can indicate:

1. A fetus is not a full moral person in the “practical sense” of the word, because the absence of a connection between the fetus’s thalamus and neocortex prevents it from having both mental and physical life. The fetus cannot possess interests and rights of its own until its nervous system has developed to the extent necessary to support some measure of human consciousness.<sup>22</sup> Therefore the only legitimate grounds upon

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17. DWORKIN, *supra* note 2, at 24.

18. *Id.* at 11.

19. *Id.*

20. *Id.*

21. *Id.* at 24.

22. *See id.* at 16-19. Dworkin argues that “an immature fetus cannot have interests and therefore cannot have an interest in surviving.” *Id.* at 18.

- which “we” might oppose or defend abortion are “detached” rather than “derived” from the fetus.<sup>23</sup>
2. Most people—including Catholics and feminists—either fundamentally agree that the abortion debate is not about derivative fetal rights and interests or they ought to.<sup>24</sup> People’s opinions about abortion actually reflect a “detached” and seemingly universal moral judgment about the sanctity of life, even at its earliest stages: “Almost everyone shares, explicitly or intuitively, the idea that human life has objective, intrinsic value that is quite independent of its personal [or derivative] value for anyone . . . .”<sup>25</sup>
  3. Detached judgments about the permissibility of abortion reflect a view about the intrinsic sacredness or inviolability of human life.<sup>26</sup> Human life is sacred because it is the product of natural and artistic creative processes that we value in and of themselves—intrinsically—without relation to our personal desires and interests or to the utility of their results alone.<sup>27</sup> But while “we” all share this fundamental belief in the sanctity of human life, “disagreement about the right interpretation of that shared idea is the actual nerve of the great debate about abortion.”<sup>28</sup> The conventional or derivative “fetal rights and interests” explanation of the abortion debate is thus seriously mistaken.
  4. Every legal scholar and commentator who has written about the abortion controversy before and since *Roe v. Wade*<sup>29</sup> has overlooked the role of the sacred in people’s value systems, and thus has overlooked the government’s “detached” interest in protecting the sacredness of human life as the crux of moral debate about abortion laws.<sup>30</sup> Just as the derivative moral claim that abortion centers on fetal rights and interests is wrong, so too is the legal argument that the fetus becomes a constitutional person at the moment of birth and therefore entitled to equal protection of the laws.<sup>31</sup> The states therefore have “no constitutional power to declare a fetus a person or to protect fetal interests at the expense of [their] citizens’ constitutional rights.”<sup>32</sup> Accordingly, “[t]he

23. *Id.* at 19-21.

24. *Id.* at 30-35.

25. *Id.* at 67. *But see* Greenwood, *supra* note 14, at 561 (“Dworkin’s effort is troubling. . . . [H]is breathtakingly broad assertions about our shared moral views are wrong.”).

26. DWORKIN, *supra* note 2, at 24-25.

27. Dworkin writes that “the nerve of the sacred lies in the value we attach to a *process or enterprise or project* rather than to its results considered independently from how they were produced.” *Id.* at 78 (emphasis added). For a more detailed exploration of the sacredness principle, see *infra* part III.B.

28. DWORKIN, *supra* note 2, at 78.

29. 410 U.S. 113 (1973).

30. DWORKIN, *supra* note 2, at 108-09.

31. *See id.* at 109 (stating that almost everybody agrees with Justice Blackmun’s opinion in *Roe* that the fetus is not a constitutional person).

32. *Id.* at 115.

crucial question is whether a state can impose the majority's conception of the sacred on everyone."<sup>33</sup>

5. Under the theory of constitutional jurisprudence first discussed in *Law's Empire*,<sup>34</sup> ours is a Constitution of principle rather than one of detail,<sup>35</sup> and the framers "intended a great constitutional adventure."<sup>36</sup> The only limit on this adventure is "good argument,"<sup>37</sup> which yields integrity, a principle that generates uniformity of ideals rather than of results.<sup>38</sup>
6. As applied to the legal debate over abortion, Dworkin's integrity theory requires that women have an abstract, privacy-based constitutional right to "procreative autonomy" whose theoretical contours are somewhat different than the privacy right relied on in *Roe*.<sup>39</sup> This right to procreative autonomy arises because the state lacks a compelling interest in protecting the detached sacred value represented by the fetus where this would seriously curtail the mother's liberty interest and where the community is divided about what respect for this value requires.<sup>40</sup> Interpretations about how best to respect the intrinsic value of life are essentially religious in nature, and therefore the states are barred by the religious clauses of the First Amendment from establishing any single interpretation into law.<sup>41</sup> Thus the states may not ban abortion but may force pregnant women to reflect responsibly on the abortion decision, so long as they do not coerce women into making a particular decision.<sup>42</sup> Accordingly, *Roe* and *Casey*<sup>43</sup> were correct in result, if not in legal or ethical reasoning.<sup>44</sup>

33. *Id.*

34. DWORKIN, *supra* note 4.

35. DWORKIN, *supra* note 2, at 119-24.

36. *Id.* at 137. Dworkin maintains that the framers intended "that the United States be governed according to the correct understanding of what genuine liberty requires and of how government shows equal concern for all its citizens." *Id.* at 137-38.

37. *Id.* at 145:

The Constitution insists that our judges do their best collectively to construct, respect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command. We must abandon the pointless search for mechanical or semantic constraints and seek genuine constraints in the only place where they can be found: in good argument.

38. *See id.* at 146-47.

39. *Id.* at 157; *see also* *Roe v. Wade*, 410 U.S. 113, 152-55, 164 (1973) (finding privacy right extends to women's choice to abort pregnancies). *Roe* established an abstract right to privacy based in several constitutional amendments and in the precedent set by *Griswold v. Connecticut*, 381 U.S. 479 (1965). As we discuss, *infra* part IV, Dworkin locates the right to choose abortion in the First Amendment's protections against state establishment of religion.

40. DWORKIN, *supra* note 2, at 157. We explore this argument in greater detail *infra* part V.

41. DWORKIN, *supra* note 2, at 160-68.

42. *Id.* at 151-53.

43. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

44. DWORKIN, *supra* note 2, at 168-78.



7. A person could have just as much of an interest in dying as in living, and the sacredness principle is ambivalent about when and under what circumstances such a death occurs.<sup>45</sup>
8. People who become demented or otherwise incapacitated have past rights to autonomy and dignity that may outweigh their present beneficence rights and entitle them to be deprived of sustenance unto death, regardless of whether they wish to remain alive in a state of incapacity. This liberty respects the sacredness principle.

In this Review, we will first discuss Dworkin's conception of personhood and his argument that the derivative claim of fetal rights and interests does not constitute the center of the abortion debate. We will address the misunderstanding of the personhood debate from which he launches his critique of the derivative rights argument and will take issue with the self-serving caricatures of feminism and Catholicism he creates to buttress his thesis. Next, we will delineate Dworkin's claim that the abortion debate is really about how to interpret the detached sacred value of human life, showing that his concepts of intrinsic value and sacredness are ultimately incoherent. We will show how Dworkin uses the sacredness principle to ground his constitutional argument, leading to serious problems for his claim that the First Amendment prohibits states from establishing any particular majoritarian interpretation of the sacred value of human life by enacting antiabortion laws. Finally, we will suggest an alternative way to consider the debate over abortion, grounding it in conflicts over women's roles in society rather than in Dworkinian conjectures about the intrinsic sacredness of human life.

## II

### HERCULES'S THIRD LABOR:<sup>46</sup>

#### WHAT IS IT LIKE TO BE A PERSON?

##### *A. Binary Ethics: The Dworkinian Understanding*

Discussions of abortion have often focused on the issue of whether the fetus is a person and what this means. For Dworkin the claim that a fetus is a person can mean either of two things: a *derivative* claim that the fetus already has interests and rights of its own at conception or a *detached* claim that from the moment of conception "a fetus embodies a form of human

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45. Dworkin's organization to the contrary, the chapters on euthanasia are conceptually independent from the jurisprudential and philosophical arguments about abortion made earlier in the book. The two issues are not as similar as they first appear to be. While both questions deal with the morality of ending human life (potential or actual) they diverge in their political and constitutional implications. We choose to focus in this review on Dworkin's argument about abortion, as this aspect of *Life's Dominion* is more fully developed and controversial.

46. Hercules's third labor was to clean the Augean stables. THOMAS BULFINCH, *THE AGE OF FABLE OF THE BEAUTIES OF MYTHOLOGY* 146-47 (Stanley W. Hayter ed., Heritage Press 1942) (1855).

life which is sacred, a claim that does not imply that a fetus has interests of its own."<sup>47</sup> Dworkin dismisses the first understanding in favor of the second, framing the derivative claim about fetal personhood in terms of a binary logic that assumes that there can be no dispute about the package of rights and interests inherent in personhood: "[T]he claim that a fetus is a person means only that it has a right to be treated *as* a person, that is, in the way we believe creatures that are undeniably persons, like you and me, should be treated."<sup>48</sup>

But the status of personhood itself is at issue: what rights and interests does personhood entail in different moral and legal contexts, and who may reasonably be brought into this category? Dworkin insists there is only one "way" that "we" believe persons should be treated. If a fetus is a person, it necessarily must have the full panoply of rights and interests that all human beings possess; if not a person, the fetus has none. Yet he offers no argument for why this premise is true. He assumes, without elaboration, that this binary understanding is inherent in the "practical sense" of the word person itself.<sup>49</sup> This conception of "a fetus [with] the same rights as children and adults"<sup>50</sup> becomes the foundation for his attack on derivative rights-based understandings of abortion in both the moral and legal contexts.

But by framing the derivative argument in this way, Dworkin fails to consider that the mere assertion of fetal personhood might not settle the abortion issue altogether in the derivative view.<sup>51</sup> Even if everyone agreed that the fetus was a person, it might not follow that abortion would always be wrong or that fetal interests would always trump those of the mother. As Frances Kamm has pointed out, unintended pregnancies caused by rape can create a set of equities entirely different from pregnancies resulting from voluntary sex, though abortion could be permissible in both cases.<sup>52</sup> Similarly, while children and adults are both considered persons, their rights and interests are not equivalent in a variety of contexts. It is reasonable to assume that intense differences of opinion might exist concerning the scope of rights possessed by a fetus-person, particularly when balanced against those of a pregnant mother.

Complex arguments about rights thus seem to lurk beyond the threshold of a determination of personhood. Yet Dworkin's binary conception of personhood seeks to preclude any further investigation into the question of

47. DWORKIN, *supra* note 2, at 21.

48. *Id.* at 23.

49. *Id.*

50. *Id.*

51. See JUDITH J. THOMSON, *THE REALM OF RIGHTS* 288-93 (1990), and especially the work of Dworkin's NYU colleague, FRANCES M. KAMM, *CREATION AND ABORTION* 1-6, 14-18, 78-120, 165-82 (1992), which analytically describes different spheres of rights that might exist even if the fetus were a person.

52. KAMM, *supra* note 51, at 83-89, 163-65.

whether there can be varying understandings of derivative rights and interests within different moral and legal contexts. He is similarly reluctant to ask whether such disparity among derivative views might actually account for the continued debate about abortion.

Dworkin elides this question as a matter of rhetorical convenience, thus establishing the premise for the *reductio ad absurdum* that is *Life's Dominion's* biggest point. Dworkin posits his either/or understanding of the claim that the fetus is a person with full moral interests and rights and then deduces from it a number of conclusions that show how inconsistent or contradictory this view is in practice. If the derivative argument about fetal rights and interests constituted the true center of the abortion debate, he suggests, there could only be two possible views: abortion is permissible always or never.<sup>53</sup>

Given this framework, Dworkin then argues that no one really believes the derivative view upon closer inspection of their convictions. The fetal personhood issue cannot be the focus of the abortion debate, because most pro-lifers would permit abortions in certain exceptional cases and many pro-choice advocates are squeamish about permitting late-term abortions.<sup>54</sup> For instance, if they really believed that a fetus is a person, pro-lifers could not with any logical consistency permit legal abortions in cases of rape or incest, or when the baby would be born with Tay-Sachs disease, or when the life of the mother was endangered by the pregnancy.<sup>55</sup> The taking of a fetal life would always be the murder of a person. According to Dworkin, although pro-lifers *claim* to hold the personhood of the fetus pre-eminent, their widespread support for exceptions<sup>56</sup> proves that a belief in fetal personhood cannot ground the entirety of their views against abortion.<sup>57</sup>

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. It would be contradictory to insist that a fetus has a right to live that is strong enough to justify prohibiting abortion even when childbirth would ruin a mother's

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53. DWORKIN, *supra* note 2, at 32.

54. *Id.* at 31-32.

55. *Id.* at 32.

56. Dworkin cites poll data to support his assertions of pro-life inconsistency. *E.g., id.* at 13-14, 243 nn.14-15, 32, 245 nn.2-3. For a discussion of his questionable search for empirical evidence to support his thesis as to Catholic and feminist views about abortion, see *infra* parts II.C.1-C.2.

57. This argument has a danger that Dworkin fails to recognize or does not take seriously. Pro-lifers encountering this argument might choose to repair the inconsistency of their views by taking a harder line. Instead of rejecting their derivative objections in favor of Dworkin's detached viewpoint, they might jettison their beliefs that there are some exceptions where abortion should be legal. Thus, *Life's Dominion* might foster less, rather than more, accommodation on the abortion issue, which would thwart one of its author's stated goals. See DWORKIN, *supra* note 2, at 10-11, 71, 101.

or a family's life but that ceases to exist when the pregnancy is the result of a sexual crime of which the fetus is, of course, wholly innocent.<sup>58</sup>

Accordingly, Dworkin concludes that the abortion debate cannot be about this simply defined derivative question of whether the fetus is or is not a person; some other moral value or question must account for the variety of passionate and apparently contradictory views on the subject.<sup>59</sup> Since the derivative view is "scarcely comprehensible,"<sup>60</sup> Dworkin's own "detached" understanding of the debate seemingly acquires greater descriptive and analytic plausibility:

The scalding rhetoric of the "pro-life" movement seems to presuppose the derivative claim that a fetus is from the moment of its conception a full moral person with rights and interests equal in importance to those of any other member of the moral community. But very few people—even those who belong to the most vehemently anti-abortion groups—actually believe that, whatever they say. The disagreement that actually divides people is a markedly less polar disagreement about how best to respect a fundamental idea we almost all share in some form: that individual human life is sacred. Almost everyone who opposes abortion really objects to it, as they might realize after reflection, on the detached rather than the derivative ground. They believe that a fetus is a living, growing human creature and that it is intrinsically a bad thing, a kind of cosmic shame, when human life at any stage is deliberately extinguished.<sup>61</sup>

Dworkin has effectively ruled out the possibility suggested by Kamm and Thomson that a nation can have various opinions about the scope of rights and interests inherent in personhood in different moral and legal contexts.<sup>62</sup>

If they were right, Dworkin would have to confront more directly his opponents' substantive claims about rights and interests. He could not so easily dismiss their views as internally inconsistent and then reinterpret them to reveal what people "really" mean when they discuss the morality of abortion. Furthermore, he would have to argue for his novel thesis as the product of his own moral beliefs about abortion, rather than portraying

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58. *Id.* Dworkin also shows how the liberal position on abortion is inconsistent with a view that an early-stage fetus is a person with rights and interests of its own. *See id.* at 32-34.

59. Dworkin concludes that this other value is the sanctity of life, *id.* at 67, but see the sources cited *supra* note 10 for a variety of alternative conclusions.

60. *Id.* at 20.

61. *Id.* at 13. We will examine the validity of Dworkin's detached "cosmic shame" theory in part III.B.

62. *See* sources cited *supra* note 51.

it as the cosmic revelation of beliefs about the sanctity of human life that "we" all share but have yet to discover. However convenient the binary depiction of derivative claims about fetal personhood may be, it lends a false simplicity to the abortion debate.

### B. *Is the Fetus a Person?*

To further expose the irrelevance of the personhood issue, Dworkin suggests that science might just settle the issue after all. Although he has attempted to show that no one really believes that the fetus is a person with rights and interests, he proceeds to argue that even if people did believe it, they would be wrong because an early-term fetus is simply not a person.<sup>63</sup>

Dworkin argues that a fetus cannot have interests until it develops the neurological hardwiring necessary to generate consciousness and feel pain;<sup>64</sup> without such interests, one cannot "derive" an objection to abortion. He writes, "It makes no sense to suppose that something has interests of *its own* . . . unless it has, or has had, some form of consciousness: some mental as well as physical life."<sup>65</sup> Dworkin's citations to investigations into embryology identify a twenty-six-week time frame for the development of fetal consciousness, and hence for the acquisition of interests, a finding consistent with the current definition of fetal viability.<sup>66</sup>

While such neurological determinism may effectively buttress the *Roe* framework Dworkin ultimately defends, it does not convincingly prove the claim of *Life's Dominion* that the abortion debate is really about detached values rather than derivative rights. Dworkin's scientific personhood argument is somewhat similar to Kant's predication of moral agency on rational thought,<sup>67</sup> although Dworkin does not cite him here.<sup>68</sup> The linkage among

63. DWORKIN, *supra* note 2, at 15 ("[I]t is very hard to make any sense of the idea that an early fetus has interests of its own . . .").

64. *Id.* at 17.

65. *Id.* at 16.

66. *Id.* at 17, 244 n.23 ("[S]ince we should use extreme caution in respecting and protecting possible sentience, a provisional boundary at about twenty-six weeks should provide safety against reasonable concerns. The time is coincident with the present definition of viability." (quoting an embryological expert)); see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2817-18 (1992) (plurality opinion) (rejecting the trimester framework in favor of a more generalized viability determination).

67. IMMANUEL KANT, *PROLEGOMENA TO ANY FUTURE METAPHYSICS THAT WILL BE ABLE TO COME FORWARD AS SCIENCE* 72 (James W. Ellington trans., Hackett Publishing Co. 1977) (1783). For a general discussion of Kantian ethics, see W. H. Walsh, *Immanuel Kant*, in 4 *THE ENCYCLOPEDIA OF PHILOSOPHY* 317-19 (Paul Edwards ed., 1967). Kant argued that reason was the basis for making a person a moral character and thus a person whose rights should be respected. See *id.*

68. Dworkin does cite Kant much later, claiming that his own theory "provides a useful reading" of Kant's Golden Rule (the moral imperative). DWORKIN, *supra* note 2, at 236.

Dworkin often proceeds along the lines of Kantian moral theory, and his patron philosopher, John Rawls, has justified constitutional liberalism on Kantian grounds. John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 548-49 (1980) (cited with approval in DWORKIN, *supra* note 4, at 440 n.19). Rawls has since disassociated himself from the style

pain, consciousness, and interests seems to glide over the intractable, centuries-old philosophical debate about the mind-body problem. Dworkin seems to confuse brain state with pain, committing an error that Saul Kripke warned against years ago.<sup>69</sup>

### C. *They Know Not What They Think: Debasing Derivative Claims*

In chapter 2, Dworkin looks at some of the allegedly derivative claims made by Catholics and feminists concerning the morality of abortion to find empirical support for his argument that no one really believes such claims.<sup>70</sup> What he finds—or constructs—confirms his theory. He writes, “The detailed structure of most conservative opinion about abortion is actually inconsistent with the assumption that a fetus has rights from the moment of conception, and the detailed structure of most liberal opinion cannot be explained only on the supposition that it does not.”<sup>71</sup>

Dworkin does not conduct a close reading of representative texts or provide persuasive data to support his essentially empirical claim that his selected opponents do not really believe the rhetoric in which they have expressed their convictions. Instead, Dworkin produces distorted representations of opposing views. These he easily dismisses as internally inconsistent or inherently implausible, largely due to the poor moral reflection and political extremism of their proponents. He then suggests that if only his opponents indulged in more careful “reflection,” they might understand

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of argument in *Life's Dominion* because it departs from the form of “public reason” needed for such discussions. John Rawls, Address at the New York University Colloquium on Law, Philosophy & Social Theory (Nov. 18, 1993).

Others have also noted an affection for Kant in Dworkin's work. See, e.g., Allan C. Hutchinson, *The Last Emperor?*, in *READING DWORBIN CRITICALLY*, *supra* note 4, at 45, 64 (“Contemporary political philosophers, like Dworkin, claim to have noticed [the] boundaries [of democratic politics] lurking in the interstices of Kantian moral theory.”). Some note that Dworkin has not read Kant well enough. Brendan Edgeworth, *Reading Dworkin Empirically: Principles, Politics, and Property*, in *READING DWORBIN CRITICALLY*, *supra* note 4, at 187, 205-06.

69. See Saul A. Kripke, *Naming and Necessity*, in *THE NATURE OF MIND* 238, 243-46 (David M. Rosenthal ed., 1991) (Lectures II & III, Jan. 22 & 29, 1970). Kripke pointed out that no matter how precise a correlation occurrence between pain and an objectively observable brain state, the two terms could never be equivalent. That is, *pain* is used to describe what pain is *subjectively* like. Dworkin, in offering the evidence of the lack of a connection between the nerve stem and the hypothalamus, is arguing that without this connection, there can be no subjective feeling of pain, and by extension, there can be no subjective interests at all. But this is not a scientific point, it is a metaphysical one. Presumably, no matter what sort of scientific data becomes available, one will never be able to observe another being's subjective states. We are grateful to Professor Thomas Nagel for illumination on this point.

70. DWORBIN, *supra* note 2, at 35:

[P]eople do not respond to great moral or legal issues only as individuals; on the contrary, many people insist that their views . . . reflect and flow from larger, more general commitments or loyalties or associations. . . . We must now consider how far the hypothesis I am defending . . . helps us better to understand the claims, insights, doctrines, and arguments of these large institutions or movements.

71. *Id.* at 31.

that they were really expressing detached arguments—in accord with his own understanding—about how best to respect the sanctity of life.<sup>72</sup>

Dworkin coyly recognizes the apparent audacity of his own rhetoric and methodology:

[Y]ou may nevertheless find my suggestion arrogant, because it seems to claim to understand people's views about abortion better than they do themselves. After all, many people do say, and many of them carry banners declaring, that abortion is murder and that unborn people have a right to live. These phrases do seem to claim that fetuses have interests and rights.<sup>73</sup>

Dworkin insists that he is not claiming that “people do not know what they think,” yet his desire to cut through his opponents’ “high rhetoric” to get at their true convictions<sup>74</sup> is flawed by caricature and distortion, betraying a lack of respect at odds with his putative goal of improving tolerance among alternative views about abortion.<sup>75</sup> Through selective misreading, Dworkin tailors opposing views to fit his premises.<sup>76</sup>

72. *Id.* at 20-21.

73. *Id.* at 20.

74. *See id.* at 20-21.

75. *Id.* at 10-11, 71, 101, 167-68. Stephen Carter similarly observes that Dworkin “paints an unrealistic portrait of abortion opponents . . . which dooms his imaginative effort at compromise.” Carter, *supra* note 9, at 90.

76. Laurence Tribe concurs: “one often gets the uneasy sense that he tailors his premises to fit his conclusions.” Tribe, *supra* note 8, at 41; *see also* Carter, *supra* note 9, at 88 (“He makes no effort to hide his prejudices: he is unapologetically pro-choice.”). *But see* Scanlon, *supra* note 14, at 45 (“[Dworkin’s articles] typically proceed by means of a Socratic inquiry into the reasons that might be offered for Dworkin’s own position . . . carefully formulating and reformulating these reasons and checking each formulation to see if its implications are acceptable, much as Socrates did . . .”).

Many other critics have persistently objected to this technique in Dworkin’s previous works. According to one critic of *Law’s Empire*, this tendency toward caricature stems from Dworkin’s use of “a more popular expository style” in order to reach a broader readership with his theories: “[T]he price is a certain looseness of expression and a rather cavalier treatment of many intellectual positions from which he wants to distance himself.” Alan Hunt, *Law’s Empire or Legal Imperialism?*, in *READING DWORKIN CRITICALLY*, *supra* note 4, at 9, 9. But another critic locates the flaw in Dworkin’s broader theory of legal interpretation itself, which permits Dworkin to take liberties with, and perhaps do violence to, the work of writers with whom he disagrees:

[Dworkin takes a] negative and superficial approach . . . to the work of other theorists. He utilizes criteria for assessing their ideas which, if accepted, make it hard to understand how they could ever have been taken seriously. . . . Central to this [critique] is his exposition of the nature of interpretation. When we see that this allows him to ‘impose meaning’ on the works of others, we should reflect upon the meanings which he chooses to impose . . . and ask ourselves why he should want to impose ‘those meanings’. He clearly accepts that his reading of them makes them look quite ridiculous, and we should perhaps pause to ask ourselves what this charade tells us of Dworkin’s purposes. Given that the other emphasis in his account of interpretation is that we should make of a work ‘the best it can be’, we should be mindful of the difference between the approach to interpretation that Dworkin advocates and that which he employs.

### 1. *Catholicism Caricatured*

Dworkin first attempts to substantiate his claim that religious pro-lifers in general, and Catholics in particular,<sup>77</sup> do not believe their own rhetoric that the fetus is a person with rights and interests. He generously acknowledges that the Church's statement that it *does* believe that the fetus is a person "seem[s] an important counter-example"<sup>78</sup> to his claim. However, Dworkin, in less than ten pages, is satisfied that he can authoritatively reroute Church doctrine.<sup>79</sup>

Dworkin argues that the Church originally endorsed a *detached* moral claim that "abortion is wrong because it insults God's creative gift of life."<sup>80</sup> "For many centuries," he writes, "this traditional church view—that abortion is wicked because it insults the sanctity of human life even when the fetus killed has not yet been ensouled—was believed capable of sustaining a firm and unwavering moral opposition to early abortion."<sup>81</sup> Dworkin then determines that in the mid-nineteenth century the Church miraculously converted from its early doctrine to a more dogmatic and derivative view that the fetus is a person at conception.<sup>82</sup> This radical doctrinal shift had a purely strategic motivation in Dworkin's reading: to increase the Church's political advantage in its campaign against abortion.<sup>83</sup> In effect, by expanding its doctrine to embrace "a derivative secular as well as a detached religious argument," the Church armed itself with the power to claim that abortion is the murder of an unborn child, since ensoulment now occurred at conception.<sup>84</sup>

Because he believes that the Church's current derivative position lacks legitimate doctrinal and historical foundations, Dworkin suggests that the Church could simply revert from its current doctrine based on the personhood of the fetus to its earlier, detached theory. In his view, the Church would still retain a strong, principled objection to abortion even if it abandoned the politically motivated derivative view. Dworkin implies that this move would also align the Church's official doctrine more consistently with

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Robert N. Moles, *The Decline and Fall of Dworkin's Empire*, in *READING DWORKIN CRITICALLY*, *supra* note 4, at 71, 71.

77. DWORKIN, *supra* note 2, at 36.

78. *Id.* at 39.

79. See Rosen, *supra* note 14, at 36 ("An unsettling vanity runs throughout Dworkin's work."); Bradley, *supra* note 14, at 329 ("[*Life's Dominion*] is breathtakingly audacious."). Dworkin's willingness to quickly dismiss rivals has attracted attention before. See Moles, *supra* note 76, at 72 ("Dworkin finds that he can dismiss both Austin and Hart in just over two pages, and Natural Law theories and the Realists in just under two.") (citing DWORKIN, *supra* note 4, at 33-37).

80. DWORKIN, *supra* note 2, at 39.

81. *Id.* at 44.

82. *Id.* at 44-45.

83. *Id.* at 45-47.

84. *Id.* at 45-46. Under the original view that ensoulment occurred much later in pregnancy, the Church was unable to make such a sweeping, politically hard-line claim.



the views of most American pro-lifers<sup>85</sup> and, not surprisingly, with the theoretical innovations described in *Life's Dominion*.

This cynical reading of Church doctrine as essentially political creates theoretical problems for Dworkin's constitutional argument that the outcome in *Roe* is dictated by the Establishment Clause. His argument is founded on the claim that beliefs about abortion are "essentially religious" in nature.<sup>86</sup> If the Church's position is, as Dworkin argues, largely motivated by secular political ends, then his constitutional argument is much eroded.

One of the empirical problems with Dworkin's analysis of religious objections to abortion is its assumption that American pro-life sentiment is run by the Catholic Church. "The anti-abortionist movement is led by religious groups, uses religious language, invokes God constantly, and often calls for prayer. It embraces . . . not only fundamentalists but Orthodox Jews, Mormons, and Black Muslims. But Catholics have provided the organizational leadership."<sup>87</sup> Dworkin provides no evidence for this other than that Catholics like Judge John Dooling<sup>88</sup> aver that it is true.<sup>89</sup>

85. *Id.* at 40, 48.

86. *Id.* at 35.

87. *Id.* at 36. Note the troubling similarity between Dworkin's claims in this section of the book and those of ROSALIND P. PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 252 (rev. ed. 1990), whom Dworkin does not cite here.

[T]he antiabortion movement, which encompasses not only Catholics and fundamentalist Protestants but also Orthodox Jews, Mormons, and Black Muslims, is narrowly religious and antiseccular. . . . While various denominations participate, the unquestioned direction of the "right-to-life" movement—doctrinal, organizational, financial—has from the outset come from the Catholic church hierarchy. (citations omitted). Petchesky, like Dworkin, cites Judge John Dooling, *see infra* note 89, in the same paragraph with this information.

88. DWORKIN, *supra* note 2, at 36-39.

89. Judge Dooling's opinion in *McRae v. Califano*, 491 F. Supp 630 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980), is one of six sources Dworkin consults for reasons people cite for opposing abortion. Dooling discusses extensively religious sentiment about abortion in his opinion, 491 F. Supp. at 690-702, and also addresses the leadership of Catholic organizations in pro-life activities. 491 F. Supp. at 703-15. For cites to the other sources, see DWORKIN, *supra* note 2, at 9, 243 n.12, 13-14, 243-44 nn.14 & 17, 20, 245 n.28 (citing ROGER ROSENBLATT, *LIFE ITSELF* 185 (1992)); *id.* at 14, 243 n.15 (citing data from Yankelovich Clancy Shulman Poll of Sept. 10, 1992); *id.* at 14, 244 n.16 (citing data from NBC News/*Wall Street Journal* poll of July 10, 1992); *id.* at 15, 244 n.18 (providing a summary of post-*Casey* polls); *id.* at 32-33, 245 nn.2, 3 & 5 (citing *Time/CNN* poll data of June 1992). Reliance on such sources alone flaws Dworkin's discussion. He fails to discuss the phenomenon of pro-life sentiment in more rigorous detail (which might require sociological ethnography) and fails to properly engage the moral issues involved (which might require rigorous philosophical analysis and would preclude an *argumentum ad populum* by use of poll data). For description of *argumentum ad populum*, *see infra* note 194.

*Life's Dominion* never investigates whether Dooling's pro-choice proclamations might have been formulated for political reasons, which is the rationale given for the Church's unprincipled conversion to the derivative view. Dworkin seems unwilling to admit the politicization of law. *See* Hunt, *supra* note 76, at 39-43 (critiquing Dworkin's "fear of politics" in *Law's Empire* and his failure to confront "the inescapably political dimension of

These assertions about the preeminent role of Catholicism are at best misleading. Dworkin notes that 22 percent of Baptists and fundamentalists, 15 percent of Southern Baptists, and 15 percent of Catholics oppose any and all abortions,<sup>90</sup> but he neglects to explore the moral character and political strength of the Protestant views in any great detail.<sup>91</sup> Indeed, early religious sentiment against abortion was shaped primarily by Protestant denominations, not the Catholic Church.<sup>92</sup> A more fertile investigation of the religious roots of pro-life sentiment in this country would also focus on Protestantism.

Furthermore, we should perhaps look beyond organized religion to the origin of religious pro-life sentiment in America. In *Abortion in America*, James Mohr documents how the evolution of antiabortion sentiment was championed primarily by physicians rather than organized religion, either Protestant or Catholic.<sup>93</sup> Religious opposition to abortion began to develop only after the Civil War.<sup>94</sup>

What limited religious support there was during the late 1860s derived more from generalized concerns about birthrate and nativism than concerns as to the abstract morality of abortion.<sup>95</sup> The Protestant majority opposed abortion because it feared that "strictly Americans"—meaning those of Anglo-Saxon Protestant descent—would soon become a political minority in the face of the relative growth of Irish Catholic and other immigrant populations.<sup>96</sup> Mohr shows that the physicians who led the crusade to ban abortion were "white, native-born Protestants," who "both used and were influenced by blatant nativism."<sup>97</sup>

Dworkin, despite his critique of the Catholic church's position on abortion as motivated by concerns other than the purely religious, seems to ignore the fact that antiabortion sentiment may reflect other essentially secular views about rights, justice, and morality, which are not subsumed by the sanctity of life thesis of *Life's Dominion*. Moreover, Dworkin's attack on the alleged hypocrisy of Catholic moral teaching does nothing to increase tolerance, understanding, or accommodation, regardless of his stated intent to the contrary.<sup>98</sup>

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law"). "This fear of politics and the corresponding dream of discovering a means of resolving political problems by some means other than politics is deeply embedded in the problematic of legitimacy and is endemic within the liberal tradition." *Id.* at 39.

90. DWORKIN, *supra* note 2, at 35.

91. *See id.* at 36-39.

92. JAMES C. MOHR, *ABORTION IN AMERICA* 187 (1978).

93. *Id.* at 182-83.

94. *Id.* at 182-96.

95. *Id.* at 195.

96. MILBAUER, *supra* note 10, at 116-18, 132-33; MOHR, *supra* note 92, at 187-96.

97. MOHR, *supra* note 92, at 166-67.

98. *See* DWORKIN, *supra* note 2, at 10-11, 71, 101, 167-68.

## 2. *Feminism Misunderstood*

Dworkin's putative quest for greater tolerance is further undermined by his distortion of feminist views on abortion. Dworkin has not conducted even a cursory examination of feminist theory regarding the subject.<sup>99</sup> He cites little of the work done by feminists in this area, and the few works he does reference are cited parenthetically, without any substantive engagement.<sup>100</sup> His ten-page discussion of "feminism" relies exclusively on the work of Catharine MacKinnon, Robin West, and Carol Gilligan.<sup>101</sup> Of Dworkin's three representative feminists, *none* has ever written a book-length study of abortion, and neither MacKinnon nor West has ever even devoted a full law review article to the subject.<sup>102</sup> Given the wealth of feminist writings about abortion, this myopic focus is curious and hardly amounts to a serious review of contemporary feminist scholarship and its place in the abortion controversy.<sup>103</sup>

In effect, Dworkin's discussion establishes feminism as a straw woman that is easily dismissed through reference to his own more encompassing and sensitive theory.<sup>104</sup> His caricature of feminism takes place on two levels. First, Dworkin only looks to three sources to derive his characterization of feminist views, none of which is directly on point, and he fails to explain adequately why he has selected these particular sources. Second, Dworkin misconstrues feminist arguments against the Supreme Court's decision to use privacy as a basis for the right to choose abortion.

Why MacKinnon, West, and Gilligan? Dworkin claims that he has chosen to focus on the feminist views that are "central to this book, those that are concerned with the special connection between a pregnant woman and the fetus she carries."<sup>105</sup> Yet he has overlooked most feminist work on abortion.<sup>106</sup> Furthermore, his stated selection method renders his implicit argument about feminism's failure to understand abortion entirely circular: he claims to have read only those arguments that are central to his book

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99. For a sample of feminist legal and political theory on abortion, see sources cited *supra* note 10.

100. Dworkin cites parenthetically PETCHESKY, *supra* note 87; ADRIENNE RICH, *OF WOMAN BORN* (1976); and Judith Jarvis Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFFAIRS* 1 (1971). See DWORKIN, *supra* note 2, at 6, 243 n.5, 54, 249 n.4, 55, 247 n.39. He discusses in a slightly more substantive manner MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); MacKinnon, *supra* note 10; Robin West, *Taking Freedom Seriously*, 104 *HARV. L. REV.* 43 (1990); and CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1992). DWORKIN, *supra* note 2, at 6, 243 n.6, 52-57, 246-47 nn.34 & 40-41, 57-58, 247 n.40, 58-60, 247 n.41, 61, 247 n.42.

101. DWORKIN, *supra* note 2, at 50-60.

102. MacKinnon's article on sex equality does deal significantly with abortion but addresses it along with other reproductive issues, sexual assault, and other issues of sex inequality. See MacKinnon, *supra* note 10, at 1298-308.

103. DWORKIN, *supra* note 2, at 35.

104. *Id.* at 50, 56, 58, 60.

105. *Id.* at 51.

106. See sources cited *supra* note 10.

and concludes therefore that "feminist arguments and studies are grounded . . . in positive concerns that recognize the intrinsic value of human life."<sup>107</sup> As we shall see, that conclusion relies on selective misrepresentation of these few feminist arguments rather than substantive engagement with feminist theory on abortion.

*a. Dworkin's (Mis)reading of Catharine MacKinnon*

In the second paragraph of the feminism section, Dworkin attempts to frame his argument as a broad and textured response to feminism. He claims that it would be a "crude mistake" to believe that one doctrinaire feminist approach to abortion exists.<sup>108</sup> Dworkin's example of feminism's diversity is the debate over pornography—or, as Dworkin puts it, "divisions of opinion . . . about the ethics and wisdom of censoring literature some feminists find demeaning to women."<sup>109</sup> MacKinnon, of course, has participated significantly in this debate, both as an academic and activist.<sup>110</sup> Dworkin throws down the gauntlet by characterizing these efforts as censoring literature rather than as regulating pornography. He then picks up his sword and sallies forth to do battle with the MacKinnonite (for Dworkin, the paradigmatic feminist) head of the feminist Hydra.

As portrayed by Dworkin, feminism is quite unpleasant and deserves slaying. Despite his caveat about diversity of opinion among feminists, he immediately begins to frame feminist arguments as a monolithic and insupportable whole. The beast is strong: feminists led the fight to repeal abortion laws and pushed for the outcome in *Roe*<sup>111</sup> "with an urgency and power unmatched by any other group."<sup>112</sup> The bad temper and ungratefulness of the monster appear next: "They have since expressed deep disgust with Supreme Court decisions that have allowed states to restrict those rights in various ways . . ."<sup>113</sup> Finally, the Hydra is strident and nasty:

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107. DWORKIN, *supra* note 2, at 50.

108. *Id.*

109. *Id.*

110. She has helped cities to draft antipornography legislation and has assisted them in defending these ordinances in court. For example, MacKinnon coauthored Indianapolis's disputed antipornography ordinance and filed an amicus brief on the city's behalf when the ordinance was challenged in court. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding unconstitutional an Indianapolis ordinance that created a cause of action to sue sellers of pornography by those exposed to such material and prohibited trafficking in pornography, coercing performance in pornographic works, and forcing pornography on others), *aff'd mem.*, 475 U.S. 1001 (1986).

111. For a contrasting opinion, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 66-91 (1984), which argues that the early movement to legalize abortion in California came from the medical profession.

112. DWORKIN, *supra* note 2, at 51.

113. *Id.*

“[S]ome feminists are among the most savage critics of the arguments Justice Blackmun used in his opinion justifying the Roe decision.”<sup>114</sup>

According to Dworkin, feminists who follow MacKinnon are not engaging in the smart lawyerly practice of advancing every available legal basis for a right by rejecting privacy as the best theoretical basis for the right to abortion.<sup>115</sup> He wonders: “[W]hy should they be eager not only to claim an additional argument from equality but actually to reject the right-to-privacy argument on which the Court had relied? Why shouldn’t they urge both arguments, and as many others as seem pertinent?”<sup>116</sup>

Dworkin simply misunderstands feminist critiques of privacy discourse.<sup>117</sup> He views the issue as an abstract discussion about abortion as a legal phenomenon, rather than an embedded argument about a facet of women’s existences in a world in which they are governed by law as women.<sup>118</sup> Dworkin claims to see no connection between women’s coercion and abuse and MacKinnon’s discussion of the rhetoric of privacy.<sup>119</sup> He thus fails to recognize that abortion is not the only constitutional issue that privacy governs.<sup>120</sup> He seems also to assume that the Court views privacy as a constitutionally protected right for women to control the use of their

114. *Id.* Dworkin himself cites none of this savage criticism. The decidedly nonfeminist writings of James Bopp, Richard Coleson, and John Hart Ely (among others) are equally, if not more, critical of the reasoning in *Roe* as most feminist critiques. See James E. Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181 (1989); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

115. DWORKIN, *supra* note 2, at 51.

116. *Id.*

117. Part of Dworkin’s problem may be his limited familiarity with feminist argument in this area. The only feminist rejection of privacy as the best basis for the holding in *Roe* that Dworkin considers is MacKinnon’s. In fact, a veritable cottage industry of scholarship on precisely this point exists. See, e.g., Colker, *supra* note 10, at 1011; Copelon, *supra* note 10, at 15; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992); Koppelman, *supra* note 10, at 480; Law, *supra* note 10, at 955; Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology, and Abortion*, 24 GA. L. REV. 923 (1991); Neff, *supra* note 10, at 327; Siegel, *supra* note 10, at 261.

118. See Neff, *supra* note 10, at 327 (“Instead of the eroding right to privacy, what is required is a mode of legal analysis that comports with the physical reality of women’s lives, a legal principle that can reunite women and their wombs under the law and provide a more effective shield from state interference.”).

119. DWORKIN, *supra* note 2, at 52-53.

120. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (right to privacy protects family formation); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to privacy in choosing marital partner); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to privacy protects the receipt of information by married couples about contraception). This is an interesting omission on Dworkin’s part, given his commitment to “horizontal integrity.” DWORKIN, *supra* note 2, at 146 (“[I]ntegrity holds horizontally: a judge who adopts a principle in one case must give full weight to it in other cases he decides or endorses, even in apparently unrelated fields of law.”).

bodies.<sup>121</sup> This is an interesting, if somewhat farfetched, interpretation of the doctrine of privacy as articulated in *Roe*, particularly given the significant role that doctors are granted in the Court's opinion.<sup>122</sup>

To restate MacKinnon's point about coercion, privacy discourse can be and has been used to demarcate a realm of noninterference by the government into the lives of citizens.<sup>123</sup> When privacy is located in the home, it may be used to permit a variety of coercive acts by individuals that then are protected from investigation by the state.<sup>124</sup> Like any legal construct, privacy as it appears in the abortion context cannot exist in constitutional theory as an isolated phenomenon, but must be understood within its broader implications. Because privacy has been used to generate a social (not merely physical) sphere into which the state cannot intrude, it has at times acted to permit the continued subordination of women by men. "Private" acts of domination escape the scrutiny of the state through appeals to liberty, a result that MacKinnon finds to be ironic in the extreme.<sup>125</sup>

In Dworkin's reading, MacKinnon fears that recognizing privacy in sex will prevent protection from marital rape or prevent state funding for abortions.<sup>126</sup> In response, he argues that MacKinnon "conflates different senses of 'privacy.' Sometimes privacy is territorial . . . . Sometimes privacy is a matter of confidentiality . . . . Sometimes, however, . . . privacy means sovereignty over personal decisions."<sup>127</sup> According to Dworkin, the government's protection of a woman's sovereignty over the use of her own body for procreation does not preclude government attention to coercive situations inside the home or government protection of this right through

121. DWORKIN, *supra* note 2, at 53.

122. *Roe v. Wade*, 410 U.S. 113, 163-65 (1973). The Court stated that prior to the end of the first trimester of pregnancy, "the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated." *Id.* at 163. Before viability, the decision "must be left to the medical judgment of the pregnant women's attending physician," *id.* at 164, while postviability abortions could be regulated except where necessary, "in appropriate medical judgment," *id.* at 165, to preserve the mother's life or health; *see also id.* at 165-66 ("The decision vindicates the *right of the physician* to administer medical treatment according to his professional judgment . . . . [T]he abortion decision [before viability] is inherently, and primarily, a medical decision, and *basic responsibility for it must rest with the physician.*") (emphasis added).

123. *See* MacKinnon, *supra* note 10, at 1311.

124. *Id.* ("Privacy does nothing for [women who lack power and hence equality], and even ideologically undermines the state intervention that might provide the preconditions for [the] meaningful exercise [of equality].").

125. *Id.* ("The private is a distinctive sphere of women's inequality to men. Because this has not been recognized, the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination.").

126. DWORKIN, *supra* note 2, at 53.

127. *Id.*

the financial facilitation of its exercise.<sup>128</sup> In all of his descriptions of privacy, however, Dworkin does not recognize the facet of privacy on which MacKinnon relies to make her argument: the idea that privacy identifies a zone of human experience into which the government has no authority to intrude.<sup>129</sup> This zone is not a territorial concept; after all, few modern legal abortions take place in the home or the bedroom. MacKinnon, like many other feminists, has no objection to basing the right to choose abortion in a right to bodily integrity broadly defined.<sup>130</sup> If, however, Dworkin advocates a bodily integrity approach, why call it privacy at all, particularly when the Court has declined to do so?<sup>131</sup>

Dworkin identifies part of MacKinnon's argument as worthy of serious consideration; unsurprisingly, this "far more compelling explanation"<sup>132</sup> relates to his own argument about abortion. This is the argument that liberal approaches to abortion have not taken seriously enough the relationship between the woman and the fetus.<sup>133</sup> Dworkin translates this argument into a broad assertion: "Feminists do not hold that a fetus is a person with moral rights of its own, but they do insist that it is a creature of moral consequence."<sup>134</sup> This shifts the inquiry about the morality of abortion to a question of "whether and when abortion is an unjustifiable waste of something of intrinsic importance,"<sup>135</sup> thus directly supporting Dworkin's thesis.

But Dworkin has again missed the point of MacKinnon's project. MacKinnon is not making an argument about the intrinsic value of the fetus but rather about the material relationship between the woman and the fetus she carries.<sup>136</sup> This relationship is deeply contextual and carries with it the history of its formation. It thus may be rendered problematic by the way it came into being: if a woman becomes pregnant through an act of

128. *Id.* at 53-54 ("[I]t does not follow, from the government's protecting a woman's sovereignty over the use of her own body for procreation, that it is indifferent to how her partner treats her . . . inside her home.").

129. See MacKinnon, *supra* note 10, at 1311. "In gendered light," she writes, "the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability. . . . It belongs to the individual with power. Women have been accorded neither individuality nor power. Privacy follows those with power wherever they go, like and as consent follows women." *Id.*

130. See *id.* at 1318-24. This approach is compatible with a sex equality approach: Women's ability to exercise bodily integrity should not be circumscribed by denial of the right to choose abortion, since men's rights are not circumscribed in any comparable way. See Regan, *supra* note 10, at 1631. There are some theoretical problems with this approach, however, since it requires the establishment of equality for women through reference to a male standard.

131. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 277-79 (1990) (recognizing that a competent person has a liberty interest under the Due Process Clause in refusing life-sustaining medical treatment).

132. DWORKIN, *supra* note 2, at 54.

133. See MacKinnon, *supra* note 10, at 1309, 1313-18.

134. DWORKIN, *supra* note 2, at 57.

135. *Id.* at 56.

136. See MacKinnon, *supra* note 10, at 1309-18.

coercive sexuality, her relationship with the fetus she bears will be different than her relationship with a fetus she had conceived willingly.<sup>137</sup> Fetuses are largely morally equivalent in and of themselves. A fetus conceived through an act of rape is morally no different from a fetus conceived through an act of artificial insemination. MacKinnon seeks to focus on the contextualized history of the fetus's origins and the effect that these origins have upon the woman who carries it.<sup>138</sup> Her argument does not reduce to a mere detached interpretation of how best to respect the sanctity of life represented by the fetus.

Dworkin further states that “[t]he most characteristic and fundamental feminist claim is that women’s sexual subordination must be made a central feature of the abortion debate.”<sup>139</sup> While some feminists believe that sexual subordination is part of the context that should be taken into account when the permissibility of abortion regulations is considered,<sup>140</sup> his claim is wildly inaccurate. Even MacKinnon, who comes closest to this standpoint, would probably prefer to base her analysis of abortion in sex equality rather than in sexual subordination, if only for the pragmatic reason that sex equality provides a substantial constitutional hook for arguments about abortion.<sup>141</sup> Certainly she would not be in favor of conducting an analysis of the level of sexual subordination present in every conception as a condition for allowing abortion.

MacKinnon’s point is more subtle and convincing than Dworkin’s caricature of it. He reads MacKinnon as positing that in a world of sex equality, fetuses would take on a bizarre property-like dimension: “Abortion would then more plainly be . . . a kind of self-destruction, a woman destroying something into which she had mixed herself.”<sup>142</sup> MacKinnon’s point about sex equality is that when sexual encounters between men and women become less coercive, the relationship between woman and fetus becomes correspondingly less fraught with moral difficulty.<sup>143</sup> In fact, as this change takes place, the role of fathers in creating life could be taken into account more readily without risking unfairness to the woman.<sup>144</sup>

137. *See id.* at 1313, 1316-18.

138. *See id.* at 1309-19, 1326-28.

139. DWORKIN, *supra* note 2, at 55.

140. *See, e.g.,* LUKER, *supra* note 111; PETCHESKY, *supra* note 87; MacKinnon, *supra* note 10; Siegel, *supra* note 10.

141. *See generally* MacKinnon, *supra* note 10.

142. DWORKIN, *supra* note 2, at 56. Locke defines property as something removed from the state of nature through the mixing of one’s labor with it. *See* JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERANCE* ch. V, § 27, at 15 (J.W. Gough ed., new ed., corr. and rev., Macmillan Pub. Co. 1956) (1690). It is not clear whether Dworkin intended to evoke this image; given the pun on labor, it seems unlikely.

143. *See* MacKinnon, *supra* note 10, at 1326-28.

144. *Id.* at 1327 (“Under conditions of sex equality, I would personally be more interested in taking the man’s view into account. The issue of the pregnant woman’s nine-month



MacKinnon's argument does not "presuppose[ ] that the pivotal issue is whether a fetus is a person with interests and rights of its own."<sup>145</sup> Rather, as she explains it, "[t]he legal status of the fetus cannot be considered separately from the legal and social status of the woman in whose body it is. The pregnant woman is more than a location for gestation."<sup>146</sup> Dworkin's myopia about the basic elements of MacKinnon's argument causes him to give it less credit than it deserves and permits him to ignore the genuine challenge it poses to his theory.

*b. Sez Who? West and Gilligan*

Dworkin discusses West and Gilligan even more briefly than MacKinnon. He devotes only two paragraphs to West<sup>147</sup> and about two pages to Gilligan.<sup>148</sup> Still, in this short space, he manages to suggest some rather novel interpretations of their work in his attempt to create common ground for his concept of the sanctity of life.

With regard to West, Dworkin begins with a reasonable reading of an article in which West addresses abortion,<sup>149</sup> claiming that West rejects privacy in favor of an approach rooted in responsibility. He paraphrases West's point that "women should emphasize responsibility . . . [offering] a responsibility-based argument to supplement the right-based claims of *Roe*."<sup>150</sup> He then reads her point about responsibility to mean that "most people recognize, even when their rhetoric does not, that the real argument against abortion is that it is irresponsible to waste human life without a justification of appropriate importance."<sup>151</sup> In fact, what West says (which Dworkin actually quotes<sup>152</sup>) is that "[w]omen need the freedom to make reproductive decisions . . . to strengthen their ties to others . . . . Whatever the reason, the decision to abort is almost invariably made within a web of interlocking, competing, and often irreconcilable responsibilities and commitments."<sup>153</sup>

Dworkin's interpretation of this passage misunderstands West's argument. In his reading, West is arguing that women feel an abstract commitment to the intrinsic value of human life. West is actually arguing that

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commitment and risk would remain, and might have to be dispositive. The privacy approach might make more sense."). Dworkin, claiming that MacKinnon's argument "takes no notice of the creative function of the father," DWORKIN, *supra* note 2, at 56, apparently overlooked MacKinnon's mention of precisely this point in *Reflections on Sex Equality Under Law*.

145. DWORKIN, *supra* note 2, at 55.

146. MacKinnon, *supra* note 10, at 1316.

147. DWORKIN, *supra* note 2, at 57-58.

148. *Id.* at 58-60.

149. West, *supra* note 100, at 43.

150. DWORKIN, *supra* note 2, at 57.

151. *Id.* at 58.

152. *Id.* at 57-58, 247 n.40.

153. West, *supra* note 100, at 84-85.

women's decisions about abortion are deeply contextual, embedded within the personal histories and experiences of the women making the choices. In making this assertion, she relies on the moral theory of Carol Gilligan, claiming that women value relationships more highly than rules and that women use an ethic of care for others when making tough moral decisions. Understood in its fuller sense, West's work does not fit so easily into Dworkin's intrinsic value theory.

On the other hand, Dworkin's interpretation of Gilligan seems more plausible, for her work might be read to support the argument that some women believe that the fetus has some intrinsic moral status. Part of her study, which has been used, far beyond the scope of its research question, to ground broad claims about men's and women's fundamental natures,<sup>154</sup> analyzed interviews with women deciding whether to have abortions.<sup>155</sup> In the interviews, women expressed a deep level of struggle and difficulty with their decisions about abortion.<sup>156</sup>

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154. Gilligan wrote:

[T]he different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation . . . . But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.

GILLIGAN, *supra* note 100, at 2. The book's principal intent is to modify the work of Lawrence Kohlberg on the development of morality. *See id.* at 16-23. Kohlberg proposed a scale of moral development that went from the most basic and egoistic level to a level at which a person can understand and generate rules of substantive justice. LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981). On this scale, women tended to test out with lower levels of moral development than men of similar ages and backgrounds. GILLIGAN, *supra* note 100, at 18. Gilligan articulated the theory that women experience a different type of moral development that leads to an "ethic of care." *Id.* at 19 ("This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules."). Despite its wide citation for any number of broad assertions, the book is relatively narrow in its scope. For critiques of Gilligan and a sampling of the wide debate her work has inspired, see the essays collected in *AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES* (Mary Jeanne Larrabee ed., 1993).

155. Gilligan derived many of her conclusions about moral development from a study that involved interviews with twenty-nine women at the time when they were making their decisions about abortion and follow-up interviews a year after the decision. Gilligan conducted follow-up interviews with twenty-one of the original subjects. GILLIGAN, *supra* note 100, at 3.

156. The design of this study raises some serious methodological questions that Dworkin ignores. As Gilligan herself recognizes, the number of interviews is quite small, and the representativeness of the sample is open to criticism. *Id.* at 71-72. Gilligan also acknowledges the possibility that the interviewees "were in greater than usual conflict over the decision," because the referral procedure meant delay between the initial counseling visit and the eventual abortion, and some of the counselors "saw participation in the study [for the women seeking abortions] as an effective means of crisis-intervention." *Id.* at 72.

Dworkin uses Gilligan's interviews to draw broad conclusions about what "most people think is the real moral defect in abortion"<sup>157</sup> and illuminate "convictions about the value of life and the meaning of death."<sup>158</sup> This use of the work is questionable: "Since the study focused on the relationship between judgment and action rather than on the issue of abortion per se, no effort was made to select a sample that would be representative of women considering, seeking, or having abortions."<sup>159</sup> Worse yet for Dworkin's moral and philosophical generalizations, Gilligan cautions that "the findings pertain to the different ways in which women think about dilemmas in their lives rather than to the ways in which women in general think about the abortion choice."<sup>160</sup>

Moreover, Dworkin fails to address the main point of Gilligan's study on abortion: how crisis illuminates the changing ways that women configure their morality and move toward a relational ethic of care.<sup>161</sup> In Dworkin's reading of Gilligan, the rhetoric of responsibility plays a central role,<sup>162</sup> while relationships drop almost completely out of the picture. This enables him to quote as unambiguous and unproblematic one interviewee's statement, " 'Once a certain life has begun it shouldn't be stopped artificially,' " as an abstract commitment to the intrinsic value of human life.<sup>163</sup> In fact, the interviewee also states, " 'It is not that clear-cut. I both want the child and feel I should have it, and I also think I should have the abortion and want it . . . . ' "<sup>164</sup> While the interviewee asserts that the fetus is a human being, this view is neither the only nor the primary factor driving her confrontation with her crisis pregnancy. Contrary to Dworkin's unambiguous "commitment to intrinsic value" interpretation, this interviewee's statement reveals a woman attempting to balance conflicting feelings of responsibility: the obligation she feels toward the life she has created and her obligations to the others around her and to herself to avoid bringing a child into the world at the present time. The ethic of care to which this interviewee subscribes does not give her a clear answer, since it points both toward and away from choosing abortion.

Dworkin's discussion of feminism is unsatisfying on many levels. In addition to evading a serious review of feminist work on abortion, he has not considered carefully the few sources he did consult. If he had bothered to take feminist arguments about abortion seriously, he would have had to question some of his own grounding views and possibly abandon his vague

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157. DWORKIN, *supra* note 2, at 60.

158. *Id.*

159. GILLIGAN, *supra* note 100, at 72.

160. *Id.*

161. *Id.* at 73-105, 107-27.

162. See DWORKIN, *supra* note 2, at 59.

163. *Id.* at 60 (quoting GILLIGAN, *supra* note 100, at 88).

164. GILLIGAN, *supra* note 100, at 88.

concept of the sacred. His theory, although it aspires to do so, fails to engage deeply with the world.

### III

#### SACRED COWS: INTRINSIC VALUES AND COSMIC SHAME

Dworkin believes he has conclusively demonstrated why views that the fetus is a person are nonsense. He also claims to have discovered the "hidden planet" whose gravitational force will explain the "otherwise inexplicable convictions"<sup>165</sup> that divide the country so bitterly over abortion.<sup>166</sup> Yet he admits that his visionary concept that "human life has intrinsic value" may seem incomprehensible to readers who have only just discovered that they did not know what they really thought about abortion:

I have tried to show the inadequacy of the conventional explanation. But so far I have said little to make the concept of intrinsic value, or of sanctity or inviolability, more precise or to answer the objection that these ideas are too mysterious to figure in a genuine explanation of anything. Nor have I yet explained . . . how we can make sense of the abortion debate in light of these ideas.<sup>167</sup>

*Life's Dominion* fails to offer this "genuine explanation." Dworkin's central concepts of intrinsic value, sacredness, and "essentially religious" convictions lack the clarity and precision needed to ground the novel moral and legal interpretations that would clear up our collective confusion about the meaning of abortion. As a result, Dworkin appears to be fabricating out of thin air a collective common sense moral view of abortion: the Emperor wears no clothes.

#### A. *Intrinsically Mysterious*

Dworkin's "hidden planet" is his theory of the sacred,<sup>168</sup> distilled from the concept of intrinsic value. The idea of intrinsic value is not new in the abortion debate nor is it sufficiently distinct from other values in Dworkin's moral system.

Dworkin first attempts to distinguish intrinsic value from *instrumental value*, which depends on an object's utility in obtaining other things we

165. DWORKIN, *supra* note 2, at 69. Apart from lending the illusion of empirical research to Dworkin's reinterpretation of what people really believe about abortion, his planetary discovery metaphor self-reflexively (and self-servingly) magnifies the importance of the powers of moral vision through which Dworkin allegedly has divined what no one else has seen in people's views about abortion.

166. Those convictions may be explained more convincingly as a reflection of competing views about women's roles in society. See *infra* part V.

167. DWORKIN, *supra* note 2, at 67.

168. Dworkin uses "sacred" interchangeably with "inviolability" in order to emphasize that sacredness is a general term, which has a secular as well as a religious nature. *Id.* at 25, 70. This interchangeability dilutes the already questionable precision of the concept.

want or need,<sup>169</sup> and from *subjective value*, which derives from a person's desire for a thing.<sup>170</sup> In contrast, something is *intrinsically valuable* only "if its value is *independent* of what people happen to enjoy or want or need or what is good for them."<sup>171</sup>

Dworkin cites great paintings as an example of something that has intrinsic value: we admire and protect them for their "inherent quality as art" alone, and not simply because they give us aesthetic pleasure or instruction. We would be horrified at the destruction or desecration of such objects, not because this would "cheat us of experiences we desire to have" in relation to them, but because their loss would be horrible in and of itself.<sup>172</sup> Other examples of intrinsically valuable things include endangered species<sup>173</sup> and the environment.<sup>174</sup>

Dworkin argues that human life has intrinsic value<sup>175</sup> and that therefore its destruction by abortion is "morally problematical."<sup>176</sup> He maintains "that it is *intrinsically* regrettable when human life, once begun, ends prematurely. We believe, in other words, that a premature death is bad in itself, even when it is not bad for any particular person."<sup>177</sup>

Dworkin's connection between fetal life and intrinsic value is not entirely original. In *Religious Conviction and Political Choice*,<sup>178</sup> Kent

169. "Money and medicine, for example, are only instrumentally valuable: no one thinks that money has value beyond its power to purchase things that people want or need, or that medicine has value beyond its ability to cure." *Id.* at 71.

170. "Something is *subjectively* valuable only to people who happen to desire it. Scotch whiskey, watching football games, and lying in the sun are valuable only for people, like me, who happen to enjoy them." *Id.* Dworkin later refers to subjective value as personal value. *Id.* at 73.

171. *Id.* "[W]e think we should admire and protect [intrinsically valuable things] because they are important in themselves, and not just if or because we or others want or enjoy them." *Id.* at 71-72; cf. KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 103 (1988) (describing the moral consideration humans owe to animals and nature based on their intrinsic value or inherent worth):

What I mean by consideration owed to the entities as such is that the consideration does not depend either on the interests of some other kinds of entities, such as human beings, or on the number of similar entities in existence, protection being owed for some reason other than an entity's being one of the last remaining members of a species or other set of natural objects.

172. DWORKIN, *supra* note 2, at 72. This example seems to build in a subjective or instrumental valuation that serves to distinguish "great" art from the lesser variety.

173. *Id.* at 75-76.

174. *See id.* at 77-79.

175. It may also have instrumental or subjective value in different contexts, *see id.* at 74, although Dworkin believes that a fetus can have no subjective interest in staying alive that the state would be forced to protect. *Id.* at 73 ("I have argued that an early fetus has no interests and rights, and that almost no one thinks it does; if personal value were the only pertinent kind of value at stake in abortion, then abortion would be morally unproblematic.").

176. *Id.* "If it is a horrible desecration to destroy a painting," Dworkin writes, "even though a painting is not a person, why should it not be a much greater desecration to destroy something whose intrinsic value may be vastly greater?" *Id.*

177. *Id.* at 68-69.

178. GREENAWALT, *supra* note 171, at 120-37.

Greenawalt also characterizes people's views about abortion as judgments about the intrinsic value of the fetus:

If many people did regard the fetus as like a human being, the legal right of a pregnant woman might represent a cavalier attitude toward the protection of innocent life; but if fetuses were generally thought to have *intrinsic value*, their destruction would have little bearing on the *sanctity of life* of developed human beings.<sup>179</sup>

This formulation may seem to conflate detached and derivative values in just the manner Dworkin seeks to prevent, but elsewhere Greenawalt makes it clear that he understands the distinction:

A coherent moral view can treat as wrongful some things human beings do to entities that are incapable of having rights. Once this much is granted, a possible candidate among duties is that people should not intentionally destroy the life of a being that is potentially sentient, and a fetus might warrant protections as stringent as those given mature persons though it is not deemed a holder of rights.<sup>180</sup>

Moreover, Greenawalt develops his notion that fetuses have "inherent worth"<sup>181</sup> deserving of moral consideration by comparison with examples of animal rights and environmental protection<sup>182</sup>—the same examples of intrinsically valuable things that Dworkin uses.<sup>183</sup>

In his analysis, Greenawalt assumes that "the crucial questions are whether entities other than human beings intrinsically deserve protection and, if so, how much."<sup>184</sup> He argues that people should be allowed to rely on religious convictions when deciding how to protect such intrinsic values. Because controversial issues like abortion, animal rights, and the environment cannot be resolved by commonly accessible "premises of justice and criteria for determining truth,"<sup>185</sup> people, including legislators and even judges, may rely on religious convictions when deciding such questions.<sup>186</sup> Greenawalt thus seems to anticipate Dworkin's argument that decisions

179. *Id.* at 121 (emphasis added); see also *id.* at 122-25 (examining two arguments for permissive abortion laws that "do not rest on assigning the fetus an *intrinsic moral status* that is less than commonly thought appropriate for newborns" and concluding that "the appropriateness of a permissible legal approach to abortion cannot be demonstrated if one makes the concession that the fetus is *intrinsically entitled* to as much protection as an ordinary human being") (emphasis added).

180. *Id.* at 134.

181. *Id.* at 126, 131, 136-37.

182. *Id.* at 98-114, 144-69.

183. DWORKIN, *supra* note 2, at 75-79.

184. GREENAWALT, *supra* note 171, at 102; see also *id.* at 101 ("The attitude being favored is one in which ordinary people would attach intrinsic value to animals and nature . . .").

185. *Id.* at 12; see also *id.* at 109-12.

186. *Id.* at 12, 144-69.

about controversial intrinsic values may involve religious beliefs, although Dworkin will argue that because this connection is inevitable, the state may not intervene to coerce an outcome that would establish any particular religious view.

Dworkin goes beyond Greenawalt's concepts and refines intrinsic value by articulating his notion of sacredness or inviolability. But his distinction among intrinsic, subjective, and instrumental forms of value begins to break down as he defines the contours of the sacredness concept. He first claims that his theory can overcome persistent philosophical objections to the concept of intrinsic value itself. "David Hume and many other philosophers," he notes, "insisted that objects or events can be valuable only when and because they serve someone's or something's interests."<sup>187</sup> If valid, this objection could prove to be a devastating flaw in the conceptual lens of Dworkin's moral telescope; his hidden planet might not exist after all. And although he characteristically dismisses the Humean objection as unfashionable,<sup>188</sup> his definition of sacredness seems to incorporate subjective and instrumental processes of evaluation, when ostensibly it should rely on intrinsic value alone.

For example, Dworkin writes that "the nerve of the sacred lies in the value we attach to a process or enterprise or project rather than to its results considered independently from how they were produced."<sup>189</sup> Sacred value thus inheres in the natural or human creative processes invested in an object: we revere these processes inherently, not merely their products. For instance, art and cultural artifacts are intrinsically valuable because they are invested with artistic creativity, while endangered species are intrinsically valuable because we respect the natural processes that produced them, whether evolutionary or divine.<sup>190</sup>

This definition proves too much: intrinsic value becomes an exhaustive category. One cannot imagine an existing object that was not produced by nature or people; everything seems to have the potential for intrinsic value.

Dworkin attempts to sharpen the definition by explaining that two essential caveats to sacredness rescue the notion from fatal abstraction and hence uselessness. Not everything turns out to be sacred: there are *degrees* of sacredness, and our convictions about the sacred are *selective*.<sup>191</sup> But he

187. DWORKIN, *supra* note 2, at 69.

188. *E.g., id.* at 69-70 ("[The idea of intrinsic value] is commonplace, and it has a central place in our scheme of values and opinions.")

189. *Id.* at 78.

190. *Id.* at 76-77; *see also id.* at 78 ("Our attitudes toward individual works of art and discrete cultures, then, display a deep respect for the enterprises that give rise to them; we respect these enterprises independently of their particular results.")

191. *Id.* at 80. Dworkin proceeds by observing what people do and do not treat as sacred:

We do not treat everything that human beings create as sacred. We treat art as inviolable, but not wealth or automobiles or commercial advertising . . . We do

does not provide any guidelines for applying these limiting concepts or any principles for identifying the inherent value of a thing, apart from its use or our desire. We only know that some things are sacred but others are not. In fact, Dworkin's definition of the sacred seems explicitly to rely on processes of subjective and instrumental valuation:

[I]n different ways we are selective about which products of which kinds of creative or natural processes we treat as inviolable. As we would expect, *our selections [of sacred things] are shaped by and reflect our needs and, in a reciprocal way, shape and are shaped by other opinions we have.* . . . The reciprocity between our admiration for processes and our admiration for product is complex, and its result, for most people, is not a single overarching principle from which all their convictions about the inviolable flow but a complex network of feelings and intuitions.<sup>192</sup>

The process of sacred valuation is determined by a vague "network" of our "needs" and "opinions": Dworkin's concept is infused with the instrumental and subjective values he sought to exclude from his original definition of the sacred. On this formulation, therefore, the sacredness principle fails to overcome Hume's observation that "objects or events can be valuable only when and because they serve someone's or something's needs." Dworkin counters this by declaring how obvious it is that "much of our life is based on the idea that objects or events can be valuable in themselves,"<sup>193</sup> thus committing the classic logical fallacy of *argumentum ad populum*.<sup>194</sup> Moreover, even common-sense notions, which Dworkin claims to be expostulating,<sup>195</sup> should not be self-contradictory, as the definition of the sacred appears to be.

If we do not value sacred things only in and of themselves, independent of our desires, needs, and opinions, Dworkin's concept is unworkable on its own terms. Dworkin's promised hidden planet, which would clarify our confusion about the abortion debate and take us all the way to the Supreme Court, seems confused in its own conceptual origins. Accordingly, it fails even to meet Dworkin's own explanatory standard, proving too vague and mysterious to be a "genuine explanation of anything."<sup>196</sup>

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not treat everything produced by long natural processes—coal or petroleum deposits, for example—as inviolable either, and many of us have no compunction about cutting down trees to clear space for a house or slaughtering complex animals like cows for food.

*Id.*

192. *Id.* at 80-81 (emphasis added).

193. *Id.* at 69.

194. *Argumentum ad populum* is defined as the fallacy of appealing to popular prejudice as evidence of the truth of a proposition. See J.L. Mackie, *Fallacies*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 169, 178 (Paul Edwards ed., 1967).

195. DWORKIN, *supra* note 2, at 70.

196. *Id.* at 67.



B. *Sacredness and the Establishment Clause*

The confusion only increases in Dworkin's constitutional argument, where the vague sacredness principle merges with the notion of "essentially religious" convictions. "We may describe most people's beliefs about the inherent value of human life—beliefs they deployed in their opinions about abortion—as *essentially* religious beliefs."<sup>197</sup> Having established that abortion is a morally problematic event given the sanctity of life, Dworkin will demonstrate why moral and legal integrity nevertheless require the procedure to be legal. *Life's Dominion* will apologize—apparently a customary element of the author's theoretical style<sup>198</sup>—for *Roe*<sup>199</sup> and *Casey*<sup>200</sup> on tenuous First Amendment grounds.

Dworkin presents his Establishment Clause argument as if it were completely novel. He seems to have overlooked Peter Wenz's excellent book-length study of abortion as a fundamentally religious issue.<sup>201</sup> Wenz argues that people who wish to bar early abortions argue from their religious beliefs in the personhood of the fetus.<sup>202</sup> He thus creates a foundation in the First Amendment for *Roe*'s holding without relying on obscure conceptions of intrinsic value or the sacred.<sup>203</sup> In fact, Wenz's theory may be more powerful than Dworkin's because it encompasses both detached and derivative objections to abortion:

[T]he personhood and right to life of young fetuses is a religious matter. The view that such fetuses have intrinsic value or inherent worth amounts to the same thing. . . . [T]he issue of the intrinsic value or inherent worth of young fetuses corresponds to the issues of their personhood and right to life. And whatever terms are used—personhood, intrinsic value, inherent worth or right to life—the issue is a religious matter. The Establishment Clause forbids legislation that addresses it.<sup>204</sup>

Wenz's theory would guarantee a right to abortion regardless of whether the state justified its abortion restrictions on detached or derivative grounds.

197. *Id.* at 155.

198. See Hunt, *supra* note 76, at 33 ("Dworkin's methodology [in *Law's Empire*] places him too close to his object of enquiry, [and] the absence of concepts of ideology and discourse . . . shifts his legal theory toward legal apologetics."); Valerie Kerruish & Alan Hunt, *Dworkin's Dutiful Daughter*, in *READING DWORKIN CRITICALLY*, *supra* note 4, at 209, 212 ("[Dworkin's] theory of the 'true community' . . . is grounded in ontological individualism, pragmatic personification, and utopian political philosophy and is . . . an apologetic misrepresentation of contemporary liberal democratic society.").

199. 410 U.S. 113 (1973).

200. 112 S. Ct. 2791 (1992).

201. WENZ, *supra* note 10.

202. *Id.* at 15, 78-79, 161.

203. *Id.* at 161-90, 248-50.

204. *Id.* at 189.

Individual human life is sacred in *Life's Dominion* because it represents both natural and human creativity, the "combined and intersecting bases of the sacred."<sup>205</sup> People may disagree about the relative importance of these two elements where abortion is concerned,<sup>206</sup> but in general everyone believes it is a "cosmic shame"<sup>207</sup> if life is wasted prematurely. In a numbingly inclusive sentence, Dworkin reveals how overdetermined his concept has become:

The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the divine or evolutionary processes that produce new lives from old ones, at the processes of nation and community and language through which a human being will come to absorb and continue hundreds of generations of cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself, a mysterious, inescapable process in which we each participate, and which is therefore the most powerful and inevitable source of empathy and communion we have with every other creature who faces the same frightening challenge.<sup>208</sup>

This breathless abstraction is the foundation on which Dworkin builds his pro-choice constitutional thesis. The list of reasons for protecting human life is so expansive that no one could disagree with its generalities. Accordingly, Dworkin asks, since no one disputes that government can legislate to protect other manifestations of intrinsic value—art, culture, endangered species, the environment<sup>209</sup>—why should the state not ban abortion to protect the intrinsic value of life? "Why should government not have the power to enforce a much more passionate conviction—that abortion is a desecration of the inherent value that attaches to every human life?"<sup>210</sup>

In response, Dworkin argues that opinions on this divisive issue are "essentially religious"<sup>211</sup> and therefore cannot be enshrined into law unless

205. DWORKIN, *supra* note 2, at 83.

206. The abortion debate thus reflects deep disagreements about the relative moral importance of the natural and human contributions to the sacredness of human life. "If you believe that the natural investment . . . is transcendently important," Dworkin writes, "you will also believe that a deliberate, premature death is the greatest frustration of life possible," *id.* at 91, no matter how miserable the life would have been. Those who valorize the human contribution will "see more point in deciding that life should end before further significant human investment is doomed to frustration." *Id.*

207. *Id.* at 13.

208. *Id.* at 84.

209. *Id.* at 149.

210. *Id.*

211. *Id.* at 155.

they pass a constitutional balancing test.<sup>212</sup> The structure of this test seems ingenious if one has been convinced by Dworkin's exposition of the sacredness principle and has rejected all nonsensical derivative arguments:

A state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people's opinions about the nature of that value reflect essentially religious convictions that are fundamental to moral personality.<sup>213</sup>

Under this test, women purportedly have a constitutional privacy right to "procreative autonomy"<sup>214</sup> that outweighs the intrinsic value embodied by the fetus. For Dworkin, this privacy right is compelled by moral philosophy and the most principled reading of Supreme Court case law.<sup>215</sup> It finds its "textual home" in the Free Exercise and Establishment Clauses of the First Amendment.<sup>216</sup> Of course, the principle of procreative autonomy would apply only when the state claims an interest in protecting an intrinsic value; in Dworkin's view, it would not guarantee the right to abortion if the rights and interests of a person were involved.<sup>217</sup>

We have seen that the concept of the sacred is expansive and can encompass a variety of things, from great art and culture to endangered species and human life.<sup>218</sup> How is it that only convictions about abortion rise to the level of essentially religious convictions?

212. Balancing tests, though a common metaphor in legal discourse, are inherently subjective yet lend a pseudo-objective ring to the speaker's claims. The metaphor suggests that decision making is as simple and verifiable as a comparison of standardized measurements. Stanley Fish has criticized the coherence of the balancing metaphor as Dworkin uses it to articulate his theory of "law as integrity." See Stanley Fish, *Still Wrong After All These Years*, 6 L. & PHIL. 401, 408-16 (1987).

213. DWORKIN, *supra* note 2, at 157.

214. *Id.*

215. Dworkin tantalizes us:

I do not mean that no stronger constitutional right of personal autonomy can be defended as flowing from the best interpretation of the Constitution as a whole. Indeed, I think a significantly stronger right can be. But I shall not defend any principle broader than the more limited one just described, because that principle is strong enough to ground a right of privacy understood to include a right to procreative autonomy.

*Id.* at 252 n.15

216. *Id.* at 160-68. Dworkin writes that this conclusion rests on a "natural—indeed, irresistible—understanding of the First Amendment: that a state has no business prescribing what people should think about the ultimate point and value of human life, about why life has intrinsic importance, and about how that value is respected or dishonored in different circumstances." *Id.* at 164-65.

217. *Id.* at 157. Hence the need to destroy the derivative claims earlier in the book: "It bears repeating that if a fetus were a constitutional person from the moment of conception, this principle would not guarantee a right to abortion." *Id.* But see WENZ, *supra* note 10, at 189 (arguing that the First Amendment prohibits states from banning abortion because people's beliefs in the personhood of the fetus are religious in nature).

218. See *supra* notes 172-75 and accompanying text.

Dworkin defines a belief as essentially religious “by asking whether it is sufficiently similar in *content* to plainly religious beliefs.”<sup>219</sup> But how is it possible to distinguish these beliefs from the variety of passionate secular beliefs in equality, fairness, and moral philosophy, which often occupy the place that religion once had in peoples’ lives? Why are these views not barred from establishment? For example, Dworkin’s own system of moral philosophy has derived a principle that abortion must be legal. This supposedly secular view could be interpreted as expressing and installing a particular view about the meaning of life into law, a view that is not neutral. How can this be permissible within Dworkin’s framework?

Dworkin responds that religious belief must answer the “deep” existential question of the point or meaning of life—“does human life have any intrinsic or objective importance?”<sup>220</sup> He insists that these “foundational” questions are distinct from “more secular convictions about morality, fairness, and justice,” which merely “address themselves to the issue of how competing interests of people should be served or adjusted or compromised; they rarely reflect a distinctive view about what human interests have objective intrinsic importance, or even whether they do.”<sup>221</sup>

But Dworkin’s own system in *Life’s Dominion* seems to belie this distinction.<sup>222</sup> As T.M. Scanlon notes, concepts of morality and justice have been crucial elements in the content of many religious beliefs: “I would say that a conception of my rights and duties as an individual is more important to my sense of self—of my standing and dignity as a person—than is any impersonal idea of the meaning and value of human life.”<sup>223</sup> The difficulty of separating morality from religion creates the most friction as Dworkin tries to apologize for the holding in *Casey*.<sup>224</sup> He believes that while the

219. DWORKIN, *supra* note 2, at 155 (emphasis added). The content of essentially religious beliefs must “presuppose [a] particular conception of why and how human life is sacred, or take a position on any other historically religious matter.” *Id.* at 165. The subjective importance of a belief is not sufficient to make it religious. *Id.*

220. *Id.* at 156. This question is presumably distinguishable from the assertion that all human life has intrinsic *value*, which Dworkin maintained “we” all shared. See *supra* part III.

221. *Id.*

222. We are not the only ones to note the unworkability of this scheme. Scanlon drew the line at this contrivance. Scanlon, *supra* note 14, at 48 (“Even if this argument succeeds, however, there remains the second, very interesting question of whether the religion clauses of the First Amendment, if they do apply in this case, actually support the position Dworkin adopts.”); see also Book Note, *supra* note 14, at 943 (“The book . . . suffers from a potentially misleading ambiguity: at a crucial moment—Dworkin’s connection of his moral argument with the legal doctrines of the First Amendment—Dworkin obscures the prescriptive turn in what to that point has been a largely descriptive argument.”); cf. Carter, *supra* note 9, at 90 (“[I]n Dworkin’s scheme the justices and scholars who reject abortion rights, no less than the ones who support them, can insist that their conclusions are rooted in the broad principles underlying the constitutional language: principles like community, deference to elected authority, and respect for the sanctity of life.”).

223. Scanlon, *supra* note 14, at 47.

224. DWORKIN, *supra* note 2, at 171-76; see also *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-33 (1992) (plurality opinion). The *Casey* Court affirmed the basic decision in

right to abortion must be protected, the State may enact laws designed to ensure that the pregnant woman takes this decision seriously, as long as the law does not coerce a particular decision.<sup>225</sup> But between “responsibility” and “coercion,”<sup>226</sup> such legislation can create enormous burdens for many women. Dworkin’s scheme would forbid coercive abortion laws, but it does not give much content to the kinds of “responsible” restrictions it would countenance nor does it measure the burden of such restrictions on women.<sup>227</sup>

We find it difficult to imagine how Dworkin’s “secular” endorsement of regulations enforcing responsible restrictions on female choice does not express an interpretation about how best to respect the sanctity of life, not to mention a problematic view about the proper place and role of women in society.<sup>228</sup> Dworkin believes that states have a “legitimate interest in maintaining a moral environment in which decisions about life and death are taken seriously and treated as matters of moral gravity.”<sup>229</sup> While this moral view is professedly neutral, in fact it is an authoritative interpretation of how states should honor the intrinsic sacredness of life. Dworkin attempts to disguise this essentially imperialist move by claiming that his

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*Roe* that “it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy.” *Id.* at 2816. However, the plurality dispensed with *Roe*’s trimester framework for governing abortion regulations, *id.* at 2818, and adopted an “undue burden” standard for balancing the woman’s liberty interest against the state’s interest in potential life. *Id.* at 2820 (“[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”). Under this test, the Court upheld provisions of the Pennsylvania law requiring a twenty-four-hour waiting period, parental notification with a judicial bypass option, reporting and recording requirements, and informed consent, but struck down a spousal notification provision. *Id.* at 2822-33.

Dworkin fails to mention the uncommon honor bestowed upon him in the *Casey* opinion. Dworkin’s work was cited in Justice Stevens’s concurrence. *Id.* at 2839 n.2 (Stevens, J., concurring in part and dissenting in part) (citing Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 400-01 (1992)).

225. See DWORKIN, *supra* note 2, at 150-57, 172-76. Dworkin writes, “It is perfectly consistent to insist that states have no power to impose on their citizens a particular view of how and why life is sacred, and yet also to insist that states do have the power to encourage their citizens to treat the question of abortion seriously.” *Id.* at 153. But while he would allow states to encourage “responsible” decision making through legislation, he also argues that *Casey* was correct in striking the spousal notification provision and wrong in upholding the twenty-four-hour waiting period. *Id.* at 173-74. Dworkin further suggests that the courts should reconsider their support for laws that forbid government funding for abortion. *See id.* at 172-76.

226. *See id.* at 150-51. Legislation is coercive if it could cause citizens to act in ways contrary to their own moral convictions about when and why life is sacred. *Id.*

227. Dworkin endorses the *Casey* plurality’s “undue burden” standard: [W]e must regard a constraint as undue if it makes the exercise of that right all but impossible for some women . . . . [A restraint that] makes it sufficiently more expensive or difficult that it will deter some women . . . imposes an ‘undue’ burden if it seems, on balance, *designed* to have that consequence.

*Id.* at 173.

228. *See infra* part V.

229. DWORKIN, *supra* note 2, at 168.

view opposes the establishment of any other authoritative interpretation of how best to honor the sanctity of life.<sup>230</sup> Under his own system, therefore, Dworkin's view should be constitutionally suspect.

#### IV

#### HERCULES GOES WILD: DWORKIN'S MISREADING OF THE CONSTITUTIONAL DEBATE

Dworkin's constitutional argument is unsatisfactory not only because he grounds it in unpersuasive philosophical reasoning but also because he fails to work carefully through the doctrinal complexities of jurisprudence regarding abortion. We will first show how he misinterprets the positions of those who debate abortion within the legal community, and then we will discuss how he misunderstands the nature of the constitutionally-based right to choose abortion. Finally, we will address the additional difficulties generated by Dworkin's integration of his flawed philosophical argument with his legal discussion.

At many points in his argument, Dworkin seems to equate a right's status as a constitutionally protected right with a declaration that the right is fundamental,<sup>231</sup> something that Justices Scalia and Rehnquist in particular have taken great pains to avoid in the context of abortion.<sup>232</sup> As framed by Dworkin, constitutional analysis of abortion regulations can only have

230. We do not level this charge of imperialism lightly. Other legal scholars have also noted this characteristic of Dworkin's work. *See, e.g.,* Edgeworth, *supra* note 68, at 197 ("At a more fundamental level Dworkin's philosophy represents the imperialism associated with the modern rise of nationalism."); Hunt, *supra* note 76, at 10-14 ("Underlying [Dworkin's] legal optimism lies a parallel lack of confidence in democracy, in the capacity of popular participation in the public affairs of society to subject power centers to control through the primary agency of political rather than legal process."); Allan C. Hutchinson, *Indiana Dworkin and Law's Empire*, 96 *YALE L.J.* 637, 655 (1987) (book review) ("*Law's Empire* is an unadulterated form of oligarchic politics. Its stunted character of public discourse confirms Rousseau's dictum that without robust debate and active citizens, below the rulers (i.e., [Dworkin] and Hercules), there is nothing but debased slaves."); *id.* at 662 ("*Law's Empire* . . . is also profoundly elitist and undemocratic. Under the ostensibly liberating tutelage of principle, there functions a subtle regime of oppression.").

231. *See* DWORKIN, *supra* note 2, at 157-58, 166, 168. "Procreative decisions are fundamental . . . the moral issues on which they hinge are religious in the broad sense I defined, touching the ultimate purpose and value of human life itself." *Id.* at 158. For Dworkin, "integrity" requires that the fundamental right of "procreative autonomy" in contraception cases must be extended to abortion cases. *Id.* at 158-59; *see also id.* at 173 ("[A] woman's right to procreative autonomy is fundamental . . .").

232. *See* *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). Rehnquist argues that women have a "liberty interest" in abortion, which the Fourteenth Amendment protects against deprivation without due process of law. While he limits constitutional scrutiny to a rational basis test, he does suggest that a state cannot prevent women from getting abortions when their lives are at risk. *Id.* In *Casey*, Scalia acknowledges the liberty interest but specifically states that it is not a constitutionally protected liberty. 112 S. Ct. at 2874.

two results: either abortion is a fundamental right that requires strict scrutiny of state regulations or it is not fundamental and thus is extremely vulnerable under mere rational basis review.<sup>233</sup> But the *Casey* decision, by categorizing the right to abortion as a constitutional liberty interest<sup>234</sup> and applying an “undue burden” test rather than strict scrutiny, suggests that view is wrong.

Dworkin begins by reasonably asserting “[t]hough *Roe v. Wade* is famous, and furiously attacked and defended, few people understand the constitutional issues raised by the case.”<sup>235</sup> But he places himself in the uncomprehending majority by stating that due process analysis takes place at two levels of constitutional scrutiny: rational relationship review and compelling state interest review.<sup>236</sup> As he explains, these two kinds of protections are available under the Due Process Clause of the Fourteenth Amendment. All laws come under the first restriction: “the ‘due process’ clause of the Fourteenth Amendment requires a state to act *rationally* whenever it restricts liberty.”<sup>237</sup> Such a low level of scrutiny would be inadequate for some liberties, so the Constitution “picks out certain freedoms and makes them specific constitutional *rights* that a state cannot restrict or override unless it has a very strong reason for doing so—the Supreme Court sometimes describes this as a *compelling* reason.”<sup>238</sup>

Dworkin merely asserts that tiered scrutiny exists in due process analysis, assuming without argument that the Supreme Court has lifted its complex system of three-tiered analysis out of equal protection jurisprudence and placed it within a due process framework in compressed form. His analysis does not show convincingly that *Roe* itself established strict scrutiny of abortion regulations,<sup>239</sup> regardless of Justice Blackmun’s intentions.<sup>240</sup>

Dworkin apparently believes that the specific holding of *Roe* is driven by *Griswold v. Connecticut*<sup>241</sup> because decisions about contraceptives are as serious as decisions about abortions and because “it may not be possible consistently to distinguish abortion . . . from some popular forms of contraception, because the safest and most popular contraceptives now in use — intrauterine devices and the most widely used birth-control pills — act as

233. DWORKIN, *supra* note 2, at 104-05.

234. *Casey*, 112 S. Ct. at 2816 (plurality opinion).

235. DWORKIN, *supra* note 2, at 103.

236. *Id.* at 104.

237. *Id.*

238. *Id.* at 105.

239. *See id.* Dworkin seems to assume that the *Roe* Court applied strict scrutiny.

240. This is especially clear in the interplay between the plurality opinion and Blackmun’s concurrence in *Casey*, in which Blackmun argues that strict scrutiny, rather than the undue burden standard settled upon in that case, should be applied to abortion regulations. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2843, 2845-50 (1992) (Blackmun, J., concurring in part and dissenting in part). Under strict scrutiny, Blackmun would have invalidated all of the Pennsylvania restrictions. *Id.* at 2850-52.

241. 381 U.S. 479 (1965).

abortifacients . . . .”<sup>242</sup> Part of his argument then seems to be that one cannot accept *Griswold* and deny *Roe*, because “law’s integrity” requires that “the authoritative principles necessary to support an authoritative set of judicial decisions must be accepted in other contexts as well.”<sup>243</sup>

Dworkin posits his interpretation of the ruling in *Roe* as the proper basis through which to judge regulations of abortion. Therefore his entire constitutional analysis centers around whether states can assert a compelling interest in regulating the right to choose abortion. He explains: “Let us assume that pregnant women have a specific constitutional right . . . to control the use of their bodies for reproduction. A state cannot violate that right unless it has a compelling reason to do so.”<sup>244</sup> This assumption sets up the proregulation side of the constitutional analysis as a straw person, since Dworkin can then rely on strict scrutiny to strike almost any regulation with which he disagrees.<sup>245</sup>

Dworkin does not spend much time discussing the development of the line of cases dealing with abortion. He focuses instead principally on *Roe* and secondarily on *Casey*. On this basis, he interprets the constitutional argument as revolving around the personhood of the fetus, not the state’s ability to limit a woman’s choice of abortion.<sup>246</sup> This reading of the constitutional debate about abortion allows him to better ground his own solution to the constitutional issue: locating views on abortion within the Establishment Clause of the First Amendment rather than locating rights concerning abortion in the Fifth and Fourteenth Amendments. If Dworkin had considered the status of the right to choose from the perspectives of women who may or may not be able to exercise that right, this framing would have been more difficult to accomplish. Asking the question, what is the nature and strength of the right to choose abortion? leads to a different constitutional analysis than asking, to what extent may states enforce their religious views about the ethical status of the fetus through regulating

242. DWORKIN, *supra* note 2, at 107. We assume that Dworkin is defining safety as elimination of the risk of pregnancy, not the physical safety of the woman using the birth control device, since both the pill and the intrauterine device may pose substantial health risks for some women. BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *THE NEW OUR BODIES, OURSELVES* 282-85, 296-98 (1992). Further, the most widely used pills, combination pills, function by preventing ovulation and are not primarily abortifacients. *Id.* at 280.

243. DWORKIN, *supra* note 2, at 158.

244. *Id.* at 109.

245. *See id.* at 172-76 (arguing that the *Casey* Court was wrong to uphold twenty-four-hour waiting period but right to strike spousal notification provision in the Pennsylvania abortion statute).

246. Focusing on a woman’s ability to choose abortion would bring attention to cases that do not fit well in the Dworkinian framework, like *Maher v. Roe*, 432 U.S. 464, 473 (1977) (holding that states were not required to fund nontherapeutic abortions with Medicaid funds even if they funded prenatal care) (“[T]he right in *Roe v. Wade* can be understood only by considering both the woman’s interest and the nature of the state’s interference with it.”).



abortion? Dworkin has done little to establish that his reading of the constitutional debate ought to be accepted as a starting point.<sup>247</sup>

Dworkin's own views about constitutional powers and authorities incline him toward ignoring the perspective of individual women. He makes an astonishing statement about the structure of the Constitution, claiming that the argument about abortion has focused on the question of "whether the United States Constitution gives state legislatures the power to declare that a fetus is a person from the moment of conception, and to outlaw abortion on that ground."<sup>248</sup> But technically, the Constitution does not give the state legislatures the power to do anything; it enumerates the powers of the federal government, reserving the remainder to the states. By posing the question in this manner, Dworkin has less need to consider the rights of individual women.

Much of Dworkin's argument reiterates his long-standing critique of originalism in constitutional interpretation.<sup>249</sup> In his view, original intent does not provide clear rules in hard cases; rather, judges must turn to a broader consideration of the principles underlying the constitutional framework.<sup>250</sup> Dworkin finds these underlying principles in the Bill of Rights and distills their motivating force as "equal concern and respect."<sup>251</sup> He combines this with a commitment to "integrity," which requires that decisions must be principled rather than the product of compromise, strategy, or political accommodation; that decisions must be vertically consistent, or embedded logically in precedent; and that decisions must be horizontally consistent, or based on principles that cut broadly across apparently different areas of law.<sup>252</sup>

This theory of jurisprudence has been criticized extensively elsewhere.<sup>253</sup> This approach is made more difficult in the current context through its combination with Dworkin's idiosyncratic definition of the right to choose abortion as rooted in state power, rather than in individual women's liberty. At the deepest level, Dworkin argues not for women's freedom to choose abortion, but for the federal government's ability to prevent the states from significantly limiting the right to choose abortion. This focus determines his use of the Establishment Clause as a basis for the right,

247. See *infra* part V.

248. DWORKIN, *supra* note 2, at 109.

249. Dworkin explains this critique in chapter 5, "The Constitutional Drama." *Id.* at 118.

250. *Id.* at 144-45.

251. *Id.* at 119.

252. *Id.* at 146. He cites the opinion in *Casey* written by Souter, O'Connor, and Kennedy as a model of vertical integrity, *id.*, without discussing Scalia's rather acerbic criticism on precisely this issue. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2881-82 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). The concept of integrity makes its fullest appearance in DWORKIN, *supra* note 4, at 146-47.

253. See the essays collected in *READING DWORKIN CRITICALLY*, *supra* note 4.

rather than the more standard equal protection<sup>254</sup> or privacy<sup>255</sup> approaches. This position also enables Dworkin to hint that the state has the constitutional authority and perhaps the moral responsibility to ensure that women are making the abortion decision with sufficient seriousness.<sup>256</sup> He believes that courts judging the acceptability of abortion laws should consider the extent to which a particular regulation "could reasonably be expected to make a woman's deliberation about abortion more reflective and responsible."<sup>257</sup> The difficulty in this argument derives from Dworkin's focus on the sanctity of life rather than on abortion's role in women's lives. If state attempts to regulate abortion are really about adopting particular views of women's proper roles in society, Dworkin's legal argument misses the point.

## V

### THE FORGOTTEN PLANET: FEMINISM UNCONSIDERED

Contrary to Dworkin's theory about the primacy of religious beliefs, differences of opinion about abortion, at least in some cases, mask differences of opinion about women's roles in society. Earlier, we disputed Dworkin's superficial interpretation of the three feminist sources, which constitutes his entire discussion of feminism.<sup>258</sup> A deeper feminist critique of his project questions his substantive discussion of abortion and his framing of the debate itself. Dworkin insists that the debate over abortion is a mask for differing views about the sanctity of life.<sup>259</sup> But abortion can also be understood as a mask for a quite different debate, a debate over women's roles and identities in the modern American state and society.<sup>260</sup>

Kristin Luker, in her book *Abortion and the Politics of Motherhood*, contends that differences between pro-life and pro-choice activists can be related to their views about women's appropriate place in the legal and

254. See generally MacKinnon, *supra* note 10.

255. See *Roe v. Wade*, 410 U.S. 113 (1973).

256. Dworkin suggests that the state could compel a certain amount of reflection on the moral meaning of abortion and could, perhaps, absent such reflection forbid abortion:

The rare woman who has had a genuine opportunity to abort early in her pregnancy, when in almost everyone's view the insult [to such life] is much less, but who decides on abortion only near the end may well be indifferent to the moral and social meaning of her act. Society has a right, if its members so decide, to protect its culture from that kind of indifference, so long as the means it chooses do not infringe the rights of pregnant women to a choice. Many people think society has not only a right but an important responsibility to act in that way.

DWORKIN, *supra* note 2, at 170.

257. *Id.* at 171.

258. See *supra* part II.C.2.

259. DWORKIN, *supra* note 2, at 25-26.

260. The argument can be extended beyond the United States, but this would entail the development of a more subtle and nuanced argument than can be articulated here.

social order.<sup>261</sup> Her study, which relied on interviews of pro-choice and pro-life activists in California,<sup>262</sup> has influenced scholarly understanding of how the world views of activists inform and shape their views on abortion and their decisions to intervene in the controversy. In a similar vein, Rosalind Petchesky<sup>263</sup> argues that abortion politics “acquire volatility in periods when the social position of women generally is under siege.”<sup>264</sup> For Petchesky, this occurs because “the abortion decision epitomizes the capacity of individual women and women collectively to control fertility and . . . the consequences of heterosexual sex . . .” and therefore represents a threat to patriarchal power.<sup>265</sup> In our view, which draws on these two perspectives, the abortion debate is significantly about conflicting views of women’s roles both as mothers and as liberal citizens in modern American culture.

Some feminists and critical race theorists have recently focused on the concepts of selfhood and consciousness, holding that a view of unitary selfhood denies the complexity of the modern Western individual.<sup>266</sup> Turning to the idea of multiple consciousness,<sup>267</sup> they have posited a self that is contingent, partial, and emergent, as opposed to a self that is monolithic, static, and complete.<sup>268</sup> Various influences from culture and experience work to shape the contested and divided self, and the product is never finished.<sup>269</sup>

Multiple consciousness develops and amends W.E.B. Du Bois’s understanding of “double consciousness,” a term he used to describe the development of a split consciousness among Blacks that incorporated both the

261. LUKER, *supra* note 111, at 193-94. “While on the surface it is the embryo’s fate that seems to be at stake, the abortion debate is actually about the meaning of *women’s* lives.” *Id.* at 194.

262. *Id.* at 9.

263. Dworkin cites Petchesky in a passing footnote. DWORKIN, *supra* note 2, at 243 n.5.

264. PETCHESKY, *supra* note 87, at ix. Petchesky writes, “Abortion is the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood, and young women’s sexuality are contested.” *Id.* at xi.

265. *Id.* at ix.

266. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in FEMINIST LEGAL THEORY 235, 237 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (“[W]e are not born with a ‘self,’ but rather are composed of a welter of partial, sometimes contradictory, or even antithetical ‘selves.’ . . . Thus, consciousness . . . is not a final outcome or a biological given, but a process, a constant contradictory state of becoming . . .”).

267. See, e.g., Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 9 (1989) (“The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed.”).

268. Harris, *supra* note 266, at 237-38, 250-55; cf. Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1192 (1992) (“[P]ostmodernism rejects the notion of an abiding, fixed, or essential identity. Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected.”).

269. Hutchinson, *supra* note 268, at 1192.

dominant white culture and subordinate Black culture.<sup>270</sup> Critical race theorists, in particular Mari Matsuda, Patricia Williams, and Angela Harris, have developed this concept further to include consciousness built on people's gender, profession, social class, and other factors.<sup>271</sup> While the idea is incomplete,<sup>272</sup> it still provides a different and more promising basis for understanding what is at stake in abortion than Dworkin's concept of the sacred.

Multiple consciousness better describes the diversity of female views about abortion than the notion of intrinsic value. Multiple consciousness allows for the possibility that individual women who must decide whether to abort an unwanted pregnancy will feel pulled in different directions based on competing concepts of appropriate female social roles. Women are individuals in a liberal society. As such, they hold certain rights against interference by the state. But women are also *women* who have grown up and come of age in a society that glorifies motherhood and condemns abortion. They may feel conflicts between their roles as workers and their roles as mothers or between their responsibilities to themselves and their families and their responsibilities to the fetus. But each woman ought to be granted the complementary right and responsibility to wrestle with these difficult tensions for herself, as the tensions will differ for each woman. No woman is solely a liberal citizen or a potential mother, and every woman must negotiate the conflicts between these roles.

Thus the concept of multiple consciousness may provide a possible grounding for judges who must make decisions about the proper scope of abortion regulations. By using their own experiences in dealing with conflicting social roles, they can recognize some of the tensions inherent in the abortion decision and can attempt to adopt the perspectives of women who must encounter a given abortion restriction. By incorporating an awareness of multiple consciousness into the legal decision-making process, judges might be better able to understand the meaning and effect of regulations that restrict a woman's right to choose an abortion from a variety of other, conflicting options.

The descriptive power of multiple consciousness is borne out by Luker's empirical data on the abortion debate. As her study suggests, abortion opponents see women's proper fulfillment of gender roles as part of a particular social space in the private sphere.<sup>273</sup> Pro-choice advocates

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270. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 43-47 (Signet Classics 1969) (1903).

271. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 7-8, 10, 124-29, 163-65, 168, 196-97, 216-36 (1991); Harris, *supra* note 266, at 237-41, 250-55; Matsuda, *supra* note 267, at 8-10.

272. See Julie Novkov, *Multiple Consciousness and the Sociological Self* 2-3, 8, 23, 26-35 (Apr. 26, 1993) (unpublished manuscript, on file with the author and the *New York University Review of Law & Social Change*) (arguing that the concept of multiple consciousness, while useful and innovative, would be improved by the integration of sociological theory on the creation and articulation of selfhood).

273. LUKER, *supra* note 111, at 159-75.

have a different understanding of women's selves.<sup>274</sup> This conflict is particularly evident in the data that Luker presents on the world views of the activists she interviewed.<sup>275</sup> She writes, "The abortion debate has become a debate among women, women with different values in the social world, different experiences of it, and different resources with which to cope with it."<sup>276</sup> Further, there is some evidence that rather than religious belief driving views about abortion, the converse may sometimes be the case; some activists have sought out different religious affiliations based upon their beliefs regarding abortion.<sup>277</sup>

For pro-life activists, women are essentially different from men.<sup>278</sup> As one of Luker's interviewees explains: "I don't believe men and women are equal. I believe men and women are very different, and beautifully different, and that they're complementary in their nature to one another."<sup>279</sup> The pro-life activists view differences between men and women as natural rather than imposed by society or other outside forces.<sup>280</sup>

In the pro-life view, difference thus naturally leads women and men to contrasting areas of life as their proper spheres of influence. "I believe that there's a natural mother's instinct," claims one pro-life activist.<sup>281</sup> When a woman becomes part of a family unit, she bears the primary responsibility for maintaining the home, a role that should not be degraded by negative comparisons with marketplace work.<sup>282</sup> Another activist explains that mothering is an important job: "You're responsible for your home, and I think you're responsible for the children you bring into the world, and you're responsible, as far as you possibly can be, for educating and teaching them . . . . It's a huge job, and you never know how well you're doing until it's too late."<sup>283</sup> Maintaining this responsibility at the

274. *Id.* at 175-86.

275. *Id.* at 158-91. Luker's study was conducted before the abortion debate began to heat up nationally in the 1980s and concerns only activists in California. *See id.* at 194-97 (describing demographics of interviewees). Nevertheless, it does give us some insight into the architecture of beliefs about abortion of activists on both sides.

276. *Id.* at 193.

277. *See* FAYE D. GINSBURG, *CONTESTED LIVES* 189-93 (1989). Ginsburg describes one pro-life woman whose decision to leave the work force for a role as a housewife precipitated her strong stance on abortion and religion:

Roberta's shift from wage labor to homemaking, her commitment to the right-to-life cause, and her conversion to born-again Christianity emerged more or less in sequence. Contrary to the stereotype, she was not urged by religious leaders to join the pro-life movement. . . . For Roberta, the right-to-life cause legitimates choices she has made—as a woman, mother, and political activist.

*Id.* at 193.

278. LUKER, *supra* note 111, at 159.

279. *Id.* at 160.

280. *E.g., id.* at 168 ("Pro-life people believe that one becomes a parent by *being* a parent; parenthood is for them a 'natural' rather than a social role.").

281. *Id.* at 160.

282. *Id.* at 160-61.

283. *Id.* at 161.

level demanded makes it difficult, if not impossible, for a woman to pursue a full-time career, particularly when her children are young.<sup>284</sup> Many pro-life activists believe that the real work of maintaining the home is grossly devalued by career-focused feminists, since the "special status" of women's role in the home has been degraded into being "just a housewife."<sup>285</sup>

In the pro-life activist's world view, the end result of advances in women's equality, including the securing of abortion rights, is the destruction of a cherished female sphere.<sup>286</sup> The nurturing and warm enclave of the home is devoured by the colder outside world, and the family loses its special status. As Luker explains,

Because pro-life people see the world as inherently divided both emotionally and socially into a male sphere and a female sphere, they see the loss of the female sphere as a very deep one indeed. They see tenderness, morality, caring, emotionality, and self-sacrifice as the exclusive province of women: and if women cease to be traditional women, who will do the caring, who will offer the tenderness?<sup>287</sup>

For these activists, the delicate balance between men and women, with complementary strengths and weaknesses assigned to each sex, bears grave consequences if disturbed. Pro-life activists view most feminist agendas as driving out the values and strengths traditionally associated with women.<sup>288</sup>

Abortion disrupts the order of this complementary and balanced lifestyle.<sup>289</sup> Women are special and superior in part because they have the capacity to create life, and abortion devalues this capacity by crudely casting away its product.<sup>290</sup> It also disturbs the balance of power between women and men by granting women complete control and veto power over fertility, which should ideally be negotiated between both married partners.<sup>291</sup> Finally, abortion undermines traditional gender roles and diminishes male responsibility for sexuality.<sup>292</sup>

For the pro-life activist, then, the debate over abortion is not solely a debate over the personhood of the fetus or over the sacredness of human life. Rather, attitudes about abortion are connected intimately to an entire system of beliefs about women's roles and the nature of women's true selves.<sup>293</sup> Dworkin's framework excludes these beliefs entirely as a basis for explaining the abortion controversy.

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284. *Id.*

285. *Id.* at 160-61.

286. *Id.* at 161-63.

287. *Id.* at 163.

288. *Id.* at 202-04.

289. *See id.* at 205.

290. *Id.* at 161.

291. *Id.* at 162.

292. *Id.*

293. *See id.* at 214-15.

Similarly, the pro-choice activists interviewed by Luker appear to integrate their views on abortion into a systematic understanding of the world that revolves around their beliefs about women's gender roles.<sup>294</sup> In Dworkin's theory, pro-life activism is a function of the activists' views on the sanctity of life of the fetus, but pro-choice activism is left largely unexamined.<sup>295</sup> In contrast, Luker demonstrates that pro-choice activism is more than a simple reaction against pro-life activism.

For pro-choice activists, control over reproduction is supremely important to ensure women's ability to fulfill their potential.<sup>296</sup> Luker explains that such individuals "see women's reproductive and family roles not as a 'natural' niche but as potential barriers to full equality."<sup>297</sup> Rather than understanding motherhood as a different and in some ways superior status and role, pro-choice activists often identify it with the social devaluation of women and with the banishment of women to the private realm.<sup>298</sup>

For pro-choice activists, parenthood, particularly motherhood, is an important social role that should not be undertaken without serious consideration. Good parenting requires a combination of social, economic, and psychological resources that not all adults possess at any given moment in their lives.<sup>299</sup> In this view, it is wrong for a woman to bear a child that she cannot support, perhaps more wrong than for her to choose to abort the fetus. While mothering is valued as a significant part of a woman's life, it must be actively, consciously, and responsibly chosen and ought to enhance the mother's life. As one interviewee suggested: "I think life is too cheap, I think we're too easy-going. We assume that everybody will be a mother . . . . Hell, it's a privilege, it's not special enough."<sup>300</sup>

Not every woman should be expected to choose motherhood or to subordinate the rest of her life to maintaining the family. Some pro-choice advocates view an exclusive focus on maintaining the family as a danger for women, since sole reliance on a man for financial support renders women vulnerable to economic crisis in the event of death, divorce, desertion, or a disability.<sup>301</sup> Pro-choice activists believe that men and women are substantially equal in their capabilities and psychologies; thus, the tight linking of women to home life unfairly circumscribes women's capacities.<sup>302</sup>

294. *Id.* at 175-86.

295. In his brief discussion of feminism, Dworkin does not address post-*Roe* pro-choice activism at all. He does analyze the "paradigm liberal position" on abortion to prove that it "does not flow simply from denying that a fetus is a person," but this summary of "moderate liberal views" does not cite or examine any examples of activist beliefs in general or the women's movement in particular. DWORKIN, *supra* note 2, at 33-35. As we have discussed, his discussion of the "feminist," *id.* at 35, is wholly inadequate. See *supra* part II.C.2.

296. LUKER, *supra* note 111, at 176.

297. *Id.*

298. *Id.*

299. *Id.* at 181-82.

300. *Id.* at 181.

301. *Id.* at 176.

302. *Id.*

Luker shows that the difference among abortion activists is not fundamentally over the personhood of the fetus or over views about the sacred. Both sets of activists, as Luker points out, have a range of views about the moral implications of abortion.<sup>303</sup> The debate arises in large part from different understandings of women's proper role in modern society. As Luker states it, "beliefs about abortion are intimately tied to the two very different world views of the pro-life and the pro-choice activists; their beliefs about abortion are intimately connected to their attitudes toward children, sexuality, parenthood, [and] the proper role of women . . . ."<sup>304</sup>

In this conflict of interpretations, there seems to be little room for the kind of accommodation that Dworkin imagines. If the abortion battle is over the social roles occupied by half of the nation's population, recognizing and respecting the opposing person's "deep view" on the issue cannot generate consensus, nor can it produce a guide for reconciliation. Ultimately, the stark social issues must be decided one way or another: Will public or privately-supported day care be provided? Will antidiscrimination legislation operate to promote broader participation in the workforce by women with children? Will women continue to take more public roles in the governing of the country? Will changes in the economy act to increase burdens on single-income families? Will social initiatives that increase women's ability to leave unsatisfactory domestic arrangements be implemented? While individual women may remain able to choose their own conceptions of selfhood to some extent, no woman can escape the social forces that surround her and shape her life.<sup>305</sup>

Dworkin's liberal solution to the question of antithetical beliefs is tolerance.<sup>306</sup> Admittedly, advocates for choice probably would not object to continued pro-life advocacy against abortion in some fora, nor is it likely that pro-choice activists would want to persuade pro-life women to choose abortion. Similarly, if abortion itself could be stopped, pro-life advocates would probably tolerate, although frown upon, pro-choice advocacy. But between the two different visions of women's lives, little accommodation seems possible.<sup>307</sup>

303. *Id.* at 199-214.

304. *Id.* at 9-10.

305. As MacKinnon suggests, the abortion controversy will only subside when conditions of sex equality are realized. See MacKinnon, *supra* note 10, at 1326-27. She explains: The point is the politics of abortion would be so dramatically reframed, and the numbers so drastically reduced, as to make the problem virtually unrecognizable. If authority were already just and body already autonomous, having an abortion would lose any dimension of resistance to unjust authority or reclamation of bodily autonomy.

*Id.* at 1327.

306. As Dworkin states, "Tolerance is a cost we must pay for our adventure in liberty." DWORKIN, *supra* note 2, at 167.

307. See LUKER, *supra* note 111, at 214-15. This is why Dworkin must struggle to construe the conflict as one about religious differences. "We are committed, by our love of liberty and dignity, to live in communities in which no group is thought clever or spiritual



While individuals remain free to some extent to select their own life paths, larger choices about women's roles in the family and in society are determined by the collective social and political body. The fundamental split over how these choices should be made leaves little room for reasoned critical interaction designed to reach a principled compromise. By focusing on the role of the fetus rather than on the role of the woman facing the abortion decision and on society's role in deciding among different conceptions of women, Dworkin does not see this fundamental difference of views and its irreconcilability. He asks a helpful question: What is the abortion debate, at bottom, about? His answer, though, does not lead the debate toward resolution.

Instead of seeking to reconcile the pro-life and pro-choice perspectives within civil society or through state intervention, we should permit each woman to make this difficult decision for herself. More importantly, we should aid her efforts to do so in a positive rather than negative way. If states wish to encourage women to choose childbirth, they should do so by providing better forms of support for those who decide to give birth, rather than attempting to coerce the choice by making abortion more difficult or impossible.

An understanding of multiple consciousness can also assist women in negotiating the pressures of being mothers and workers. In particular, it can ease the psychological difficulties inherent in balancing the conflicting roles women confront when they decide whether to bear children or not. But multiple consciousness alone is not enough. Ultimately, society must, through the state's authority, choose which roles it wishes to endorse for women and in what ways it will encourage the performance of such roles. We only hope that this choice fosters more opportunities for women to participate in society and rise to the highest levels of individual accomplishment. Only by guaranteeing women's status as full and equal members of society can the "problem" of abortion be finally resolved.

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enough or numerous enough to decide essentially religious matters for everyone else." DWORKIN, *supra* note 2, at 167-68. But this picture looks much different when one sees the conflict in the context of real sex inequality, where one group has historically assumed the power to control women's reproductive lives and other decisions.

