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Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy

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INTRODUCTION

"Privacy" today presents paradoxes of knowledge, social vision, and power. Nowhere are these three paradoxes more evident than in the issue of abortion.

The current controversy over abortion reflects two distinct sets of issues. While *Roe v. Wade*[1] represents the most striking development in the evolution of the constitutional right to privacy, which the Supreme Court enunciated in *Griswold v. Connecticut*,[2] it is also widely viewed as the epitome of the federal courts' heightened assertiveness since *Brown v. Board of Education*.[3] *Roe v. Wade* has evoked a strong response for both reasons, as pro-life forces have made enormous efforts to limit and eventually overturn what is in their view a license to murder, a license issued on unprincipled grounds by an unelected and remote institution.[4] Pro-choice groups have defended the right to abortion with equal, if somewhat belated vigor, for they realize that the re-criminalization of abortion would constitute an incalculable blow against the struggle for women's equality. Defenders of the Court have also been at pains to reject the charge that *Roe v. Wade* represents a dangerous and undemocratic usurpation of power by the judiciary.

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

2. 381 U.S. 479 (1965). See, e.g., Note, *Roe v. Wade* and *Doe v. Bolton*: The Compelling State Interest Test in Substantive Due Process, 30 Wash. & Lee L. Rev. 628, 632 (1973) ("The Court's decisions in the abortion cases should be viewed as a development of the principles set forth in *Griswold v. Connecticut*.") (footnote omitted).

3. 347 U.S. 483 (1954). See, e.g., Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on *Harris v. McRae*, 32 Stan. L. Rev. 1113, 1114 (1980) (*Roe v. Wade* is one of most controversial cases of "modern constitutional law," which began with *Brown v. Board of Education*).

4. Indeed, the Reagan administration has asked the Court to overturn *Roe v. Wade*. See Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, No. 84-495 (U.S. brief filed July 15, 1985).

The two sets of concerns running through the abortion controversy—the debates over judicial activism and the proper scope of the right to privacy—present a paradox concerning the possibility of knowledge of morality and politics. Can we "know" that abortion is, or is not, wrong? And can we "know" that a woman should, or should not, have a right to an abortion? One response to these questions is complete skepticism: normative "reasoning" about the morality of abortion and the right to privacy is simply an elaboration of one's views or tastes, or a cover for the promotion of one's interests. Another response is that actual knowledge, as opposed to mere opinion or belief, is possible: as fallible human beings we may not know that we have the right answer in any given case, but our reasoning does have a determinate structure by which we might, at least in principle, come to know that abortion is (not) right or that a woman should (not) have a right to abortion.

Yet in practice what one finds is a selective skepticism. Those who favor the right to abortion tend to be highly skeptical of attempts to prove that the fetus is a "person" or "human being." A key argument in the liberal pro-choice arsenal is that such questions concern subjective moral issues regarding which people must come to their own conclusions. Yet most pro-choice advocates also tend to be more favorably disposed towards the efforts of the courts and legal theorists to develop a structured, principled body of doctrine on basic human rights and social values, including the right to abortion. Most pro-life advocates, on the other hand, have little difficulty resolving or setting aside doubts about the possibility of knowing whether the fetus is a person. Yet many of those most strongly opposed to abortion look with disfavor on the courts' efforts to elaborate a body of doctrine on basic social values or individual rights. Such matters, they argue, are subjective concerns which are incapable of reasoned or principled resolution, and should be left to the political process.

To be sure, that there is an inconsistency at all cannot be taken for granted. Perhaps, in both cases, the selective emphasis on skepticism is simply a useful rhetorical weapon in the political struggle, unrelated to any deeply held beliefs about the possibility of knowledge; if so, the paradox is easily explained. Or, perhaps it is possible to know that abortion is murder, whereas the scope of the right to privacy is inherently subjective (or vice versa); if so, the paradox is merely apparent. I believe neither to be the case, however, and will argue that this selective skepticism stems from a divergence in visions of the social order, that is, beliefs about what people are like and about how society should be structured.

Turning to an analysis of these social visions, we find a second paradox. On the one hand, private life takes on an increasing pre-eminence as the "moral yardstick" against which everything else, including one's politics, is measured. From this perspective, one's life acquires meaning only in personal

experience and intimate associations.[5] Yet this ideal of private life has a darker side as well, for the belief in "the moral primacy of the private over the public sphere of society"[6] appears to be accompanied by a psychology of self-centeredness and an emphasis on personal fulfillment through consumption.[7] Indeed, the ideal itself turns out to be hollow: "the more privatized the psyche, the less it is stimulated, and the more difficult it is for us to feel or express feeling."[8]

Both sides of this ambiguity coexist in the issue of abortion. On the one hand, the right to abortion represents a commitment to the notion that the choice of one's way of life or role is a profoundly personal decision. A woman may choose to be a mother, or to pursue a career, or to combine the two. The shape a woman gives her life derives its significance not from passive acceptance of some "natural" or God-given plan, but from the fact that she made the choice herself.[9] Yet if the right to abortion makes her master of her own fate, one cannot ignore what appear to be the less palatable aspects of that fate. Even if one rejects the pro-life charge that a decision to have an abortion is necessarily selfish or that it inherently undermines "the family," the emphasis on the exclusivity of the woman's right to decide can too easily seem uncomfortably compatible with an atomization of personal life. Further, a social order that tends to substitute personal authenticity for transcendent moral principle as the supreme guide for action may not prove the most conducive setting for individuals to pursue the difficult moral issues concerning abortion.[10]

The third paradox concerns our understanding of what "privacy" means for social structure and power relations. On the one hand, the private sphere appears to be granted increasing protection from outside interference, and

5. For a good description (and criticism) of this phenomenon, see R. Sennett, The Fall of Public Man (1976).

6. A. Westin, Privacy and Freedom 330 (1967).

7. See generally, e.g., C. Lasch, The Culture of Narcissism (1979).

8. R. Sennett, supra note 5, at 4. Cf. id. at 260 ("The development of personality today is the development of the personality of a refugee.").

9. See, e.g., Jones, Abortion and the Consideration of Fundamental, Irreconcilable Interests, 33 Syracuse L. Rev. 565, 567 (1982) ("[O]nly the right to have an abortion may emancipate [a woman] from her traditional position in society and enable her to become a person valued more in her own right than for the reproductive capabilities by which she is bound.").

10. Indeed, even the concept of religion bears the mark of this shift. One theorist compares privacy to religion, arguing that "[b]oth religion and privacy (at least in some forms) seek to protect the most intimate, the most sincere, the most deeply felt aspirations of man." Silver, The Future of Constitutional Privacy, 21 St. Louis U.L.J. 211, 276 (1977). Apart from the question of the persuasiveness of the comparison, what is striking is the identification of "religion" with deep, sincere feelings. Cf. Ramsey, Reference Points in Deciding about Abortion, in The Morality of Abortion 60, 61 (J. Noonan ed. 1970) (discussing United States v. Seeger, 380 U.S. 193 (1965)) ("We believe that a deeply felt, conscientious belief in or outlook on some public question is really the same, at least in the public forum, as any belief traditionally called religious."); R. Sennett, supra note 5, at 4 ("The Roman in private sought [in Christianity] another principle . . . based on religious transcendence of the world. In private we seek out not a principle but a reflection, that of what our psyches are, what is authentic in our feelings.").

turned into a sanctuary from power in which individuals, freed from the dictates or prying of the government, explore the deepest truths about themselves and realize their inner natures. The growing importance since *Griswold* of constitutional restrictions on governmental regulation of intimate relationships and personal choice manifests this development most strikingly: the Court, claims one conservative critic, has "deregulated" the family.[11] It appears that respect for the moral ideal of private life is becoming embedded in the very structures of power. Yet we may also wonder if that is really so—or, if it is—whether it constitutes a desirable development. For at the very time that an enclave of personal autonomy is given constitutional protection, the family and private life appear to be subjected to a "socialization of reproduction," a process by which bureaucracy, both governmental and corporate, "intrudes [into the family] and obliterates its privacy."[12] Worse, the very ideal of personal life as the highest good may itself be a technique of power. Is sexuality a key to self-realization and knowledge; or is it a "discourse" in which individuals enmesh their very understanding of themselves in a web of power relations?[13]

The abortion issue once again epitomizes this ambiguity. On the one hand, *Roe* established a woman's freedom to obtain an abortion without fear of criminal sanctions, a real gain in personal freedom for countless women who otherwise would have been forced to bear children or risk their lives in illegal abortions. Yet the privacy cases, including *Roe*, can be seen in quite the opposite terms, as representing not a triumph for individual freedom but the implementation of a state social policy premised on "two standard conservative views: that social stability is threatened by excessive population growth; and that family stability is threatened by unwanted pregnancies."[14] Perhaps *Roe* marks the first step towards state control of individual reproductive decisions. Further, even if the threat to women's freedom does not take blatant forms (such as conditioning welfare benefits on having an abortion), in the longer run the more subtle forms of coercion could weigh most heavily. At worst, abortion (and contraception) could turn out to constitute one important means by which women adjust their reproductive capacities to the capitalist system, especially the labor market.[15]

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11. Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 196.

12. C. Lasch, Haven in a Heartless World at xxiii (1977). We may doubt, however, that the family was ever really as much of a haven as this thesis implies. See generally text accompanying notes 359-586 infra.

13. See 1 M. Foucault, The History of Sexuality, (1978); S. Heath, The Sexual Fix (1982); N. Poulantzas, State, Power, Socialism 63-75 (1978)

14. Grey, Eros, Civilization and the Burger Court, Law & Contemp. Probs., Summer 1980, at 83, 88.

15. See Roeloffs, The Warren Court and Corporate Capitalism, Telos, Spring 1979, at 94, 99. I do not mean to claim that before abortion was legalized, sexuality and childbearing constituted a pristine realm of individual freedom. On the contrary, the structure of family life has always been closely related to capitalist development. See Section III infra. Nevertheless, *Roe*

The claim that abortion is not intrinsically liberating and that the ideals underlying the liberal right to privacy are not unambiguously desirable is one often associated with opponents of abortion.[16] This article approaches these paradoxes from the other side, from a perspective supportive of the right to abortion as an essential element of women's liberation but mindful of grounds for disquiet over the possible impact and significance of the right in its liberal form. Criticism of the manipulative sexuality so pervasive in capitalist advertising and media need not be premised on a repressive moralism;[17] similarly, criticism of the liberal pro-choice position for its approach to the morality of abortion need not be anti-feminist. On the contrary, a "feminist morality of abortion"[18] could be a key ingredient in the struggle to ensure that the right to abortion is truly liberating.

An essential element of a critique of the liberal right to abortion—a critique that insists, not that we cut back or withdraw the right, but rather that we attack the radical inadequacy of any individual right in a liberal capitalist society—is a rejection of two basic methodologies currently available for understanding moral questions and their relation to social structure. On one side are approaches that ask what is "right" in some timeless sense and proceed by normative reasoning abstracted from social circumstance. One may, for example, begin with extremely broad, ahistorical observations about what people or society are like, and then work out their consequences; or, one might set out various intuitions and proceed by analogy; or one might begin with some fundamental moral or religious principle and then explore its meaning and implications. On the other side are sociologically oriented approaches, which look directly to questions of power and interests, and view moral ideas and arguments either as froth or as factors that can only be understood by a sociology of knowledge.

The contrast between the two methodologies might be characterized as overdrawn; but—whatever its broader validity—it does accurately characterize the options available within the dominant mode of American legal theorizing.[19] This bifurcation is particularly clear in the debates concerning privacy. Numerous conceptual analyses of the right to privacy treat it in an ahistorical manner. These analyses ask what we mean by "privacy,"[20] call for

might indicate a significant transformation in the form of that relationship towards more intensive social control of reproduction.

16. E.g., Swan, Compulsory Abortion, 3 Ohio N.U.L. Rev. 152 (1975).

17. Cf. S. Heath, supra note 13, at 4 (aim is "to begin a critique of contemporary sexuality . . . from the other side, from a position that is not anti-sex and pro-repression but for change in the social relations of subjectivity, of our existence as related individuals—a change that today's construction and valuation of 'sexuality' can be seen to oppose").

18. Petchesky, Reproductive Freedom, 5 Signs 661, 669 (1980).

19. Compare, e.g., Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959), with, e.g., Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298 (1960). For a general discussion of the question of methodology, see R. Unger, Law in Modern Society 9-23 (1976).

20. E.g., Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421 (1980); Comment, A Taxonomy of Privacy, 64 Calif. L. Rev. 1447 (1976).

"clearer definitions" of the concept,[21] or specify the essence of the right to privacy on the basis of general assertions about some timeless human nature.[22] Other analyses eschew talk of the moral claims of privacy and argue instead, for example, that the family is being invaded or that the idea of an enclave of personal freedom is an illusion.[23]

Arguments over abortion are similarly dichotomous. Many concentrate on the status of the fetus,[24] or ask in a general way whether the decision to bear a child is fundamental to one's personhood;[25] all such approaches purport to give us an answer that would be as valid in one society or time as another.[26] A different set of arguments, however, concentrates on showing that pro-life advocates are really concerned with keeping women in their place, or that an anti-abortion policy is simply an attempt to reinstate a conservative social order, or that a pro-choice policy really reflects a state determination regarding population growth. In this mode of argument the moral claims against abortion—or in favor of it—are more or less dismissed.[27]

Finally, this dichotomy pervades associated issues as well. Arguments over funding, for example, may test the consistency of the Supreme Court's funding decisions against what is argued to be the basic principle underlying *Roe*.[28] On the other hand, a more pragmatic or "realist" approach can be taken, charging the Court with showing a bias in favor of middle- and upper-class women, or contending that it executed a tactical retreat from a contro-

21. E.g., Lusky, Invasion of Privacy: A Clarification of Concepts, 72 Colum. L. Rev. 693 (1972).

22. E.g., Fried, Privacy, 77 Yale L.J. 475 (1968).

23. C. Lasch, supra note 12. R. Jacoby, Social Amnesia (1975). Compare Benn, Privacy, Freedom, and Respect for Persons, in 13 Nomos, at 1, 13 (J. Pennock & J. Chapman eds. 1971) (treating "[t]he very intimate connection between the concepts of *oneself* and *one's body*" as "beyond question," (although admitting to a certain cultural relativity as to "the outer limits of our personalities") with N. Poulantzas, supra note 13, at 29, 63-69 (the "body," as opposed to "biological individuals," is forged in capitalist social practices), and D. Armstrong, Political Anatomy of the Body at xi (1983) ("medical knowledge both describes and constructs the body as an invariant biological reality").

24. E.g., Krimmel & Foley, Abortion, 46 U. Cin. L. Rev. 725, 727-70 (1977).

25. E.g., L. Tribe, American Constitutional Law § 15-10, at 923 (1978).

26. To be sure, extremely broad limits may be announced, as when the analysis relies on values embedded in "Western culture and religion." See Note, State Intrusion into Family Affairs, 26 Stan. L. Rev. 1383, 1384 n.7 (1974). But, the qualifications (if any) having been made, the analysis proceeds in an ahistorical manner.

27. E.g., L. Gordon, Woman's Body, Woman's Right 415 (1976) ("The attribution of human rights to the fetus is not a new idea but repeats nineteenth-century anti-birth-control views which, revealingly, fused abortion with contraception. Perhaps sperm and ova have rights too. This is not to deny the existence of real moral issues about life or to deny the reasonableness of a position that fetuses ought not to be destroyed. But right-to-life advocates do not usually fight for 'life' in any systematic way. . . . They are reacting not merely to a 'loosening of morals' but to the whole feminist struggle of the last century; they are fighting for male supremacy."); Grey, supra note 14; Roeloffs, supra note 15.

28. E.g., Perry, The Abortion Funding Cases, 66 Geo. L.J. 1191 (1978); Horan & Marzen, The Supreme Court on Abortion Funding, 25 St. Louis U.L.J. 411 (1981); Note, *Harris v. McRae*, 12 Colum. Hum. Rts. L. Rev. 113 (1980).

versial area.[29]

This methodological dichotomy poses a serious obstacle to the development of a critical approach to abortion and privacy. We cannot hope to resolve the paradoxes of abortion as a matter of knowledge, social vision, and power structure, unless we overcome the dichotomy between abstract normative arguments and analyses of power and social structure. Without a different approach, we will constantly veer between conceptual or analytical arguments that too easily ideologize individual freedom, thereby obscuring the extent to which liberal rights may signify heightened social control, and analyses which, at base, offer no understanding of the individual except as the hapless product of a total domination from which escape is not merely impossible but inconceivable. Equally, we will be condemned to a sterile juxtaposition of analyses of abortion which implicitly treat women's individual choice as an oasis of self-determination and control, and to arguments that their choice is meaningless in a society so thoroughly pervaded by inequalities of sex, race, and class.

Thus, I do not plan to argue that abortion is right or wrong for any abstract reason; but neither do I propose to contend that the proponent of a given view of the morality of abortion or the right to privacy is really concerned only with furthering some political interest. I do not wish to argue that the "concept of privacy" entails *A* or *B* or that we all use it in some particular way; nor do I intend to assert that the right to privacy is really just ideological. It is not my hope to demonstrate that *Roe* was (or was not) a correct interpretation of the Constitution; but neither will I attempt to understand *Roe* as no more than an exercise of judicial power in service to some state interest.

Instead, in Sections I and II, I will consider in some detail, liberal moral, political, and legal theories of abortion and privacy, with two aims. First, I wish to analyze their structure to show that they are necessarily incoherent. Second, I will argue that underlying these theories are two conflicting social visions, which I will call the traditionalist and nontraditionalist. These visions both help to make sense of the incoherence underlying the theoretical arguments, by attenuating consciousness of the contradictions within them, and serve as criticisms of social experience, by setting forth an ideal of social life and individual development.

Next, in Section III, I will examine the relationship of these visions to the social structure of liberal capitalist democracies. I will argue that "abortion" and "privacy," the "individual" and the "state," and so on, are not phenomena that can be taken as given for the purpose of theoretical or doctrinal analysis, but rather are constructed in struggles for power and in reflective understandings of those struggles. This conclusion, finally, both necessitates and makes possible a distinct form of doctrine from the liberal one. In the final section, I will attempt to give some indication of what a nonliberal or critical theory of abortion and privacy might look like.

29. E.g., Friedman, The Conflict over Constitutional Legitimacy, in The Abortion Dispute and the American System 13, 25-26 (G. Steiner ed. 1983).

I
THE MORALITY AND POLITICS OF ABORTION

A. Introduction

Much of the political debate over abortion is phrased in terms of a "pro-life" versus a "pro-choice" position.[30] Adherents to the former assert that abortion is murder and should be prohibited; advocates of the latter rest their case on the woman's right to decide for herself whether abortion is wrong. While each position seems to address a distinct concern, the two approaches exhibit important similarities.

For the pro-life advocate, the issue is one of fact: is or is not the fetus[31] a human being? The value of protecting human life is also an issue at stake here, but this value is so commonly shared that it is not itself in dispute. Pro-life advocates assert that in fact the fetus is human and, therefore, abortion is wrong, except perhaps in the extreme case where the choice is between the life of the mother and the life of the fetus. Thus, a sharp distinction between facts and values is drawn, and, the pro-life advocate asserts that the only relevant dispute is one of fact.[32] For this reason, moreover, the distinction between public discourse and private decision is collapsed. In society's decision whether to outlaw abortion or refuse public funds for it, and in the individual person's thinking about the morality of abortion, precisely the same factor counts: the status of the fetus.

For the pro-choice advocate, on the other hand, the dispute turns on fundamental values, not questions of fact.[33] The pro-choice advocate asserts that

30. Except where the context makes it inappropriate, I use the terms "pro-life" and "pro-choice" because these are the labels by which adherents to each side describe themselves. It should also be noted that the "pro-choice" position which I analyze in this section is a liberal individualist one; I discuss more radical and feminist understandings of abortion and privacy in sections III and IV infra.

31. In the following discussion, I use the term "fetus" to encompass all stages of development from conception onwards.

32. See, e.g., 1 The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, 97th Cong., 1st Sess. 13 (1981) [hereinafter Human Life Bill Hearings] (statement of Prof. Hymie Gordon) ("[N]ow we can say, unequivocally, that the question of when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact."); id. at 18 (statement of Dr. Jerome Lejeune) ("the scientific fact that [the fetus] is a human being cannot be disputed"); Kimble, Abortion on Request: Is It Really "Liberal"?, 1 Texas So. Intra. L. Rev. 173, 174 (1971) ("the beginning of life is scientifically ascertainable"). But see G. Grisez, Abortion: The Myths, the Realities and the Arguments 274 (1970).

33. See, e.g., 1 Human Life Bill Hearings, supra note 32, at 102-04 (statement of Daniel Callahan). But see L. Sumner, Abortion and Moral Theory 15-20 (1981) (claiming that what distinguishes pro-abortion advocates from anti-abortion advocates is, essentially, that the former believe the fetus not to be a person while the latter believe it is). Such a view, however, overlooks the sense in which pro-choice advocates see themselves as arguing over a different matter—the right to choose—from that which pro-life advocates emphasize, the "personhood" of the fetus. See, e.g., M. Barrett & M. McIntosh, The Anti-social Family 14-15 (1982) ("The feminist position on abortion is a woman's right to *choose*, and feminists would defend to the hilt the right of any woman *not* to have an abortion irrespective of the grounds she gave for

since values are personal matters, the individual, not the state, should make the decision regarding the morality of abortion. Thus, the pro-choice advocate draws the same sharp distinction between fact and value that the pro-life advocate draws, but as the issue is felt to be one of value, the distinction between public discourse and private morality is absolute. For the pro-choice advocate, the one issue relevant to the public debate about abortion is who should make the decision—the state or the individual. In private decision making, in contrast, each individual must determine for herself not merely the ultimate verdict on the morality of abortion, but also what factors—such as the "personhood" of the fetus or the kind of life the child would have—should count in deciding its morality.

These outlines describe, in broad terms, the predominant moral and political arguments concerning abortion. Yet neither the question, "is the fetus a human being?", nor the question of who—the state or the individual—ought to decide the issue, can be resolved in a nonarbitrary way within the confines of liberal thought. Further, abortion presents more than a problem of doctrine; it implicates central aspects of actual social experience as well. A complete account of the abortion issue must therefore go beyond an analysis of doctrines to include our actual social experience. This section will explore this aspect by focusing on several major areas of controversy, including attitudes towards sex, the family and the role of women, and attempts to assert control over human biology.

Briefly, those who oppose abortion tend to have a "traditional" view of sex, women's roles, and the degree to which humans should attempt to control their biology. Abortion opponents tend to see sexual relations as proper solely in marriage and for the purpose of procreation. Alternatively, sex may be considered acceptable without any conscious procreative purpose but only because the framework of marriage "excuses" lust. Or sex may be thought to have positive value, but only within the traditional structure of marriage. Those who oppose abortion also tend to emphasize and advocate the traditional role of women as mothers and homemakers. Finally, opponents of abortion reject or are highly suspicious of attempts to achieve individual or social control over biology, whether through living wills, genetic engineering, or other means.

Those who support the right to abortion generally hold a different view on each point. For now, it will be sufficient to characterize these "nontraditionalist" positions negatively. The nontraditionalist does not accept, or at least accept fully, the idea that sex has any intrinsic meaning or that it is proper only within some established framework like marriage. The nontraditionalist also rejects the "traditional" confinement of women to the role of mother and homemaker. Finally, the nontraditionalist sympathizes with the desire to take more active control over the terms of life, making "quality of

making this choice. The anti-abortion position is in fact an anti-choice position . . . ."). See generally B. Sarvis & H. Rodman, The Abortion Controversy 15-26 (2d ed. 1974).

life" an issue not only in the abortion context but also in the context of such issues as euthanasia, living wills, and brain death.

Admittedly, these associations might be purely contingent ones. For example, the considerations relevant to the question, "is the fetus a human being?", might have little to do with opinions about the role of women. It might be that there is nothing in the positions of pro-choice or pro-life advocates which would make it inconsistent to oppose abortion and favor the Equal Rights Amendment. Similarly, it does not appear impossible or logically contradictory to support a right to abortion even while condemning the Supreme Court's decision in *Roe*.[34] Further, many of those who favor abortion dispute the idea that a position on abortion might in any way be tied to positions on other issues, as when they take pains to reject pro-life claims that the availability of abortion takes us inevitably towards Nazism. Perhaps the connection between positions on abortion and traditional and nontraditional views on other matters is an empirical one—and nothing more.

Nevertheless, I believe this connection is more than coincidental. Although it is by no means a matter of logical entailment, there is a link between the pro-life position and the traditionalist perspective, and between the pro-choice position and the nontraditionalist perspective. Essentially, the traditionalist and nontraditionalist perspectives are visions of the social order—reflective understandings of what society necessarily is and what it should be. These social visions attenuate consciousness of the contradictions of liberal thought and give it an appearance of coherence. It is this attenuated consciousness of the inconsistencies of each position that allows each group to offer its position as a coherent (even the definitive) philosophical or moral answer to questions about abortion and privacy.

This section first analyzes the issues of whether the fetus is a human being, and whether abortion is encompassed within the political right to privacy. It then analyzes the opposing social visions which can be discerned in the debates over abortion and privacy. Finally, this analysis is used to present more clearly the paradox of selective skepticism discussed in the Introduction.

B. Abortion and Privacy as Problems of Liberal Thought

1. The Morality of Abortion

For most pro-life advocates the central issue is whether the fetus is a human being. Further, many pro-choice advocates would agree that the issue of the status of the fetus must at least be addressed by the individual woman when she makes her own personal decision concerning abortion.[35] Many ar-

34. 410 U.S. 113 (1973). See, e.g, Ely, The Wages of Crying Wolf, 82 Yale L.J. 920 (1973).

35. Obviously, one cannot make absolute characterizations of the positions involved. For most pro-life advocates, for example, resolution of the "personhood" issue does not fully decide the question of the morality of abortion. For a discussion on the double effect doctrine see, e.g., Finnis, The Rights and Wrongs of Abortion: A Reply to Judith Thomson, 2 Phil. & Pub. Aff.

guments have been offered to show that the fetus is or is not a person; all are inconclusive by necessity. The main purpose of the discussion here is not to criticize particular answers that have been offered and propose a new one, but rather to conduct a methodological inquiry into the question itself and the possible terms on which it might be answered.

In doing so, it will be helpful to distinguish three approaches. The first, a theological approach, poses the issue in terms of when the soul enters the fetus. The second, a factual approach, consists of a search for some attribute or attributes without which a being is not human and with which it is. One may ask, in other words, is the fetus a "human being" or "person"?[36] The third, or moral, approach poses the issue directly as a question of whether abortion is right without attempting any definition of what the fetus "is."

This threefold categorization of the approaches to the status of the fetus is not the only possible one. Indeed, for purposes of the present discussion, the theological question could be assimilated into the factual one. Nevertheless, it is helpful to discuss them in terms of these three types: each one can be seen as a rephrasing or recasting of the preceding approach to avoid its intractable difficulties.

a) When Does the Soul Enter the Fetus?

One way of deciding whether the fetus is a person is to ask when the soul is infused into the body. If the soul has not been infused, the fetus is not human; therefore abortion is not the killing of a human being.[37] In the abor-

117 (1973) ("double effect" doctrine); D. Granfield, The Abortion Decision 132-37 (1969). Equally, one can argue that a woman has a right to abortion even if the fetus "is" a person. See Thomson, A Defense of Abortion, 1 Phil. & Pub. Aff. 47 (1971). Nevertheless, it is safe to say that the status of the fetus is commonly seen as a matter of peculiar importance, in that definitive resolution of that issue one way or the other would profoundly shape the character of whatever else was left to debate on the morality and politics of abortion.

36. I use the terms "person" and "human being" interchangeably.

37. I intend to make no analysis here of any particular religion's approach to ensoulment, though I may advert to religious views at times. My aim is not to analyze, much less refute, any particular religious doctrine. That the Catholic Church, for example, predicates its official opposition to abortion on no one particular theory of ensoulment, including that of immediate animation, is irrelevant to my analysis. Nor are the intricacies or subtleties of the debate over ensoulment by Catholic theologians the main object of my attention. For a treatment of the Catholic position on abortion and ensoulment, see generally J. Connery, Abortion: The Development of the Roman Catholic Perspective (1977); id. at 304-08 (summary of history of Catholic teaching on animation). I intend, instead, to look at the notion of "ensoulment" in the more colloquial or popular sense, which is how it is used in the abortion debate.

I have two reasons for addressing ensoulment. First, sometimes ensoulment is discussed in debates over the status of the fetus and it should be included for the sake of completeness. Second, and more important, many people dismiss the whole ensoulment question as intrinsically meaningless because it focuses on an ineffable quality or phenomenon. See, e.g., Abortion and Animation, in 2 Abortion in a Changing World 1, 5 (R. Hall ed. 1970) [hereinafter Abortion and Animation] (question of ensoulment is "nondebatable" because it is "nonverifiable" and "nonfalsifiable") (remarks of Joseph Fletcher). By showing here that the structure of the debate over personhood is the same as that over ensoulment, I wish to demonstrate that the same charge of ineffability could as easily be made of "personhood" or "humanity."

tion debate, the soul and its infusion are assumed to have two central characteristics. First, the soul exists independently of our knowledge, perception, or recognition of it, and "infusion" likewise occurs independently of our knowledge of its occurrence, as a "real event in the objective order."[38] Second, the soul is an essential whole, that which makes a being truly human for all purposes. Similarly, the act of infusion is a discrete event—one that either occurs or does not occur, and before which the thing is not a human being and after which it is. In other words, after ensoulment the fetus is every bit as much a human being as an adult is. These two claims, the first of which concerns the possibility of knowledge and the second of which concerns the nature of that knowledge, can be summarized by saying that the soul is the "intelligible essence" of human beings.[39]

I will attempt to confirm, in two ways, that this account is what one has in mind when taking this approach. First, I will examine how the failure of various attempts to identify the moment of ensoulment casts doubt on the possibility of any knowledge of it. Then I will analyze the problematic nature of that knowledge by exploring the consequences of adopting one solution and mode of analysis or another.

In addressing the issue of when the soul enters the fetus, one common approach is to look for evidence in biological data on fetal development. The general scheme of the biological approach is to list certain likely points for the ensoulment of the fetus or embryo, such as conception, quickening, viability, and birth, and ask which is the most likely moment.

In deciding upon one of these possibilities, one might look directly at each possible moment and try to discover positive reasons for concluding that ensoulment has or has not occurred. For example, conception may be favored because it seems to be a discrete event, an "objective discontinuity."[40] That is, it marks a qualitative change from two separate entities that alone can never be anything other than human sperm and egg, to a single entity that with time will become a child. But, given the phenomenon of fetal wastage, one may argue that "if all these early miscarried fetuses possess souls, the majority of 'humans' in heaven will never have even reached a state of being organized into fetal human shape." This might lead one to reject conception as the time

38. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 54 (J. Noonan ed. 1970) (referring to "humanity" of fetus).

39. For my analysis of the ensoulment debate, I draw largely on P. Steinhoff & M. Diamond, Abortion Politics 94-100 (1977); Abortion and Animation, supra note 37, at 1-18; D. Granfield, supra note 35, at 140; R. Gardner, Abortion: The Personal Dilemma 122-28 (1972); W. Reany, The Creation of the Human Soul 173-98 (1932); Donceel, A Liberal Catholic's View, in 1 Abortion in a Changing World 39-45 (R. Hall ed. 1970); Gerber, When is the Human Soul Infused?, 22 Laval Theologique et Philosophique 234 (1966); See also D. Callahan, Abortion 418-20 (1970); Gahringer, Observations on the Categorical Proscription of Abortion, in Abortion: Pro and Con 53, 57-58 (R. Perkins ed. 1974). On "intelligible essences," see R. Unger, Knowledge and Politics 31-36 (1975).

40. Noonan, supra note 38, at 56 (referring to "humanity").

of ensoulment.[41]

The moment of quickening—when the mother first feels movement by the fetus—is another possible point. It has a certain amount of support in history: the abortion of a fetus before quickening was not a crime at common law, while abortion after quickening was illegal.[42] On the other hand, one might argue that quickening is an unlikely point for the moment of ensoulment both because it seems to have to do more with the mother's feelings and perceptions—whereas we are searching for an "objective" event—and because actual bodily movement (as opposed perhaps to the potential for movement) certainly does not seem like an "essential" human characteristic.[43]

Viability is another potential point of ensoulment, as it is the point when the fetus is capable of being an independent human being, even if in actuality it is not.[44] The time of "viability," however, varies with medical technology: the more advanced the technology, the earlier the point at which the fetus can survive separation from the mother. It is hard to imagine that the timing of an event that is essentially independent of our knowledge could be manipulated by improvements in medical techniques. [45]

Finally, birth might be chosen as the point of ensoulment,[46] for here is surely a qualitative, discrete change, one that is inherently followed by the presence of what is unquestionably a human being. Yet one can object that there is little if any basic difference between a newborn infant and an eight month old fetus. Indeed, it would seem strange to say that a doctor who delivers a baby by Caesarean section a month before the natural time of birth has thereby caused the baby to be ensouled a month earlier than it otherwise would have been.[47]

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41. See R. Gardner, supra note 39, at 124; see also G. Williams, The Sanctity of Life and the Criminal Law (1957). In turn, one could ask whether the conclusion really follows from the premise: what is wrong with the notion that indeed most " 'humans' in heaven" never saw the light of day? Such a question can be answered by replying that "the idea would debase the doctrine of Man," but that in turn would only lead to further questions. R. Gardner, supra note 39, at 124. The underlying problem, I will argue, is the plasticity of the idea of "the soul" as used in the abortion debate. See text accompanying notes 51-54 infra.

42. On the treatment of abortion in American common law in the nineteenth century, see J. Mohr, Abortion in America 3-19 (1978). On the English common law of abortion, which may have been somewhat different, see G. Williams, supra note 41, at 151-52; D. Granfield, supra note 35, at 73-74; Means, The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968, 14 N.Y.L.F. 411, 419-26 (1968).

43. Cf. Byrn, Abortion on Demand: Whose Morality?, 46 Notre Dame Law. 5, 10 (1970) (quickening is subjective matter of maternal perception rather than a fetal achievement).

44. See, e.g., G. Williams, supra note 41, at 230.

45. Cf. Riga, *Byrn* and *Roe*, 23 Cath. Law. 309, 325 (1978) (time of viability "artificial" because dependent on technology).

46. Cf. Jakobovits, Jewish Views on Abortion, in Abortion, Society and the Law 103-21 (D. Walbert & J. Butler eds. 1973) (birth as time of becoming person as Jewish view); Smith, Abortion—The Theological Tradition, in Abortion: Pro and Con 37, 39-40 (R. Perkins ed. 1974) (same); G. Grisez, supra note 32, at 127-35 (same); J. Connery, supra note 37, at 7-21 (same); id. at 23 (Stoic philosophy).

47. Cf. 1 Human Life Bill Hearings, supra note 32, at 968 (statement of Dr. Carolyn Gerster) ("Pro-abortionists who insist that a human exists only at birth speak as though 'per-

Other arguments concerning ensoulment take a more indirect approach. One may, for example, assert that the child is of course a human being, and the sperm and egg alone are not, and then trace back through the entire process of fetal development looking for some sufficiently discrete, qualitative break that will indicate when ensoulment has occurred. Once again, conception seems to be the most likely candidate. Similarly, we can acknowledge uncertainty, asserting that "we don't know for sure" when ensoulment occurs, and conclude that to be on the safe side we should choose an early, likely candidate as the point of ensoulment—again conception.[48]

Conception, then, seems to be the favored answer for this approach. For one thing, we are looking ultimately for an event (ensoulment) that is fundamentally independent of our experience of it; points other than conception seem open to human intervention. We can push forward the time of viability or birth; the mother may or may not notice a slight movement by the fetus. Conception, however, even if it takes place in a laboratory dish, occurs precisely at the moment when sperm and egg unite. Moreover, conception seems to be a point of "objective discontinuity" that parallels the notion of the soul entering the body. Conception is not only the most obvious point of discontinuity, but it also necessarily occurs at precisely the same moment in fetal development in every particular case. In contrast, although viability and birth occur at roughly 24 to 28 weeks and nine months after conception respectively, there is no single time at which either necessarily occurs for *all* infants.[49] Conception seems to be a universal characteristic, "there" for all purposes and circumstances, and invariable in its nature from person to person or society to society—unlike the exact time of birth, which varies by purely individual factors, and viability, which varies according to technology, available medical care, and so on.[50]

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sonhood' or 'ensoulment' is hovering over the delivery table ready to be 'zapped in' with the first breath of air.").

48. See, e.g., Gahringer, supra note 39, at 53, 59; R. Gardner, supra note 39, at 122 (arguing that "the Roman Catholic Church has played for maximum safety for the soul by absolutely forbidding abortion on any grounds, although never pronouncing on the time of the infusion of the soul"); O'Donnell, A Traditional Catholic's View, in 1 Abortion in a Changing World 34, 38 (R. Hall ed. 1970) ("since it is at least quite probable that ensoulment does coincide with the very earliest stages of embryonic life, the only practical working premise, from a moral viewpoint, is to treat the human conceptus as if the moment of a new and distinct human life were certainly the moment of conception").

49. For descriptions of fetal development, see D. Callahan, supra note 39, at 371-73; D. Granfield, supra note 35, at 15-25; Corner, An Embryologist's View, in 1 Abortion in a Changing World 3-15 (R. Hall ed. 1970).

50. Cf. Abortion and Animation, supra note 37, at 13 (ensoulment as question of "when God makes some sort of supernatural substance intrinsic to the biological fetus"). The "wholeness" of the soul, as well as the notion of it as "substance" added to the body, is suggested by the references to the time it "enters" the fetus (see, e.g., G. Williams, supra note 41, at 150; P. Steinhoff & M. Diamond, supra note 39, at 97; J. Pelt, The Soul, The Pill and the Fetus 87 (1973), or is "infused" into it (see, e.g., R. Gardner, supra note 39, at 122; D. Granfield, supra note 39, at 64; Donceel, supra note 39, at 39). As I make clear in the text below, other views of the nature of the soul are possible as well, including ones that do not implicitly view the soul as a "substance" that a being has or does not have, and ones that envision different sorts or

The theological approach, then, appears capable of providing a coherent account of the point of ensoulment, which, in light of the biological data, seems to be conception. Yet, the notion of the soul as intelligible essence fails in two ways. The first is the result of an irreducible *a priori* element in our examinations of fetal development. That is, we bring into the investigation a predetermined idea of what the soul is like and what would be evidence for it, and use this notion to select certain data as presenting persuasive indications that infusion occurs at one time rather than another. A look at two different notions of the "soul" will make this clear.

One idea, more modern, is a dualistic one: there is a soul and a body, the two being only contingently (though, of course, during lifetime, inescapably) connected to each other. The soul tends to be identified with "higher" functions like thinking and emoting; the idea of an animal soul is rejected. The soul, then, must enter the body at some point, and we search for that point by looking for a discrete, discontinuous moment in the process of fetal development: conception.

We may, however, understand the soul in a second, quite different way. For example, one might adopt an "Aristotelian" view of the soul as the organizing principle of the functioning living body, and believe that there could be a human soul present only when the body has developed to a point where it functions in a human way.[51] Before that point, it would have only the "vegetative" or "nutritive" soul appropriate to other nonhuman beings; after that point, it would have the "intellectual" soul in virtue of which it would be human. Taking this view of the soul, one might easily be led to consider later stages of fetal development as the time of ensoulment. The stage at which the fetus becomes recognizably human in appearance might be one candidate; another might be the stage at which the previously undifferentiated embryo has in place all the major internal organs, a central nervous system, and the like.[52]

Which idea is "correct"? Looking more closely at the process of fetal development will never answer this question. Indeed, we seem to have no way to gauge the relative truth of these notions. It seems that the attempt to "discover" the moment of ensoulment can ultimately be nothing more than the mustering of facts to support subjective theories of what the soul is. Indeed, because whatever notion of soul one adopts *is* subjective, it seems infinitely

stages of the soul (such as animal or vegetative). See, e.g., W. Reany, supra note 39, at 109. What all such views do share, however, is the belief that it is the soul which makes the being fully human. See, e.g., id. at 124 (soul is "the first principle and source of life in the body").

51. I label this approach "Aristotelian" simply as a convenient name for a view of the soul as the "organization to function" of a being. See generally Aristotle, De Anima (W. Ross ed. 1961); M. Nussbaum, Aristotle's De Motu Animalium 148 (1978). I do not mean to refer specifically to Aristotle's notion that the male fetus is "formed" at 40 days after conception and the female at 90 days. See Aristotle, Historia Animalium bk. 7, ch. 3 (J. Smith ed. 1910). See generally D. Granfield, supra note 35, at 49-50.

52. Cf. Donceel, supra note 39, at 44 (arguing against a theory of "immediate animation," and concluding that fetus is not a person "during the early stages of pregnancy"); Donceel, Abortion, Continuum (Spring 1967).

manipulable, depending on exactly how the general notion is made specific.[53] But without a more definite and less manipulable idea of what the soul is, we will never have a benchmark against which we can definitively judge the theories. In turn, our inability to gain such knowledge with certainty seems to

53. There are many examples of this plasticity with regard to the dualistic notion of the soul as a separate substance from the body. First, conception is a point of discontinuity, but how much discontinuity do we need to determine when the soul has entered the fetus, and how do we measure the "amount" of discontinuity? For some, there is little discontinuity at conception; all that happens is that two groups of chromosomes converge and "[t]here is no more . . . human life . . . present after this rearrangement than there was before." Abortion and Animation, supra note 37, at 10 (remarks of Cyril Means); American Friends Service Committee, Who Shall Live? Man's Control Over Birth and Death 19-22 (1970); Potts, The Problem of Abortion, in Biology and Ethics 74-75 (1969). In contrast, the beginning of brain waves might seem like the flipping of a switch that marks the start of the most characteristic human activity (mental activity), a point which finds great favor in the identification of the soul with "higher" functions.

A second example is the implantation-conception dispute. Conception is sometimes rejected on the ground that the fertilized egg may subsequently divide into two or more independent zygotes that develop into separate fetuses. This possibility disappears at the time of the implantation of the egg in the uterus, and so some theorists support that moment as the time of ensoulment: our idea of what a soul is does not typically include the possibility that it may split in two. See Donceel, supra note 39, at 43 ("metaphysical impossibility"); J. Fletcher, Humanhood: Essays in Biomedical Ethics 134 (1979). Why, however, can it not be argued that our usual notion is incorrect? Cf. Brody, On the Humanity of the Fetus, in Abortion: Pro and Con 49, 84 (R. Perkins ed. 1974) ("One amoeba can become two, so why can't one living human being become two?"). Another response is to avoid the dilemma entirely. Grisez notes and apparently agrees with the view that the fertilized egg before twinning could be viewed as the parent of the twins, thus making the parents of the child later born its "grandparents." G. Grisez, supra note 32, at 25. The difficulty is, of course, that if we call this idea "implausible" we are evaluating it against an image of the "true nature" of the soul that depends on some kind of knowledge other than observation of the facts of fetal development. Just as significantly, even if we accept the implausibility of "soul-splitting" there is nothing to stop us from asserting that no such thing need occur: at the moment of division, a new soul is created and infused into the new embryo or embryos. See Gerber, supra note 39, at 242. Infusion, in this view, would certainly occur at conception and possibly take place at the subsequent moment of division.

We find the same plasticity in the "Aristotelian" variants of the soul. As we noted above, the idea of the soul as the form of the body, organized to function in a characteristically human way, can lead us to favor a relatively later moment for ensoulment. See generally W. Reany, supra note 39, at 173-98. We may, however, ask whether the functioning must be actual or potential for the form to be present. That is, "[c]hromosomes suggest very strongly what Aristotle referred to as the 'animal soul,' the 'form of the body,' which he took to be of the essence of the being realized. It is but a step then to the belief that the human soul appears when the chromosomes begin to direct generation in the fertilized human egg." Gahringer, supra note 39, at 57 (noting but disagreeing with the argument). See Ramsey, Reference Points in Deciding About Abortion, in the Morality of Abortion 60, 67 (J. Noonan ed. 1970) (chromosomes as "formal cause" of fetal development); D. Granfield, supra note 35, at 21-22. We might reply, though, that this soul is not the specifically "human" soul, to which we could answer that it is indeed specifically human because the genetic makeup of the being whose soul it is is human. Cf. Noonan, supra note 38, at 5 n.8 ("Can it be said that what is generated by the copulation of two animals is a plant?") (referring to the idea of an earlier, "vegetative" soul in fetal development); Gerber, supra note 39, at 239 (rejecting postulation of animal and vegetative souls as needlessly introducing metaphysical entities); 1 Human Life Bill Hearings, supra note 32, at 967 ("[H]orses beget horses and cats beget cats. Anyone conceived by human parents and possessing the genetic and chromosomal pattern appropriate to homo sapiens can be nothing less than human. No woman, to my knowledge, has ever given birth either to a carrot or an airedale.") (statement of Dr. Carolyn Gerster).

confirm that ultimately we are engaged in a subjective investigation. To be sure, one looks at facts—and may even be persuaded by new discoveries to choose a different point for ensoulment—but always in the light of some idea of the soul that is adopted independently of any empirical investigation. Any "discovery" of the time of ensoulment turns out merely to reflect the image of the soul the theorist brought into the investigation. Consequently the entire notion of recognizing the fetus as a person because of some real, objective event in the moral order simply collapses.[54]

As if this difficulty were not enough, there is a second general problem with the soul as an intelligible essence: not only must it be "intelligible," but it also must be an essence. That means that if the fetus has a soul, then it is every bit as much a human being as a child or an adult, a person under all circumstances and from all viewpoints. Yet this conclusion entails consequences that are highly difficult if not impossible to accept. For example, abortion becomes murder, literally, if the fetus has a soul, and if we allow the death penalty generally there must be some cases of abortion for which it would apply as well.[55] Or consider the fact that perhaps one half of all fertilized eggs abort

54. There is one other possible way to overcome this problem. This is to assert the accessibility of a different kind of knowledge: revelation. The teaching of a particular religion might provide us with divine authority for the belief that ensoulment occurs at conception. However, the "revelation" could be legal or social as well. We may view legal or moral doctrines or practices as evolving toward some particular answer, or alternatively as stating it early on and holding to it throughout the ages. The obvious problem with this approach, however, is that there are conflicting revelations and we have no method for selecting the correct one. Historical traditions may be the product of force, mistakes, or circumstance. But even if we could overcome this difficulty, there would still be insuperable problems in interpreting the revelation. See text accompanying notes 149-155, and text accompanying notes 261-281, infra.

55. Given that attention has been focused on whether abortion should be legal and whether it should be publicly funded, it is not surprising that the issue of criminal penalties for abortion is not often discussed, or that when it is the discussion is entirely unsatisfactory. See, e.g., Horan, Franzel, Crisham, Horan, Gorby, Noonan, & Louisell, The Legal Case for the Unborn Child, in Abortion and Social Justice 105, 113-14 (T. Hilgers & D. Horan eds. 1972) [hereinafter Horan & Franzel] (denying that the failure to apply the death penalty to abortion indicates doubt as to the fetus' humanity) or indeed evasive, see, e.g., 1 Human Life Bill Hearings, supra note 32, at 500 (not "utterly repugnant" to apply penalties for murder to abortion if logic requires it). Yet the issue is an extremely revealing one, for the "essentialist" view either requires the possibility of applying the death penalty for abortion, if it is applied at all, or calls into question the full humanity of the fetus.

Suppose we were to exempt from capital punishment those who murder elderly people or blacks. Clearly, we would take it as an indication of a lesser value placed on the lives of members of those two groups; the same holds true with respect to the fetus. See Oteri, Benjoia, & Souweine, Abortion and the Religious Liberty Clauses, 7 Harv. C.R.-C.L. L. Rev. 559, 580-82 (1972). We may reply that we exempt abortion, not because of a judgment as to the status of the fetus, but because the circumstances of abortion do not call for it. See G. Grisez, supra note 32, at 427. This has the merit of recognizing that the applicability of the penalty is generally based upon the character of the defendant and the circumstances of the crime (and not the status of the victim), but it is unconvincing in the case of abortion. In general, there is a rather curious shift of emphasis when pro-life advocates turn from a discussion of the morality of abortion to a discussion of penalties for it. Not only is abortion murder of an innocent unborn child, pro-life advocates inform us, but it is murder committed typically for one reason: the woman's selfish convenience. See, e.g., Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L.J. 395, 446 (1961) ("There will always be women to shut their ears to every-

spontaneously in the early period of development—the woman may not even know she is pregnant.[56] If we feel a moral obligation as a society not to ignore diseases and medical problems that contribute to infant mortality, it is hard to reject the conclusion that we must also devote significant resources to an attempt to reduce the mortality of embryos in their early stages. If it is right to try to save the lives of one class of ensouled beings, we can hardly deny the same efforts to another on the ground that they are just different.[57]

Admittedly, arguments against any of these consequences can be made, but they entail either inconsistency or tacit rejection of the idea that the status of the fetus as an ensouled being entitles it to as much respect for its life as is accorded to that of children and adults. For example, one might argue that the fetus is indeed "ensouled" from the moment of conception, but that the killing of an ensouled being is not always murder: fetuses are not members of the public community, and that difference is morally relevant to the decision to apply the full penalties for murder to abortion. The obvious difficulty with this approach, however, is that it immediately raises the issue of why this relevant characteristic does not in fact go to the matter of ensoulment in the first place. For example, if the soul is taken to mean the functioning principle of the body, perhaps that includes some minimal interaction (such as being seen or felt) with other members of the community. From here one could return

thing but their own desires."). Cf. Gerber, Abortion: Two Opposing Legal Philosophies, 15 Am. J. Juris. 1, 21 (1970) (denouncing moves to liberalize abortion laws) ("The morality of the masses has always been convenience . . . ."). Yet when the issue of penalties arises, we are assured that passage of the Human Life Bill, for example, would not mean "a pell-mell rush to make the women who might have an abortion a murderess, or the person perpetrating the abortion, the physician involved, the abortionist, a murderer." 1 Human Life Bill Hearings, supra note 32, at 175 (remarks of Sen. John East). This assurance is puzzling, for how can we rule out in advance the possibility that the circumstances and motivation attending a particular abortion would be as bad as those attending a murder? For example, one woman, to spite her husband, pays a hired murderer to kill her child; another woman, for the same reason, pays a doctor to perform an abortion on her. To those who advocate the full humanity of the fetus based on religious and ethical beliefs, the two crimes are fundamentally the same. Even if such circumstances are infrequent, what reason can there be for absolutely forswearing application of the death penalty for abortion in these circumstances, except that we are not fully convinced that the crime is murder (or as bad as murder)?

There is, to be sure, one reply available: we might say that all fetuses, unlike the elderly, blacks, or any other group, necessarily share some characteristic relevant to penalties for murder, characteristics that make it permissible never to apply the severest punishment for abortion. But, as I will argue below, see text accompanying notes 57-58 infra, while this response succeeds in refuting the charge of inconsistency, it does so at the cost of reopening the question of the status of the fetus as an "ensouled" being.

56. See M. Potts, P. Diggory, & J. Peel, Abortion 540 (1977); G. Grisez, supra note 32, at 30-33.

57. Bok, Who Shall Count as a Human Being? A Treacherous Question in Abortion Discussion, in Abortion: Pro and Con 91, 95 (R. Perkins ed. 1974). To use an argument often proffered by opponents of abortion, if the only distinction between a newly conceived fetus and a newborn infant is one of age, is it not difficult to justify total unconcern for the high rate of mortality of the former while taking every effort to save the lives of the latter? Cf. Riga, supra note 45, at 321 (distinction between unborn/born is simple age discrimination); Noonan, supra note 38, at 2 (suggesting same).

to all the arguments on ensoulment. Perhaps the moment of quickening marks such a beginning; or possibly only birth fulfills it; or possibly, as we become more aware of fetal development or see pictures of developing fetuses, and so on, fetuses become functioning "members" of the community as a class from the moment of conception. In other words, we can avoid the problem of the essentialist nature of the knowledge we seek only at the cost of plunging back into the difficulties that cast doubt on whether any knowledge in this area is even possible.

In light of these difficulties, it seems that we are asking for too much: an "objective" knowledge that is "essentialist" as well. Before we accept the conclusion that the issue "is the fetus a human being?" is insoluble, we must consider alternative ways of stating the problem. Perhaps we can find some purely analytic method for deciding what is human, one that does not depend on *a priori*, unverifiable notions of the soul.

b) Is the Fetus a Person?

The idea of ensoulment as a way to determine the status of the fetus is by no means rare, but attempts to phrase the issue in terms of whether the fetus is a "person" or a "human being" are far more typical. The aim here is to avoid the injection of *a priori* notions of humanity, cast as conceptions of the "soul," by simply analyzing facts about all human beings.[58] This endeavor, it is hoped, will yield an essential attribute of human beings which one can use to decide whether or not the fetus is one.[59]

Broadly put, there are two ways we can carry out this project.[60] First, we

58. Cf. H. Thielicke, The Ethics of Sex 228 (1964) ("One may regard the animation theory as a kind of mythological cipher for the thesis that germinating life is fully valid human life and therefore subject to the same protection as all human life.").

59. This freedom from the need to appeal to unverifiable metaphysical notions is not achieved without cost. When we deal with religious notions of ensoulment, the idea is not only that there exists a soul, but that precisely because the soul is what it is—given to us by God—human life is sacred and deserves our respect and protection. If we knew whether or not the fetus has a soul, then, our answer to the abortion issue would be certain and objective. In contrast, when we simply ask whether the fetus is a human being, we sharply distinguish this "factual" issue from the moral one of what our attitude towards the taking of human life should be. The proscription of the taking of human life seems to rest ultimately on an act of faith or a subjective moral or ethical outlook. In turn, any answer we give to the morality of abortion will be partially subjective.

The significance of this objection, however, should not be overestimated. If we can determine as a factual matter that the fetus is or is not a person, we certainly will have taken an extremely important step towards resolution of the abortion issue. The broader question of the status and content of our morality and ethics would remain to be determined, but that would be a different issue. Moreover, given that we do, in fact, seem to agree on these general notions—for example, that it is wrong for one individual to take another's life except in self-defense—we could easily arrive at a workable, intuitively acceptable answer to the issue of abortion. The general uncertainty of our moral knowledge would remain a problem, but the questions peculiar to the abortion controversy would at least have been insulated from its effects.

60. Attempts to determine whether the fetus is a person—or whether the question is answerable—are quite numerous. I have relied principally on D. Callahan, supra note 39, at 349-404; G. Grisez, supra note 32, at 273-87; L. Sumner, supra note 33; Bok, supra note 57, at 91;

can look for a characteristic that each human being necessarily has, and then ask whether the fetus has it as well. Second, we can adopt a "relational" approach, looking to interactions between persons as the repository of the attribute, and then attempting to see if there is anything comparable with regard to the fetus. Although the two are not mutually exclusive, it will be helpful to discuss each in turn.

With respect to the first, "[i]t is a nearly universal assumption in the abortion debate that humanity can be determined on purely descriptive grounds, that once we have established that the being in question is the genetic product of human beings and that it closely resembles human beings, then it is a human being."[61] In other words, by observation of what are unquestionably "persons," we determine which characteristics or attributes are essential to being human. Having done this, we may then define (or more appropriately, discover) a class of human beings—a natural grouping that is not simply the product of an arbitrary classification we happen to make. We can then examine the fetus at various stages of its development to determine when, if ever, the fetus can be included within such a class.

One way to make that determination is to look for some characteristic of the fetus which excludes it from the class of human beings. For example, before implantation the fertilized egg may split into two or more independent zygotes, and this possibility might seem to set it off from human beings because a person cannot split into two people.[62] Or one might look to the fact that a large percentage of conceptions result in very early spontaneous abortions, the mother perhaps never realizing that she was pregnant. This high rate of mortality, one might assert, makes it dubious that the fetus is really a human, at least at that stage.[63] In both cases, however, it is not clear what exactly about these characteristics allows us to exclude the fetus from the class of human beings. Infants in certain countries may have high mortality rates, but we do not generally conclude for that reason that they are not persons.[64] Further, one might compare probabilities of achieving personhood before and after conception, making the phenomenon of fetal wastage appear relatively

Brody, supra note 53, at 69; Gahringer, supra note 39, at 53; Krimmel & Foley, Abortion, 46 U. Cin. L. Rev. 725, 727-70 (1970); Manier, Liu, & Solomon, Conclusion, in Abortion: New Directions for Policy Studies 169 (E. Manier, W. Liu, & D. Solomon eds. 1977); O'Connor, On Humanity and Abortion, 13 Nat. L.F. 127 (1968); Pincoffs, Membership Decisions and the Limits of Moral Obligation, in Abortion: New Directions for Policy Studies, supra at 31; Wertheimer, Philosophy on Humanity, in Abortion: New Directions for Policy Studies, supra at 117.

My intent is not to give an exhaustive presentation of these attempts (and criticisms), but rather to outline them in sufficient detail that the relationship of their structure to that of the arguments in legal theory, discussed in Section II, becomes apparent.

61. Pincoffs, supra note 60, at 38.

62. See Becker, Human Being: The Boundaries of the Concept, 4 Phil. & Pub. Aff. 334, 339-340 (1975).

63. See, e.g., R. Gardner, supra note 39, at 123-24.

64. Cf. O'Connor, supra note 60, at 130 ("Certainly humanity has much more to do with experience, say, than with biological statistics.").

insignificant: before fertilization, the chance of any given egg and sperm uniting to become a human conceptus is practically infinitesimal, whereas afterwards perhaps two or three out of four will mature into an infant.[65] Finally, why should the ability of the fertilized egg to divide distinguish it as a nonperson? It is indeed a unique characteristic, but so are many of its other aspects—such as the fact that it lives inside someone else's body.

Another way to determine the status of fetuses is to look for an essential characteristic shared by all persons and fetuses alike. Once again, the typical approach is to list certain points in fetal development and ask if an attribute is acquired at any of those points that could be termed "essential" to being a person. Conception, commencement of brain waves, viability, and birth are typical candidates.[66]

One approach looks to genetics: Every person has a full set of specifically human chromosomes, and has them from the moment of conception.[67] Yet, one might reply, the genetic component may be a necessary condition for something to be human, but it is not sufficient by itself: not every human cell is a person. One might, of course, distinguish the fertilized egg from other cells on the ground that the former will grow into a child, and define as a "person" anything with a set of human genes that will develop into what is unquestionably a human being. However, with cloning, it would no longer be true that the fertilized egg and other human cells are really very different in that respect, for any human cell could become the basis for a new person.[68]

Other points are similarly indeterminate. The onset of brain waves might mark the appearance of a person, a position that could be seen as the logical extension of the increasingly accepted notion of "brain death." "Human beings" are that class of beings that have a certain type of brain waves or function.[69] Once again, the significance of this factor seems elusive. First, the absence of brain waves does not by itself (under the most commonly accepted definition of "brain death") indicate death; a person without brain waves is

65. Noonan, supra note 38, at 55-56. For a criticism for this view, see Brody, supra note 53, at 81-82.

66. See Brody, supra note 53, at 70-74 (listing possible points); Ramsey, supra note 53, at 60-100; Krimmel & Foley, supra note 60, at 732-43.

67. See D. Granfield, supra note 35, at 30-31 ("The complexity of the whole human body is contained in some real way in its first cell. Its human life principle irresistably moves the organism to physical maturity."); Krimmel & Foley, supra note 60, at 744-70.

68. See Bok, supra note 57, at 94. Nor is it true that every fertilized egg naturally develops into a new person. See M. Potts, P. Diggory, & J. Peel, supra note 56, at 539 ("The fertilised ovum, in about one in 2000 cases, gives rise to a mass of placental tissue (a hydatidiform mole) to the exclusion of embryonic tissue. It is not a 'potential human being', even though it is genetically unique.").

Of course still further replies to these arguments are possible. One could argue that a fertilized egg will "naturally" grow into a child, whereas a cell can be cloned only through human intervention. But that would merely raise further questions. For example, if a fetus that would otherwise die is saved by the intervention of medical technology, is it now not a person?

69. See Brody, supra note 53, at 84-88 (suggesting onset of brain-function as the point when fetus should be regarded as "person").

not considered dead where their absence stems from hypothermia or drug-induced comas.[70] More important, the absence of brain waves has not generally been thought to *constitute* death any more than the other indicators do, such as unresponsiveness to painful stimuli, or the cessation of the heart beat. In other words, "brain death" is at most a criterion of death,[71] one that can be overinclusive as well as underinclusive.[72] Why, therefore, should it be given decisive weight in determining the "personhood" of fetuses? Finally, even if one did want to argue that the absence of brain waves *is* a definition of death, it would be necessary to give reasons for doing so, and even the most thorough set of observations of the brain's activity could not by itself supply them.

Viability may also be proposed as the point at which the fetus becomes human, but once again its significance is hard to pinpoint. The ability to survive on one's own might seem to be an essential attribute of humanity, but it is an approach we would certainly reject in the case of a conscious, critically ill patient.[73] An answer to the question whether there is a difference between the patient's dependence on a machine and the fetus's dependence on a human being will not simply emerge from a closer examination of the course of fetal development or a study of human physiology. Similarly, pointing to the stage in which the fetus has in place all the major organs and a central nervous system,[74] or the time at which it looks human, or to the time of birth,[75] still leaves us without a reason for going on to the conclusion that the fetus becomes a person at that point.

If it is impossible to find, merely by looking at biological facts, a criterion by which we can naturally group certain beings together as "persons,"[76] per-

70. See Ad Hoc Comm. of the Harvard Medical School to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 J.A.M.A. 337 (1968). See generally President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Defining Death, in The Determination of Death 21-43 (1981); Green & Wilker, Brain Death and Personal Identity, 9 Phil. & Pub. Aff. 105 (1980).

71. But even the assertion that brain death is a criterion of death can be questioned. See Becker, supra note 62, at 352-58 (brain death is not a criterion of death but of irreversible coma; the question is then what to do with someone in an irreversible coma). Cf. J. Fletcher, supra note 53, at 135 ("It is not the death of the *brain* that counts. What is definitive is the absence of cerebration or 'mind' even though other brain functions continue.").

72. Thus Karen Ann Quinlan, who was at least arguably dead when In re Quinlan, 70 N.J. 10, 25-27, 355 A.2d 647, 654-55 (1976), was decided, did have brain waves.

73. See Becker supra note 62, at 347. But see Zaitchik, Viability and the Morality of Abortion, 10 Phil. & Pub. Aff. 18 (1981) (defending viability as a dividing line).

74. Becker, supra note 62, at 343-45.

75. J. Fletcher, supra note 53, at 136.

76. Nor will it do to begin with the "personhood" of an infant and then emphasize the continuity of development from conception to birth, concluding that the only real point of discontinuity (and so the only point where drawing the line will not be arbitrary) is that of conception. See, e.g., Zepeda v. Zepeda, 41 Ill. App. 2d 240, 249-50, 190 N.E.2d 849, 853 (1963); Horan & Franzel, supra note 55, at 124. Just as the probability of survival could look high or low depending on whether we compared the rate of fetal wastage with the chance of a given sperm and egg uniting or (implicitly) with rates of infant mortality, so too the moment of conception can appear to be either a minor event in a vast continuity of life stretching back to the Creation or a sharp break, a clear point of discontinuity and beginning. It simply depends

haps we can look instead to a description of human interactions and relationships as a way to discover the essential criterion of humanity. The most basic inquiry is whether the fetus is a separate person or merely a part of the mother. Any being that is necessarily parasitic upon another's body and is contained within it, one might say, cannot be a person. Yet the notion of what is "part of" something else is as indeterminate as the idea of an "objective discontinuity." Opponents of abortion emphasize that the fetus has its own physiological structure—a circulatory system, nervous system, its own organs.[77] Indeed, even referring to the earliest stages of development, there is a tendency among pro-life advocates to picture the fetus as "aggressive"[78] in relation to the mother, "invading" her uterus and setting itself up as an independent functioning unit with only a "temporary residence" inside her.[79] Which image one adopts, then, depends upon what one emphasizes—the aspects of the fetus's dependence or those of its structural integrity.[80]

More sophisticated attempts to isolate "humanity" consider the fetus as the subject or the object of experience and relations with others. An essential aspect of being a person, it might be argued, is to be aware of oneself and to engage in relationships with other people. By these criteria, the fetus is not a person.[81] The counterarguments, however, are obvious. If a sleeping or unconscious individual is not a nonperson, why should the fetus be considered one? Further, the newborn infant might not qualify under an "experience"

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on how we characterize it. Compare, e.g., Noonan, supra note 38, at 55-57, with e.g., American Friends Service Committee, supra note 53, at 19-22.

77. Indeed, they may simply assert that the pregnant woman and the fetus each has a body. See Finnis, supra note 35, at 140-141 (the woman's body "is *her* body . . . [and] *the child's body is the child's body, not the woman's*"); Note, Haunting Shadows from the Rubble of Roe's Right of Privacy, 9 Suffolk U.L. Rev. 145, 181 (1974) (referring to the "biological reality that two bodies are involved in pregnancy").

78. Ramsey, supra note 53, at 70-72.

79. D. Granfield, supra note 35, at 20, 24-25. See also Byrn, supra note 43, at 8-9 (fetus "swimming" in amniotic sac); Louisell & Noonan, Constitutional Balance, in The Morality of Abortion 220, 252 (J. Noonan ed. 1970) (" 'More than any living species,' the fetus 'dominates his environment.' ") (quoting B. Day & H. Liley, Modern Motherhood 28 (1967)).

80. Cf. Le Doeuff, Pierre Roussel's Chiasmas: From Imaginary Knowledge to the Learned Imagination, I & C, Winter 1981-82, at 58-59 (showing a similar process at work in embryologists' descriptions of the development of male and female fetuses, which are heavily influenced by stereotypes of masculinity and femininity).

It should also be noted that even to the extent that we do view the fetus as an "independent" or "aggressive" being, the significance of that view is entirely ambiguous. One proponent of abortion, apparently not entirely tongue-in-cheek, proposes that pregnancy be viewed as an illness, characterizing the fetus as a parasite: "[t]he relationship between the gravid female and the fetoplacental unit . . . is basically one of a host to parasite." Hern, The Illness Parameters of Pregnancy, 9 Soc. Sci. & Med. 365, 368 (1975). Cf. Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569, 1611 (1979), reprinted in C. Schneider & M. Vinovskis, The Law and Politics of Abortion 1 (1980) (presenting abortion as a case of self-defense or refusal to render aid) (fetus "burrows into the endometrium," "grapples onto the woman's insides," "commandeers the woman's metabolism").

81. We may, of course, deem it a "potential person" or something of that sort. See, e.g., 2 Abortion and Animation, supra note 37, at 13-18 (remarks of Max Stackhouse). In either case, we determine its status by the nature of its relations with others.

criterion, because the kinds of relationships a newborn infant has—being held by someone, for example—are not significantly different from the kinds of experiences that a fetus has, for example, when it is comforted by the warmth of the mother's body, or her heartbeat.[82] Yet these replies merely raise further questions, which cannot be answered simply on the basis of observing relationships and experiences with others. It is unclear, for one thing, whether it is the lack of consciousness or the loss of it that is compatible with being a human. The sleeping person has had many experiences, and even though temporarily bereft of consciousness and withdrawn from social interaction, has a very specific potential for future interactions and conscious states of particular types. The fetus, in contrast, has only a general potential for such experience, one that seems only slightly different from that enjoyed by the "potential person" in the form of an egg and sperm in close vicinity. Observations of social relationships will not explain which kind of potential is the one that counts, nor will they indicate how much experience is needed to be a "person."

Attempts to understand the humanity of the fetus as the object of our own experience prove just as unsatisfactory. For example, the parents' feelings about the fetus could be taken as evidence of its status. They may grieve less when a miscarriage occurs than when a baby dies. Similarly, a woman may be "prepared to protect with her life even the smallest child,"[83] but at least some question can arise as to whether she ought to sacrifice her life for that of her fetus. Therefore, the fetus is not a person. We could also argue more generally in terms of social visibility[84] or sympathy:[85] we perceive the fetus as different in some ways from the child, and so we may consider it a nonperson. If a fetus is aborted, for instance, it is difficult for us to empathize with its loss, especially in the very early stages; if a child dies, in contrast, everyone feels a loss.

These arguments are open to the objection, however, that they attempt to locate the essential attribute in inherently variable attitudes and feelings. There are two ways to address this objection. We can conclude that the fetus is a human being if its particular mother feels very close to it or a given society strongly empathizes with it, and not a human being if the mother happens to regard it as a piece of tissue or if social and cultural beliefs deem it a nonper-

82. See, e.g., Fleck, A Psychiatrist's View on Abortion, in Abortion, Society and the Law 179, 182 (D. Walbert ed. 1973) ("From the psychiatrist's vantage point, either a fetus or even a newborn baby can realize its potential to become a person only if its biological parents and society at large supply the essential psychosocial nutrients"); Noonan, supra note 38, at 53 ("It could be argued that certain central experiences such as loving or learning are necessary to make a man human. But then human beings who have failed to love or to learn might be excluded from the class called man."); Gerber, supra note 55, at 8.

Conversely, if we argued that "experience" should count, whether self-conscious or not, then our criterion of humanity would include even insects and fish.

83. H. Thielicke, supra note 58, at 244; O'Connor, supra note 60 at 131-32.

84. Noonan, supra note 38, at 54; O'Connor, supra note 60, at 132; Ramsey, supra note 53, at 74. Of these three, only O'Connor actually accepts social visibility as a criterion.

85. See Pincoffs, supra note 60, at 46-49.

son. Alternatively, we can first posit a "normal" mother or society and then find the attribute of humanity from a description of her (or its) "normal" feelings about the fetus.[86] If we choose the former response, the endeavor remains descriptive but the attribute becomes a function of changing individual and social attitudes; if we choose the latter, the attribute may resemble an "essence," but it loses its purely descriptive character. Either way, the attempt to discover a natural class of human beings fails completely.

None of the attempts to discover whether the fetus "is" a human being move us any closer to a definite answer. In every case, some set of criteria is needed to gauge the significance of the various facts regarding human biology and social relationships. As in the debate over ensoulment, any conclusion as to whether the fetus is a person depends upon what image of humanity one brings into the abortion debate. A purely factual verdict on the status of the fetus is not possible.

A second, equally telling objection to this inquiry is that even if a purely factual verdict were possible, the kinds of consequences that flow from such a conclusion would seem universally unacceptable when taken in their entirety. For example, nearly everyone would consider it unreasonable to punish abortion with the death penalty or to attempt to save all embryos from spontaneous abortion in their early stages.

Both objections point us to a purposive definition of humanity. Perhaps we should recognize openly that *we* must choose the criteria for humanity, selecting the standards that best serve the purpose we have in mind in asking whether the fetus is a person.[87] This kind of inquiry is explicitly subjective, turning the "factual" question of whether the fetus is a person into the avowedly moral question of whether or under what circumstances it is right to take the life of the fetus. If, however, everyone agrees on some general principles regarding the taking of human life, we may be able to formulate a position on abortion that serves those principles better than any other position. The problems encountered in our search for some form of certain knowledge may still cast doubt on the truth or certainty of those principles, but at least the direct effects of that uncertainty can be confined to the level of basic principles.

86. See Wertheimer, Understanding the Abortion Argument, 1 Phil. & Pub. Aff. 67, 85-88 (1971).

87. See, e.g., id. at 85 ("In brief, when seen in its totality the conservative's argument *is* the liberal's argument turned completely inside out. While the liberal stresses the differences between disparate stages, the conservative stresses the resemblances between consecutive stages. . . . The arguments are equally strong and equally weak, for they are the *same* argument, an argument that can be pointed in either of two directions. The argument does not in itself point in either direction: it is *we* who must point it, and *we* who are led by it."); J. Fletcher, Morals and Medicine 212-15 (1954); Hare, Abortion and the Golden Rule, 4 Phil. & Pub. Aff. 201, 204-07 (1975); Oteri, Benjoia, & Souweine, supra note 55, at 574, 579-80.

c) Is Abortion Right?

If we abandon the effort to discover an essential attribute of humanity, we transform the premise (that the fetus is or is not a person) into a conclusion that follows from our verdict on the morality of abortion. If one decides that abortion is wrong, for example, one will deem the fetus a "person," rather than conclude that abortion is wrong *because* the fetus is a person.

This procedure will have several advantages. First, we are more likely to achieve an acceptable solution to the abortion issue if we acknowledge our role in deciding what the criteria should be; only in this way can we hope to determine whether "there are good and bad reasons for deciding in the way we do,"[88] as one exponent of this approach puts it. Second, it becomes much more plausible that a fetus could be a "person" in one sense and not a "person" in another. For example, one could give a consistent explanation for prohibiting abortion while refusing to apply the harshest penalties to it: arguably, the purposes served by the prohibition of abortion do not require a punishment as harsh as that for murder of children and adults. Finally, this approach makes it possible to answer two questions at once, and by the same criteria. If we merely ask whether the fetus is a person or has a soul, an affirmative answer does not necessarily tell us that abortion is always prohibited. We might, for example, still allow it in certain cases, as where the mother's life is endangered. Similarly, a negative answer does not mean that abortion is always unobjectionable. A separate inquiry into the conditions under which the act is justified is needed. In contrast, if we decide whether the fetus is or is not a person in terms of the purposes served by the distinction, precisely the same inquiry will tell us when it is justified to take the life of the fetus.

Many attempts to elaborate a "purposive" approach to the status of the fetus and the morality of abortion have been made. Obviously, these efforts must begin with some conception of what the purpose itself is. The most common and general notion is that the purpose is to maintain respect for the sanctity of human life: the best solution to the abortion issue is the one that most strengthens respect for other human beings. Starting from this premise, the various efforts to define the status of the fetus or determine the morality of abortion can take several forms.

One approach posits that an objective distinction between the fetus and what we clearly acknowledge are "persons" cannot be made, and concludes that the best way to foster respect for human life "is simply to define certain entities as not being human life which need to be protected."[89] If we draw a clear distinction between the fetus and adults, for example, sanctioning abortion will not weaken our condemnation of murder. The lack of any direct connection between various societies' positions on abortion and their general

88. O'Connor, supra note 60, at 131.

89. Abortion and Morality, in 3 Abortion in a Changing World 89, 105 (R. Hall ed. 1970) (remarks of Ralph Potter) [hereinafter Abortion and Morality].

respect for human life might seem to support such an approach.[90] Yet the general notion of the sanctity of life could easily push us in the opposite direction. In this view, we should include the fetus within the class of persons because "[a]ny attempt to limit humanity to exclude some group runs the risk of furnishing authority and precedent for excluding other groups."[91] If we can decide that fetuses are not persons, why can we not also decide that a slave, or anyone over sixty-five, is not a person?[92] Indeed, even if we reject the idea that personhood can be determined by looking for "a real event in the objective order,"[93] we still might want as a matter of policy to argue for the broadest definition of what is human. If something is arguably a person, we should treat it as such in order to avoid, as much as possible, the dangers inherent in our discretion.

While these opposing approaches certainly exhibit significant differences,[94] they both depend crucially upon an "objectivist" image of humanity.[95] Both approaches assume that there is a core of entities whose status as "persons" is beyond doubt, and a periphery of entities whose status is doubtful, and apply their conception of what best serves the principle of respect for human life only to the periphery.[96] Indeed, we determine whether we have correctly formulated and elaborated the purpose by testing the results against

90. Many commentators have pointed to Nazi Germany's restrictive abortion laws as reason to doubt that recognition of a right to abortion pushes a society toward Naziism. See, e.g., M. Potts, P. Diggory, & J. Peel, supra note 56, at 546; L. Tribe, American Constitutional Law § 15-10, at 932 n.70 (1978); see also Bock, Racism and Sexism in Nazi Germany, 8 Signs 400 (1983); Glass, Further Notes on the Effectiveness of Abortion Legislation, 2 Mod. L. Rev. 227, 228 (1938) (acquittal of Jewish woman charged with seeking abortion). Cf. Glass, The Effectiveness of Abortion Legislation in Six Countries, 2 Mod. L. Rev. 97, 116 n. 71a (1938) [hereinafter Glass, The Effectiveness of Abortion] (Nazi denunciation of abortion as "a violation of Nature, a degradation of womanhood, motherhood, and love"). See generally id. at 113-16; Grossman, Abortion and Economic Crisis, New German Critique, Spring 1978, at 119.

91. Noonan, supra note 38, at 54.

92. Cf. C. Turnbull, The Mountain People 124, 151-52 (1972) (elderly or sick not seen as "persons" by members of the Ik tribe).

93. Noonan, supra note 38, at 54.

94. One such difference lies in the evaluation of just how much of a danger our discretion poses. The more we trust ourselves, the more detailed and exacting we can become in our classifications; the more danger we see in our own judgment, the more we will want to resolve the matter in a broad, once-and-for-all way that errs on the side of overinclusion.

95. For example, those who argue that we should define fetuses as nonpersons might also apply their approach to the issue of when to consider someone dead. That is, they might argue that we best maintain the principle of respect for human life by defining, for example, irrevocably comatose persons as "dead" and then pulling the plug. See Abortion and Morality, supra note 89, at 105. But few if any advocates of a purposive approach would maintain that we could preserve respect for human life if we seriously entertained the notion of defining as nonpersons and exterminating all who failed to earn a living for themselves. Cf. Hare, supra note 87, at 207 ("It is clear at least that we ordinary adults are persons."). Those who argue for the broadly inclusive approach similarly would limit the scope of their method; they might argue, for example, that we are not bound to treat cows as persons in order to ensure respect for human life.

96. Similarly, an animal rights advocate could argue that we are not bound to treat insects (or plants) as persons in order to insure respect for human/animal life. In either case the method would be the same: core and periphery are distinguished, with the purposive method applying only to the latter.

the core of what are unquestionably persons. For example, many theorists argue that we must reject any definition of humanity, no matter how plausible, if it would allow infanticide as well.[97]

By what criteria, however, can one distinguish the core from the periphery? The existence of controversy cannot signal the presence of a "peripheral" issue, for there are many who are firmly and absolutely convinced that the fetus is *obviously* a person. Nor is it possible to prove that fetuses lie in the periphery by appealing to an objective truth about the "core" of humanity, as the failure of the ensoulment and attribute approaches demonstrates. Finally, the purposive approaches themselves cannot be relied upon to make the distinction, for one tests their acceptability in the periphery by comparing the answers they give with regard to the core against the "true" core positions—which were given independently of the purposive tests in the first place. In other words, to exclude the possibility of allowing infanticide is to claim access to some kind of method for knowing what is a person other than the purposive one. And it is just such a method that we seem not to have.[98]

The attempt to move directly from an extremely general proposition about respect for human life to a specific answer to abortion may leave so much room for different results—even diametrically opposed conclusions—that it is too easy to lapse into the more "metaphysical" approaches. Perhaps more detailed and thoughtful conceptions of the purposes and principles we hold with respect to the sanctity of life would obviate the need to claim that there is an undeniable core of human beings.[99] However, a consideration of typical attempts to do so reveals that it is an inescapable feature of the purposive approach to rely on "objective" notions whose deficiency it is intended to remedy.

One common attempt is to construe the purpose of the principle of respect for human life in conformity with our reactions to the killing of others.[100] For example, if we do not, in fact, react with the same condemnation toward the woman who has an abortion in the early stages of pregnancy

97. E.g., Ramsey, supra note 53, at 79; Abortion and Animation, supra note 37, at 6 (remarks of David Granfield). But see Tooley, Abortion and Infanticide, 2 Phil. & Pub. Aff. 37 (1972); J. Fletcher, supra note 53, at 144.

98. We can see now why we cannot use a judgment on how much to trust ourselves to resolve the question of whether on the one hand to "put the matter out of our hands," or on the other hand, to engage in much finer distinctions about the beginning of life and the definition of death. The only way to test the results of our discretion would be to compare its answers to the right ones; if we found that people often make the wrong decision, we would conclude that the former approach was correct. But to know this would require the same kind of "objectivist" claims we earlier had to reject.

99. To put it another way, we might have certain intuitions, based on our views on morality, that would lead us to expect it to be immoral to sanction murder. If a position on abortion appears to contradict that expectation, we might express our surprise by calling adult humans "obviously" persons. We would appear to be relying on a notion of some core of humanity, when in fact we were calling on our expectations as to how our moral principles should work out in practice.

100. See, e.g., O'Connor, supra note 60, at 131-32.

as we do towards a person who murders an adult, then in allowing abortion we will not weaken the principle of respect for human life by acting contrary to our moral sensibilities. But "if people began to see their 'children' at one and two months as a matter of course (due perhaps to certain artificial incubation techniques becoming widespread) this might change, and the range of human feelings and emotions become extended to include fetuses in early stages of development in their scope."[101]

Still other conclusions are possible if we look to our reactions to killing. If as a matter of fact we feel a certain degree of condemnation of abortions even at early stages, perhaps we should consider the fetus a "quasi-person," the killing of which would be wrong, but not as wrong as the killing of an adult.[102] Similarly, if our reaction to an abortion in the very late stages of pregnancy was positive under certain circumstances and negative under others, there would be nothing inconsistent in concluding that the fetus was a person in the latter set of cases but not in the former—even though biologically the two fetuses might be the same.

A second attempt to decide when the fetus becomes a person by examining our reaction to abortion focuses on the "modes of respect in different circumstances."[103] In the context of abortion, we disrespect human life if we force unwanted or deformed children to be born to a life likely to be filled with suffering. On the other hand, to abort fetuses in the very late stages "would too obviously conflict with our basic principle of unconditional respect for the human as an end in itself and its correlative principle of respect for the 'potentially human.' "[104] Thus, we draw the line between permissible and impermissible abortions at the point where the fetus begins to look human, because that is "where it is in fact usually drawn."[105]

A final attempt at a purposive theory of humanity that does not depend on a predetermined core of human beings draws on a more complex set of purposes and principles. Respect for the sanctity of human life is based upon minimizing a number of harms which murder causes. Killing harms many people: the victims (by causing them to suffer as they die, by inflicting on them the apprehension of death, and by depriving them of experience); the killer (by brutalizing the killer); the victim's family (by depriving them of the victim's companionship); and society generally (by threatening everyone's life).[106] This variant might lead one to adopt viability as the dividing line. Abortion in the very early stages of pregnancy arguably causes none of these harms, while the killing of a viable fetus, though it arguably would not deprive the fetus of anything, would be so like infanticide that it *would* brutalize the parents and

101. Id. at 132; see also Ramsey, supra note 53, at 74.

102. Cf. G. Williams, supra note 41, at 17-33 (similar argument regarding infanticide).

103. Gahringer, supra note 39, at 63 (emphasis deleted).

104. Id. at 64.

105. Id.

106. Bok, supra note 57, at 98-99.

society generally.[107]

These efforts are all open to the objection that they merely accept as given the moral sensibilities of a particular society. Though we are looking at values, the approach seems to be purely factual—a description of how in fact people respond to abortion. Accepting such descriptions as definitive would seem to condone the denial of humanity to slaves in the pre-Civil War South.[108] More generally, it would mean that we "allow for the loss of human rights by some minority merely because some society has adopted a criterion of humanity that excludes the minority."[109] What began as an effort to see how best to serve the moral principle of respect for human life ends in an inability to condemn the denial of humanity of slaves or oppressed minorities. [110]

Finally, we can rely entirely on the moral principle of respect for human life to tell us what is human or, simply, what is right. Yet, because the way we frame the moral principle influenced the results we obtain, we are left uneasy.[111] The discomfort leaves us with only two choices. We can dispute the general principle itself, as ultimately wrong. This endeavor is hopeless, however, for it requires us to compare different theories of the right to the "true theory." Alternatively, we can limit the scope of a particular conception of

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107. Id. at 99-102.

108. E.g., Noonan, supra note 38, at 6, 54; Wertheimer, supra note 86, at 67, 83.

109. Brody, supra note 53, at 77.

110. Some commentators attempt to avoid this problem by reliance on a notion of a *natural* response to certain classes of beings. This theory suggests that we can discount the slaveowner's denial of the slave's humanity because, were it not for the distorting effects of slavery, blacks would naturally be treated as no different from whites, whereas we have no such natural response to the fetus. E.g., Wertheimer, supra note 86, at 86-89. Similarly, infanticide is excluded from any possible justification by the purposive approach on the ground that it is *necessarily* brutalizing for the society that accepts it: the public acceptance of infanticide in modern societies is simply "unthinkable." Bok, supra note 57, at 100. There is, then, a core of beings who are "naturally" or "undeniably" human, and the purposive method applies only to the periphery of doubtful entities. This claim, however, suffers from precisely the defect that was noted earlier in the discussion: the lack of a basis in the purposive method itself for distinguishing core from periphery.

Although I speak here of "core" and "periphery", another way to phrase the approach is in terms of a "natural kind." See, e.g., Brody, supra note 53, at 84-88. Thus we first determine that there is a class of beings whom we want to protect because of some characteristic they have (which is essentially a purposive approach) and then resolve to protect all members of the class. For a critique of natural kind approaches, see L. Sumner, supra note 33, at 96-99.

111. For example, many of the attempts described above ultimately point to the time at which the fetus comes to look human to us as the time at which it becomes human. Yet we can build an entirely different way of viewing the proscription of murder: we ought to treat others as we would have them treat ourselves, or as "we are glad was done to us." Since we are glad that our lives were not terminated during pregnancy, we should, other things being equal, refrain from obtaining or allowing abortion. Hare, supra note 87, at 208 (emphasis deleted). For a somewhat similar approach, see Sterba, Abortion, Distant Peoples, and Future Generations, 77 J. Phil. 424 (1980). From here we can elaborate a position that condones or condemns abortions (as well as contraception) depending on the likely health of the child, the general state of population growth, and any other factors relating to the degree of "gladness" the adult would have at not having been aborted. See generally Hare, supra note 87, at 211-14, 218-19, 221-22. For a critique of Hare's approach, see Sher, Hare, Abortion, and the Golden Rule, 6 Phil. & Pub. Aff. 185 (1977).

the principle of respect for human life—or even reject it entirely—because it leads to too many implausible and unacceptable conclusions. Indeed, one commentator ends her purposive argument by testing abortion's effects on societies that accept it.[112] Yet again, such judgments rely on notions of plausibility that exist independently of the purposive method—a method we adopted to avoid reliance on such notions.

Even if it were possible to overcome this reliance on non-purposive notions of plausibility, there would still be another difficulty inherent in the purposive method.[113] It is not simply that whatever position one might take on the morality of abortion could be attacked as either relying implicitly on notions of objective knowledge or as making everything relative. Rather, the purposive method throws into question the very notion of a general position on the morality of abortion. After all, if our purpose is to do that which accords with or promotes respect for human life, why should we expect that there would be one position? We still have to ask, in each and every case, "does abortion serve or disserve that purpose?"[114] This is not to observe that certain invariant principles would have to be applied to evaluate the morality of each case of abortion, but rather that there could be no such principles at all, except perhaps as rules of thumb. To be sure, one might argue that the principle of respect for human life itself requires a general verdict on the morality of abortion, because the absence of a general verdict might reduce our respect for the sanctity of life. But even this argument is incompatible with the purposive approach, for that approach might require a conclusion that the general rule did *not* further the purpose of respect for human life in a particular case. Nothing in the purposive approach could justify the refusal to entertain the possibility of such a conclusion.

d) Conclusion

The ensoulment approach assumes the existence of an objective reality that transcends that fact-value distinction to arrive at an "objectively correct" verdict on abortion. That very assumption undermines the ensoulment approach in its entirety. The debate over whether the fetus is a person is an attempt to isolate the moral issue (when is it wrong to take human life?) from the factual one (what is a person?) to confine the effects of uncertainty in knowledge to the former. When this effort at containment fails, we turn to the purposive approach. The purposive approach collapses the factual and moral issues in the hope that a reasoned analysis of purposes will provide one's position on abortion with something like the certainty of logical entailment. In

112. See Bok, supra note 57, at 103-04 (concluding that societies that do allow abortion have not been "brutalized" by it).

113. I will discuss this difficulty in greater detail in Section II. See text accompanying notes 252-55 infra.

114. Cf. Note, *Roe* and *Paris*, 26 Stan. L. Rev. 1161, 1176 (1974) (attempt to determine privacy right by magnitude of impact of government intervention would, if individualized, "make generalized holdings of law such as those in *Roe* impossible").

other words, although the validity of any general principle regarding respect for human life may lack a firm basis, a particular stand on abortion may be considered objectively correct in that it would follow from the general principle.

This last approach[115] proves inadequate and emphasizes that the dichotomy between subjective and objective deprives us of any satisfactory answer to the question of abortion. We can assert that a particular verdict on abortion is objectively correct because a certain religion, or one's intuition, says it is. Or we can assert categorically that everything is subjective. No coherent middle ground exists between these extremes. To find a defensible position in that middle ground, we would need to justify the point beyond which purposive reasoning will not be allowed to venture, or beyond which our claims of access to some kind of "objective" or "universal" moral principles will no longer be respected. No such justification, however, is possible. Thus at this point, we might approach abortion not as a matter of right, but of rights.

2. *Abortion and Privacy*

The very failure to find a nonarbitrary answer to the morality of abortion—an answer between the extremes of asserting a completely objective morality and of concluding that everything turns on our purposes or interests—forces us to look elsewhere for a resolution. Rather than reluctantly concede an element of subjectivity each time we find an objective approach impossible to sustain, we might take as a premise that issues of value are personal concerns to be determined primarily by the individual.[116] Earlier we approached abortion as a problem of knowledge, and adopted one view of the relationship of rights to the right: if we could know that abortion is objectively right it should be a right, and if abortion is objectively wrong, no one should have a right to use privacy "as a kind of veil to conceal the enactment of evil."[117] An alternative approach is that the very lack of any "right" position on abortion is the strongest argument for making it a right and allowing each person to decide for herself.

The central notion of liberal theories of privacy[118] is that a coherent ap-

115. There is one other well-known argument about the morality of abortion which I have not discussed. See Thomson, supra note 35. I will discuss her approach in Section II. See text accompanying notes 302-05 infra.

116. Cf. Oteri, Benjoia, & Souweine, supra note 55, at 586 ("Morality is inherently the quintessence of personal predilection.").

117. Midgley, Natural Law and Fundamental Rights, 21 Am. J. Juris. 144, 152 (1976); see also Hare, supra note 87, at 203-04 (rejecting the "rights" approach on the ground that until "a theory of rights which links the concept firmly to those of 'right', 'wrong,' and 'ought' " is produced, "we shall get the issues in better focus if we discuss them directly in terms of what we ought or ought not to do, or what it would be right or wrong to do, to the fetus or the mother in specified circumstances."). Cf. Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 175-76 (secrecy protected by privacy is cover for fraud).

118. The analysis here is not concerned with the legal question of the propriety of a judicially enforced right to privacy under the Constitution, but rather with the kind of political and

proach to the protection of privacy can be formulated without resting the account of individual autonomy on a substantive conception of the good life.[119] Of course, to propose that individuals be free to pursue their own life plans and shape their own values is to make a substantive and contestable conception of what society should be like. But given the initial choice in favor of that kind of society, it can still be argued that individuals should be free to choose their own personal plans, control information about themselves, and enter into intimate relationships with others, without the state interfering by favoring one particular ideal of the good life over any other.

The protection of individual autonomy, however, must be limited and given some definite scope, for any aspect of social and political life could be characterized in terms of its impact on privacy or autonomy.[120] There are, broadly speaking, two ways of doing this. First, one can attempt to elucidate a "correct" theory of privacy, which asserts on the basis of psychological studies, intuition, or whatever, that we know that certain areas of life are "fundamental" to individual autonomy. Second, we can eschew any approach that makes claims (whether empirical or deductive) about human nature, and look to shared values: we may not *know* that x is "fundamental," but everyone believes that it is, and that shared belief provides a useful basis for a theory of privacy.[121]

These attempts to set out a doctrine of fundamental aspects of individual

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social relationships we want established both among individuals and between the individual and the state.

119. See, e.g., B. Ackerman, Social Justice in the Liberal State 11 (1980) (power structure is illegitimate if it operates on the assumption that one person's "conception of the good is better than that asserted by any of his fellow citizens"); Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy, 14 Harv. C.R.-C.L. L. Rev. 361, 365 (1979) ("The human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a lifestyle which allows expression of their uniqueness and individuality.").

120. See L. Tribe, supra note 90, § 15-1, at 888-89 ("A concept in danger of embracing everything is a concept in danger of conveying nothing.") (footnote omitted); Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 261 (1977) ("We have to find some way, in our definition of the concept, to keep it from swallowing itself. . . . An unrestricted concept is perhaps no concept at all.") (footnotes omitted).

121. There are, broadly speaking, two other approaches to privacy, which I do not discuss in text. The first is suggested by the definition of privacy as "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Private acts, with which the government ought not interfere, are those which affect only the individual who commits them (or perhaps as well as those individuals who consent to be affected). See generally J.S. Mill, On Liberty (1859). Or, to put it alternatively, there is a zone or sphere of privacy into which the government may not intrude. See, e.g., Gerety, supra note 120, at 271 (describing that concept); Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421 (1980) (privacy as limitation on others' access to an individual); A. Westin, Privacy and Freedom 7 (1967) (privacy as "the voluntary and temporary withdrawal of a person from the general society through physical or psychological means"). One could question the point of defining privacy in such a way that dead persons enjoy it most fully. See, e.g., Gavison, supra, at 428; cf. Marvell, To His Coy Mistress, in 1 The Poems and Letters of Andrew Marvell 28 (H. Margoliouth 3d ed. 1971) ("The Grave's a fine and private place,/But none I think do there embrace."). To reply that privacy so conceived must be balanced against a "need" for public or social activity seems to

autonomy, or to delineate aspects of personal life which everyone agrees should be treated by the state as private, suffer from two defects. We have no convincing basis for asserting access to a knowledge of what is truly "fundamental" or what values we really do share. Even if we did, we have no way of giving a coherent account of how the state could act on that knowledge while at the same time respecting individual autonomy.

a) Developing a Theory of Privacy

Attempts to elaborate a "correct" notion of privacy share one feature—the attempt to discern from the nature of individuals or relations among individuals factors that are fundamental to individual autonomy. One may assert that particular aspects of private life, (such as the freedom to choose a spouse, conduct intimate conversations without fear of being overheard, determine the circumstances of death with dignity,[122] or control who is able to sense one's body,[123]) are "essential" to freedom or autonomy. Alternatively, one might analogize love and friendship to market transactions and conclude that privacy is the control over information about ourselves—control that allows us to build up the "moral capital" we spend in our personal relationships with others.[124] Finally, if analyses of individual psychology and interpersonal relationships seem too doubtful a basis from which to draw conclusions about the

presuppose a particular, and not very desirable, sort of division between public and private life. See generally R. Sennett, The Fall of Public Man (1976).

The other major definition of privacy is as control over information about oneself. E.g., Beardsley, Privacy: Autonomy and Selective Disclosure, in 13 Nomos 56, 56-70 (J. Pennock & J. Chapman eds. 1971). Obviously, the two definitions are not mutually incompatibile, and one can define privacy in terms both of withdrawal and of selective disclosure. See, e.g., A. Westin, supra, at 7. Similarly, one can combine one or the other (or both) of these two approaches with one that is explicitly concerned with the protection of certain "fundamental" decisions or choices. E.g., Whalen v. Roe, 429 U.S. 589, 598-600 (1977); Comment, A Taxonomy of Privacy, 64 Calif. L. Rev. 1447 (1976).

I do not discuss either the withdrawal or selective disclosure notions of privacy because they have little direct relevance to abortion. To view abortion as "self-regarding" or as involving one isolated person is to take a substantive position on its morality, see Gerety, supra note 120, at 274 n.150, and the inquiry here is whether we can formulate an approach to abortion as a matter of privacy that does not depend upon taking a stand on its morality. Equally, apart from the issue of record-keeping, the notion of control over disclosure of information has no direct bearing on the abortion issue. See Planned Parenthood v. Danforth, 428 U.S. 52, 79-81 (1976). Nevertheless, it is worth noting, in view of the larger claims I make about the possibility of a coherent liberal theory of the right to privacy, that both approaches ultimately do rely upon deeply substantive and highly contestable notions about "human nature." To determine whether an act affects only one person or society at large is to make a judgment as to the kind of society we wish to be. See L. Tribe, supra note 90, § 15-1, at 888. Similarly, theories of control over information about oneself presuppose a particular conception of what individuals and relationships are like. Compare, e.g., Fried, Privacy, 77 Yale L.J. 475 (1968), with R. Sennett, supra, at 10, and Benn, Privacy, Freedom, and Respect for Persons, in 13 Nomos 1, 25 (J. Pennock & J. Chapman eds. 1971).

122. See, e.g., L. Tribe, supra note 90, §§ 15-1 to 15-21, at 886-990.

123. Parker, A Definition of Privacy, 27 Rutgers L. Rev. 275 (1974).

124. See Fried, supra note 121, at 484. For a critique of Fried's theory, see Rieman, Privacy, Intimacy, and Personhood, 6 Phil. & Pub. Aff. 26, 31-31 (1976).

fundamentals of autonomy, we might look to biology instead—as where control over one's body is termed essential to individual freedom. Thus "[u]ntil a woman is able to control her own reproductive functions, it is literally impossible for her to plan her life or career with any certainty."[125]

Regardless of the theory, one can always ask how we know that those areas of private life are truly fundamental. We originally turned to the question of the right to privacy because we could find no certain basis for a verdict on the morality of abortion; there seems no reason to suppose we can do any better here. One may, for example, construct a theory that locates the fundamental aspects of autonomy and self-realization in the family, in intimate relationships, and in the individual body, and condemn governmental intrusions into those matters, at least in the absence of compelling justification. This is, of course, the basic structure of most arguments that abortion should fall within the right to privacy: forbidding abortion forces a woman to become a mother against her will and commandeers her body for the sake of some interest the state believes will be promoted by making her continue the pregnancy.[126] When we "examine" individuals to see what is fundamental to their autonomy, however, we unavoidably bring into the discussion prescriptive notions of personal life, particular and highly contestable visions of what people should be like and how they ought to structure their lives. It is wrong, therefore, to assert that such theories of fundamental aspects of autonomy represent knowledge rather than assertions of taste or opinion.

Consider two examples. First, sexual activity often figures prominently in privacy theories as a fundamental aspect of individual autonomy and self-expression, while work does not.[127] For example, although an attack on governmental regulation of a public employee's sex life would commonly be thought to raise colorable privacy claims, an attack on an alienated and fragmented job structure imposed on that same employee would not. One could argue, however, that it is in labor that individuals should be able to realize themselves,

125. A. Sachs & J. Wilson, Sexism and the Law 162 (1978). See generally E. Shorter, A History of Women's Bodies (1982); S. Firestone, The Dialectic of Sex (1970); Sedler, The Legal Dimensions of Women's Liberation, 47 Ind. L.J. 419, 427 (1972).

126. E.g., Sedler, supra note 125, at 419-33; Jones, Abortion and the Consideration of Fundamental, Irreconcilable Interests, 33 Syracuse L. Rev. 525, 567-74 (1982).

127. See, e.g., Note, supra note 114, at 1176; Gerety, supra note 120, at 280, 296; Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1183-86 (1980) (procreation) [hereinafter The Constitution and the Family]. See also Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 10 (1971) ("Why is sexual gratification nobler than economic gratification?").

Richards, Sexual Autonomy and the Constitutional Right to Privacy, 30 Hastings L.J. 957 (1979), provides an instructive example. He argues that "[c]ontemporary understanding of the strategic importance to self-respect and personhood of sexual autonomy requires that we . . . guarantee full liberty to enjoy and express love," regardless of sexual preference. Id. at 1001. He does mention other values, including "choice of occupation and avocations," id. at 1000, but it is clear that he has in mind just that—a choice among existing occupations, not any critique of the structure of work generally. Further, he presents this and other essentials of autonomy as if they were an aspect of some essential human nature or "human life cycle" that transcends cultural boundaries. See id.

and that the emphasis on sexuality as fundamental is little more than an ideology of "repressive desublimation,"[128] a permissiveness that diverts people into the pursuit of private pleasures and away from collective, political action. A second example is control over reproduction, which is often deemed an intensely personal matter essential to individual autonomy. In the case of abortion, such a notion rests on the assertion that becoming a mother at a time when she did not want to would constitute a profound disruption of a woman's present life and future plans. The basis of this assertion, however, is unclear: is it a view that women have a natural desire to control their fertility? One could just as easily argue that women naturally wish to become mothers, and that the ability to control the decision whether to bear a child, while of some importance, is not of fundamental significance to them.

If the only objection to privacy theories were that a theorist may assert that any given interest "really" is fundamental, the objection would not be particularly grave. The existence of disagreement does not, in itself, invalidate a theory. It is when one asks what the possible bases are for the assertions that some interest is fundamental that one runs into a dilemma, for we have, at base, only two ways of approaching the question whether any particular interest is "fundamental." Neither is satisfactory.

On the one hand, we can assert that "the truly essential interests of human existence are finite and not subject to changing mores or technology,"[129] claiming access to knowledge of an unchanging, timeless human nature. Once we take it beyond an extremely high level of generality, however, we lose any justification for asserting such knowledge. For example, general claims of the importance of intimate relationships give us little specific guidance about marriage and sexuality. But more concrete claims cannot plausibly be said to draw on any essential feature of human nature that simply exists.[130] The modern ideal of romantic love, or of sexuality as a key to one's self-understanding and as a natural way of relating to another stripped of social roles and context, cannot plausibly be attributed to all societies and all times.[131]

On the other hand, we might concede that alternative visions of what is fundamental to individual autonomy are embodied in alternative social prac-

128. See H. Marcuse, One Dimensional Man (1964).

129. Disanto & Podolski, The Right to Privacy and Trilateral Balancing—Implications for the Family, 13 Fam. L.Q. 183, 202 (1979). See also A. Westin, supra note 121, at 13-22 (surveying universal needs for privacy); cf. M. Walzer, Radical Principles 23, 24 (1980) ("Liberal theorists of the welfare state have always claimed to know what we want. Their work rests on two assumptions: first, that politics ought to be the instrument of human desire; second, that the nature of human desire is obvious.").

130. See R. Unger, supra note 39, at 241 ("Either the allegedly universal ends [intrinsic to human nature] are too few and too abstract to give content to the idea of the good, or they are too numerous and concrete to be truly universal. One has to choose between triviality and implausibiity.").

131. See generally R. Sennett, supra note 121, at 257-340; 1 M. Foucault, The History of Sexuality (1978); J. Weeks, Sex, Politics and Society: The Regulation of Sexuality Since 1880, at 11-16 (1981).

tices.[132] This concession, however, undermines the essential premise of privacy theories; why *should* the government protect an area of life that is "essential" to individual autonomy, when some other aspect of private life might be "essential" in a different social structure? A common example of this dilemma concerns the fourth amendment searches: it is circular to base protection against government searches on reasonable expectations of privacy, given that these expectations are signficantly influenced by what the government is and is not allowed to search.[133] The same dilemma appears in privacy doctrine generally. For example, although individuals may feel their autonomy more compromised by restraints on contraception and abortion than by alienated work, that fact supplies us with no normative basis for deeming sex to be fundamental while work is not deemed such. In a society in which population growth was a matter for collective determination, and in which individuals worked in creative, satisfying jobs, the situation might be reversed. If so, one could as well urge the government to regulate sex or procreation and encourage job enrichment as to give scrupulous privacy protection to sexuality and none to the structure of work. Furthermore, in a social structure in which women were largely excluded from work and were systematically channelled into becoming housewives and mothers, the desire to control fertility might well be weaker than in a society in which women are free to pursue careers and are not so economically dependent on marriage. Adopting the latter as the context for asking whether abortion implicates a fundamental aspect of individual autonomy, one is more likely to answer the question affirmatively. The choice of context, however, requires a normative justification.

Finally, consider the circular impact of the Supreme Court's decisions regarding abortion. By declaring a right to abortion, the Supreme Court removed much of the stigma of abortion in many people's eyes. In turn, the greater social acceptance of abortion might well have increased its importance to many women, who, in part because of *Roe*, have come to see it not as a degraded, risky, and immoral matter but as a basic right. Thus the Court's declaration that abortion is a fundamental right contributes to the fact that many women do see it as such.[134] This circularity, however, undermines any

132. Cf. Bachmann & Weltchek, Book Review, 30 UCLA L. Rev. 1078, 1086 (1983) ("Childbearing can be 'clearly' a public matter (in China), just as it is 'clearly' a private matter (in the United States).") (reviewing The Politics of Law: A Progressive Critique (D. Kairys ed. 1982)). See also Craven, Personhood: The Right to Be Let Alone, 1976 Duke L.J. 699, 713.

133. See, e.g., Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974); Note, A Reconsideration of the *Katz* Expectation of Privacy Test, 76 Mich. L. Rev. 154, 157-64 (1977).

134. This may be true to some extent in a direct sense, as some commentators have argued. See, e.g., Glendon, Marriage and the State, 62 Va. L. Rev. 663, 719 (1976) ("[T]he Supreme Court [is] . . . so widely seen as a moral arbiter that its opinion striking down abortion laws has meant for many persons that abortion no longer has a moral aspect."). But see Sandalow, The Distrust of Politics, 56 N.Y.U. L. Rev. 446, 447 (1981). Most theorists confine themselves to less specific (and more plausible) assertions like "[t]he Supreme Court is a significant force in the shaping of values in American society." McKay, Judicial Review in a Liberal Democracy, in 25 Nomos 121, 138 (J. Pennock & J. Chapman eds. 1983). See also Perry, The Abortion

purely observational or descriptive account of privacy; attempts to specify what "in fact" is fundamental to individual autonomy are essentially incomplete without a moral theory of how society ought to be structured.

This last objection might seem to overstate the importance of the element of circularity. Though one might concede that in some other society or in some other time, things might be viewed differently,[135] in constructing a theory of privacy one could simply assume that the values we share are those we ought to protect, leaving the evaluation of those shared values to some broader inquiry. These shared values might be drawn from something as general as "Western culture and religion,"[136] or from some social consensus on a narrower point, like the importance of family life. One might also try to identify some logic immanent in private life or political practices that embody an ideal of respect for individual privacy in sexual matters.[137]

The attempt to found a theory of privacy on shared values, however, falls prey to the same unavoidable arbitrariness that undermines efforts to set out a "correct" theory of privacy. First, the level of generality at which the interests are specified is inevitably arbitrary.[138] Is it "intimate sexual relationships" generally or the "traditional marital relationship" in particular that is fundamental?[139] Is it "sexual relations" or "heterosexual relations" that are crucial to self-expression?[140] Suppose everyone agreed that abortion should be legal;

Funding Cases: A Comment on the Supreme Court's Role in American Government, 66 Geo. L.J. 1191, 1228 (1978); Noonan, supra note 38, at xi ("Moral notions are partly formed by the teaching of the law.").

Probably much more important, however, is the *indirect* effect of the Court's holdings. That is, *Roe* did help to legitimize abortion, perhaps in part because of what the Court said about it, but also because it made abortion legal, safe, and much more accessible. In turn, the social practice of abortion may well have a significant impact on people's acceptance of it: as more women experience the control over their lives that it offers, the more likely they are to view it as a fundamental right. I discuss this second type of impact on values at greater length in Section III.

135. Similarly, we could decide to ignore the effect of the Court's privacy decisions on what people consider fundamental, arguing, for example, that its decisions reflect more than shape social values. See, e.g., L. Tribe, supra note 90, at iv (emphasizing "the inevitable social and cultural constraints on judicial intention and impact").

136. See, e.g., Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 Stan. L. Rev. 1383, 1384 n.7 (1974); Keifer, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach, 66 Minn. L. Rev. 459, 506 (1982) (suggesting that shared values may be found in "cultural history and constitutional tradition"); The Constitution and the Family, supra note 127, at 1182 (looking to "longstanding cultural consensus").

137. Gerstein, California's Constitutional Right to Privacy, 9 Hastings Const. L.Q. 385, 414-18 (1982).

138. See generally J. Ely, Democracy and Distrust 60-63 (1980).

139. See Bork, supra note 127, at 10; see also Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.), rehearing en banc denied, 746 F.2d 1579 (D.C. Cir. 1984) (per curiam).

140. Indeed, some commentators specifically note the high degree of care with which the level of generality must be selected if the proper conclusion is to emerge from the analysis of "shared values". E.g., L. Tribe, supra note 90, § 15-13, at 946 ("It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct."). In turn, the justification for the choice of level of generality is that it is "[p]lainly" the correct one. Id.

what might that tell us about the nature or purpose of our shared values? It might indicate a concern that individuals be able to control their own bodies; or it might express the principle that people ought to be able to determine whether their bodies will be the source of children. If the former, the right to privacy might well include a right to die with dignity; if the latter, that right would lie outside the scope of the shared value.

The second objection is equally serious. A close examination of "shared values," inevitably reveals that they contain conflicting ideas as well as many that comport ill (if at all) with the idea of privacy. We may believe that the home should be a sanctuary from the government, but there is also a strong current of belief that those who insist too strongly on fourth amendment protection must be hiding something. Similarly, we may seem to believe both that sex is a private matter, of concern only to the two consenting individuals involved, and also that homosexual relations should be outlawed. We quickly discover that uncritical attempts to incorporate shared values in a relatively concrete form are entirely unworkable.[141]

We may, therefore, attempt to refine our understanding of those values. We must ferret out cases of prejudice from our shared values, and reconcile instances of at least apparently conflicting values.[142] Yet the process of refining turns out to be indistinguishable from substantive theorizing about the proper scope of privacy. It is a mistake, in other words, to think that we change the nature of the debate if instead of saying, "this view of privacy is wrong," we say, "in light of other values we all share, this position is no more than prejudice." For example, if we argue that it is one of our shared values that we respect individual sexual expression and protect it from government intervention when conducted in private between consenting adults, is the denial of that protection to homosexuals an instance of prejudice? If by "prejudice" we mean to make an assertion about the psychology of those who oppose privacy protection for sexual preference, we run into the fact that it is undeniably possible to be perfectly sincere and well-meaning in asserting (say) that, unlike engaging in heterosexual relations, engaging in homosexual relations degrades individuals rather than allowing them to express themselves. On the other hand, one might argue that the distinction is inconsistent: it "take[s] into account considerations our conventions exclude."[143] Homosexuals, it might be argued, are not responsible for their sexual preference and thus should not be disadvantaged because of a characteristic which they "cannot help having."[144] The distinction drawn between homosexuals and heterosexuals is therefore untenable.

One obvious difficulty with this approach is determining whether people

141. See J. Ely, supra note 138, at 60-61.

142. See The Constitution and the Family, supra note 127, at 1181 (need to distinguish "tradition" from "fortuitous historical attributes" such as "prejudice and insensitivity"); R. Dworkin, Taking Rights Seriously 248-53 (1978); Richards, supra note 127, at 977-78.

143. R. Dworkin, supra note 142, at 249.

144. Id. at 250; Richards, supra note 127, at 978-99.

are really harmed by state intervention. If homosexual relations are in fact morally degrading, forbidding individuals from engaging in homosexual relations may not harm them. No amount of medical, psychological, or social studies, moreover, can answer this essentially moral question.[145] We may also question the proper scope or assumed purpose of the moral principle that the shared value embodies. Having been confronted with the example of sexual preference, might we not begin to realize that our general characterization of the shared value was too broad? It may be underinclusive: do we believe, for example, that it is a sufficient reply to objections to discrimination against aliens that their condition is not immutable?[146] Perhaps it is overinclusive as well; we may, upon reflection, conclude that what we really believe is that it is wrong to treat people's sexual lives as inferior or otherwise disadvantage them because of a characteristic they cannot control only so long as that characteristic does not prevent them from partaking in normal family life. I am not arguing for such a conclusion, but rather pointing out that we can always either modify our general statement of the shared value in light of a particular position, or modify the particular position to make it consistent with our previous characterization of the shared value. To choose which response to make will inevitably throw us back into the same dilemmas we faced in attempting to elucidate a correct theory of privacy.

b) The Relationship Between the Individual and the State

The second major dilemma one faces in trying to construct a theory of privacy is that of giving a coherent account of the relationship between the individual and the state. Suppose we were to overcome the difficulties set out above. Just as one might rely on religious revelation to claim that abortion is wrong, so one might simply rely on one's "judgment" to overcome the points where the theoretical arguments threaten to lead straight into unresolvable disputes about human nature. In both cases, others might disagree with the view the conclusion thereby reached, but they could not call it "incoherent."

Having done so, however, we immediately face the question whether individuals may hold sharply divergent values. An affirmative answer is obviously more plausible, but ultimately is unworkable. Individuals have not only their own particular desires, but their own general conceptions about what sorts of activities are fundamental to their self-realization. Some people might believe that sexuality is fundamental to their own self-realization, while others might believe that work is fundamental. Indeed, even in a society in which most women viewed motherhood as the natural and desired role, some women would want to control their fertility. Yet these individual conceptions count

145. I am not advocating this view. I simply wish to point out that facts—even "[t]he cumulative impact of . . . facts"—cannot prove anything, or even put significant constraints on our approval or disapproval of any form of sexuality. Richards, supra note 127, at 986; see generally text accompanying notes 359-586 infra.

146. J. Ely, supra note 138, at 150.

for nothing if the right to privacy, as actually enforced, rests upon one "correct" theory or upon a *generally* shared value. One could argue that it is really the state that makes the basic decisions through its power to classify areas as "fundamental" or "not fundamental." But if the state tells the individual, "realize yourself in these areas and through those types of choices and not through some others," that can hardly be considered *individual* autonomy.

We could, of course, attempt to respect every individual choice or action on the ground that any of them might be central to that individual's autonomy, but this would fail as it would both threaten society and glorify the state. No actions that could be characterized as a restraint on any particular individual's pursuit of her ends could be tolerated, and the idea of organized social life itself would be drawn into question. Individual autonomy would also be threatened as expressive acts and desired ends might easily entail interference with others' autonomy or even their safety and their lives; in order to strike a balance between the conflicting demands for expressions of autonomy, extensive state intervention would be needed to set out in detail acceptable kinds of interference.[147]

We might, alternatively, argue that values or judgments concerning what areas of life are fundamental to individual autonomy are in fact necessarily shared. This would avoid the anomaly that the state may deny privacy protection to an activity some individuals believe to be fundamental to their self-realization on the ground that they are wrong, or that the majority thinks they are wrong. The price of doing so, however, is the undermining of the notion that *individual* autonomy is being protected at all. One would have to postulate that individuals are who they are at least in part because of some concrete set of beliefs that they cannot transcend. This is less a theory of individual autonomy than of individual heteronomy. The idea of individual autonomy, and the theory of privacy that protects it, are both premised on a rejection of determinism at some point in the analysis. As one perceptive commentator notes,

> [t]he very idea of a fundamental right of personhood rests on the conviction that, even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortations and scarcities and constraints of one's social environment, the "personhood" resulting from this process is sufficient "one's own" to be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government.[148]

If we resort to the notion of necessarily shared values, however, we assert just such a determinism—whether it is a determinism of mass culture, advertising, or government indoctrination. Indeed, even if it is a genetic determinism, and

147. Gerety, supra note 120, at 262; cf. Gavison, supra note 121, at 438 (typical privacy claim is "a claim *for* state interference in the form of legal protection against other individuals").

148. L. Tribe, supra note 90, § 15-2, at 890.

so entirely "natural," we are still not talking about individual autonomy, and we are equally bereft of a normative basis for respecting it.

c) Abortion in Moral and Political Theory

As noted earlier, we encounter precisely the same difficulties in the right to privacy as in the morality of abortion. With respect to the morality of abortion, we first looked for an "objective" description of the status of the fetus, but found that our descriptions turned on the images of the soul or humanity that we brought into the analysis. Turning to a purposive approach, we abandoned the attempt to ask what was in fact right and instead took some broad purpose as given, but found that we either had to rely implicitly on the same objective or factual notions that we had rejected earlier (in order to limit the scope of the purposive method), or allow the purposive method to be applied without limit (in which case anything seemed possible). We also found that either our verdict on abortion was "essentialist," applying in all contexts in equal degree, or that it became indefinitely particularizable.

The same dilemmas exist in privacy theories. We attempted to describe certain fundamental aspects of individual autonomy, but we found that our "observations" of what is fundamental turn on assumptions, both in the mind of the theorist and embedded in social practices, about what people *should* be like. When we turned to a notion of shared values, however, we either had to accept them in a concrete form, "as is," with all their conflicts and even authoritarian sentiments, or else we had to attempt to refine them, facing the same difficulties we encountered in trying to describe the fundamental aspects of individual autonomy. Moreover, efforts to conceive how the state might enforce a right to privacy veered between two extremes: either everyone necessarily had the same values or conception of autonomy, or each individual had his or her own conception. In the former case, the state might respect something, but it was doubtful whether that individual autonomy was actually "autonomy," and it seemed odd to call it "individual"; in the latter case the state in effect determined for the individual which areas of life are fundamental.

Before coming to any conclusions about the possibilities of a coherent liberal doctrine of privacy and abortion, however, we must make one more effort. Up to now, we have considered two broad approaches to the abortion issue. The first assumed away the privacy issue and asked whether we could have certain knowledge of the status of the fetus, or more broadly of the morality of abortion. The second dismissed the possibility of such knowledge and looked to a doctrine of privacy for the answer. Neither approach has worked, but there still remains the possibility that borrowing elements from both approaches might provide a reasonable solution to the dilemma. Few theories make rights either totally dependent upon or absolutely indifferent to a conception of the right. Thus, we may attempt to approach abortion as a problem of morality *and* politics.

Such an approach could begin by drawing a distinction between the indi-

vidual and society as the subject of knowledge. Society may enjoy access to knowledge of what is right that is not enjoyed by the individual. Considered historically, the idea might not seem too implausible in the form of "revealed" knowledge: our own social practices might reveal something of which we are unaware when we approach the problem as an ahistorical exercise in factual observation or moral reasoning.[149]

Our ideas of the relationship of individual and society, however, leave us with no firm ground for believing that we can claim access as social actors to knowledge that we do not have as individuals. On the one hand, social and political decisions may clearly represent some agglomeration of private, individual ends and values. In this case, they can be no more certain in moral matters than can any individual's subjective desires. If politics is simply the pursuit of private interests by public means, in other words, we have no reason to expect that any ideal immanent in our history will have greater claims to the truth than any one individual's views. The passage of the nineteenth century abortion statutes, for example, was clearly bound up with the efforts of "regular" physicians to secure their status. These doctors, who took the formal medical training and high social prestige of the European medical profession as their ideal, and who tended to be affiliated with the American Medical Association, sought to establish themselves as a profession to the exclusion of their competitors such as folk practictioners and homeopaths. Many of the "irregulars" were far more willing to perform abortions than were the regulars, who thereby lost potential customers. To the extent that such factors played a role in the passage of the anti-abortion statutes,[150] there would be no basis for treating their passage as some sort of collective recognition of the principle of respect for human life and its applicability to fetuses.

On the other hand, one might view political activity as an activity elevated above mundane pursuit of individual advantage. When individuals participate in this kind of decision making, they do so on the basis of their common quality as one citizen among many. The vote, for example, is given equally to each citizen *as* a citizen and not in proportion to wealth or income, or in accordance with particular beliefs and values. Any mixture of the pursuit of individual ends with the search for the common good is condemned, whether manifested in a property qualification to vote, in the failure to put aside self-interest in deciding how to vote or what policies to support, or in attempts to deny the vote to those of differing ideologies. Yet once we move

149. Cf. Noonan, supra note 38, at 2 ("History can record insights gained by human beings, insights which once generalized by education are taken as a part of the mental outlook of the persons subject to such education."). This is the underlying premise of the arguments that the growing recognition of fetal personhood by the law of torts, inheritance, and property reveals a gradual recognition and acceptance of the fact that the fetus is a person. See, e.g., Gerber, supra note 55, at 14-19; D. Granfield, supra note 35, at 154-55, 160; J. Pelt, supra note 50, at 100-01. I discuss this particular argument more fully in Section II. See text accompanying notes 295-303.

150. See text accompanying notes 451-65 infra.

beyond generalities, we have no clear idea what a public good separate from a compromise among competing private interests, or competing private visions of the good life, could be.[151] Suppose, for example, that the regulars did have more than base economic self-interest in mind. They also aspired to be moral counselors to society, and were genuinely concerned about the dangers to women's health and the nation's strength posed by women who sought abortions and refused to accept nature's role.[152] Could this be considered public interest legislation? It appears equally as an instance in which individuals, because of their social standing and access to the political process, persuaded the legislature to impose their views on everyone else. Even the regulars' belief that abortion was murder could be characterized as one particular moral belief which was imposed on everyone else. The basic difficulty is that a theory which would allow one reliably to distinguish instances of moral consensus or historical revelation from interest-oriented or ideologically intolerant impositions would be either a true theory of the morality of abortion or a correct theory of privacy.

Most theories of privacy do not pose the question of society's access to "correct" moral ideas in such all-or-nothing terms, though. A more moderate position might draw a distinction between core and periphery. As a society, we may know that beings such as infants are unquestionably "persons," and we can rightfully forbid termination of their lives (given the general principle of respect for human life) without concern for the legitimacy of suppressing the autonomy of anyone who may feel differently. We might also know that animals are not persons and so need not worry about the ultimate denial of their autonomy, or of the autonomy of those who seek to protect them, when we refuse to consider killing animals to be murder.[153] The status of other entities, however, is not so easily ascertainable. With respect to such peripheral entities, the claims of individual autonomy on subjective questions come to the fore; thus we leave it up to each person to make the decision about (among other things) the status of the fetus.[154]

Though this approach may seem more realistic than those premised upon either the complete objectivity or subjectivity of the morality of abortion, it is

151. See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1669-72, 1681-88 (1975).

Clearly, the public interest cannot be identified as a compromise among competing private interests or values, because such a compromise would merely reflect existing differentials of power and wealth.

152. See text accompanying notes 459-60 infra.

153. As noted earlier, the same analysis would apply even if we believed in animal rights. We could know that plants were not covered by the principle of respect for the sanctity of life, and we could therefore, it is asserted, confine the scope of that principle to animals and humans without fearing that we were on some slippery slope requiring us to confine respect for the sanctity of life to some "master group."

154. Alternatively, to put it more generally (if we feel other considerations besides the status of the fetus are relevant), there is a core of actions that are morally wrong (such as the murder of adult human beings) and a periphery of actions—like abortion—the morality of which is a subjective, personal matter.

still unsatisfactory. There is no reason to suppose that the state or society can "objectively" distinguish the core from the periphery. For example, any attempt to prove or infer from the facts that the fetus is, in effect, a peripheral or "quasi-person" would meet the same fate as attempts to show that it is a "person." By distinguishing core and periphery, we may simply find ourselves on a slippery slope pulling us toward complete discretion as a society over the designation of what is a human being. In other words, without an "objective" method for distinguishing core and periphery, the strategy of dividing up knowledge between that which can be known with certainty (as to what is in the core and what is in the periphery) and that which is subjective (as to what to decide about entities in the periphery) breaks down entirely. This would threaten not only to exclude from protection what we feel are definitely persons but also to undermine the very idea of individual autonomy in decision making. If society can make the (possibly controversial) determination of what is and is not in the core, and on the basis of that deny the claim of individual autonomy, what is left of the idea of respect for the individual? Suppose, for example, that society were to decide that people over 65 are in the periphery, and cows in the core. The autonomy of the elderly would be threatened, as would the autonomy of those who choose to eat meat.

One response to this objection is to deny its plausibility. If we have faith in democracy, we can be confident that certain designations simply would not be made, and we should not distort our doctrinal positions by pretending otherwise.[155] This response, however, simply misses the point: it claims that society does have access to objective knowledge of some sort, or at least that for practical purposes we can act as if it did. This claim, moreover, can always be answered by pointing to things like the enslavement of blacks or the treatment of the elderly and the sick as nonpersons in certain societies. To fall back on notions of what is "realistic" to expect, then, is simply to acknowledge theoretical impasse.

3. *Abortion and Liberal Thought*

The failed attempts to develop a coherent, nonpolar liberal doctrine of abortion and privacy pose two questions: What reasons are there for believing that further argument and inquiry would be equally unproductive? And what does it mean to say that it is "liberal" approaches which fail? The answer to these two questions is the same: there is an underlying structure to the incoherence, a structure sufficiently distinct and cohesive to justify use of the term "liberal" as more than a covenient label. That structure consists of two dichotomies: the first between subjective and objective, and the second between universal and particular, both related to each other in a specific way.[156] I will

155. See J. Ely, supra note 138, at 181-83.

156. See generally R. Unger, supra note 39, at 1-144; T. Nagel, Mortal Questions 197-213 (1979).

first present the terms of the dichotomies and then consider their importance for the abortion issue.

The first dichotomy reflects our inability to find a nonarbitrary middle position between two extreme (and simplistic) approaches to the nature of knowledge. On the one hand, we can seek "objective knowledge" which conforms to some reality given independently of our experience or perception of it. In this case, the attempt to gain knowledge is the effort to ensure that our understanding of the world reflects true reality. On the other hand, we can object that such an attempt assumes that we can step outside of our knowledge and compare it with reality. This objection pushes us to conclude that knowledge is in the final analysis subjective; opinions can be offered, and consistency in beliefs may be sought, but there is no ultimate objective standard by which to prove or disprove them. The problem, then, is the apparent impossibility of finding a basis for attaining knowledge which is objectively true, yet not in principle beyond our capacity for understanding; and which conversely is accessible to us, yet not "merely" subjective. Although we may reject the possibility of finding some "standpoint of the cosmos in itself,"[157] we do not want to abandon the hope of finding some rational way to select among competing theories and outlooks.

The second dichotomy of universal and particular may be understood in terms of the notion of primacy. At one pole we may see each particular as entirely dependent on the universal, in the sense of having a fixed, established place under the single universal concept to which it belongs, and as being exhaustively defined by its place in relation to the universal. Another way of looking at this pole, one which relates it more directly to the discussion of abortion, is through the idea that particular things have "intelligible essences" by which they can be naturally grouped or classified.[158] At the opposite pole, we may believe that each particular is not defined exhaustively by its relation to any given universal concept; things can be grouped in an indefinite number of ways with no one classification fully exhausting its meaning because there is no single "essence" to be fully defined. Alternatively, then, we can deny that anything has an "essence" or if it does have one, we cannot know what it is, because what any particular "essentially" is depends upon how we classify it. In sum, the first, "essentialist" pole represents the primacy of the universal, not because it denies the existence of particulars, but rather because the fact that the essence of any one thing is fully defined with respect to a universal quality makes the particular dependent upon it. In contrast, the second pole casts into doubt the very idea of an essence and reduces the universal to an arbitrary selection among the infinitely many ways to group particulars. It thus leaves the particular as the primary object of our experience.

The importance of the primacy of universal or particular, and of our in-

157. See A. Gramsci, Some Problems in the Study of the Philosophy of Praxis, in Selections from the Prison Notebooks 445 (Q. Hoare & G. Smith eds. 1971).

158. See R. Unger, supra note 39, at 31-36.

ability to resolve the issue, becomes clearer when we examine the various, more specific dilemmas in social theory and legal doctrine that it expresses. In much of our thinking about society, we seem to be faced at bottom with a choice between absolute individualism and the primacy of community. We may believe that each person is who he or she is independently of society, and that society is the joining together of those independent individuals in one of any number of possible forms of association that they might choose. Moreover, the association itself—taken as a whole, or considering other particular members of it as members of the association—is simply an instrument to the individual's ends. Any state action restraining the individual, moreover, is an imposition on the individual, however legitimate: either the will of the state or that of the individual prevails. Conversely, in a situation of pure community no person is seen as having any meaningful existence outside society. One's place in society exhaustively defines who and what one is. Here the association itself is not the mere instrument of its members, but the primary end of social life. Of course, few theorists adhere to either version in its pure form, but more moderate alternatives necessarily amount to internally inconsistent juxtapositions of aspects of both poles.

The two dichotomies of subjective and objective and of universal and particular combine to create greater dilemmas than each could generate alone. By itself, the dichotomy of subjective and objective simply reflects the fact that while moral choices seem to lack "objectivity," neither are we satisfied with a purely subjective approach; by itself the dichotomy of universal and particular simply reflects our inability to reconcile part and whole. But together, they create a far more difficult problem. If there were no polarity in our distinction between individual and state, actions based upon dubious claims of access to "the right" could not threaten individual autonomy; and if decisions could be objectively right, then we might, even taking an atomistic view of society, have less reason to object to the state's ordering of outcomes on issues such as abortion. If, however, we believe that subjective decisions are essentially individual matters, then any choice by the state becomes a constraint on individual freedom and autonomy that is not merely inconsistent with a view of the state as instrument, but which also cannot claim objective normative justification.

These polarities underlie all the specific dilemmas we have analyzed in the abortion issue. The dichotomy of subjective and objective means that every attempt to set out a specific argument about the morality of abortion or the proper scope of privacy can always be shown to have inconsistent elements within it, unless the position advocated lies at one or the other of the extremes. The dichotomy of universal and particular means that every attempt to set out the consequences of any given position is, if not all or nothing, inconsistent. If we do not claim (say) that the fetus "is" a person in all possible respects and for all possible purposes, or that no general verdict on the morality of abortion is conceivable, then our argument can be shown to lack consistency. Similarly,

our ideas about the relationship of individual to state or society take on an all-or-nothing character: if we do not argue that individuals are absolutely atomistic or else utterly social beings with necessarily shared values, it will always be possible to spot inconsistencies in any argument about privacy. The effect of these dichotomies is that we always have available to us a repertoire of stock arguments and counterarguments about abortion and privacy. If one person argues that, "we must accept at some point that *we* determine whether the fetus is a person," the other can always respond, "so you believe that society could legitimately make a judgment that slaves are not persons?," to which the former could reply that the power to determine personhood applies only to doubtful cases, pointing out that even the pro-life advocate is content to let individuals decide for themselves whether, for example, cows are sacred.

To these last replies, of course, still further counterarguments could be made. The same endless quality of the argument appears in debates about privacy. Yet, in fact, people do almost always settle on some nonpolar position, and though they may not always be fanatically convinced of the truth of their position, neither do they come to a conclusion with a sense of complete theoretical arbitrariness. The common experience of doctrinal disputes, then, appears to comport poorly with any analysis devoted to showing that liberal thought is necessarily incoherent or arbitrary. If liberal theories of the morality and politics of abortion are so contradictory, why are nonpolar positions continually put forth and defended?

It would be a mistake to attribute this phenomenon entirely to the psychology of the theorists—to argue that they cannot, whether for personal, political, or professional reasons[159] admit the incoherence of liberal theory. A more illuminating approach lies in examining the judgments that account for the sense that the theoretical dilemmas can be resolved. Confronted with seemingly intractable theoretical disputes, that is, the most sensible response appears to be to exercise one's judgment about what is reasonable or realistic, or call upon one's intuitions. To be sure, these judgments or intuitions are not perceived as a substitute for reason: the commitment to find some reasoned solution remains. But argument must of necessity stop at some point if actions are to be taken or positions advocated. As I will argue in the next section, these judgments, which attenuate consciousness of the ultimate arbitrariness of the arguments, rest on opposing visions of what society is and should be like.

C. Abortion and Social Vision

The controversy over abortion and privacy is more than a theoretical disagreement over how best to criticize and justify the way liberal society is structured. As a conflict within that social structure, the abortion dispute shapes, in part, the character of our social experience. The abortion issue is closely

159. See Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205 (1981).

related to a whole range of contests over the structure of liberal society. By looking at the abortion debate in the context of these other conflicts, we can begin to understand not only the characteristic features of the liberal social experience as a whole, but also their relation to the theoretical disputes already examined.

Two opposing social visions, which I will call the traditionalist and the nontraditionalist perspectives, underlie and unify a number of areas of political and social conflict in contemporary society.[160] The struggle over abortion is part of a larger contest in which those who oppose abortion attempt to structure society along traditionalist lines, while those who support the right to abortion try to structure it along nontraditionalist ones. For purposes of this discussion, the broader contest between the two visions can be understood in terms of three issues: sexual relations, the family and the role of women within it, and the relation of people to the biological terms of their lives.

In order to make this argument, it will be necessary to outline the two visions and draw their connection to the abortion dispute. There is, however, a dilemma inherent in undertaking this analysis. It requires going beyond relatively superficial observations about how frequently a position on abortion is associated with a positon on another issue. The analysis here looks to a deeper level of interconnection between such positions which the participants in the conflicts may not always fully grasp. In searching for this deeper level, however, it is too easy to fall into the trap of claiming to analyze the objective logical structures of the various positions, and to attribute to social actors a "true" position regardless of whether they subjectively believe it or not.

There is no entirely satisfactory way to avoid this pitfall other than to maintain a constant awareness of it.[161] Subsection one focuses on describing

160. In using the word "traditionalist," I do not mean to make any assertion about the nature of the social practices or structures that traditionalists seek to defend. The nuclear family, for example, is often taken as the "traditional" one. See, e.g., The Constitution and the Family, supra note 127, at 1213. Yet one might also view the extended family as typical of older, traditional, immigrant cultures in contrast to the modern nuclear family. Cf. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (referring to "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children"). Moreover, I will argue in Section III that our seemingly "traditional" social practices and beliefs are more properly understood as social constructs emerging from political struggles of the late nineteenth century onwards. Nevertheless, these beliefs and practices—such as the idea of woman's role as wife and mother, or of the family as an oasis of emotional security—are perceived as traditional. It is that perception which the analysis in this section addresses.

I should also emphasize that I do not intend (at this point) to evaluate either perspective; I certainly am not attempting to advocate a modern, progressive, nontraditional approach. On the contrary, I will argue in Sections III and IV that neither perspective is satisfactory.

161. There are also problems of documentation. That people who oppose abortion tend also to oppose the Equal Rights Amendment, for example, is not a statement that will surprise anyone. More generally, there is a common perception that in some way the abortion issue implicates or at least symbolizes larger questions. This perception is especially strong among opponents of abortion. See, e.g., Note, supra note 77, at 175 n.161 ("Quality-of-life [ethic] is diametrically opposed to traditional western ethic which places absolute value on every human life. . . ."); Krimmel & Foley, supra note 60, at 727 ("Is the legalization of abortion consistent with the kind of society we desire?"); id. at 797-84; D. Granfield, supra note 35, at 126, 129; J.

the two visions in terms of the kinds of social structures that participants in these disputes foster. The connections among the different positions that characterize the two perspectives are not absolute; it is not inherently impossible for one who adopts the nontraditionalist view on the role of women, for example, to oppose abortion. The basis for giving less weight to such positions will be clear from the analysis of the relationship of the social visions to the dilemmas of liberal thought, which is taken up in subsection two, below.

1. The Traditionalist Controversy

a) Respect for Others

Central to the conflict over the experience of life in liberal society is this issue: under what conditions is it possible to realize in personal practice the moral ideal of respect for others? For the traditionalist, the practice of morality in human relationships is possible only if those relationships are part of a larger order or established framework that transcends any one individual or society and is morally justified in its own right. Any attempt to subject such a framework to conscious social or individual control threatens individual integrity and freedom by exposing people to exploitation by others. For the nontraditionalist, in contrast, those established frameworks constrain human freedom precisely to the extent that they are *not* subjected to active control by individual or society. Blind acceptance of any institution as the exclusive vehicle for achieving the ideal of respect for others threatens individual autonomy. What framework for human relationships is "right," then, depends upon the evaluation of the individuals who create it.

(i) Sexual Relations

The first area of the controversy regards sexual relations. In the traditionalist view, shared in varying degrees by those who oppose abortion, sexual

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Noonan, A Private Choice: Abortion in America in the Seventies 172-77 (1979); Byrn, supra note 43, at 19-34; Gerber, supra note 55. But it is also true (in a different way) for feminists. See, e.g., M. Barrett & M. McIntosh, supra note 33, at 14 ("Abortion is . . . an indexical issue. It can provide a litmus test of how well—to put it crudely—feminist and socialist views are bearing up against religious and familist forces."); Hayler, Review Essay: Abortion, 5 Signs 307, 313 (1979) ("Opposition to women's demand for freedom of reproductive choice reveals deep patriarchal anxiety about how women may act when freed from the restraints of biological motherhood."). See also Potter, The Abortion Debate, in Updating Life and Death 85, 101 (D. Cutler ed. 1969) ("Abortion is a symbolic threat to an entire system of thought and meaning.").

Still, the claims I make throughout subsection one below are much more specific. To a certain extent, I simply assume that the particular empirical connections I draw between the abortion controversy and issues of sexual morality, the family, women's roles, and biological "engineering" reflect common perceptions of the debates over these matters. It is, I believe, the nature of the connection, and not its existence, that poses the more difficult and controversial question. There are, however, some very helpful studies documenting the connections between the abortion debate and other issues. See P. Steinhoff & M. Diamond, supra note 39, at 71-117; P. Conover & V. Gray, Feminism and the New Right 97-129 (1983); K. Luker, Abortion and the Politics of Motherhood 158-91 (1984). Also helpful in this respect is Moore, Moral Sentiment in Judicial Opinions on Abortion, 15 Santa Clara L. Rev. 591 (1975).

relations are right only within some given framework that transcends any one individual (such as marriage). Sex must be treated as having some intrinsic meaning that deserves respect of its own accord. This attitude is compatible with a view of sex as a necessary evil but it does not necessarily imply such a view. Within this framework, sex can be a positive good, if treated with respect for its intrinsic meaning. In either case, sexual pleasure as an end in itself is condemned.

The traditionalist position has both a general and a particular aspect. The traditionalist, after all, does not merely believe in *some* framework for sex, but defends a particular one: for example marriage between a man and a woman who love each other and wish to have a family. Similarly, one might believe that in the right framework for sex, procreation and sexual pleasure are intrinsically linked.[162] These particular assertions are obviously important because ultimately the dispute concerns what sorts of actual, concrete arrangements can be made between individuals. That dispute cannot be resolved merely by referring to a general need to place sex within the context of some kind of established, right framework. For now, however, I will focus on that more general assertion of the necessity of some framework that presents itself to individuals as given, because it is precisely this necessity that the nontraditionalist view disputes.

The nontraditionalist position differs from its traditionalist counterpart in two ways. First, it denies that a structured, given framework, independent of any individual or society, is in any sense a precondition for morality in human relationships. Two persons may either create their own structure (for example, by taking vows to each other and creating their own version of a marriage) or choose not to concern themselves with a structure at all (for example, by mutually consenting to sex purely for the pleasure of the moment). Neither course of action necessarily implies a disrespect for others. Second, sex has no intrinsic meaning;[163] rather, it carries precisely the significance that individuals attach to it. Thus, the nontraditionalist finds it much more difficult than the traditionalist to condemn any particular sexual arrangement between two consenting partners, regardless of what it might be.

The two views have strikingly different implications, both on a personal

162. See, e.g., Bryn v. New York City Health and Hospitals Corp., 31 N.Y.2d 194, 214, 286 N.E.2d 887, 897, 335 N.Y.S.2d 390, 404 (1972) (Scileppi, J., dissenting) ("a decision to engage in sexual intercourse necessarily entails an acceptance of the consequences and must take into account the possibility that another life may be created"), appeal dismissed, 410 U.S. 949 (1973); J. Schall, Human Dignity and Human Numbers 74, 77-83 (1971); D. Granfield, supra note 35, at 205 ("Sex involves a tripartite relation: man, woman, and child. Sex can be enjoyed apart from the family, even apart from another person, but it can never be fully understood or evaluated apart from the family.").

Alternatively, one might argue that the one, right framework is marriage, within which there need not be a connection between sexual relations and procreation. E.g., J. Pelt, supra note 50, at 69-71.

163. Cf. Goldman, Plain Sex, 6 Phil. & Pub. Aff. 267 (1977) ("There is no morality intrinsic to sex . . . .").

and a political level. For the traditionalist, any act of disrespect for the correct, established, sexual framework threatens to undermine the very ideal of respect for others in sexual relationships. Without respect for the intrinsic meaning of sex, the pursuit of sexual pleasure by one partner will degenerate into the treatment of the other as a degraded object.[164] Further, the established framework for sexual relations, whatever it may be, is part of a larger moral order. The very act of disregarding that framework and consciously substituting something else is an arrogation of power to human beings and a threat to the whole fabric of the moral order. In religious terms, not only is it intrinsically wrong for an individual to violate God's law on any one occasion, but it is also likely to lead to other violations. The very act of disobedience implies the possibility of other acts. In secular terms, individuals who accept one kind of unnatural or immoral relationship risk the degradation of their own character.[165]

For the nontraditionalist, however, the very fact that such a framework appears as a given inhibits full respect for human beings. If individuals can be free to create their own structures, they will experience greater freedom to develop along lines uniquely tailored to their own needs. They can create a framework which accords greater respect to the needs and desires of the partner. The nontraditionalist rejects the notion that any one established framework is inextricably tied to respect for the worth of individuals or a larger moral order. For the nontraditionalist, morality is more open-textured than the traditionalist view implies, and the act of abandoning one aspect of traditional morality in individual relationships need not carry any necessary implications for other aspects. Instead, such abandonment implies the affirmation of individuals' capacities consciously to shape the terms of their relationships—the central point of disagreement between traditionalist and nontraditionalist.

These differences extend to views on public policy. For the traditionalist, the proper framework for sex demands respect not only from individuals but from society as a whole, because this framework is part of a larger, tightly connected, right moral order.[166] Societies do not choose to encourage or allow one framework rather than another based upon calculations of utility. Rather, they acknowledge the established framework as a given fact of moral life or, if they do not, they threaten the possibility of morality in individual relation-

164. Cf. Paul VI, Humanae Vitae, pt. 2, § 17 (1968) (use of contraceptives may cause man "finally [to] lose respect for the woman" and to consider her "as a mere instrument of selfish enjoyment").

165. See, e.g., J. Schall, supra note 162, at 62 ("We are witnessing a long term separation of sex from reproduction. Abortion, as it is being argued in contemporary thought, is a necessary stage in this separation, the one which eventually accustoms us to the acceptance of the proposition that human life need not always be protected.").

166. Cf. Tushnet, Book Review, 82 Colum. L. Rev. 1531 (1982) (reviewing D. Richards, Sex, Drugs, Death and the Law (1982)) (arguing that conservatives see society as an interlocking whole, whereas for liberals various aspects of social practices and beliefs can be disaggregated).

ships. Thus, for example, laws prohibiting homosexuality show no disrespect for the principle of individual freedom, because homosexuality is intrinsically degrading.[167] For the nontraditionalist, in contrast, society may legitimately condone or encourage individuals' efforts to create their own types of sexual relationships outside traditional frameworks. Society is not bound, out of respect for individual freedom, to treat any particular structure as the only possible embodiment of morality in individual relationships. Thus, to continue with the same example, homosexuality cannot be prohibited on the ground that it is intrinsically degrading, because no one form of sexual relationship is.[168]

(ii) The Family and the Role of Women

The second area of disagreement concerns the family and the role of women. One variant of the traditionalist view, shared widely by many opponents of abortion, emphasizes the role of women as mothers and homemakers (and of men as breadwinners). Women are to define their primary concerns as raising and caring for their children and answering the emotional needs of the family while the husband provides for its material needs. A woman who rejects having children shows a narrowminded concern for her own convenience that is incompatible with true caring for others.[169] This view of women's roles, however, is merely one of a number of possible beliefs about what particular sorts of relationships ought to be established among individuals. While many opponents of abortion share this view, it is no more the only possible version of the traditionalist position than is the notion of sex as a necessary evil. As it becomes increasingly accepted and economically necessary for women to enter the workforce, other views of women's roles—which are discussed below—can be developed in a way compatible with the traditionalist viewpoint.

The nontraditionalist denies that any given role is naturally right for women, or that any structure particularly suits the family. Instead, the nontraditionalist emphasizes freeing women and men alike from the constraints imposed by gender-specific roles: women must have the option of pursuing careers, and men must have the opportunity to be more involved in raising children. A woman may *choose* to be a mother primarily, but it should be just that—a choice of one among a number of roles open to men and women.[170]

167. Indeed, attempting to outlaw discrimination based on sexual preference may threaten the very possibility of respect for others by protecting a form of sexual activity that corrodes the essential preconditions for morality in sexual relations. To take another example, sex education in public schools can be acceptable to the traditionalist only to the extent that it firmly ties sex into the particular correct framework.

168. Similarly, sex education can promote respect for others only to the degree that it promotes informed individual choice rather than attempts to impose the "right" moral code.

169. See, e.g., 1 Human Life Bill Hearings, supra note 32, at 775 (statement of David Wilkinson) ("reality teaches us [that] usually the sole consideration . . . [in the abortion decision is] what the woman desires by her own convenience").

170. See, e.g., P. Steinhoff & M. Diamond, supra note 39, at 88 (among pro-choice advocates, "[m]otherhood was generally viewed as one of many female roles, not as woman's destiny

The availability of contraceptives and abortion plays a major role in this choice, allowing women control over their bodies and offering them the option not to have children or to control the timing of parenthood in a way that makes career pursuits possible.

A similar contrast between the traditionalist and nontraditionalist views emerges when we examine the differing views on the family. The traditionalist may reject the view that the only proper role for a woman is as a mother, but still advocate preserving some social differentiation between the sexes and denounce efforts to break down those differences as attempts to create an unnatural "unisex." Much emphasis is placed upon preserving some sort of "traditional" nuclear family, with some kind of allocation of gender-specific roles for men and for women. The nontraditionalist, by contrast, defines a family and the roles within it in whatever way its members want. From this perspective, there is no archetypical "family" but rather a diversity of possible family structures.[171]

At the most general level, the contrast between the two visions concerns the necessity of a structured allocation of roles. To the traditionalist, the breakdown of the traditional mothering role of women and the weakening of the family threatens the values of emotional intimacy and caring for others.[172] It poses the danger that close family relationships will follow the pattern of the marketplace, where people treat others as expendable means to their own ends. Moreover, the roles women and men are supposed to take are divinely mandated, or are part of a natural, tightly integrated, moral order whose violation poses a grave danger to society. To the nontraditionalist, on the other hand, individuals can truly respect one another only if they enjoy the flexibility to tailor their relationships and roles to their individual needs. What is for the traditionalist the danger of violating the established order is for the nontraditionalist a source of greater individual and societal freedom.

These differences of opinion as to the family and the role of women arise in disputes over public policy as well. For the traditionalist, those laws which show respect for the correct framework for relations among individuals are compatible with individual freedom and morality. Those which fail to show respect for it are not. Consider the question of the minor's access to abortion and contraceptives. The state fosters respect for others by recognizing and

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or ultimate fulfillment. The role of motherhood was seen as one which women should *choose* and then exercise responsibly.").

171. At a White House Conference on Families, for example, conservatives generally opposed abortion, sex education, the Equal Rights Amendment, and favored the traditional structure of family life; liberals were pro-choice, favored sex education, and the ERA, and were much more open in what they would call a "family". See American Family Life at the Crossroads, The Boston Sunday Globe, Apr. 6, 1980, at B1, col. 1; see also Family Forum or Abortion Battle?, The Boston Globe, Feb. 20, 1980, at 17, col. 2. See generally G. Steiner, The Futility of Family Policy 3-46 (1981).

172. Cf. G. Steiner, supra note 171, at 51 (For pro-life advocates, "to support abortion is to support a cavalier disregard for the unity of the family."); id. ("in this view, pro-life and pro-family . . . are inseparable concepts.").

reinforcing the given family structure, one aspect of which is that the parents have control over their children's upbringing, including their sexual development, and exercise that control in the children's best interests. A parental consent requirement, therefore, is far from an absolute veto which parents may exercise on arbitrary, irrational, or even vindictive grounds to deny the child's autonomy. Instead, it promotes the child's freedom and supports the intrinsically correct family structure that makes possible true love and respect between parent and child.[173] Conversely, for the state to undermine this structure, by permitting minors to have access to abortion and contraception without parental consent or knowledge is to threaten the traditional family structure and with it the very possibility of autonomy and respect for others.

For the nontraditionalist, in contrast, which sorts of state actions in fact promote respect for others within the family is an empirical matter.[174] In most families consultation between parent and child may very well prove helpful; in others, however, the parents may take a vindictive attitude towards a daughter who gets pregnant.[175] Because it locks all families into a particular conception of the "correct" family structure, a parental consent requirement necessarily undermines the minor's autonomy. It amounts to nothing less than an attempt by the state to fit this particular aspect of family relations into a predetermined mold.

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173. Cf. Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329, 338 (for conservative Justices, "only parental authority exercised in a traditional authoritarian format requires constitutional deference").

Of course, the traditionalist need no more claim that all parent-child relationships are in fact perfect than she need claim that all marriages are actually perfect.

174. For example, one commentator argues that the exercise of parental authority is not always likely to be more in the minor's best interests than guidance by a physician. See Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv. L. Rev. 1001, 1017 (1975) [hereinafter Contraceptive Controversy] ("[T]he decision whether to use contraceptives is not necessarily improved by the greater experience or knowledge that a parent is likely to possess, particularly if physicians play a role in determining what birth control methods are to be utilized."). See also Note, Parental Consent Abortion Statutes: The Limits of State Power, 52 Ind. L.J. 837, 848-49 (1977) [hereinafter Limits of State Power] ("While the parents may have a more personal knowledge of the minor than the physican, it has been shown that because of their personal attachment to their child, parents' reactions to their minor daughter's pregnancy may result in a decision which is not in the minor's best interests. Thus, the detachment of the physician may allow him to make a more objective determination of what would serve the best interests of the child."); Note, The Right to an Abortion—Problems with Parental and Spousal Consent, 22 N.Y.L. Sch. L. Rev. 65, 73 (1976); Comment, Constitutional Law—Privacy Rights— Consent Requirements and Abortion for Minors, 26 N.Y.L. Sch. L. Rev. 837, 848 (1981); Note, The Minor's Right to Abortion and the Requirement of Parental Consent, 60 Va. L. Rev. 305, 330-31 (1974).

My purpose here is neither to agree nor disagree with these empirical evaluations, but simply to point out that an empirical evaluation is made. In contrast to the traditionalist, the nontraditionalist asks which authority structure is likely to be more oriented to the child's best interests—the family or the medical profession. The nontraditionalist finds no sense in the notion that respect for the minor's best interests is necessariy tied to any one given, morally right family structure.

175. See Dembitz, The Supreme Court and the Minor's Abortion Decision, 80 Colum. L. Rev. 1251, 1255-56 (1980).

(iii) Control over Human Biology

The third area of disagreement concerns the notion of active control over human biology. Two common examples are the concept of a right to die and the possibility of genetic engineering. Both concepts are highly suspicious notions from the traditionalist perspective (though not necessarily incompatible with it). Further, opposition to both concepts is generally strong among opponents of abortion.[176] Both contemplate a conscious control over the biological terms of life and death that "is wrong because it presumes a dominion over our species life which we have not been given."[177] Such control implies the renunciation of an established order that preserves respect for individual life by containing our worst impulses. Any breach in this order carries the distinct possibility of further breaches. This danger is present on a political as well as personal level: it is just as dangerous, if not more so, for the state to "play God" as it is for individuals to do so.

From the nontraditionalist perspective, on the other hand, while the dangers are present, they are not tied together so inextricably. A woman who seeks an abortion, for example, is not for that reason alone necessarily more likely to take a callous attitude towards the elderly. Similarly, greater social control over biology (for example, by providing, through genetic engineering, new ways of dealing with diseases, learning disabilities, and so on) can enhance the possibility for individual freedom.[178]

b) Individual Autonomy and Self-realization

A second aspect of the traditionalist controversy concerns not respect for others but individual growth and development. To what extent is an individual's self-realization bound up with a larger, established, morally right frame-

176. The Massachusetts legislature encountered strong opposition from anti-abortion groups and the Roman Catholic bishops of Massachusetts when it considered a bill to provide for a "living will," whereby the individual would specify his "wish to die 'naturally'—without artificial life-prolonging measures—if he suffered a certainly terminal illness but was unable to give doctors direction on when to cease aggressive treatment." See An Emotional Debate over "Living Will," The Boston Globe, Feb. 28, 1980, at 19, col. 3. Proponents of the bill termed it a measure that would "enlarge the fundamental right of the patient to make his or her own decisions on final medical care," while opponents denounced it both as a dangerous first step toward euthanasia and more generally as an expression of the "quality of life ethic of humanism." Id.; see also L. Tribe, supra note 90, § 15-11, at 937 & n.15; cf. J. Lyon, Playing God in the Nursery 33-58 (1985) (describing pro-life involvement in issue of nontreatment of handicapped newborns).

177. Smith, supra note 46, at 48 (speaking of the prima facie wrongness of abortion as the killing of a fetus).

178. Compare Callahan, Abortion: Some Ethical Issues, in Abortion, Society, and the Law 89, 100 (D. Walbert & J. Butler eds. 1973), ("The deepest philosophical issue beneath the abortion question is the extent to which, in the name of freely chosen ends, biological realities can be manipulated, controlled, and set aside . . . . [T]he trend toward abortion on request reflects . . . the attempt to subordinate biology to reason, to bring it under control, to master it."), with Smith, supra note 46, at 48 ("Abortion, like all killing of our species life, is wrong because it presumes a dominion over our species life which we have not been given [though it may sometimes be the lesser of two evils]."). See also Gahringer, supra note 39, at 62-63.

work? The traditionalist defines individuals by their place in such frameworks. By stepping outside all established social institutions or frameworks, an individual would succeed only in stripping herself of her very humanity. To assert one's autonomy, to develop oneself as a unique person, and to accept some established role or framework for individual self-realization, are the same. For the nontraditionalist, in contrast, true individuality can be asserted only by setting oneself apart from some larger order. While individuals may naturally wish to have some role as part of an institution or social order, to the extent they play that role they sacrifice rather than realize their uniqueness as persons.

We can better understand the conflict over the conditions of individual autonomy by looking at the way the conflict manifests itself in each of the three areas of the traditionalist controversy.

(i) Sexual Relations

The first of these areas is the connection between sexual relations and individual development. For the nontraditionalist, to be constrained from choosing any framework for sexual relations other than marriage is to be denied individual autonomy;[179] to have to conform to some established way of life rather than choosing one's own "lifestyle" is the very antithesis of the nontraditionalist view.[180] The state's attempts to limit sexuality to one particular framework can only stunt individual development. For the traditionalist, however, participation in some larger order is the only way that individuals can grow and develop as truly autonomous persons. Those who pursue sex outside the traditional framework succeed only in degrading themselves by venting their lust and selfishness.[181] Similarly, if society undermines the correct frameworks, it hinders the ability of individuals to promote their true self-realization. Thus, if the state promotes the removal of sexuality from its proper context (for example, through public school sex education programs which remove sex education from the family context) it runs the risk of promoting teenage sexuality to an artificially high, necessarily degrading extent.

(ii) The Family and the Role of Women

The same conflict occurs with respect to the family and the role of women. As noted earlier, the traditionalist views a particular gender-specific role as natural and intrinsically right. A woman realizes her own individuality

179. That such a denial is implicated does not mean that the nontraditionalist would automatically condemn it. Other factors might make the denial seem justifiable (e.g., the child's well-being in the case of laws forbidding sexual relations between adults and young children).

180. See generally L. Tribe, supra note 90, §§ 15-12 to 15-16, at 938-65.

181. See Eastern States Health Education Conference, The Family in Contemporary Society 135 (1958) (expressing fear that "right to manipulate . . . [human] physical processes" may lead to "sterile eroticism," one aspect of which is "the exercise of unlimited self-determination in sexual activity") (quoted in N. St. John-Stevas, The Agonising Choice 77 (1971)); Paul VI, note 164 supra.

precisely by accepting the role given to her and then exploiting its inherent potential for her own self-development. To reject that role is to deny the possibility of her own fulfillment; "pregnancy," for example, "is an honor for which a woman is chosen. Her acceptance and faithful execution of this responsibility provides her fulfillment and is the measure of her moral worth."[182] For the nontraditionalist, however, a woman cannot be truly free and autonomous unless she can choose her own role. She can cultivate her own individual development through the traditional roles of mother and housewife only if she chooses them. Similarly, a man may choose to be the family breadwinner, but to tie him to that role to the exclusion of others is to force him into an inhibiting mold.

The dispute over the nature of individual development and its relationship to the family extends to political life as well. As far as the traditionalist is concerned, the state confronts the traditional family and sex roles, and then either recognizes and reinforces them or subverts them. If the state chooses the latter, it threatens the ability of individuals to cultivate their talents and abilities by tying themselves into the larger moral framework. For the nontraditionalist, in contrast, the family and its associated sex roles are much more plastic. The "family" is what we, through our social policies as well as our personal decisions, make of it, a contingent unity of various purposes and attributes.[183] Thus, consider once again the issue of parental consent for minors' access to abortion and contraception. To the traditionalist, if the state imposes such a requirement, it merely *recognizes* what is already there—the parent's intrinsically right, natural, or traditional authority over the child. To the nontraditionalist, if the state imposes a parental consent requirement, it *delegates* authority to the parent for some purpose.[184] Conversely, refusing to impose such a veto cannot be said to undermine the naturally right structure of the family, nor can it be said to be neutral in action; rather, it simply gives a particular definition to the structural aspects of daily life. Of course, whether the intended purpose is best served by means of such a delegation, or whether

182. P. Steinhoff & M. Diamond, supra note 39, at 106 (describing anti-abortion position).

183. For a good example of this approach, see The Constitution and the Family, supra note 127, at 1214-20, 1270-96 ("functional" approach to family and protected relationships).

184. See, e.g., Contraceptive Controversy, supra note 174, at 1013 ("the state's grant to parents of legal control over minors' access to contraceptives constitutes state action"); Limits of State Power, supra note 174, at 840 ("A statute . . . which allows abortions on minors only where the minor obtains parental consent, in effect gives the parents a veto over the minor's decision to terminate her pregnancy"); id. at 841 n.22; cf. Planned Parenthood v. Danforth, 428 U.S. 52, 93 (1976) (White, J., concurring in part and dissenting in part) ("[t]he State is not . . . delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus . . . .").

See generally Disanto & Podolski, supra note 129, at 225-26 (consent requirements can be seen either as delegation or recognition of parental or spousal power). Cf. Gabel, Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory, 61 Minn. L. Rev. 601, 625 (1977) ("The constitution of the image as meaningful in one or the other of these ways is inherently intended, results from an *a priori* intentional orientation on the part of the perceiver.").

the purpose itself is legitimate in light of other political and social values, is another question. All that can be said *a priori* is that if the state regulates sexual freedom by imposing one particular idea of the correct family type, it confines people to roles that may actually hinder their self-realization.

(iii) Control over Human Biology

Finally, the opposition of the two visions regarding individual self-realization runs throughout the debate over the control of the biological terms of life and death. For the traditionalist, a "right to die" independent of any larger, given moral context poses the risk of self-degradation; the same can be said of a woman's right to control her body. Individually or collectively, we degrade ourselves if we arrogate the power to determine life and death. For the nontraditionalist, on the other hand, control over one's body is a critical component of individual development: if another actor, such as the state, or even one's spouse, has the power to constrain that control according to some particular conception of the good, the individual's ability to develop and grow will be severely compromised. Similarly, a terminally ill individual's right to refuse further medical treatment represents "death with dignity," the dignity that comes from mastering one's fate. Finally, on a collective level, we may, for example, choose to deny ourselves the power to engage in genetic engineering (by restricting genetic research), but such a decision simply represents one particular policy choice, not a recognition of some given moral imperative.

2. Abortion and the Traditionalist Controversy

The traditionalist, then, sees respect for others and individual self-realization as necessarily bound to some established moral order. We can—individually or collectively—disregard that order, but the inevitable consequence will be a degraded and unfree society. The traditionalist questions not only the desirability, but ultimately the practicability of the nontraditionalist vision. As one commentator has put it, "[a]t the very center of conservative thought lies this idea: that the present division of wealth and power corresponds to some deeper reality of human life. . . . [W]hatever the division of wealth and power is, it naturally is, and . . . all efforts to change it, temporarily successful in proportion to their bloodiness, must be futile in the end."[185] To the nontraditionalist, possessed by an almost "metaphysical dread of being encumbered by something alien to oneself,"[186] accepting as inevitable any one framework for human association and individual development stands in the way of self-realization and full relationships with others.

a) Two Levels of Connection

It is easy to see how abortion fits into the traditionalist controversy in

185. M. Walzer, supra note 129, at 237.
186. E. Shils, Tradition 10-11 (1981).

particular ways. First, abortion obviously contributes to the separation of sexual pleasure and procreation. A prohibition of abortion can serve as a disincentive to sex outside of marriage or even as a punishment for women who pursue sex for pleasure. Second, prohibiting abortion can make pregnancy and its timing, and the role of mother and homemaker, seem all the more natural and inevitable. Finally, the less we attempt consciously to control reproduction, the more we may be inclined to respect the natural or divine biological order.

The connection between the traditionalist controversy and abortion issue, however, extends beyond this concrete, particular form. There is a more general level of connection as well, relating to the basic question of the existence of established, moral frameworks or meanings for human activity. Thus the established framework for sex, including some sort of connection between sexual pleasure and children or family, appears to the traditionalist to be one part of a natural or divine order. It is the conscious decision to ignore even one part of that order, as much as the particular break with tradition itself, that alarms the traditionalist.[187] To be sure, the fear that abortion will promote the availability of sexual pleasure outside of any established framework, disconnected from any intrinsic meaning, is important in itself. But at a more general level, abortion also represents to the traditionalist part of a conscious effort to subject the terms of our lives to individual and social manipulation. In that sense it poses a danger not only to the fetus (who in the eyes of the opponent of abortion may "in fact" lose a human life) but to the humanity of men and women in general.[188]

There is a similar connection between opposition to abortion and the other two dimensions of the traditionalist position. The traditionalist views a woman's desire not to have children (or to have fewer, or to postpone them) as a self-centered decision that ignores the values of loving and caring as well as self-sacrifice for the sake of others. More important, the woman's very assumption of conscious control over her role opens her up to the kind of self-centeredness that the traditionalist fears. The availability of abortion seems to promote selfish decisions and so heightens the possibility of a general breakdown of morality in our dealings with others. Moreover, the conscious deci-

187. Cf. J. Noonan, Contraception 437 (1965) ("To the idealistic advocates of birth control as an urgently necessary solution of social problems, the Church appeared to reiterate, in obscurantist fashion, an incomprehensible and irrelevant doctrine on nature. To the Pope, the bishops, and the theologians, the birth control movement appeared to rationalize and foster hedonistic irresponsibility and to challenge the wisdom handed down from Christian antiquity.").

188. In words of an opponent of abortion, a woman who has sexual relations has committed herself to a communion with life forces greater than herself.

> The willing partner willingly surrenders part of the private entity. It is an intricate balance that can be perverted by selfishness but never altered in substance. Hence its eternal power over humankind. We are all, in a sense, prisoners and victims—men of sex, women of biology. To change that, even if such were possible, would be an alteration of the basic character of our humanness.

Schalestock, Abortion and the Banality of Evil, The Wash. Star, Dec. 21, 1979, at A15, col. 1.

sion to ignore the established biological frameworks of life and death and the decision to manipulate the biological facts of pregnancy are both acts which place all decision-making power over life and death outside of the established structure that is (for the traditionalist) the essential precondition for morality in the treatment of others. Abortion is undesirable not only because it directly facilitates control over reproductive biology, but also because it appears to reject the very idea of a given, established framework for individual and social control.

The connections between the two perspectives and particular positions are by no means absolute. Indeed, one cannot deduce any particular concrete assertion from any general statement of the traditionalist or nontraditionalist visions, for each perspective is more a cohesive approach to certain aspects of social structure than a list of concrete positions. For example, the traditionalist position on sex need not be limited to the view that the possibility of procreation must accompany each and every sexual act. In fact, while opposing a "contraceptive mentality," in which sex is pursued solely for pleasure, it may encompass an acceptance of contraceptives within a framework of marriage and family in which children generally play an important role. Similarly, the traditionalist might accept women as workers as well as housewives, while rejecting the vision of men and women freely choosing whatever role they wish regardless of their sex. The essential aspect of this variant of the traditionalist position would be the maintenance of some sort of distinctive feminine (and masculine) ideal. The possibility of variation is even clearer in matters like divorce law and sex education. For example, one can easily imagine a traditionalist position which completely opposed teaching of sex in public schools on the ground that it would undermine the proper role of the family. However, one can just as easily imagine a traditionalist position which accepted sex education but emphasized the need to integrate it with an appreciation of the proper moral framework for sex. Finally, it is possible to imagine a traditionalist position which even accepted abortion as an individual right. Just as contraception might be accepted within the proper framework for the role of women and for sex, so conceivably might a right to abortion. From this perspective, however, a woman who chose abortion could not be exercising control over the role she played. Instead, she would be making a necessarily sorrowful, tragic, and guilt-ridden decision, a sacrifice of an essential aspect of her selfhood: her full and unquestioning commitment to motherhood.[189]

The existence of variations within the traditionalist and nontraditionalist perspectives might suggest that the dispute over abortion is purely instrumental. Traditionalists, it might be thought, oppose abortion simply because they believe that prohibiting it helps support the necessary contexts for relations of loving and caring; nontraditionalists support a right to abortion because they believe that making abortion available helps free women from established

189. For an example of such an approach, see M. Denes, In Necessity and Sorrow (1976).

roles. Each could change its position on abortion without hesitation if it appeared that the underlying purpose would be better served by doing so.

The connection between the traditionalist controversy and the abortion issue does have an instrumental aspect, but it would be a mistake to reduce it to that. The aim here is not to assert that the doctrinal positions and disputes conceal beneath them nothing more than the "real" dispute over how social life ought to be organized. A traditionalist may well believe, for example, that a particular gender-specific role is intrinsically valuable, or that sex has intrinsic procreative significance. But the focus here is on the belief that the inevitable consequence of disregarding the proper roles and frameworks will be a demise of the ideal of respect for others and the true development of one's self.

b) The Attenuation of Skepticism

It is at this more general level that we can draw the basic connection between the doctrinal disputes examined earlier and the two visions of the social order considered above. Each perspective attenuates the consciousness of the arbitrariness of the doctrinal arguments in a particular way. At points of theoretical impasse, we call upon our judgment—a judgment informed by a vision of what the social order is like and should be.

In the abortion context, this process of attenuation works in the following way. With respect to the issue of privacy, state intervention into an individual's life can, for traditionalist and nontraditionalist alike, pose a threat to an individual's freedom, but the kind of intervention that is feared most is itself a matter of dispute. From the traditionalist perspective, precisely because there are established, correct frameworks uniquely suited to fostering individual self-realization and respect for others, state intervention need not threaten individual autonomy so long as it is confined to supporting those frameworks. Laws prohibiting "incorrect" sexual activities, for example, do not necessarily impinge upon individual autonomy as would an effort by the state to force women into the workplace: one would protect marriage and the family, the other would detract from it in its traditional form. In the abortion controversy, in particular, the argument for privacy or personal choice regarding abortion has little to recommend it to the traditionalist because the act of choosing abortion implies an attempt to step outside the traditional framework of marriage and the role of women. This attempt can only sever the woman from the moral and social frameworks which form the necessary context for morality in relationships, and to which the woman's own personal potentials are inextricably tied. For this reason, state intervention to prevent an abortion does not threaten the woman's "true" autonomy or interfere in any essential way with personal relationships.[190] Similarly, for the traditional-

190. Cf. Bennett, Abortion and Judicial Review, 75 Nw. U.L. Rev. 978, 998 (1981) ("[R]ight-to-life legislators display little legislative empathy for the pregnant woman who will bear most of the burdens of the right-to-life laws."). What I have tried to show, however, is that such lack of empathy is not necessarily due to myopia alone (though surely it does in part

ist, the argument that access to contraceptives or abortion enhances the minor's autonomy is unavailing. A teenage girl will not find herself by having sex; indeed, she will necessarily open herself to exploitation by others. If unwanted pregnancy is a problem, the solution is to encourage her to respect the proper framework for sexuality by being chaste and reserving sexual relations for marriage.

Of course, that the traditionalist does not see in many state "invasions" of privacy the encroachments upon personal autonomy or intimate relationships that the nontraditionalist sees does not imply that the traditionalist must automatically endorse any state regulation of "lifestyle". It is quite possible for the traditionalist to disfavor such state regulations unless some other factor (such as harm to other people) is involved. Admittedly, many of those who adopt the traditionalist perspective do support laws regulating individual conduct which (in a direct sense, at least) affects only the parties involved, such as laws forbidding homosexual activity. But what is important here is the lack of any sense of real imposition on personal freedom. Particularly in the abortion controversy, the traditionalist senses no real conflict between the life of the fetus and the freedom of the mother. Concern for fetal life supplies a powerful reason for forbidding abortion, while the woman's autonomy—the central pro-choice argument—simply is not implicated in any compelling way by state action which stands in the way of her attempts to cut herself off from her own personhood and from the necessary contexts of loving and caring. In turn, it becomes quite natural to resolve whatever theoretical doubts there may be about the status of the fetus or the morality of abortion against abortion: there is nothing seriously objectionable about the possibility of erroneously concluding that the fetus "is" a person, because the woman's true autonomy is not really at stake.

For the nontraditionalist, on the other hand, the price of resolving such doubts against abortion is very high. Any state attempt to make an individual's relationships conform to a particular framework constitutes a direct constraint on individual autonomy and relations with others. If one does not believe in a necessary or intrinsic connection between any established institution and a particular individual's needs and potentials, there is every reason to believe that being compelled to conduct oneself within a particular role or framework will only stifle individual development and interfere with individuals' ability to relate to each other. Conversely, the lack of any sense of larger frameworks or connections among moral positions attenuates the sense of contradiction within arguments that assert, for example, that we can really know that a slave is a human being and a fetus is not (or that we can "deem" one to be human and the other not). There is much less danger of stepping onto a slippery slope in making such judgments because each issue is felt to be

reflect the fact that most legislators are male), but also reflects a deep disagreement over visions of the social order.

fairly separate and distinct, rather than one aspect of a larger, tightly interrelated, moral universe.

3. *Conclusion*

Two perspectives or social visions—the traditionalist and the nontraditionalist—can be identified in the abortion controversy. Each represents a distinct vision of the social order; each attentuates the consciousness of the theoretical incoherence in the doctrinal arguments elaborated earlier. These perspectives do not eliminate any basis for skepticism about the structure of liberal doctrine of the morality and politics of abortion. Neither perspective can "resolve" the theoretical dilemmas because, as a moment's consideration will show, neither perspective is likely to seem fully satisfactory, even to its own advocates.

For the traditionalist, because there is some correct framework to which individual development is necessarily tied, state intervention will not carry any real danger to individual autonomy and relations with others so long as it supports this framework. Thus, as we saw, the traditionalist can countenance state intervention into "private" or personal decisionmaking (e.g., prohibiting abortion or regulating sexual activity) but oppose, for example, state-mandated sex education as a dangerous intrusion of the state into the family.[191] Yet the traditionalist cannot grant unambivalent support even to the "correct" sorts of state intervention, for to the extent that the established frameworks come to appear dependent upon state support, they become subject to the very sort of active control which they are supposed to limit.[192] Efforts to "preserve" or "support" traditional structures can easily come to be seen as efforts to impose a chosen one. Thus, given the fear of individual or social control as selfish and exploitative, the prospect of active state control over the frameworks of association—even if in support of the right ones at the start—can be seen as a serious threat to individual freedom.

For the nontraditionalist, on the other hand, the state activities that most threaten individual autonomy are precisely those which try to support some "correct" framework. Other state actions, however, may not be so threatening, and indeed may be welcomed. The nontraditionalist supports state funding of abortion, for example, not because it is perceived as pressuring individual women to obtain abortions, and thus conform to the nontraditionalist's idea of the roles of women and the family, but rather because it is seen as increasing the individual's ability to create her own way of life. From this one might conclude that the state should be in the forefront of attempts to break

191. See, e.g., American Family Life at the Crossroads, The Boston Globe, Apr. 6, 1980, at B1, col. 1; Is Family Planning Best Left up to the Family? The N.Y. Times, Apr. 6, 1980, at § 4, E6, col. 3 (Roman Catholic bishops, with support of anti-abortion groups, denounce sex education and support the teaching of chastity as the best way to stop unwanted pregnancy).

192. Cf. C. Geertz, The Interpretation of Cultures 219 n.42 (1973) (once traditional structures are questioned, it is impossible to return to them except in the form of "ideological retraditionalization").

down established frameworks that inhibit individual freedom and growth. However, the unqualified assertion that a particular state action supports individual choice comes close to assuming with the traditionalist that the state can discern some set of conditions that are best for individual growth. Not only is this the very kind of judgment that the nontraditionalist has foresworn, but it also appears to open the way toward state control over individual autonomy. With regard to abortion and contraception, for example, some degree of state control seems inevitable. The state cannot avoid laying out those conditions under which abortion is to be funded or permitted (such as whether a licensed physician must perform it in a hospital, or whether lay persons may be allowed to perform it in feminist clinics). Similarly, in an age of overpopulation, even a commentator who is sympathetic to the right to abortion [193] still acknowledges that the government may be justified in taking "narrowly and nondiscriminatorily tailored" steps to limit reproduction.[194] Yet as long as the heart of the nontraditionalist's position is that the state has no sure guide for its actions, the nontraditionalist can answer the abortion opponent's cry that "[a]bortion is . . . the avenue by which reproduction will eventually be taken out of the hands of the individual and placed in the hands of the state"[195] with nothing more than a "profession of faith"[196] that that will not happen.

My intention, therefore, is not to suggest that these perspectives, in any sense, "resolve" the theoretical dilemmas, but rather to explain what keeps the sense of skepticism at bay despite the insolubility of those dilemmas. More specifically, the focus is on the question of why the pro-life view is so largely nonskeptical when it comes to the morality of abortion while the pro-choice view is so avowedly skeptical.

This contrast is all the more striking when one considers the two positions on the role of the state, and in particular the role of the courts, with respect to personal and social life. As noted in the Introduction, those who are most strongly opposed to abortion tend also to oppose "judicial activism," quite often on the ground that such activism necessarily depends upon highly questionable, value-laden assertions of fundamental rights not amenable to the sort of reasoned analysis in which courts are supposed to be engaged. Conversely, the most ardent pro-choice advocates, generally skeptical about claims to know the status of the fetus tend to look favorably upon judicial efforts to set out doctrines of fundamental rights in one form or another and to enforce them actively. I will pursue this connection in greater detail in Section II. For now, it will be sufficient simply to state the paradox: the nontraditionalists are "skeptics" when it comes to the morality of abortion, but not so

193. L. Tribe, supra note 100, § 15-10, at 923 ("[W]hether one person's body shall be the source of another life must be left to that person and that person alone to decide.").

194. Id. at 923 n.18A.

195. J. Schall, supra note 162, at 57.

196. Cf. L. Tribe, supra note 90, § 15-2, at 890.

concerning such questions as fundamental rights, and substantive due process; while the traditionalists display precisely the opposite pattern.

We can begin to understand one side of this paradox by realizing that the theoretical positions advanced cannot be understood entirely at the doctrinal level. An appreciation of competing social visions is crucial to a full understanding of what may appear to be purely epistemological differences. Behind most skepticism, in other words, lie "disagreements over what personality and society are really like."[197] The traditionalist's lack of skepticism and the nontraditionalist's intense skepticism regarding abortion rest in part upon the particular vision of human association and individual development characteristic of each pespective.

So far, however, we have explained only one side of the paradox. The next Section will be concerned with the other: the differing perspectives on judicial activism and the abortion controversy.

II
ABORTION AND THE CONSTITUTION

A. Introduction

Abortion presents intractable dilemmas of moral and political theory. At first glance, this fact does not appear to undermine the possibility of a coherent account of abortion and privacy as a matter of legal theory. The question of the "true" status of the fetus might be left to the philosophers, for example, while legal theorists confine themselves to the narrower issue of legal personhood.[198] Alternatively, one might set aside the arguments over whether abortion is really a private matter in some sense, and ask the more limited question of whether the Constitution can be understood as protecting a right to abortion. Our inability to give any verdict on the "ultimate truth" about abortion and privacy, in other words, might not hinder us from giving relatively definite and coherent answers to the question, "what does the Constitution say about them?"

I will argue in this section, however, that attempts to set out a legal theory of abortion and privacy encounter precisely the same dilemmas that undermine efforts to develop a coherent morality and politics of abortion. Further, the same clash of opposing visions of the social order, which was described in Section I, runs through the legal debates over abortion and privacy. Legal theory is in both respects—at the level of doctrine and of social visions—indistinguishable from moral and political theory.

197. Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 654 (1983).

198. See, e.g., Roe v. Wade, 401 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

B. Abortion and Privacy as Problems in Legal Doctrine

Any theory of abortion as a constitutional matter must address two distinct but related issues. First, what can the Constitution, properly interpreted, be understood to say about abortion? One might, for example, decide that it says nothing about abortion;[199] one might conclude that it forbids certain regulations;[200] or one might decide that it prohibits states from outlawing abortion but is silent as to public funding of it.[201] Second, who should authoritatively decide what the Constitution says about abortion? Anyone can offer a theory of a constitutional right to privacy encompassing abortion, or argue, for example, that the fourteenth amendment protects the life of the fetus, but at some point it becomes necessary to ask which answer will be binding. For example, should the courts strike down anti-abortion laws that have been enacted by democratically elected bodies?

There are two basic techniques for answering these questions. The first, a "textual" approach, in effect subordinates the question of judicial review to that of the meaning of the Constitution. That is, one can attempt to understand the efforts to discern the meaning of the Constitution and simply call on courts to enforce this meaning. The second approach is to formulate a theory of institutional competence—a theory that identifies those areas of political life in which representative democracy functions well, and those areas in which the courts possess some special advantage over the legislature in interpreting and enforcing the Constitution. With this approach, the nature and justification of judicial review becomes our primary concern.

Of course, it is quite possible to integrate these two approaches, especially at some extremely broad level. Textual arguments usually assume some background theory of institutional competence; at the very least they assume that judicial review is both constitutionally proper and workable. Similarly, the theorist of institutional competence who argues that judicial intervention is particularly warranted in the case of minorities whose rights tend to be disrespected by the political process may claim that while the particular decisions taken pursuant to his approach cannot be traced back to the text of the Constitution, there is textual sanction for engaging in the whole "representation-reinforcing" enterprise.[202]

Still, while the division between the two approaches is by no means absolute, most theories do emphasize one or the other. It will therefore be helpful

199. E.g., Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. Rev. 173, 199 ("Nothing in the language, legislative history, or background of the Constitution, the Bill of Rights, or the Fourteenth Amendment" provides support for *Roe v. Wade*).

200. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 449-50 (1983).

201. See, e.g., Fahy, The Abortion Funding Cases, 67 Geo. L.J. 1205 (1979).

202. See J. Ely, Democracy and Distrust 73-104 (1980).

In addition to these background relationships, moreover, the integration of textual and institutional approaches may take the form of calling upon one method at crucial points of difficulty in a theory primarily oriented towards the other.

to structure the analysis by considering first those theories which look primarily to the text of the Constitution for an answer to the abortion controversy, turning next to those which focus on the question whether abortion and privacy are issues regarding which the judiciary enjoys some institutional advantage over the legislature.

In the course of my argument, I will refer principally to three major issues in the abortion debate. First, should the courts recognize a constitutional right to privacy encompassing a woman's decision to have an abortion? Second, given the existence of such a right, may Congress or state legislatures, consistent with the Constitution, cut off public funds for abortions? Third, does the Constitution prohibit a state from conditioning abortion on the consent of the woman's husband or, in the case of a minor, her parents?

I do not propose in this section to present some new proposal for a doctrine reconciling judicial review and democracy in general, or to resolve these three issues in particular. Nor do I intend to provide a comprehensive survey of the case law and commentary concerning them, a task which has been done elsewhere.[203] Rather, my aim is to show that the theoretical dilemmas underlying the legal doctrine of abortion and privacy are the same as those encountered in the earlier discussion of the morality and politics of abortion.

1. Textual Approaches

The effort to find some authoritative answer to the abortion issue in the Constitution may take two forms. Just as we might search in the facts of fetal development for some attribute of humanity that would tell us whether or not the fetus is a person, so we might look to the words of the Constitution for some clear meaning from which to draw a conclusion about a possible right to abortion. As an alternative to this "conceptualist" approach, one could adopt a purposive approach, as we did in the discussion of the morality of abortion. In the case of legal reasoning, the purpose is not some general moral principle that might be said to command assent in and of itself (such as respect for human life), but a purpose that the courts must respect because the Constitution deems it important. I will discuss each approach in turn.

a) Conceptualism

By "conceptualism," I mean a view that words or phrases have an "obvious" or "ordinary language" meaning to which anyone who uses the words or phrases must necessarily refer.[204] This approach is consistent with the view that the core meaning of the word or phrase is surrounded by a periphery.

203. See, e.g., B. Milbauer, The Law Giveth (1983); Special Project: Survey of Abortion Law, 1980 Ariz. St. L.J. 67, 128-205.

204. E.g., Roe v. Wade, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) (abortion "not 'private' in the ordinary usage of that word"); Horan, Franzel, Crisham, Horan, Gorby, Noonan, & Louisell, The Legal Case for the Unborn Child, in Abortion and Social Justice 105, 111 (T. Hilgers & D. Horan eds. 1972) (arguing that "the ordinary person's notion of who are 'children' " includes fetuses) [hereinafter Horan & Franzel]; Louisell & Noonan, Constitutional

There are, in other words, certain entities or relationships in the world to which a concept either definitely applies or definitely does not apply, and there are others which might or might not be included in its reference. Of course, even the strictest "conceptualist" must to some extent take account of historical context in interpreting the Constitution, if for no other reason than to eliminate ambiguity.[205] Nevertheless, this qualification is very much limited; the specification of context is expected to be minimal and far removed from any endeavor to discover the fundamental purposes or values underlying particular provisions of the Constitution.[206]

Perhaps the chief attraction of this approach lies less in its interpretive efficacy than in its simple resolution of the whole "majoritarian difficulty."[207] Because the Constitution has a clear, ascertainable meaning, when the courts strike a statute down they can claim—if they have executed their interpretive

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Balance, in The Morality of Abortion: Legal and Historical Perspectives 220, 223 (J. Noonan ed. 1970).

What I call "conceptualism" resembles what is often deemed "interpretivism" or textualism in discussions of constitutional interpretation. See, e.g., J. Ely, supra note 202, at 1-12 ("clause-bound interpretivism"); M. Perry, The Constitution, The Courts, and Human Rights 10-11 (1982); Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 205-09 (1980) ("textualism"). There are three important differences between "interpretivism" and the "conceptualist" approach I discuss here. First, interpretivism is usually thought of as both a method of interpretation and a theory of judicial legitimacy. Cf. M. Perry, supra, at 10 (legitimacy of interpretive judicial review "is not a particularly difficult problem").

Second, some uses of the term "interpretivism" would allow it to include a theory that claims that certain provisions of the Constitution direct the courts to look outside the text of the Constitution for guidance in making decisions; Ely notes that his own theory might be deemed "interpretive" in this sense. See J. Ely, supra note 202, at 12-13.

In my discussion, however, I wish to separate the question of the practicability of "interpretivism" from the question of judicial legitimacy. My criticisms will be directed, not to showing that other approaches to constitutional adjudication are legitimate (which is one way to refute interpretivism), but to showing that the interpretive or conceptualist method simply cannot work at all. Further, I wish to distinguish clearly between what I call "conceptualist" approaches from "purposive" ones, and the term "interpretivism" might be read as encompassing the latter to some extent. See M. Perry, supra, at 10 (interpretive review looks to "value judgments" of which the Constitution consists).

Third, interpretivism is usually presented as a comprehensive theory of textual interpetation. By "conceptualism," however, I mean—as is pointed out in text below—one particular approach to constitutional interpretation that practically everyone tends to adopt at least in some instances or with respect to certain clauses, even if they reject it as the exclusive or primary mode.

205. Cf. J. Ely, supra note 202, at 13 (some context must be taken into account to avoid reading the limitation of eligibility for President to "natural born citizen[s]," as excluding those born by Caesarian). See U.S. Const., art. II, § 1, cl. 5.

206. Cf. J. Ely, supra note 202, at 13 ("dictionary function"). It may be that some minimal specification of historical context is necessary even for understanding the "literal meaning" of a word. See Searle, Literal Meaning, 13 Erkenntnis 207 (1978), reprinted in 2 The Philosopher's Annual 155-72 (D. Berger, P. Grim, & J. Sanders eds. 1979). At any rate, the idea would be to keep the specification of context down to the absolute minimum needed to render the words and phrases intelligible.

207. For one well-known exposition of the problem, see A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1-33 (1962); see also L. Tribe, American Constitutional Law §§ 1-7 to 1-9 at 9-14 (1978); J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court 4-12 (1980).

duties with the requisite skill—to do no more than what the people or the framers have clearly told them to do.[208] Indeed, while it may be that few if any people would adopt such an approach to constitutional interpretation without qualification,[209] few people reject it in its entirety. Rightly or wrongly, most people would agree that certain provisions of the Constitution do have a clear, determinate meaning—such as the provision setting the President's term at four years[210]—for which the conceptualist method is appropriate.[211] More important, purposive approaches always implicitly rely upon conceptualist premises. Thus, the latter are well worth examining in some detail. I will first sketch a conceptualist approach to abortion and privacy, and then criticize it.

In the abortion controversy, one most frequently sees the conceptualist method employed in the argument that the fetus is a "person" within the meaning of the fourteenth amendment. While not necessary to an argument that state anti-abortion laws are constitutional, fetal personhood would certainly be a sufficient condition for upholding the validity of such laws.[212] Thus pro-life advocates sometimes argue that the fetus is in fact a person and that,

208. See United States v. Butler, 297 U.S. 1, 62 (1936) ("It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.").

To be sure, the move from the statement that "the Constitution prohibits x" to the conclusion that "the courts ought to strike down a statute enacting x" is not entirely unproblematic, and requires justification of its own. See, e.g., Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); M. Perry, supra note 204, at 11-19. A belief that the court was following the clear meaning of the Constitution in a particular case, however, would surely make the task of justifying judicial review an easier one.

209. E.g., R. Berger, Government by Judiciary 412-13 (1977) (despite its illegitimacy, Brown v. Board of Education, 347 U.S. 483 (1954), should not be overruled).

210. U.S. Const., art. II, § 1, cl. 1.

211. Whether we are justified in so believing is another matter, which I will take up in the discussion of purposive approaches. See also note 239 infra.

212. See Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 926 (1973) ("Dogs are not 'persons in the whole sense' nor have they any constitutional rights, but that does not mean the state cannot prohibit killing them . . . ."). Although fetal personhood is not logically necessary to uphold anti-abortion statutes, it would be—assuming other possible challenges, such as those based on vagueness, were unsuccessful—sufficient to uphold such statutes: the state would be prohibiting murder. Moreover, I will argue in Section III that what "persons" are is a matter determined in the course of social and political struggles, and that anti-abortion advocates have attempted to constitute abortion as the taking of a human life. Thus, it is neither logically correct nor empirically accurate to expand Ely's narrow statement into the assertion that "[a] state's proscription of abortion simply does not carry with it the implication that fetuses are somehow 'human.'" Perry, Abortion, The Public Morals, and the Police Power, 23 UCLA L. Rev. 689, 692 n.23 (1976). On the contrary, it is precisely such an implication that pro-life advocates seek to embed in the material practice of abortion, by requiring for example that a second physician be present at a post-viability abortion in order to attend to the fetus. See Planned Parenthood v. Ashcroft, 462 U.S. 476, 482-86 (1983).

therefore, the word "person" in the fourteenth amendment necessarily includes fetuses.[213] The conceptualist approach is not, however, intrinsically tied up with opposition to *Roe*: a conceptualist could argue instead that the fetus clearly is not a person, but rather a collection of cells, and therefore is not referred to by the fourteenth amendment.

Even apart from the question of the status of the fetus, the conceptualist approach might appear to provide a coherent way to analyze the correctness of *Roe*. Privacy and abortion are not mentioned in the Constitution; therefore, the Supreme Court cannot claim that it was "commanded" to strike down the state anti-abortion statutes.[214] It goes without saying that subsequent excursions into the abortion controversy, regarding parental or spousal consent statutes, are equally without constitutional basis.

Once again, it would be a mistake to assume a conceptualist approach must be critical of *Roe*. For example, the eleventh amendment is universally interpreted as a coded overruling of *Chisholm v. Georgia*.[215] Although the amendment's literal language indicates otherwise, it is read as if it stated that no one, not just "Citizens of another State", may bring an action against a state in federal court.[216] Similarly, one might concede, without doing too much violence to the conceptualist method, that today everyone reads the Constitution as if it contained a provision protecting the "right to privacy."[217] The Constitution could then be treated as if it included that phrase, in the same way that the eleventh amendment is read as if it stated that "the Judicial Power of the United States shall not be construed to extend to any suit . . . commenced . . . against one of the United States by Citizens" of any state. This would make it possible to approach the issue of abortion by a conceptualist method. For example, one might argue that matters connected to the body and to sexuality clearly are "private" matters in the way we ordinarily use the

213. E.g., Riga, *Byrn* and *Roe*: The Threshold Question and Juridical Review, 23 Cath. Law. 309, 328 (1978) (as all scientific evidence "unimpeachably shows" fetus to be a person, there is no warrant for excluding it from coverage by the fourteenth amendment); Horan, Gorby, & Hilgers, Abortion and the Supreme Court, in Abortion and Social Justice 301, 318, 322 (T. Hilgers & D. Horan eds. 1972) (given that a fetus is in fact a person, the Supreme Court showed a lack of "intellectual honesty" in holding that fetus is not a person under the fourteenth amendment).

214. See, e.g., Posner, supra note 199, at 199; O'Meara, Abortion: The Court Decides a Non-Case, 1974 Sup. Ct. Rev. 337, 352 ("[T]he mother's personal right of privacy, on which the Court professes to rely in *Wade*, had escaped attention for over a century.") (footnote omitted).

215. 2 U.S. (2 Dall.) 419 (1793).

216. The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Hans v. Louisiana, 134 U.S. 1 (1890). See generally L. Tribe, supra note 207, § 3-35, at 130-31.

217. Cf. Alaska Const., art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."). See Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1430 n.5 (1982).

term, and that abortion implicates both.[218]

The conceptualist method has potential relevance to the controversy over abortion funding as well. One argument sometimes advanced is that, even if *Maher*[219] and *Beal*[220] (which upheld a cut-off of funds for purely "elective" or nontherapeutic abortions) are correct, *Harris v McRae*[221] (which upheld a cut-off of funds for "medically necessary" abortions) was wrongly decided. Congress should have no power to set up a program to cover medical expenses generally, including those of childbirth, while refusing to fund medically necessary abortions. To do so, it is argued, is to discriminate against the exercise of what *Roe* determined to be a fundamental right.[222] Alternatively put, Congress should not be allowed, in funding the medical expenses of (among others) pregnant women,[223] to condition the availability of those benefits on the nonexercise of a fundamental right—that is, to condition it on a decision against abortion and in favor of childbirth. It is unsatisfactory to reply that the failure to fund abortion leaves the woman in no worse a position than if there were no Medicaid program at all, since such reasoning would also justify a government subsidy of, for example, the Republican Party, on the ground that Democrats would be no worse off than if there were no subsidy program in the first place.

The various arguments and counterarguments that arise in this line of reasoning can become quite elaborate and complex.[224] The purpose here is not, however, to consider them in detail, but to illuminate the key assumption underlying them: that we know the meaning of "medicine" or "medical neces-

218. E.g., Gerstein, California's Constitutional Right to Privacy, 9 Hastings Const. L.Q. 385, 416-17 (1982) (prohibiting abortion is "by nature an interference with private life"). But see, e.g., O'Meara, supra note 214, at 339-40 (arguing that there is nothing "private" about abortion); Perry, supra note 212, at 733 n.203 ("A right of privacy in the sense of ordinary language, is a right to withhold information about oneself or to seclude oneself" and has nothing to do with abortion.); Miller, Privacy in the Modern Corporate State, 25 Ad. L. Rev. 231, 251 (1973). Cf. Horan & Marzen, The Moral Interest of the State in Abortion Funding, 22 St. Louis U.L.J. 566, 573 (1978) (public funding of abortion logically has nothing to do with "privacy").

219. Maher v. Roe, 432 U.S. 464 (1977).

220. Beal v. Doe, 432 U.S. 438 (1977).

221. 448 U.S. 297 (1980).

222. See, e.g., Note, *Harris v. McRae*: Cutting Back Abortion Rights, 12 Colum. Hum. Rts. L. Rev. 113 (1980); The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 96-107 (1980); Special Project, supra note 203, at 161.

223. 42 U.S.C. §§ 1396a-1396p (1982).

224. For critiques of *McRae*, see Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on *Harris v. McRae*, 32 Stan. L. Rev. 1113 (1980) [hereinafter Perry, *Harris v. McRae*]; sources cited note 222 supra. For critiques of *Maher*, see, e.g., Perry, The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government, 66 Geo. L.J. 1191 (1978) [hereinafter Perry, Supreme Court's Role]; Susman, *Roe v. Wade* and *Doe v. Bolton* Revisited in 1976 and 1977—Reviewed? Revived? Revised? Reversed? Or Revoked?, 22 St. Louis U.L.J. 581 (1978). For defenses of the Court's funding decisions, see, e.g., Fahy, supra note 201; Hardy, *Harris v. McRae*: Clash of a Nonenumerated Right with Legislative Control of the Purse, 31 Case W. Res. L. Rev. 465 (1981); Horan & Marzen, The Supreme Court on Abortion Funding, 25 St. Louis U.L.J. 411 (1981).

sity." The crucial assumption of the discrimination or penalty argument is that the abortions involved in *McRae* belong to the category of "medical expenses." Without that assertion the argument would be hard to distinguish from a general assertion that the exercise of personal rights should be funded.[225] One might, then, attempt to justify that assumption by arguing that the abortion procedure is clearly a "medical" one because it involves doctors, nurses, hospitals, and clinics in an operation that looks very much like other undeniably "medical" procedures.[226]

Conceptualist approaches, therefore, rely on what are taken to be the ordinary or obvious shared meanings of the words used in the authoritative doctrinal materials. A familiar criticism of such approaches is that they would "require a massive abandonment of precedent" because it seems so difficult to fit many earlier cases within a conceptualist framework.[227] That is not my criticism here, however, because my purpose is not to ask whether the approach is desirable but whether it could even work at all.

There are two basic reasons why it could not work. First, a conceptualist approach fails to avoid the intractable dilemmas of moral and political theory discussed in Section I. Second, it is, in effect, too powerful a method—too "essentialist." One case decides all, regardless of context or purpose.

These criticisms are easiest to make with respect to the question of who is a "person" under the fourteenth amendment. If the question turns on the "actual" status of the fetus,[228] the same intractable difficulties elaborated in Section I emerge. Every attempt to determine whether the fetus is "objectively" a person relies upon doubtful and controversial subjective judgments; if courts were to undertake such judgments, they would turn into philosophical forums. One possible response to this problem would be to draw a distinction between core and peripheral meanings, and base a theory of institutional competence upon the distinction. The fetus is a peripheral case of "persons" and therefore the courts ought to refrain from deciding the issue.[229] Of course, one

225. See, e.g., Bennett, Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law, 75 Nw. U.L. Rev. 978, 1009 (1981) (no general right to funding of exercise of rights); cf. Maher v. Roe, 432 U.S. 464, 474 (1977) (failure to fund abortion does not in itself burden exercise of right to abortion).

226. Another approach is to argue that it is a medical matter because unwanted pregnancy may pose serious health risks to the woman. See, e.g., The Supreme Court, 1979 Term, supra note 222, at 101.

227. Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1169 (1980) [hereinafter The Constitution and the Family]; see also Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 713 (1975); Perry, supra note 212, at 712; cf. Parness, Social Commentary: Values and Legal Personhood, 83 W. Va. L. Rev. 487, 503 (1981) (arguing that holding fetus to be a full "person" under the law would be unacceptable because "[l]ong-recognized freedoms enjoyed by the unborn child's parents, as well as by other family members and various third parties, would be substantially undermined").

228. E.g., Riga, supra note 213, at 310 (issue of fetus's actual humanity, as opposed to legal personhood, as a threshold question). See also Steinberg v. Brown, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970).

229. Byrn v. New York City Health and Hospitals Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 410 U.S. 949 (1973); McGarvey v. Magee-Womens

might argue instead that judges must of necessity decide cases even in such peripheral instances, attempting, for example, to do what the legislature (or the framers) would have done if it had confronted the issue.[230] The differences between the two approaches are not important here, nor are their relative merits. What *is* important is that in either case we have no more of a coherent basis for distinguishing core persons from peripheral persons than we do for determining the "true" status of the fetus.

The second criticism of conceptualist approaches to the status of the fetus is that they provide only an "essentialist" interpretation of the word "person." That is, having determined that the word "person" necessarily includes or excludes fetuses, it would follow that the fetus is or is not a person for all other purposes. Yet it seems plausible that the fetus could be a "person" in one context but not in another. There is no apparent reason why the ardent proponent of the right to abortion need oppose an interpretation of inheritance or tort law that deems the fetus a "person" under at least some circumstances.[231] Similarly, the pro-life advocate need not feel bound by consistency to argue that fetuses must be counted as persons in the census.[232] Yet, if we attempted to modify the conceptualist approach by arguing that the word "person" may be used in different ways depending upon the context, we would undermine the entire conceptualist project.[233] By making the meaning of the words de-

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Hosp., 340 F. Supp. 751, 754 (W.D. Pa. 1972), aff'd, 474 F.2d 1339 (3d Cir. 1973); Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 172-85.

230. And it is also possible to draw a distinction of core and periphery and then argue that the fetus is clearly in the core. This is in effect the approach taken by Horan & Franzel, supra note 204, at 113 (while it may be true that "a legislature may define 'child' for some purposes and exclude it for others," a state "may not define a person as 'legally' beginning at birth, if, in fact, he biologically begins to exist at conception"). See also note 233 infra.

231. Cf. Oteri, Benjoia, & Souweine, Abortion and the Religious Liberty Clauses, 7 Harv. C.R.-C.L. L. Rev. 559, 572-79 (1972) (recognition of fetal personhood for certain purposes in no way implies that it "is" a person); id. at 579 ("Fetal rights have developed on a largely contextual basis, contingent upon and tailored to the particular area of law involved."); see also King, The Juridical Status of the Fetus, 77 Mich. L. Rev. 1647, 1687 (1979) ("[W]hether the fetus is a 'person' is irrelevant to whether it should have legal protection."); First Feticide Test, 71 A.B.A. J. 19 (1985) (sponsor of law making it a crime to cause death of fetus by attack on woman, where fetus was viable, states that "[t]his statute is in no way connected to the abortion issue").

232. See U.S. Const., art. 1, § 2, cl. 3 (referring to "free Persons").

233. Some opponents of abortion do recognize the possibility of contextual uses of a word, but argue that it is nevertheless inconsistent to recognize the fetus as a person in tort and property law, but not in the abortion context. Finnis, for example, argues that increasing recognition of fetal personhood in tort or property law evinces a growing view that "there is no meaningful stage, in the development of the child after conception, at which the child could in common sense be said to change from a 'part' into something more than a part of the mother." Finnis, Three Schemes of Regulation, in The Morality of Abortion 172, 200 (J. Noonan ed. 1970) (footnote omitted). Others distinguish two sorts of word usage, arguing that the purposive method is appropriate to one type of use, but not to another. Thus, Grisez distinguishes references to persons as objects from references to persons as those "whom the law serves", and argues that the law must be consistent in what it includes when using "person" in the latter sense. G. Grisez, Abortion 409 (1970); see id. at 402-10; see also Krimmel & Foley, Abortion, 46 U. Cin. L. Rev. 725, 815-21 (1977) (argues that the purposive approach to interpreting the

pendent upon our purpose in using them, we could no longer claim merely to observe some fixed meaning.

The criticisms of the conceptualist approach to privacy parallel the criticisms of its approach to the meaning of "person." The absence of a constitutional "right to privacy" surely can have no significance if the presence in the text of the words, "the right to privacy," would not aid decision making. Yet the attempt to work out more specifically what such a right would entail would necessarily return the analysis to precisely the same sorts of political, value-laden judgments about "privacy" that are necessary in determining the status of the fetus. By one view, for example, "privacy" entails a commitment to individualism—it is the right of the individual to control her life and her body and to make fundamental decisions. By another, it necessarily refers to certain intimate, traditional relationships like marriage and the family.[234]

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word "person" is inappropriate when natural rights— such as the right to life—are at stake, though it is acceptable when "relational" rights are considered).

None of these approaches is convincing. With respect to Finnis's argument, it begs the question that the purposive method puts to the conceptualist approach simply to assert that there cannot be a "meaningful" distinction between pre- and post-viability fetuses for some purposes and not for others. Similarly, distinctions between "relational" and "natural" rights or between references to persons as subjects or as objects are untenable: such distinctions do not provide any basis for limiting the purposive method, as a brief hypothetical will show.

A disabled child sues a physician, and claims that the physician's negligence has caused the disability. Consider three possible sets of facts: (1) the doctor treated the child negligently shortly after the child's birth; (2) the doctor, knowing that the child's mother was pregnant, gave her a drug known to interfere with fetal development; and (3) the doctor, knowing that the woman (who was not in fact pregnant at the time) was trying to get pregnant, gave her a drug that affected the ovum and caused the child to be born with a disability. The interest the child would assert would be the interest or right to be free from bodily injury. Surely, then, this case concerns "natural" rather than "relational" rights, and raises the question of whom the law protects or serves.

While arguments might be made against holding the doctor liable in the third case, there seems to be no reason why we would want to reject liability on the ground that, at the time the doctor committed the negligent act (prescribing the drug) there was in existence no "person" to whom a duty could be owed. See Note, Preconception Negligence: Reconciling An Emerging Tort, 67 Geo. L.J. 1239 (1979). What has "personhood" to do with the purposes served by the law of torts? The interest protected—the child's interest in a healthy body—is the same in all three cases, and the distinction between what is reasonable to expect of the doctor's conduct in the second and third cases does not seem all that great. Nevertheless, if there is a basis for distinguishing among the cases, it does not rest on the presence or absence of "personhood." Thus if we do recognize "preconception torts," there is no reason why we should take it even as evidence (let alone conclusive proof) that the law views a human egg as a "person"; the same is true of "prenatal torts."

In short, one cannot have it both ways nor can one adopt a "moderate" position. Either one takes the view that the recognition of fetal personhood in various areas of law entails recognition of its personhood in other areas as well, or one argues that the use of the word in one context carries no necessary implications, at all, in another context (except insofar as the underlying purposes for which the word is used happen to be identical in two instances). Anything in between these two extremes is inconsistent.

234. For an exposition of these two approaches (favoring the former), see Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy, 14 Harv. C.R.-C.L. L. Rev. 361 (1979); see also Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463 (1983).

These views would obviously have quite different implications not only for the constitutionality of pro-life statutes but also for parental or spousal consent statutes.

Nor could we hope to find some core aspect of privacy. Some theories—for example, those emphasizing the right to control one's body—would clearly place abortion in the core, while others—such as those looking to "traditional" relationships and roles, or to a notion of privacy as a retreat into a sphere of intimate relationships—would not.[235] To make a choice among these alternatives clearly would take us beyond a neutral elucidation of the meaning of a word or concept, and carry us into the realm of political disputes about what a right to privacy really should cover.

One might think that these problems of interpretation arise solely because "privacy" is a particularly vague term, but even apparently more concrete terms suffer from the same indeterminacy. In the case of "medicine," discussed earlier, a conceptualist approach which defined "medicine" and the place of abortion within (or outside) it would prove entirely unsatisfactory. Because the meaning of "medicine" is no more some fixed quality, discoverable by analysis, than is the meaning of "privacy" or "person," there simply is no sense in which a decision concerning abortion is essentially "medical" or essentially "nonmedical." This point is easily grasped with regard to psychological health: to some, it is the height of enlightenment to treat psychological problems in a neutral, nonjudgmental therapeutic way; to others, such an approach strips the individual of her dignity by denying her status as a moral actor; and to still others it poses the danger of professional control of the woman's decision. To decide whether or not to call abortion a "medical" matter is to make a choice between these conceptions of morality, psychology, and politics.[236]

Even if one considers more seemingly obvious "medical" problems, though, the matter is still fatally ambiguous.[237] Consider a pregnant woman

235. See generally Eichbaum, supra note 234.

236. Alcoholism and drug addiction are also clear-cut examples of phenomena that can be treated as "diseases" or as moral (or even political) matters. See generally Note, Alcohol Abuse and the Law, 94 Harv. L. Rev. 1660, 1661-62 (1981) (contrasting "sin model" and "disease model" of alcoholism).

237. Indeed, it would be incorrect to assert that abortion is more susceptible than are most other matters to interpretation as a medical or nonmedical matter. It is quite possible to question the extent to which even this century's considerable successes in fighting infectious diseases have been the result of medical discoveries rather than of urban reforms such as improved housing, sanitation, and nutrition. E.g., T. McKeown, Medicine in Modern Society 39-58 (1965); T. McKeown, The Role of Medicine: Dream, Mirage or Nemesis? 71-78 (2d ed. 1979); McKinlay & McKinlay, The Questionable Contribution of Medical Measures to the Decline of Mortality in the United States in the Twentieth Century, 55 Health and Soc'y. 405 (1977). If the latter factors are of decisive significance, even disease might be described as a political matter rather than a medical one. Cf. Stark, Introduction to the Special Issue on Health, Rev. Radical Pol. Econ., Spring 1977, at v (arguing that "disease is socially constructed as a consequence of historically specific relations to and struggles around production and reproduction"). See also notes 359-586 and accompanying text infra. One could argue that "medicine" encompasses social or environmental as well as clinical approaches to disease. See, e.g., P. Starr, The Social

in generally poor health because she is living in poverty. If she "chooses" to have an abortion because of the detriment to her health that carrying the pregnancy to term would involve, her choice is as much a reflection of her social and economic status as it is of medical imperatives. Further, an attempt to fall back onto the notion that while the *decision* may not be medical, the abortion *procedure* is, depends crucially on a political judgment. One could argue that no procedure is essentially medical if it involves the purposeful taking of human life, as the pro-life advocates contend is true of abortion;[238] a doctor who deliberately injected her husband with a fatal drug instead of seeking a divorce would be practicing murder, not medicine, despite the use of a medical implement.[239]

Finally, the attempt to categorize abortion as "medical" or "nonmedical" reveals quite clearly the other defect in the conceptualist approach: it proves too much. There is no reason why the anti-abortion advocate who rejects the argument that abortion should be funded as a "medical" procedure should have to oppose inclusion of abortion under the state's medical regulations. Why cannot abortion be "medical" for some purposes, and not for others?

b) Purposive Approaches

Just as we turned away from attempts to discover the status of the fetus in our discussion of the morality of abortion and looked to a purposive approach instead, so we might abandon the conceptualist method and seek to interpret the Constitution in terms of the underlying purposes for which the words and phrases in it are used. The key assumption in this approach is that such purposes can be discerned and applied in a relatively neutral fashion—that judges can work out the framers' (or the legislature's, or society's) political intentions and purposes, without making political judgments of their own. As in the case of arguments concerning the morality of abortion, there are two advantages to a purposive approach to the Constitution. First, since conceptualist approaches ultimately confront the question of the purpose for which a word or phrase is used, it would be better to make questions of purpose explicit. In this way, it may be possible to achieve greater certainty and predict-

Transformation of American Medicine 138 (1982). But that would merely confirm that there is no fixed concept or essence of medicine discoverable by analytical inquiry.

238. See, e.g., Byrn, Abortion-On-Demand: Whose Morality?, 46 Notre Dame Law. 5, 32 (1970) ("Abortion is a brutal and violent procedure which is fundamentally repugnant to the philosophy of medical practice."); Sher, Subsidized Abortion: Moral Rights and Moral Compromise, 10 Phil. & Pub. Aff. 361, 362-63 (1981).

239. The term "medicine" is not even particularly ambiguous compared to other apparently more concrete terms. See also Nagel, Interpretation and Importance in Constitutional Law, in 25 Nomos 181, 191 (J. Pennock & J. Chapman eds. 1983) (arguing that "four years," U.S. Const., art. II, § 1, cl. 1, is not necessarily any more specific than "due process of law," once we begin to consider contingencies such as emergencies, fraud, or war; "[c]ertainly, there is widespread agreement that the meaning of a four-year term ought not be disputed, but that agreement cannot be satisfactorily explained simply on the basis of the specificity of the word 'four.' ").

ability than formalist approaches offer.[240] Moreover, instead of being confined to particular words or phrases, we might look at several provisions together, or at the structure created by those provisions, or even to the architecture of the Constitution,[241] in order to see the larger purpose. Second, the meaning of a particular word or phrase can be made responsive to its context. One decision will not necessarily decide all possible applications of the term, as seemed to be the case with the conceptualist method.

A purposive method naturally raises the question of the source of the purposes. We can, on the one hand, "look through the text to its underlying purposes"[242]—the purposes the framers had in mind. On the other hand, we can derive the purposes from sources such as tradition or social consensus.[243] Purposive theories of both sorts employ similar methodologies, but rest on different justifications. A court that looks to the framers' purposes can assert more plausibly that it is discerning the meaning of the Constitution; if it looks instead to purposes derived from currently respected traditions or from contemporary consensus, it must base its legitimacy on the assertion that the courts are in some way particularly well suited to discern tradition or consensus. While many of my criticisms of the purposive approach apply to both types, consideration of the latter is postponed until the discussion of theories of institutional competence.

The advantages of the purposive method appear quite strong at first glance. The purposive method seems well-suited to resolving the question of the status of the fetus. For example, one could argue that one purpose underlying the welfare laws is to ensure that infants are born healthy; thus, the term "person," as used in that statute, could include fetuses as well—and a pregnant mother on welfare would qualify for extra assistance because her family was now larger by one.[244] On the other hand, one could argue that the framers of the fourteenth amendment wanted to ensure that no slave or caste system could ever be re-established; thus, the term "person" in the fourteenth amendment should be interpreted to refer to members of the political and social community. By this reading, there would be nothing incongruous in holding fetuses not to be "persons" under the fourteenth even while saying they were "persons" in the welfare context. Similar sorts of arguments and distinc-

240. See generally P. Nonet & P. Selznick, Law and Society in Transition: Toward Responsive Law (1978) (substantive or "responsive" law is in fact more predictable than more formalist approaches).

241. E.g., C. Black, Structure and Relationship in Constitutional Law (1969).

242. The Constitution and the Family, supra note 227, at 1170.

243. See, e.g., id. at 1177-83 ("tradition"); Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 284 (1973) ("conventional morality"); Perry, supra note 212, at 723-34 ("public morals").

244. The Supreme Court rejected such an argument in Burns v. Alcala, 420 U.S. 575 (1975). Nevertheless, the Court approached the issue by asking whether Congress had considered the purpose of giving extra benefits to pregnant women when it provided benefits for "dependent children." The Court did not, in other words, rule that the issue was controlled by the holding in *Roe v. Wade*, 410 U.S. 113 (1973), that the fetus is not a "person" under the fourteenth amendment.

tions could be made regarding inheritance and tort laws.[245]

To be sure, one could make various substantive arguments about what the framers intended in writing the fourteenth amendment. One might argue, for example, that their essential purpose was to remove from the political process the power to define who is and who is not "human." One might attempt to bolster this purposive argument by noting that the amendment was formulated or enacted in the same period in which most of the anti-abortion laws were passed.[246] On the other hand, there is no evidence that the framers of the fourteenth amendment had any explicit intention to address, let alone legislate on, the question of abortion.[247] For the moment, however, I will assume that with sufficiently careful historical inquiry one could come to some judgment one way or the other about what the purpose was.

Not only does the purposive method eliminate the false necessity of essentialist entailment, but, arguably, it allows us to think in a clearer and more structured way about the meaning of the text. If we consider the purpose underlying the various provisions in the Bill of Rights, it seems that the framers wished to protect a certain idea of privacy. For example, the reference to "houses" in the fourth amendment suggests a desire by the framers to establish a zone of protected intimate relationships, such as the family, into which the government may not intrude without special reason. This inquiry seems far more fruitful than asking what "the concept of privacy" entails, as if words and phrases had some sort of necessary referrent discoverable by an analytical or conceptual inquiry. A purposive approach would also enjoy greater legitimacy. To choose a particular concept of privacy may be, as noted earlier, a deeply political act; but the courts could say, in effect, "the framers chose it; we did not."[248] The purposive approach also makes the application of the text more rational. We need not decide that something "is" a person, and then mechanically apply that result whenever the word "person" appears.

Despite its initial attractiveness, however, the purposive method is ultimately no more coherent than the conceptualist method. The difficulties are twofold. First, the tailoring of application to purpose threatens to undermine the very idea of "rights," unless we fall back on the conceptualist method at

245. See note 231 supra.

246. See, e.g., 1 The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 464, 480 (1981) (statement of Prof. Victor Rosenblum) ("Since the Fourteenth Amendment, with its broad protection of the lives of all persons, was ratified by state legislatures while these very same legislatures, persuaded by newly discovered scientific and medical evidence, were extending the protection of the criminal law to encompass all the unborn from the time of conception or fertilization, it is a fair assumption that the unborn were not understood to be excluded from those 'persons' covered by the Amendment.") [hereinafter Human Life Bill Hearings].

247. See 1 Human Life Bill Hearings, supra note 246, at 443-49 (statement of Prof. James Mohr).

248. Finally, the purposive approach might seem to facilitate analysis of issues related to abortion more readily than could the conceptualist approach; one could look to the underlying purpose of *Roe* (as well as to government benefit cases) to determine whether a denial of funds for abortion is constitutional. E.g., Fahy, supra note 201.

key points. Second, because we cannot know what the framers "really" intended, the interpretive benefits of the purposive method prove illusory.

Consider the first difficulty in light of a hypothetical. Suppose that the Supreme Court had ruled in *Roe* that the fetus is a "person" under the fourteenth amendment and that it is therefore constitutional (if not indeed mandatory) for a state to ban abortion. Now suppose a state legislature, in order to conserve gasoline, establishes bus and carpool lanes along major commuter highways; a "carpool" is defined in the statute as any car with two or more persons in it. A woman driving by herself in the carpool lane is given a ticket, which she contests because she is pregnant. Must the traffic court acquit her on the ground that the Supreme Court has ruled that the fetus is a "person"? The purpose behind the carpool lane law is to conserve gas and reduce traffic congestion; these have nothing to do with the purpose behind the abortion decision and the fourteenth amendment. In this case, the purpose of the carpool law would not be served by deeming the fetus a person because it would not, in the absence of the carpool lane, drive by itself in its own car.

Yet questions arise when we begin to consider the proper scope of the purposive method. Would we want to deem a "nonperson" a four year old who rides with the woman in the carpool lane? After all, no gasoline is conserved. Suppose the woman were driving with a man who had no driver's license of his own. Would we call the passenger a "nonperson" because he could not drive his own car, so that, once again, no gasoline is saved when he rides in a carpool? Or would we perhaps call him a "person" because if he were ineligible to form a carpool as the passenger in someone else's car, he might then get a license and end up increasing the consumption of gasoline? And suppose that evidence could be introduced to show that this particular individual had a mental block against driving and would never get a license; would we term him individually a "nonperson" for purposes of the carpool lane law? Finally, consider a group of neighbors who travel to the veterinarian with their dogs separately; they then arrange for one neighbor to take all the dogs together in one car. The dog owners unquestionably further the legislative purpose of conserving gasoline; would the judge be remiss if she failed to agree that a dog could (under these circumstances) be a "person" for purposes of the carpool lane law?

Two responses to these concerns are possible. First, we might attempt to draw the line somewhere, allowing the purposive method to apply to the question of the fetus but not to the dogs, for example. Dogs cannot be "persons," one might say, and not only does it do violence to the language to allow them to be considered as such, but more fundamentally, it ignores the will of the legislature, which did after all define a carpool as consisting in two or more "*persons*."[249]

If extended too far, then, the purposive method produces results at odds

249. Cf. Note, Haunting Shadows From the Rubble of *Roe*'s Right of Privacy, 9 Suffolk U.L. Rev. 145, 162 n.91 (1974) (criticizing Justice Douglas for denying personhood to the fetus

with the democratic model. Yet we have no method for identifying which cases are acceptable candidates for the purposive method and which are not. The purposive method cannot tell us what lies in the core and what lies in the periphery, and we are thus left with two unacceptable choices. We can fall back on the conceptualist approach, and say that "person" just *means a, b,* and maybe *c,* but definitely not *d* or *e,* thus opening ourselves up to all the objections to the conceptualist method. Alternatively, upon concluding that that claim is untenable, we might admit that it is judges' personal views that determine where to call a halt to the purposive method. In so doing, however, we undermine the claim that judicial decision making is truly authoritative in the sense of "interpreting" the law.

Any mode of legal reasoning that limits the purposive method, therefore, turns out to be an unacceptable hybrid of purposive and conceptualist methods. However, if we did not limit the scope of the purposive method and instead pursued it as far as it can go, the courts' activity would strongly resemble that of the legislature. Judges would have to conduct detailed factual hearings, taking all the circumstances into account—the impact of a particular interpretation on all those affected, and on other policies—in order fully to effect the purposes of the law. The result would be to undermine any notion of adjudication as distinct from pluralist politics.[250]

Even then, the purposive method would still fail to respect its own premises. In attempting to consider all the affected interests, for example, time constraints would force the judge to limit the presentation of the issues; in order to reach a decision, moreover, the judge would have to assign relative weights to the various affected interests. Yet because the policies at stake inevitably are uncontroversial (and so "authoritative") only when stated at a high level of generality, the purposive method itself could supply no guidance for the particularized articulation and weighing of the policies necessary to produce a decision.[251] The attempt to subordinate the judicial role to the popular will (as embodied in the Constitution and statutory law) would, paradoxically, end with the triumph of the former over the latter.[252]

Still worse, it is difficult to see how one could speak of what would emerge from this process as a "right." Conceptualist approaches lend them-

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in *Roe*, while advocating legal "personhood"—in the form of standing—for trees and mountains, in Sierra Club v. Morton, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting)).

250. See Kennedy, Legal Formality, 2 J. Legal Stud. 351, 383 (1973), for an explication of this point. Insofar as the legislature engages in pluralist politics, the "spirit" or "purpose" of any particular rule cannot be understood "except as pieces in a larger compromise of interests." Id. As a result, "[t]he only way to find out how the rules would have differed if they had been expected to apply to different circumstances would be to re-enact the legislative process. The litigant thus appears to be proposing that the judge foresake the secure and stable occupation of rule application for the obviously dangerous job of substantively rational arbiter of disputes about a constantly changing pattern of distributive justice and injustice." Id.

251. See generally R. Unger, Knowledge and Politics 94-97 (1975).

252. Cf. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1776-81 (1975) (interest group representation).

selves well to stable legal entitlements, because they assume there are fixed bundles of meaning that correspond to real essences there for all purposes. Purposive approaches, in contrast, lend themselves to a goal orientation by which rights are recognized according to whether the social policy underlying the right will be served in the particular case. At the extreme, however, purposive approaches undermine the stability of rights entirely: no right is fully definable except at the moment of its application to the particular case. If we consider the carpool lane hypothetical, for example, nothing in the purposive method itself could keep the inquiry into the meaning of "persons" or "passengers" from becoming as detailed as one which examines whether a particular person would in fact be likely to obtain a driver's license. Yet were it to become that detailed, no one could be certain at any time that he or she would be considered a "person" for purposes of the law. Notions of administrability or institutional effectiveness or competence could not provide effective limitations; we would always have to be open to the argument that in this particular case, the considerations of administrability which might in other circumstances weigh against too finely detailed an inquiry are outweighed by other factors specific to this case.[253] Clearly, then, application of the purposive method on an unconstrained basis could easily undermine the possibility of any rights.

For a law as unimportant as the carpool lane law, that would be a nuisance, but for a right to privacy it would be utterly disastrous—or absolutely desirable. For example, even if one concluded that most women's privacy interests are furthered by the ability to decide whether to have an abortion, or that most families' privacy interests are furthered by forcing the minor to gain parental consent for an abortion, that conclusion would not necessarily say anything about any particular woman or minor, assuming that one did not rely on some notion of necessarily shared values or family structure. The purposive method would make it necessary to ask whether the interests served by protecting privacy would be furthered in each case: one would need to ask whether a particular woman's desire to have *this* abortion will promote the development of her individual potential and relationships with others. One could determine whether the woman or the minor had a "right" to abortion only through such a detailed and particularized inquiry: carried to its limits, adjudication in a purposive mode would come to resemble moral counseling.[254] In determining the appropriateness of abortion in a particular case, the

253. Cf. R. Unger, supra note 251, at 96 ("One can never exclude in principle the possibility that in a particular case the benefit done to the policies underlying the jurisdictional rules by disobeying those rules may outweigh the disadvantages, proximate or remote, of violating the rules."). See also Kennedy, supra note 250.

254. See Note, *Roe* and *Paris*: Does Privacy Have a Principle?, 26 Stan. L. Rev. 1161, 1176 (1974) (discussing "magnitudes of impact" as a guide for delineating privacy right and noting that "any attempt to individualize the question of impact would make generalized holdings of law such as those in *Roe* impossible"). The Note goes on to argue that "consensus is probably possible with matters of such gross impact as abortion." Id. Similarly, it argues that "[s]ex is an extremely important part of the *normal* adult life, and sexual relations are *commonly considered*

judge would not consider the general importance of the abortion decision to a woman's autonomy. Rather, she would confront the woman as a full human being, taking all her circumstances into account, "informed by . . . [her] actual predicament insofar as possible."[255]

This is, it should be emphasized, no fantastic prospect; on the contrary, it is quite easy to envision such an outcome in the developing law relating to parental consent and notification statutes.[256] Roughly put, the Supreme Court appears to require that any state statute generally mandating parental consent for (or notification of) a minor's abortion must provide an opportunity (1) for the minor to demonstrate to a judge that she is in fact mature enough to decide on her own to have an abortion, or (2) for an immature minor to demonstrate that it would not be in her "best interests" to involve her parents in the decision, and that it would be in her "best interests" to have the abortion.[257] If this doctrine were taken seriously, it would require each judge con-

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private matters." Id. (emphasis added). These latter assertions, however, are beside the point in terms of a purposive approach; if our purpose is to further individual privacy, it is not enough to know what is generally important to people.

One factor in making the purposive determination might well also be a desire to avoid too great an intrusion into individual affairs. Still, even this consideration would simply be one more factor to be taken into account, and not a basis for limiting the scope of the inquiry in all cases.

255. Gustafson, A Protestant Ethical Approach, in The Morality of Abortion 101, 110 (J. Noonan ed. 1970). Gustafson contrasts two models of abortion counselling, the "juridical model" and a more "experientially" oriented one. In the former conception, the counselor is an "external judge" in two senses: he is external to himself in that by simply applying authoritative rules he limits his own personal responsibility for his decision; and he is external to the woman he advises because his relationship is not to her personally, but to the abstract typified case he draws out of her situation. In the contrasting model, the counselor approaches the woman directly; he does not apply fixed rules, but interprets them in the context of the particular case, though still relating her situation to broader patterns. As a finite being—rather than the applier of universal moral rules—he also takes a direct responsibility, though limited, for the well-being of the woman he counsels.

256. Further, proposals with similar impact have been made regarding notice to husbands. See Sherain, Beyond *Roe* and *Doe*: The Rights of the Father, 50 Notre Dame Law. 483, 489-91 (1975) (arguing that where husband opposes abortion, he should be able to bring his wife before a special hearing board which would determine whether to allow the abortion, based on its evaluation of the woman's health, the father's wishes, and the woman's reasons for wanting an abortion); cf. Louisell & Noonan, supra note 204, at 254-58 (proposing case-by-case judicial or administrative determination of abortion). The pre-*Roe* practice of having hospital boards determine whether a legal, therapeutic abortion was warranted was one of case-by-case determinations. See generally Packer & Gampell, Therapeutic Abortion, 11 Stan. L. Rev. 417 (1959). The Supreme Court has, of course, rejected attempts to make the woman's right to abortion dependent on the consent of her husband (or any other individual or group). See Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976); Roe v. Wade, 410 U.S. 113, 153 (1973).

257. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 n.10 (1983). See H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion); Bellotti v. Baird, 428 U.S. 132 (1976). For a helpful analysis of the Court's parental consent decisions see Comment, Constitutional Law—Privacy Rights—Consent Requirements and Abortions for Minors, *Bellotti v. Baird*, 26 N.Y.L. Sch. L. Rev. 837 (1981). See also Keiter, Privacy, Children, and Their Parents, 66 Minn. L. Rev. 459, 472-82 (1982). I discuss the minor's right to abortion more fully in Section III. See text accompanying notes 555-58 infra.

fronted with a minor seeking an abortion to make profound and highly personal judgments for her regarding her particular needs and family situation. In effect, an official of the state would exercise an individual's privacy right for her.[258] Far from protecting autonomy, the purposive approach seems to leave the minor at the judge's mercy.[259]

Yet neither would it do to rely on a strong presumption that the parents should decide or be consulted, or to leave the matter entirely in the parents' (or the immature minor's) hands. To do so would be, from the purposive point of view, to make a decision based upon a stereotype, an idealized vision—a "conceptualist" notion of what a minor's autonomy and the typical family necessarily "are." It would be unjustifiable to assume that in all cases the parents will necessarily have the child's best interests in mind, and that the purpose of furthering the minor's autonomy is best served by parental involvement. Even if we believed that to be so generally, consistent application of the purposive approach would require that we be open to the argument that in this particular case, it would not be so.[260]

One defect in the purposive method, then, is that it requires us to choose between undermining the idea of rights and falling back on the very method—conceptualism—whose inadequacy caused us to turn to the purposive method in the first place. The point at which we draw a line and call a halt to purposive reasoning is inevitably arbitrary. Another major defect in the purposive approach, equally serious, is the impossibility of determining in a neutral or nonpolitical way what purposes the framers had in mind—or even what the underlying purposes of relatively recent cases such as *Meyer*,[261] *Griswold*,[262] and *Roe* were.

The source of this opaqueness of purpose is an inherent ambiguity in intent. This ambiguity, which inevitably forces upon us a constructive role,

258. In theory, the judge would be guided by the minor's "best interests." See Buchanan, The Constitution and the Anomaly of the Pregnant Teenager, 24 Ariz. L. Rev. 553, 580 (1982). But it takes little imagination to see how hard it would be in theory (let alone in practice) to distinguish consideration of these "objective factors" from consideration of the minor's "subjective reasons for seeking to carry out her decision independently." Id. Buchanan herself notes how detailed an inquiry into the "best interests" of an immature minor would need to be. Id. at 587-89. See also Note, State Intrusion into Family Affairs, 26 Stan. L. Rev. 1383, 1391 n.46 (1974).

259. Cf. LaFraniere, Abortion Bill Weakened: Va. Panel Drops Consent Requirement, Wash. Post, Feb. 13, 1984, at C1, col. 1 (judge testifying against parental consent bill "protested that . . . [it] would force him to make key decisions in teen-ager's [sic] lives on the basis of his own 'personal convictions' . . . .").

260. Thus critics of parental consent or notification requirements argue that either forcing all minors to involve their parents, or employing a strong presumption that they ought to, amounts to no more than relying on idealized stereotypes of families—stereotypes that may well be irrelevant to the particular case at hand, if the minor's wish not to consult her parents is taken as an indication that the family structure has broken down. See, e.g. Buchanan, supra note 258, at 589.

261. Meyer v. Nebraska, 262 U.S. 390 (1923); see also Pierce v. Society of Sisters, 268 U.S. 510 (1925).

262. Griswold v. Connecticut, 381 U.S. 479 (1965).

arises from the fact that purposes are radically context-dependent. Consider, for example, whether it makes sense to argue that the underlying purposes of the eighth amendment mandate abolition of the death penalty.[263] Even if we discovered a statement by one of the framers that capital punishment was consistent with the eighth amendment, could we say that "death" is the same phenomenon now as it was then? On the contrary, though obviously a biological event, death is a social phenomenon as well; its meaning is to a large extent socially determined. "Death," as one commentator has noted, "was not only a much more routine and public phenomenon then, but the fear of death was more effectively contained within a system of religious belief. Twentieth century Americans have a more secular cast of mind and seem less willing to accept this dreadful, forbidden, solitary, and shameful event."[264] Even if the debates preceding the adoption of the eighth amendment expressly indicated that its purpose was to eliminate torture, but not capital punishment, we could not be sure that we were talking about the same thing.

The same is true of privacy, as I will argue in the next section in greater detail. Briefly, we cannot assume that "private life" is the same phenomenon now as it was in late eighteenth century society. The sharp distinction between an alienated, bureaucratic world of work and public life, on the one hand, and a sanctuary or haven of family and private life, on the other, is quite distinctive of contemporary liberal capitalist democracies. The very intelligibility of the idea of faithfulness to the framers' purposes in the protection of private life is thrown into question if we cannot be sure that the private life they intended to safeguard is essentially the same as the private life we seek to protect today.

One might respond that fidelity to the framers' underlying purpose is possible by recreating the historical context in which the framers used particular words or phrases, and then translating their intentions into present-day terms.[265] In undertaking such a reconstruction, however, we inevitably recreate that which we set out to discover; and in so doing, we can no longer claim to respect the framers' value choices.[266]

This is true not only if we attempt to discern the underlying meaning of the Constitution, but also if we attempt to determine the meaning of relatively recent cases. Suppose we ask, in the context of a challenge to a statute forbidding the sale of contraceptives to unmarried individuals, or a challenge to a state statute requiring a husband's consent for abortion, for an explanation of the real purpose of *Griswold v. Connecticut*.[267] Does *Griswold* stand for the

263. The following discussion is based on Brest, supra note 204, at 220-21.

264. Id. at 221 (footnote omitted).

265. Id. at 220; see also Tushnet, Following the Rules Laid Down, 96 Harv. L. Rev. 781, 798-804 (1983).

266. Brest, supra note 204, at 221-22; see also Shaman, The Constitution, the Supreme Court, and Creativity, 9 Hastings Const. L.Q. 257, 268-69 (1982).

267. 381 U.S. 479 (1965). I rely on the helpful discussion in Tushnet, supra note 265, at 806-21, in this and the next two paragraphs.

proposition that the government must respect individuals' fundamental interest in having access to contraceptives, an interest that individuals retain after they marry? Or was the real meaning of *Griswold* that the government may not interfere in the marriage relationship by forbidding married couples to use birth control or by threatening to search the marital bedroom for signs for contraceptive use?[268] There is no definitive way to pronounce one or the other as the "true" reading. One can say that the Court simply was wrong when it later adopted an individualistic approach in *Eisenstadt v. Baird*[269] and *Planned Parenthood v. Danforth*.[270] Or one can say that, in light of the later cases, *Griswold* really meant that individuals, not certain "traditional" relationships, enjoy the protection of the right to privacy. *Griswold* itself cannot tell us which reading is correct, however, because the invalidation of the Connecticut statute forbidding the use of contraceptives is compatible with either interpretation.

This ambiguity, moreover, is intrinsic; it could never be eliminated by clear and unambiguous language in the accompanying opinion. Consider once again the funding cases. Suppose the argument is made that cutting off abortion funding is incompatible with *Roe*'s basic principle. We would soon discover that it is intrinsically impossible to articulate that principle. On the one hand, *Roe* might stand for the principle that Congress may take no action that is premised on a moral disapproval of abortion or that is structured in such a way as to penalize a woman for exercising a fundamental right.[271] On the other hand, we might read *Roe* as holding that Congress or state legislatures may not place an undue burden on the exercise of the right to abortion.[272] The meaning of *Roe* is ambiguous: either principle could account for the holding that state anti-abortion statutes are unconstitutional.

Suppose, however, the opinion explicitly stated that "no statute premised on a moral opposition to abortion is constitutional." That would still not resolve the ambiguity, for we could always legitimately argue that the opinion had two aspects. It stated:

a. a general right to privacy, and
b. a specific holding that (among other things) a state may regulate abortion in the interests of the mother's health during the period

268. Griswold, 381 U.S. at 485 ("Would we allow the police to search the sacred precincts of the marital bedroom for telltale signs of the use of contraceptives?").

269. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (in striking down, on equal protection grounds, a statute barring distribution of contraceptives to unmarried individuals, the Court observes that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

270. Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976) (striking down a spousal consent provision).

271. See Tushnet, supra note 265, at 811-12.

272. See sources cited in note 222 supra; see also Perry, *Harris v. McRae*, supra note 224; Perry, Supreme Court's Role, supra note 224.

after the first trimester and before viability, and may even prohibit abortion after viability.

Now, suppose we later conclude that the general right to privacy, *properly* understood, leads us to a different specific holding regarding abortion:

b'. a state may regulate abortion in the interests of the mother's health during the first trimester as well.

We could argue that the Court was primarily interested in the general right to privacy (*a*), so that, had it had the benefit of our improved analysis of the right to privacy, the Court would have approved of *b'* rather than *b*. True fidelity to the Court's basic purpose in *Roe* would require modification of *Roe*'s specific result.[273] Conversely, however, we could argue that the Court was deciding a specific case and had in mind the specific holding; if it had known that the general principle it stated was more consistent with *b'* than with *b*, it would have stated a different general principle. Nothing in *Roe* itself, no matter how explicitly and unambiguously stated, could tell us which is more important.

This ambiguity arises as well in the interpretation of statutes. Recall the attempt to discern whether abortion was "medical," a necessary premise for the discrimination argument against funding cut-offs. The conceptualist approach was unsuccessful; the same is true of any attempt to determine whether abortion belongs in the category of Medicaid-funded "medical" expenses by referring to the underlying purpose of the program. No matter how rich the legislative history, the statute's purpose remains essentially indeterminate, for it is open to two broad and fundamentally different understandings. One can argue that the program was meant to fund medical procedures generally—that is, procedures performed by doctors and nurses in hospitals, clinics, and labs, or procedures intended to alleviate some condition having an impact on the woman's health. Alternatively, one can argue that the program was meant to fund such procedures so long as they did not involve the taking of another human life, or fetal life, or potential life—however one wished to describe it. That is, abortion could in some general sense be a "medical" procedure but might nevertheless be deemed to be uniquely and relevantly different from all other medical procedures.[274] Any attempt to determine which characteriza-

273. This is precisely the approach the Supreme Court took in *Akron* to the requirement of hospitalization for all abortions performed after the first trimester. *Roe* had held that a state could require abortions performed after the first trimester to be done in a hospital. See *Roe*, 410 U.S. at 163. In *Akron*, however, the Court concluded that advances in medical practice now meant that the safety of second trimester abortions had improved so greatly that "present medical knowledge," id., could no longer support an assertion that such an abortion invariably must be performed in a hospital in order to safeguard the woman's health. Accordingly, what was earlier within the state's power now became an unreasonable infringement on the woman's privacy right. See *Akron*, 462 U.S. at 431-39. In other words, fidelity to *Roe*'s standard of "present medical knowledge" required overruling of the specific holding (on that point) in *Roe*.

274. See Harris v. McRae, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."); 1 Human Life Bill Hearings, supra note 246, at 1023 ("abortion involves violence") (statement of Mary Meehan).

tion represents the intent of Congress is fundamentally misguided: given that there was no right to abortion at the time the Medicaid statute was passed,[275] the two amounted to the same thing. There is simply no way to determine which was Congress' "real" intent.

Finally, this indeterminacy pervades efforts to interpret the text of the Constitution, undermining purposive arguments about what the framers really intended. Consider the assertion that the framers used broad, inclusive language in particular provisions,[276] signalling an intention to have the purposive method used. The framers had as their primary objectives certain "concepts" which, secondarily, were embodied in their own particular "conceptions."[277]

This sort of distinction undoubtedly has some heuristic usefulness,[278] but the attempt to claim historical authoritativeness for the distinction is inevitably arbitrary. With respect to the eighth amendment, for example, one might argue that even if the framers wished to forbid only specific punishments, the adoption of the general language shows that their concern was with the concept of, say, humane treatment in accordance with "evolving standards of decency."[279] The difficulty, however, is that there is no basis for asserting that the framers were primarily concerned with the concept rather than their own particular conception. The problem is not that we are unlikely to find historical evidence showing that the framers were aware of the distinction in the first place. Rather, it is that for the framers, in their social and historical context, the concept was adequately embodied in their particular conception; the two were not in conflict, and the framers were not put to the test of choosing between them.[280] Similarly, the framers might be said to have adopted a concept of privacy which they embodied in its particular conceptions, such as the fourth amendment's search and seizure provisions, and the fifth amendment protection against self-incrimination. But we have no basis for deeming one primary and the other secondary. Perhaps with the same underlying commitment to privacy they would, today, believe that abortion is a fundamental right; perhaps upon being persuaded that a right to privacy, correctly understood, does entail a right to abortion, they would reconsider their commitment

275. See Beal v. Doe, 432 U.S. 438, 447 (1977).

276. Cf. Grey, supra note 227, at 717 ("majestic generalities").

277. Cf. Perry, supra note 212, at 699 (fourteenth amendment meant to be open-ended).

A concept is a general principle which may be universally accepted and which is thought to place more than trivial constraints on those who accept it (e.g., "likes should be treated alike"). "Conceptions" are the more particular, and often conflicting, beliefs which different people may hold about how the general principle can be made determinate (e.g., "discrimination on the basis of sexual preference is unjust"). See generally R. Dworkin, Taking Rights Seriously 132-37, 226 (1978); H.L.A. Hart, The Concept of Law 155-56 (1961); J. Rawls, A Theory of Justice 3-11 (1971).

278. See, e.g., Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107 (1976).

279. Trop v. Dulles, 356 U.S. 86, 101 (1958).

280. In other words, there is, necessarily, no basis for asserting that the framers did intend to make any "appeal to the *concept* of cruelty," as opposed to the "conception." R. Dworkin, supra note 277, at 136 (emphasis added).

to privacy as a value of constitutional status. To look for a historically correct resolution of this choice is in principle mistaken.[281]

Purposive theories, in sum, lead us back to the same political issues analyzed in Section I. If we want a constitutional theory of privacy, we cannot avoid those issues by asking, "which theory of privacy does the Constitution adopt?" instead of "which theory of privacy is correct?" Any understanding of the meaning or purpose of the Constitution will be "shaped not only by the character of the past, but also by our own interests, concerns, and preconceptions."[282] In turn, the constructive aspect of interpretation undermines the claim that the courts are simply following the text of the Constitution, or even the rules set out in earlier cases.

2. *Theories of Institutional Competence*

In one sense, textual approaches speak to the role of the courts in a democratic society, for the aim of any liberal theory of the law is to ensure that the exercise of judicial power is carried out legitimately. If we had a coherent, authoritative method of interpreting the Constitution, the question of the place of an unelected judiciary in a democratic society might not arise; the courts would simply be doing what we tell them. But this is like observing that if we knew objectively whether abortion were right, the question of privacy—that is, the allocation of decision making power—would not arise. Our inability to develop a coherent approach to textual interpretation thus pushes us to look at the role of the courts and the legislature, in the same way that upon the failure of attempts to decide whether abortion is right, we turned to an analysis of abortion as a matter of rights.

There is a second reason for considering the role of the courts and the legislature. As noted in Section I, claims of individual autonomy provide a reason to consider abortion as a matter of rights, independent of doubts about our ability to give a definitive verdict on the morality of abortion. Similarly, apart from doubts about the ability of judicial methods to yield an authoritative result, it may be unhealthy in a democracy for unelected judges to decide certain issues. This idea is rooted in fears that leaving too many decisions to

281. Some might be offended by the suggestion that the "higher law" consists of lists of specific provisions instead of transcendent moral and political judgments. Which view is correct is not of any importance to my argument here. Rather, I simply wish to point out that one cannot argue that constitutions just inherently do appeal to "concepts" or embody basic (evolving) values; it is equally plausible, for example, to contrast the evolving common law with "legislative enactments" such as statutes and constitutions. See, e.g., Posner, supra note 199, at 196 n.63 ("To a greater degree than common-law decisions, legislative enactments [including constitutions] are the product of interest-group pressures. Insofar as those pressures prevail, an enactment may lack any 'spirit' or rational unity that could provide guidance in areas not specifically covered by the enactment"); see also C. Beard, An Economic Interpretation of the Constitution of the United States (2d ed. 1935). We may choose to read the Constitution one way rather than another; my point is simply that we have no basis, even in principle, for claiming historical authoritativeness for that choice.

282. Tushnet, supra note 265, at 802 (footnote omitted).

the courts causes the political processes to atrophy and thereby undermines our own political autonomy.[283]

For these reasons we might turn to theories of institutional competence. These theories take two basic forms: process-oriented and substantive. Both posit that the political process functions reasonably well for the most part, but that there are certain discrete respects in which the political process becomes dysfunctional. Both theories are much less concerned with the text of the Constitution than are conceptualist or purposive approaches. Indeed, a theory of institutional competence may eschew any claim to present an "interpretation" of particular provisions of the Constitution. Despite these similarities, however, there are important differences between the two.

A process-oriented theory attempts to set out a neutral account of the proper functioning of the political system, providing not only a basis for determining where the political system no longer functions as it should, but also telling the courts how to correct the defect.[284] Because both the description of the proper functioning of the system and the prescription for intervention are specified in terms of processes, not results, the courts' intervention can be described as value-neutral (apart from showing a bias in favor of participation, equal representation, and the like).

A "substantive theory" in contrast, asserts that there are certain relatively limited issues which the courts are better suited than the legislature to resolve because of their ability to discern some fundamental values everyone shares. Substantive theories do not posit that the courts should act "neutrally," but rather, assert that if the courts execute their functions properly their (admittedly antimajoritarian) decisions will in some larger sense strengthen democracy.

a) Process-Oriented Theories

Process-oriented theories enjoin the courts to intervene in the political process for two related reasons: to keep political channels functioning properly, and to ensure that political minorities are not shut out of the political process.[285] One may argue that the "representation-reinforcing" role is man-

283. See, e.g., A. Bickel, supra note 207, at 16-23; Leedes, The Supreme Court Mess, 57 Tex. L. Rev. 1361, 1364-66 (1979).

284. I employ the phrase "process-oriented theories" in a narrower sense than it is often used. In particular, Choper's attempt at a pragmatic evaluation of how well the courts have managed in protecting individual liberties qualifies him under my categorization as a "substantive theorist." See J. Choper, supra note 207, at 64-128; note 311 infra.

More generally, I use the phrase "theories of institutional competence" to indicate what are often called "process-based theories." My distinction between "process-orientated theories" and "substantive approaches" corresponds essentially to the distinction drawn in Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223, 225-26 (1981), between "synthetic" and "analytic" approaches to constitutional interpretation.

285. The best known example of such a theory is Ely's. See J. Ely, supra note 202, at 73-179; see also Ely, supra note 212. A full criticism of all aspects of his theory is beyond the scope of this article. See generally Symposium: Judicial Review versus Democracy, 42 Ohio St. L.J. 1 (1981).

dated by—or at least consistent with—the Constitution, but the workings of the role, and the actual decisions the courts should reach if they adopt it, are not especially tied in with the text of the Constitution.

A court guided by a process-oriented theory could not closely scrutinize every legislative classification to ensure equal protection of the laws. All laws treat people differently at least to some extent; to examine all classifications closely would transform the court into a super-legislature second-guessing elected representatives on political issues. The aim of a process-oriented theory, then, is to limit the potential scope for rigorous review of legislation to those cases where, as noted, there is reason to believe that some minority group has been unable to participate in the political process on an equal basis.

The unfair treatment that results from such exclusions may take one of two forms. First, the minority may be subjected to adverse differential treatment because of "prejudice" or "hostility" (rather than sincere moral belief). Second, the disadvantaging of the group may arise more subtly from a stereotyping of "them" (those excluded from participation in the political process) by "us" (those who participate fully and convince the legislature to pass the law). Once it has been determined that a law rests on hostility or stereotyping, it can survive judicial scrutiny only if it directly fosters a substantial goal (other than the goal of disadvantaging the minority).[286]

That a process-oriented approach cannot be true to the goal of confining the courts' inquiry to matters of process becomes evident as soon as we examine the abortion issue. Confronted with a statute banning abortion, the process-oriented court would first attempt to set aside the substantive issues regarding the morality of abortion or the proper theoretical scope of the right to privacy. Instead, the court would ask, did the process that led to the enactment of this statute work properly? Women are not a statistical minority, but, like minority groups, they have suffered from discrimination. Thus there is reason to look for some indication that the anti-abortion statutes reflect prejudice rather than sincere legislative judgment.[287]

One approach looks for such indication indirectly, asking whether there is some reason to believe that anti-abortion statutes rest on stereotypes of women. While few women sit in state legislatures, no fetuses do. In banning abortion, the legislature has acted more benevolently towards the group none of whose members occupies the legislature than towards a partially represented group; therefore, there is little reason to suspect that anti-abortion statutes reflect a failure of the political process.[288] By asserting that the absence of

286. See J. Ely, supra note 202, at 145-48; cf. id. at 256 n.92 (need to distinguish legislation based on "a simple desire to injure" from that based on "a sincerely held moral objection").

287. See J. Ely, supra note 202, at 167-68. Ely would apply a higher degree of scrutiny to laws passed before women gained the right to vote than to laws subsequently passed, and the anti-abortion statutes fall in the former group.

288. See Ely, supra note 212, at 933-35. See also Krimmel & Foley, supra note 233, at 813 n.417 (arguing that fetuses constitute "a voiceless and easily identifiable minority group entitled to equal protection under the fourteenth amendment. Because of their voicelessness their rights

fetuses from the legislature is even relevant, however, this approach assumes that judges can decide that fetuses are "persons," or, at least, that their interests may be counted for purposes of judging the degree of representation in the same way that the interests of men and women are counted. In making this deeply substantive judgment, the court would necessarily take a stand on the abortion issue itself. A decision to compare the degree of representation of women with that of fetuses is simply a way of working an anti-abortion assumption into the argument; right or wrong, there is nothing substantively neutral about it.[289]

A different (and less bizarre) approach is to ask directly whether anti-abortion laws reflect stereotyping or prejudice, or unfairly disadvantage women in a way that is incompatible with equality. The prohibition of abortion—like any other restriction of birth control—oppresses women in many ways. Forcing a woman to carry a pregnancy to term puts an enormous physical strain on her body, and thrusts her into an involuntary, but highly intimate, relationship with another person—her child. Further, anti-abortion laws undermine women's ability to plan their lives, and inhibit a basic aspect

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should be even more strongly guarded by the courts than other minority groups which can at least demonstrate and fight for their rights.").

289. See Bennett, supra note 225, at 995 n.71 (because fetuses are not "relevant political actors," it is meaningless to talk of their powerlessness). Ely attempts to premise his argument on a neutral description of the relative political strengths of the two: "[c]ompared with men, women may constitute . . . a 'minority' [incapable of protecting themselves]; compared with the unborn, they do not." Ely, supra note 212, at 934-35 (footnote omitted). He offers no support for this assertion, which might be contested in light of the greater legislative successes pro-life groups have had lobbying on behalf of the "unborn" compared to women's rights advocates. Cf. J. Ely, supra note 202, at 82-87 ("virtual representation"). But the correctness of his observation is beside the point; I simply wish to emphasize that it rests on a deeply substantive judgment about the abortion issue. If one argues that male control over female reproductive capacity is the key issue in the abortion debate, for example, the "interests of fetuses" become effectively identical to those of males. Ely clearly does not accept this characterization, viewing the abortion controversy as one concerning reasonable disagreements over the beginning of life. See id. at 927. The controversy, though, can equally be viewed as a contest between men and women or individual and state for control of the abortion decision, whereas for pro-life advocates the issue is one of protecting life. Cf. B. Harrision, Our Right to Choose 226 (1983) ("In legal settings, someone must always 'stand in' for the fetus to claim 'its' rights. Invariably that person will be the husband, doctor, or lawyer most frequently powerful men in the society whose judgment will be sustained against the pregnant woman's.") To choose to compare women's political strength with that of fetuses is to make the substantive choice of characterizing the issue in the pro-life way.

Another indirect approach is to argue that anti-abortion laws (or the defeat of laws liberalizing access to abortion) probably do not rest on prejudice or stereotyping because the constant personal interaction of men and women mitigates the likelihood of prejudice. See J. Ely, supra note 202, at 161, 257 n.94. This approach, however, rests on a naive social psychology—that prejudices are necessarily broken down by interpersonal communication and relations. For a critique, see Parker, supra note 284, at 245-46. Such an assertion is especially improbable in the case of discrimination against women: sexism is not just a way men think about women, but is (among other things) a way that men (to varying degrees) act towards women in personal relationships with them. At any rate, the idea that personal interaction will tend to counteract prejudices and stereotypes is unquestionably a deeply substantive one.

of their self-expression, their sexuality.[290] Male-dominated legislatures simply discount these burdens when they prohibit access to abortion, because they hold stereotypical views about women's proper role as housewife and mother, or even because they seek to punish the unmarried woman or teenage girl who has sex.

This argument, too, is unsuccessful as a process-oriented theory. To be sure, the considerable merit of this analysis as an argument for a pro-choice position is not the issue here. The point is, instead, that it fails to permit the courts to avoid making political judgments about women's rights and the morality of abortion. Indeed, to argue that prohibiting abortion burdens women is not a neutral observation, but a deeply substantive judgment about what women (and men) are and should be like. From an entirely different perspective—the traditionalist perspective—an individual woman can truly realize herself only through the established framework of marriage and family; she may mistakenly attempt to escape that framework, but in the process she harms not only herself but everyone around her—even to the point of killing her unborn children. Far from imposing a real burden on women, laws banning abortion evince respect for their distinctive role as well as for the life of unborn children.[291]

In short, to decide whether prohibiting abortion burdens women—let alone to determine whether that burden is unfair—is to make a choice between the traditionalist and nontraditionalist perspectives.[292] More generally, the process-oriented approach fails to give a neutral description of how the political process would work "well" in the case of abortion statutes. The basic defect is that

> in looking at social attitudes toward groups, one cannot simply play

290. See, e.g., Law, Rethinking Sex and the Constitution, 13 U. Pa. L. Rev. 955, 1016-20 (1984).

291. Thus the argument that "[c]ontrol of reproduction is the *sine qua non* of women's capacity to live as equal people" posed in Law, supra note 290, at 1028, does not rest on neutral observations about the effect of anti-abortion laws on women. From a non-feminist perspective, it is permitting abortion, not prohibiting it, which burdens women. See, e.g., K. Luker, Abortion and the Politics of Motherhood 162 (1984) (pro-life advocate argues that "having abortion as an alternative . . . makes it easier for men to exploit women than ever before. I think they are less inclined probably to take responsibility for their actions."). Similarly, permitting abortion undermines the woman's capacity to control her sexuality, by "mak[ing] it harder for women . . . to say no." Id. Indeed, although few would defend it today, it is quite possible to view the exclusion of women from political life as a way of respecting their distinctive nature. See, e.g., A. Sachs & J. Wilson, Sexism and the Law 53-56 (1978) (English judges in the nineteenth century upheld exclusion of women from franchise and professions on the ground of respecting their inherent nature); M. Fishbein, A History of the American Medical Association 1847 to 1947, at 83 (1947) (quoting Dr. Alfred Stille, President of the A.M.A. in 1871, opposing the entry of women into the medical profession) ("If, then, woman is unfitted by nature to become a physician, we should, when we oppose her pretensions, be acquitted of any malicious or even unkindly spirit.").

292. See generally Sager, Rights Skepticism and Process-Based Responses, 56 N.Y.U. L. Rev. 417, 431-32 (1981); Sandalow, The Distrust of Politics, 56 N.Y.U. L. Rev. 446, 464-66 (1981).

> Linnaeus and engage in taxonomy. One cannot speak of "groups" as though society were objectively subdivided along lines that are just there to be discerned. Instead, people *draw* lines, attribute differences, as a way of ordering social existence—of deciding who may occupy what place, play what role, engage in what activity.[293]

Nowhere is this more true than with the differences between "men" and "women," which, I will argue in Section III, are socially constructed, not biologically determined; what men and women are emerges from social and political struggles. This fact necessarily undermines any attempt to give a neutral account of whether men and women (or any other groups) are participating equally and fully in the political process: at the very start of the analysis, when we divide society up into various groups in order to ask whether they are equally represented, we have engaged in a normative rather than purely descriptive determination.

b) Substantive Theories

As noted earlier, the term "substantive" is used here in the sense of the substantive values whether or not these values have any grounding in the Constitution itself. Substantive approaches hold that the courts have a special advantage over the legislative process in understanding and protecting specific values. With respect to abortion and privacy, it may be argued that the courts must discern a "public morality," which is the commonly shared view about what sorts of things ought to be free from state regulation.[294] Alternatively, the courts may be held to be especially suited to discerning fundamental traditions.[295] These approaches assert the existence of some deeply held and widely shared values which the political process, because of some structural feature, may overlook or denigrate. The courts, in contrast, are not subject to the passions and prejudices that may distort the political process. They can take a calmer, more deliberative view. Their institutional commitment to reason and principle provides a strong if concededly imperfect assurance that the basic values will be protected.[296] Finally, the ultimate inability of the process-oriented theories to avoid deeply substantive judgments provides an additional, compelling reason for explicit acknowledgment of the necessity of substantive—i.e., political—judgment by the courts. It is better to be fully aware of what one is doing, and frankness may even improve the quality of those

293. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1074 (1980).

294. See Perry, supra note 212, at 723-34.

295. See generally The Constitution and the Family, supra note 227, at 1177-83.

296. See, e.g., McKay, Judicial Review in a Liberal Democracy, in 25 Nomos 121, 138-39 (J. Pennock & J. Chapman eds. 1983); Perry, Substantive Due Process Revisited, 71 Nw. U.L. Rev. 417, 444 (1977). See also J. Choper, supra note 207, at 68; Perry, supra note 212, at 716-17, 728-29; Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 12-13 (1979); Richards, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, 42 Ohio St. L.J. 319, 329-30 (1981). But see, e.g., Holland, American Liberals and Judicial Activism, 51 Ind. L.J. 1025, 1040-41 (1976).

judgments.[297]

Little need be said here about this approach because either it amounts to nothing more than an admission that the entire project of developing a specifically legal theory of abortion and privacy is bound to failure, or else it arbitrarily limits the scope of the courts' role in discerning shared values and traditions. Nor can a substantive approach offer a theory of individual autonomy. These two defects parallel those elaborated in the discussion of privacy as a matter of political theory (a point which is discussed in more detail at the end of this subsection).

The first defect is rooted in the fact that the judiciary must not take the values "as is," because they may be inconsistent, or exhibit certain irrational features or prejudices. Thus one must refine them and then apply them neutrally according to their purpose.[298] The requirement that the shared values be "refined" or made consistent, however, inevitably leads directly into the substantive difficulties of a political theory of privacy. The level of generality at which the values are stated is arbitrary; or, put alternatively, the decision at what point to begin "refining" is arbitrary.[299]

For example, one theorist argues that the abortion funding cases are inconsistent with the basic principle of *Roe*, and rejects the argument that it is simply one of our values, or part of the public morality, that women should have a right to abortion but not a right to funding for it.[300] Yet the same theorist dismisses the possible inconsistency between a woman's right to abor-

297. Perry, supra note 212, at 732; Bennett, supra note 225, at 982; Gerety, Doing Without Privacy, 42 Ohio St. L.J. 143, 159-65 (1981); Moore, Moral Sentiment in Judicial Opinions on Abortion, 15 Santa Clara Law. 591, 634 (1975).

298. See, e.g., R. Dworkin, supra note 277, at 248-53; Note, supra note 254, at 1184; The Constitution and the Family, supra note 127, at 1184 (must separate essence of tradition from its fortuitous historical contexts). For an example of refining our understanding of shared values from a pro-life point of view, see Byrn, supra note 238, at 36.

299. For critiques, see J. Ely, supra note 202, at 60-63; Tushnet, supra note 265, at 790-92. Indeed, the very identification of the particular tradition itself may be arbitrary. Perry at one point states that certain ideals are "lost sight of, sometimes honored most in the breach"; yet, he claims, they still remain shared ideals, Perry, supra note 296, at 431, 432. It is hard to see how such an approach can give us a description—even a "refined" one—of the "evolutionary ethical sense" of society. Perry, supra note 213, at 715. In his subsequent book, Perry seems to drop the claim entirely that the courts in any sense follow some shared tradition or consensus: "[t]here are . . . no particular political-moral values supported by either 'tradition' or 'consensus' sufficiently determinate to be of significant use in resolving the human rights conflicts that have come and forseeably will come before the Court." M. Perry, supra note 204, at 97. See also id. at 93-96. Nevertheless, he informs us—via the metaphor of religion—we do have one shared value: that the Court will determine for us our shared values. See id. at 98 ("An integral component of the American people's religious understanding of themselves is the notion of prophecy. Invariably a people, even a chosen people, fail in their responsibility and need to be called to judgment—provisional judgment—in the here and now."). One may question the wisdom of a view in which an organ of government defines our basic social values (through a "dialogue" with us). Cf. Levinson, "The Constitution" in American Civil Religion, 1979 Sup. Ct. Rev. 123, 131-32 ("For all the talk of its status as an 'umpire,' the Court . . . is an intimate part of the structure of the State."). In any event, this approach only brings the theoretical dilemma up to a higher level.

300. See Perry, *Harris v. McRae*, supra note 224.

tion without her husband's consent and the requirement that both husband and wife agree to giving a child up for adoption. "[T]he character of a father's interest in his live child," we are told, "is *conventionally* regarded as of a wholly different character than his interest in a previable fetus."[301] It is arbitrary to test one set of conventional beliefs for consistency but not the other. On the other hand, if the courts were to attempt to recast all shared values, tradition, or consensus in consistent terms, their effort would be indistinguishable from an attempt to elaborate a "right" theory of privacy.

This objection can be phrased in a second way, which ties it into the earlier discussion of purposive approaches to privacy. The values or traditions that the courts seek to protect in a substantive approach are necessarily opaque: they are constituted by the particular interpretation we choose to give to them. This aspect can be seen in one frequently noted analysis of the abortion issue. Our society imposes no general "good Samaritan" requirement on people; one of our traditions is that we place a high value on an individual's freedom from coercion, even coercion to come to someone's rescue or to do good. Yet requiring a woman to give over her body to nine months of pregnancy forces her to be a good Samaritan, coming to the rescue of the fetus at considerable physical and emotional cost to herself. Thus anti-abortion statutes do not accord with our society's traditions and values, and the courts should strike them down as discriminatory.[302]

The difficulties with this approach are obvious. Determining the proper scope of the principle leads back into the same dilemmas we faced when trying to determine whether the fetus is a person. After all, another aspect of our respect for individual freedom is that one should not take "positive" steps or actions (as opposed to omissions) that kill others. Is abortion a case of committing an act (expelling the fetus) or refraining from committing one (allowing nature to take its course)? Any attempt to answer this question would take us along the same paths we travelled when we asked whether the embryo is more like an unfertilized egg or an eight month old fetus or a newborn baby.[303]

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301. Perry, supra note 296, at 455 n.245.

302. This is admittedly a highly simplified summary of the subtle and complex argument in Regan, Rewriting *Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979), which is in turn an attempt to provide an "equal protection" version of the analysis in Thomson, A Defense of Abortion, 1 Phil. & Pub. Aff. 47 (1971), but it will be sufficient for the purpose of making clear the basic criticisms of the Regan/Thomson argument.

303. Regan recognizes this difficulty and answers it by effectively making the distinction between acts and omissions turn on the degree of burden imposed on the individual. He argues that pregnancy is incredibly burdensome on the woman (at least if she does not wish to continue the pregnancy), requiring a great deal of physical and emotional strength. Because it puts much more of a burden on the woman than the law would ever impose on a potential rescuer, abortion ought to be considered an "omission" rather than an "act." See Regan, supra note 302, at 1574, 1579-83.

This argument, however, overlooks the intrinsic ambiguity in the scope of the "bad Samaritan" principle itself—the same ambiguity we saw in attempting to determine the underlying principle of *Roe*. Why can we not argue that the purposes underlying the "bad Samaritan"

Moreover, even if we could surmount this problem, we would still face the difficulty of understanding the value or tradition in question. Perhaps the principle is not that we never require an individual to rescue someone in distress, but rather that we do so only when the person in need has come into being through the other's voluntary act, and can be saved without posing a threat of death or permanent injury to the rescuer. This principle could account for the anti-abortion laws and their common exceptions for rape or a threat to the mother's life.[304] To choose between this statement of the principle and some other—such as one that is more absolute, never requiring anyone to come to anyone else's assistance—is not to interpret or refine a tradition but to give it its essential meaning.[305]

The second problem concerns the nature of the values or traditions discerned by the courts. On the one hand, if the values are not necessarily shared ones that define each and every member of society, respecting them will not always protect individual autonomy.[306] If, for example, the shared value is "the sanctity of traditional marriage relationships," then those who choose some nontraditional relationship will be left unprotected. This is precisely the objection to privacy theories based on shared values discussed in Section I. On the other hand, even universally shared values would provide a questionable normative basis for the courts' delineation and enforcement of a right to privacy. In a society marked by differentials of power and wealth, any such shared values may just as easily be understood as "imposed values."

Indeed, the Supreme Court's declarations of constitutional rights (or their nonexistence) in particular cases have an important influence on shaping people's moral beliefs or beliefs about the proper scope of privacy. Aside from making the approach circular—the courts cannot claim simply to discern our basic values—this influence suggests that the courts may not be "protecting"

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principle in fact require treating abortion as an act? For example, one reason for not imposing a duty to rescue is the difficulty of determining on whom the duty is to be imposed. In the abortion context, in contrast, we know precisely on whom the "duty to rescue" (by not having an abortion) would fall: the pregnant woman.

More generally, the defect in Regan's (and Thomson's) approach is that it seeks to avoid making substantive moral assertions by following the principle of treating like things alike. Yet the determination whether two things are alike inevitably is either empty or else brings us to ask, "are they alike in a morally relevant sense?" See Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 544-45 (1982). If we ask whether abortion is more like an omission than an act, we unavoidably will be forced to make moral judgments about it. And Regan's judgment appears to be that no woman should be forced to bear the considerable burdens of an unwanted pregnancy. That is my conclusion as well, but it is a mistake to argue that consistency or equality of treatment necessitates it.

304. See Markovits, Legal Analysis and the Economic Analysis of Allocative Efficiency, 8 Hofstra L. Rev. 811, 893-97 (1980).

305. For an argument that the common law principles regarding a duty to aid would lead to the conclusion that the woman has a duty to "aid" (i.e., not to abort) the fetus—assuming it is a "person"—see id. at 898-903.

306. To emphasize, by "values" I mean—as in Section I—not only one's particular tastes or deeply held beliefs, but also one's beliefs about what sorts of activities, or what spheres of life, are fundamental to autonomy.

individual autonomy but rather are shaping it in a particular way. Some commentators, both critical[307] and more approving[308] of the Supreme Court's privacy decisions, argue forcefully that those cases represent an instrumentalist decision by the state, acting through the judiciary, to effect certain conservative reforms. In this instrumentalist view, the Supreme Court's privacy decisions are best understood as governmental actions to promote social stability. As a result of widespread changes in social patterns, the Court is confronted with the threat of an entire set of relationships developing outside the law. Laws which make these practices illegal, or which deny individuals engaged in them the benefits of established legal frameworks, are then struck down because they preclude effective regulation of the individuals concerned. Thus a privacy right is recognized not because *individuals* "need it for their happiness (though they may), but because *society* needs it to avoid the insecurity and instability generated by the existence in its midst of a permanent and influential subculture outside the law."[309]

Though acting "in the glorious name of the individual," the courts, in fact, play the role of "enlightened conservator of the social interest in ordered stability."[310] To the extent that the Court's decision in *Roe* has had an effect on public attitudes toward abortion, we cannot dismiss the view that the Supreme Court has not so much protected individuals from state intervention as it has made it possible for state intervention to be more effective.

The substantive theorist might reply, however, that these objections are beside the point. It is no criticism of the substantive approach to argue that it requires judges to make political judgments that are not made in a vacuum, free from the influence of political power. The very point of the substantive approach is to acknowledge that the courts (and theorists) must engage in such judgments.[311] But the discussion of the instrumentalist understanding of the privacy decisions, in which those decisions are more tools or preconditions of social control than guarantees of individual autonomy, should give us pause before making such an acknowledgment. No matter how great "the care and humility that we are entitled to expect of judges"[312] may be, one can always

307. Miller, supra note 218, at 248-51.

308. Grey, Eros, Civilization and the Burger Court, Law & Contemp. Probs., Summer 1980, at 83.

309. Id. at 97 (footnote omitted).

310. Id.

311. Thus Choper poses the question whether on the whole the courts have done a good job in the area of protecting individual liberties. He concludes that they have done well and therefore judicial review in cases involving individual rights is justified. See J. Choper, supra note 207, at 67-70, 79-122. Unlike Ely, however, Choper presents no theoretical apparatus designed to justify and delimit the proper scope of judicial review in a neutral or nonsubstantive way. On the contrary, his empirical examination of the "practical operation" of the courts and the legislature requires him to evaluate in a directly substantive manner the performance of the courts. See id. at 11. For two other examples of this approach, see McKay, supra note 296, at 135-40; Friedman, The Conflict over Constitutional Legitimacy, in The Abortion Dispute and the American System 13 (G. Steiner ed. 1983).

312. Tribe, supra note 293, at 1080.

reply that

> [We] can cite occasions on which our judiciary has displayed a lesser susceptibility to bare-knuckled . . . prejudice than our elected officials, but we also can cite some where it hasn't. . . .[J]udges tend to belong to the same broad categories as legislators—most of them, for example, are white heterosexual males comfortably above the poverty line. . . .[313]

Substantive approaches ultimately amount to an admission of theoretical impasse in the whole project of reconciling judicial review with democracy.[314] They differ from other approaches only in the relative explicitness and self-awareness of that impasse.

3. Conclusion

As we saw at the end of the discussion of liberal doctrinal arguments over the morality and politics of abortion, there is in effect a repertoire of stock arguments and replies available whenever we consider the morality of abortion or the right to privacy. The same can be said for the debates over abortion and judicial review.

Recall that in moral and political arguments, while one could look for some "objective" account of abortion and of the right to privacy, such accounts always contained undermining subjective elements; conversely, explicitly "subjective" or purposive approaches always implicitly (and in contradiction to their premises) relied on "objective" notions. Only by adopting one polar extreme or the other could incoherence be avoided. The same is true of efforts to discern what the Constitution "really" says our values or traditions are. Any attempt simply to interpret the text, or gauge how representative the political process is, makes it necessary to consider our purposes in using words and concepts in a certain way, to make deeply substantive judgments concerning political life: in other words, we inevitably encounter a political or subjective element that contradicts the neutrality, objectivity, and authority of the judiciary's role. If, conversely, we begin a textual interpretation with an explicit acknowledgement of the role of purpose, or if we expressly avow that the courts must make political judgments, we end by arbitrarily limiting the scope of these acknowledgments. Only if we are willing to adopt one polar extreme or the other—to reject the very idea of judicial review or simply to accept without hesitation the wielding of power by an unelected elite of judges—might we hope to avoid incoherence.

The second set of dilemmas, we may recall, stemmed from our inability to reconcile part and whole—the dichotomy of universal and particular. The "verdicts" on the morality of abortion seemed to have an all-or-nothing nature, either "essentialist" or fragmented into case-by-case analyses; similarly,

313. J. Ely, supra note 202, at 168.

314. Cf. Stewart, supra note 252, at 1813 (same for administrative law).

in our account of the possible relationships between individual and state, we were forced to assert the absolute primacy of one over the other as the price of avoiding inconsistency. In the debates over the role of the courts, the same basic dilemmas appear. The consequences of textual interpretations seem all-or-nothing: at base we can choose between believing that a particular interpretation of, for example, the word "person" or the concept of "privacy" holds good for all matters, or so particularizing the inquiry that the very idea of rights or stable entitlements is thrown into question. And we can also, at base, offer no account which makes the judicial role compatible with that of the legislature; either there is no justification in principle for judicial review, or else there is no principled limit to it.

The theoretical arbitrariness of all but the polar positions does not lead to an abandonment of liberal doctrinal arguments in the context of the controversies over abortion and the Constitution any more than it does in the context of moral and political debates. Once again, the most reasonable response appears to be to exercise one's judgment, or to settle on a "realistic" position. The nature of such judgments will form the object of the inquiry throughout the remainder of this section.

C. *Law and Social Vision*

The dispute about law in a liberal society is more than an academic disagreement about the nature of judicial decision making and its compatibility with theories of democracy. It is a dispute about the role the courts have played since *Brown v. Board of Education*[315] an aspect of a political struggle over an entire practice of adjudication that "qualif[ies] the last twenty-five years of American legal history as something of a single experience."[316]

This political struggle reflects a contest between opposing visions of the social order. Earlier, we saw that two fundamental disagreements about the experience of life in a liberal society underlie the abortion issue.[317] Similarly, I will argue that one can discern two opposing perspectives in the debates over the constitutional right to privacy and the proper role of the courts in defining and enforcing it.[318]

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315. 347 U.S. 483 (1954).

316. L. Sargentich, Complex Enforcement 78 (March 1978) (unpublished manuscript on file at the offices of *New York University Review of Law & Social Change* and at Harvard Law School Library.)

317. See text accompanying notes 160-197 supra.

318. In formulating the contrast between the activist and nonactivist perspectives, I have relied generally on M. Perry, supra note 204, at 146-62; D. Horowitz, The Courts and Social Policy (1977); M. Rebell & A. Block, Educational Policymaking and the Courts: An Empirical Study of Judicial Activism 3-18, 199-216 (1982); Aronow, The Special Master in School Desegregation Cases, 7 Hastings Const. L.Q. 739 (1980); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Fiss, supra note 296; Glazer, The Judiciary and Social Policy, in The Judiciary in a Democratic Society 67 (L. Theberge ed. 1979); Scott, Two Models of the Civil Process, 27 Stan. L. Rev. 937 (1975); Win-

One perspective, the "activist" perspective, envisions a more wide ranging and less rigidly structured role for the judge in individual cases. In general, it supports the activism of the courts in addressing a broad range of political or ideological concerns as well as the traditional legal ones. It also supports the courts' detailed involvement in the running of important institutions like the schools, prisons, mental hospitals, and even the operation of the political system itself. The other perspective, the "nonactivist" perspective, offers an opposing vision. In this perspective, the individual judge who ranges too far outside the traditional scope of the bipolar model, in which the adversaries are the primary movers in a fight focused sharply on their particular private interests, threatens the very notion of a vindication of rights through law. Judicial activism transforms the judge into a mediator who fashions compromises rather than an authority who expounds the law. Similarly, if the judiciary takes on "political" issues or involves itself too intimately in the operation of political or social institutions, it runs the risk of sacrificing the special character of the law. If legal doctrine is merely an aspect of the political process, the judiciary is just another power center, all the more unacceptable because it is not elected.

These two perspectives are intimately connected with approval or disapproval of the product of the courts' activism over the past thirty years. Those who support a wide ranging activist role for the judiciary also tend to favor (or at least sympathize with) the specific rulings of the courts, particularly in the context of institutional litigation, but also in cases protecting individual rights. At the same time, they tend to be critical of decisions like *Maher*,[319] *McRae*,[320] or *Rizzo v. Goode*[321]. Conversely, opposition to the wide-ranging role of the federal courts since *Brown* tends to be associated with substantive disapproval of the results of that activity.

As in the case of the relationship between the traditionalist controversy and the abortion issue, the connection between the activist controversy and views on the specific decisions on individual rights might be thought to be a purely contingent one.[322] "Activists" might really be concerned only with furthering specific aims; because recourse to judicial action appears at the moment to further those aims, they favor a greater role for the courts. "Nonactivists," on the other hand, might simply dislike the decisions reached by the courts, and their real aim in calling for limits to judicial activism might

ter, The Growth of Judicial Power, in The Judiciary in a Democratic Society, supra, at 29; L. Sargentich, supra note 316.

319. Maher v. Roe, 432 U.S. 464 (1977); see also Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

320. Harris v. McRae, 448 U.S. 297 (1980); see also Williams v. Zbaraz, 448 U.S. 358 (1980).

321. 423 U.S. 362 (1976) (overturning lower court order granting broad ranging prophylactic relief against police department accused of systematic civil rights violations).

322. The contrast between reactions to the pre-1937 version of substantive due process and its current incarnation might suggest such an argument. Cf. J. Choper, supra note 207, at 136 (question is one of whose ox is gored).

be to undermine those decisions, not to establish a better balance between judiciary and legislature.[323] Indeed, the connection might appear so contingent as to call into question the appropriateness of distinguishing between "activists" and "nonactivists." In a sense, it has been pro-life advocates and judicial conservatives who have sought most actively to implement their views on abortion and the proper role of the courts. Probably most of the demonstrations on the abortion issue have been pro-life demonstrations, and segments of the pro-life movement have been active in a more direct fashion, in the form of harassment (or worse) of abortion clinics and of women who seek abortions.[324] Similarly, the most expansive opinions today might well seem to come from judges who advocate a more limited role for the courts.[325]

Nevertheless, the denomination of the two perspectives as activist and nonactivist, and the assertion that they consist of more than contingently related positions, illuminates the relation between the abortion controversy and the struggles over the role of the courts. What gives the activist and nonactivist perspectives their unity is the way that, like the traditionalist and nontraditionalist perspectives, each one attenuates consciousness of theoretical dilemmas in a particular way. Before turning to an analysis of that process, however, it will be helpful to set out the two perspectives in greater detail.

1. The Activist Controversy

At their deepest level, the nonactivist and activist perspectives offer opposing views on two issues central to the role of law in liberal society. First, under what conditions can the exercise of judicial power be justified? That is, under what conditions can respect for others—the judge's respect for the litigants' autonomy, the litigants' respect for each other, and the judiciary's respect for society's will (expressed through its elected officials)—be maintained? Second, what is the nature of judicial power and its relation to those whom it affects? Alternatively put, to what extent do institutions, norms, and actors exist apart from the exercise of state power, including the judicial process, and to what extent are they constituted by it?

This portion of the article will consider both questions in the context of

323. Cf. Eisenberg & Yeazell, supra note 318, at 515 ("People perceive remedies as arbitrary and alternatives to them as acceptable when they do not really believe that the wrong to which the remedy is addressed constitutes a serious evil.").

324. See B. Harrison, Our Right to Choose: Toward a New Ethic of Abortion 1 (1984); America's Abortion Dilemma, Newsweek, January 14, 1985, at 20. The proposed "Family Protection Act," moreover, contained a provision for potentially sweeping judicial review. The Family Protection Act of 1981, S. 1378, §§ 301(c)(1), 301(c)(4), 97th Cong., 1st Sess., 127 Cong. Rec. S6334 (daily ed. June 17, 1981); see Flax, Women's Rights and the Proposed Family Protection Act, 36 U. Miami L. Rev. 141, 144 (1981). Nor is the phenomenon entirely recent. Before *Roe*, some state legislatures liberalized their abortion laws, and pro-life advocates went to court to have the new laws struck down. See Byrn v. New York City Health and Hospitals Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), appeal dismissed, 410 U.S. 949 (1973). For a history of pre-*Roe* abortion cases, see Moore, supra note 297.

325. E.g., Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984) (per curiam).

three specific issues around which much of the activist controversy revolves: modes of adjudication in particular cases, the character of the relief, and the acceptability of the judiciary as an active, conscious agent in the shaping of social institutions. The nonactivist and activist perspectives split on each of these issues.[326]

a) The Conditions Under Which the Exercise of Judicial Power Is Justified

In the nonactivist view, adjudication must conform to one particular model or set of models. The fixed role for the judge is largely that of a passive umpire, and the lawsuit is conducted as a dispute over some fixed, past event. Likewise, litigants have specific, bipolar roles (plaintiff versus defendant); if there are classes on one or both sides, the class must have some identical or "joint" interest. Finally, outsiders are either affected so directly that they can or even must be made parties, or they are not considered to be affected at all (except in perfectly general ways, such as by *stare decisis*), so that they cannot be heard, even at the judge's discretion.[327]

At a deeper level, we can identify two aspects to the nonactivist view of modes of adjudication. The first is the view that judges who step outside of a fixed, given role abuse their power and dominate the parties by imposing their personal beliefs on them. If the cause of action is not relatively narrow and well-defined, the courts will have a "roving commission" to impose their views on society. The second is the belief that the structure, whatever its precise content may be, is presumptively right, and forms the standard against which any other proposed modes of adjudication must be tested.

The activist view differs on both points. The emphasis is on the flexibility of the structure of the lawsuit and the participants' roles. The judge is viewed more as a manager, whose task it is to see that important points are covered and that all important affected interests are represented.[328] The party structure may be modelled on something other than the sharp bipolar division between plaintiff and defendant. For example, there may be some conflicts within the class, or instead of a sharp contrast between plaintiff and defendant there may be a *range* of represented interests. Instead of refusing to certify a

326. I do not mean to imply that this is the only way to characterize the differences between the two perspectives, nor do I mean to argue that each aspect is necessarily as important as the other two. Compare L. Sargentich, supra note 316, at 1 ("The most striking feature [of complex litigation] . . . is the remarkable scale and complexity of the remedy constructed by the court."), with Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 58 (1982) ("[T]he nature of the controversy, the sources of the governing law, and the consequent extended impact of decision—rather than the form of the relief—are what really differentiate public law from private law adjudication."). Rather, I intend the tripartite characterization simply as a helpful framework by which to structure the discussion of the activist controversy.

327. E.g., Chayes, supra note 318, at 1282-83; Fiss, supra note 296, at 18-28.

328. Or one might ascribe that function to a special master. See Aronow, supra note 318, at 760-69.

class in those circumstances, the judge should be flexible and vigilant in ensuring that the various interests receive proper representation.[329]

The central notion of the activist perspective, then, is that rigid adherence to any one model of the judicial role or structure of adjudication is in itself unwise. Indeed, such rigidity is possibly unjust because it hinders rather than ensures justice.[330] To be sure, aspects of a nonactivist model of adjudication may be appropriate to a given case or type of cases. But it is unacceptable to force all adjudication into one particular form; no such form is presumptively right.[331]

The dispute over the conditions under which the exercise of power can be justified—that is, reconciled with respect for others—appears when we consider the question of the character of the relief as well. For the nonactivist, the relief the court grants must be linked to some given framework. Otherwise, the court will simply impose its own views on others. The idea that relief must be simple and prohibitory, except in unusual and tightly circumscribed situations,[332] is one example of this view. For the activist, in contrast, no one particular notion of how the relief should be structured could be appropriate for all cases. In order to take into account all the relevant interests and factors, the courts must have a fair degree of flexibility in their remedial powers. Otherwise, the prevailing party may win only an empty victory, and the vindication of the right will be meaningless.

Finally, the two perspectives differ on the question of the conditions under which the courts' exercise of power comports with democratic ideals. In the nonactivist view, if the courts are to avoid usurping the powers of elected representatives, they must occupy some relatively fixed, established place within a framework of relations vis-à-vis elected officials, a position that is also the "correct" one in the sense of being the role mandated by the Constitution. This view may take many different forms, but underlying them all is this idea: without some relatively fixed, constitutionally-mandated framework, either the judiciary will stray beyond its proper role and come to dominate the political process, or in reaction, its power will be cut back, enabling the legislature to stray beyond its own proper sphere or functions. Failure to respect the proper and correct framework for the judicial-legislative relation-

329. See generally Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1475-98 (1976). Cf. Aronow, supra note 318, at 752-57 (cannot depend on traditional party structure to ensure adequate representation of all affected interests in presentation of claims or formulation of remedies).

330. Similarly, a woman may choose to be a housewife, or a man the family breadwinner; but if forced into those roles, they will, in the nontraditionalist's view, relate to each other not as persons but as place-holders. See text accompanying notes 169-175 supra.

331. In this view, then, it is wrong to assume that the "dispute resolution" model is presumptively the right one, with any departure from it requiring some special justification. No one form of adjudication is presumptively right or wrong; the important question is whether we agree with the underlying norm and believe that the particular exercise of judicial power is effectively implementing that norm. See Fiss, supra note 296, at 39-43; Eisenberg and Yeazell, supra note 318, at 474-94, 510-16.

332. See Aronow, supra note 318, at 757; Chayes, supra note 318, at 1282-83.

ship, then, threatens to undermine the whole structure upon which the healthy functioning of the democratic system is premised. Moreover, social life generally is equally harmed by such disrespect. The efforts by the judiciary to engage in "social engineering"—that is, conscious attempts to reshape social institutions such as schools and mental hospitals—threaten to undermine the integrity of those institutions and subject social life to "government by judiciary." Perhaps the archetypal example for the nonactivist is the citizens who lose control of their neighborhood schools to a federal judge.

The activist, on the other hand, takes a much more flexible view of the role of the judiciary. The "judicial role" is not a tightly interconnected bundle of powers and functions that is seen as applicable in all situations. Rather, it is responsive to the varying needs of particular times and substantive contexts. Thus, it may be proper for the judiciary to be more assertive in certain times than in others, as it was regarding civil rights in the 1960s, or in certain substantive areas, such as reapportionment. Moreover, conscious efforts to reshape social institutions do not necessarily threaten to bring about total judicial domination. In fact, in some circumstances, conscious restructuring of entire institutions may be necessary to preserve the autonomy of individuals within those institutions.[333]

b) The Nature of Judicial Power

The nonactivist and activist perspectives also diverge on the question of the nature of power. Power in the nonactivist view is something which judges in their public capacity—assiduously kept separate from any personal views—exercise *over* the litigants.[334] The parties are fixed and defined at the outset as bearers of particular rights. The litigants' own "self-realization" as parties—that is, the vindication of their legal rights—is possible solely within the established, bipolar framework. Likewise, the judge's self-realization is possible only through strict adherence to the role of umpire.[335]

In the activist view, on the other hand, power is not exercised over given objects, but constitutes both the one who exercises it and the one who is subject to it. Judges realize themselves by remaining flexible, and by recognizing both the part that their personal views necessarily play in adjudication and the impact that being a judge has on their personal lives.[336] At least in part, the

333. Cf. Chayes, supra note 326, at 6 (courts since *Brown* engaged in "profound social reconstruction"); Fiss, supra note 296, at 2 (to implement *Brown*, it has been necessary for courts to "reconstruct social reality").

334. See generally Chayes, supra note 318, at 1282-83.

335. See text accompanying notes 178-179 supra.

336. Cf. Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1776 (1976) ("[T]he acknowledgement of contradiction makes it easier to understand judicial behavior that offends the idea of the judge as a supremely rational being. The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes . . . . In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism, *she has found herself*."); Note, The Changing Social Vision of Justice Blackmun, 96 Harv. L. Rev. 717, 724 n.47 (1983) (controversy over *Roe* changed Justice Blackmun's life)

parties may be defined through the very process of adjudication, because the question of precisely who the parties are becomes, to some extent, a matter of substantive law.[337] The process of defining the parties, moreover, is not necessarily determined by any one structure.

The same divergence is apparent when we consider the question of relief. In the nonactivist view, relief consists simply of applying an already fully-articulated norm to particular situations. In addition, the granting of relief must be tied to some fixed framework or formula if it is to be legitimate. Thus, for example, the question whether a promisee's rights have been violated is independently adjudicated before the proper form of relief, governed by other maxims, is considered.

In the activist view, however, the court's remedial powers are most effective and just if, instead of being tied to any particular formula, they are flexible and oriented to particular circumstances. The formulation of progressively more concrete remedies constitutes an essential aspect of the development of the norm itself. Contrary to the nonactivist perspective, the norm does not fully exist apart from the actual exercise of power in the implementation of the relief.[338]

Finally, the two perspectives diverge on the role of the judiciary in relation to the legislature and to society generally. For the nonactivist, subjecting social and political life to conscious experiments or manipulation threatens to sap the strength and life from those institutions. Judicial willingness to intervene in intra-family disputes may radically undermine the character of family life. Judicial activism also threatens to sap the strength of the political process and, ultimately, to dissipate the vitality of the judiciary itself.[339] On the other hand, the activist view is receptive to the conscious, "reasoned" control over large areas of social life; such efforts are the necessary response to pervasive bureaucratic power. In this context, even a refusal to exercise judicial power is viewed more as a substantive decision to respect the social policy being implemented by the bureaucratic state than as simply leaving things be.[340] Political and social life may well be invigorated by a judiciary which catalyzes

(citing H. Blackmun, Remarks, Franco-American Colloquium on Human Rights 15 (1979) (unpublished transcript on file in Harvard Law School Library)); Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 216, 267 N.Y.S.2d 450, 452 (Sup. Ct. 1965) ("[n]o release—no legalistic absolution—would absolve me or the court from responsibility" if a Jehovah's Witness died after refusal of court to order blood transfusion).

337. See Developments in the Law—Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1278-79 (1981).

338. The exposition in L. Sargentich, supra note 316, is particularly helpful on this point.

339. Thus, for the nonactivist, there is a difference between an exercise of power that acknowledges and supports the necessary contexts of respect for others and individual development, and an exercise of power that does not. The former, even if posed in sweeping legislative terms or taking the form of direct action, represents for the nonactivist an attempt to ensure that the exercise of power does not undermine those contexts. See note 324 and accompanying text supra.

340. Cf. Chayes, supra note 326, at 58-60 (Supreme Court's attempts to restrict standing is as much a substantive determination as would be adjudicating cases on the merits); Fiss,

other institutions to question long-held assumptions.[341] Thus, institutions are what they are because of decisions about the exercise or nonexercise of collective power in particular circumstances; and that power is most wisely—and democratically—exercised if not constrained to any one, rigid framework.

2. *Abortion and the Activist Controversy*

At a relatively concrete level, it is easy to see how reactions to *Roe* and subsequent abortion decisions, as well as related decisions on access to contraceptives, tie into the nonactivist and activist perspectives. These decisions generally arise from class action suits, in which varying interests (such as those of doctors as well as women) are represented. Traditional concepts of judicial restraint such as standing and mootness are strained in these suits, which are often the product of a conscious strategy by public interest groups employing litigation in furtherance of political ends.[342] Further, the Supreme Court did not merely declare a right and strike down a statute in the *Roe* decision. In the eyes of critics, the Court virtually drafted a statute in the companion case of *Doe v. Bolton*.[343] Since 1973, the courts have found themselves passing on the most concrete sorts of issues (like twenty-four hour waiting periods[344] or pathology tests for fetal remains[345]) in the name of an extremely general right to privacy. The judiciary has come to rival, if not surpass, the legislature in the fashioning of abortion policy.[346]

Thus, a connection of one sort might be asserted: those who favor a right to abortion tend to be sympathetic towards judicial activism because that activism has greatly increased women's access to abortion. Conversely, pro-life advocates dislike judicial activism solely because they disagree with many of the decisions it has produced. In other words, the connection between the

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supra note 296, at 2 (basic social values necessarily disrespected if courts fail to deal with problem of controlling bureaucracy).

341. See M. Perry, supra note 204, at 156-57 (arguing that prison reform order spurred state executive to acknowledge responsibility to make improvements in the prison system); Note, Implementation Problems in Institutional Reform Litigation, 91 Harv. L. Rev. 428, 463 (1977) (institutional reform litigation "allows people with few resources to create enough public pressure to spur substantial legislative or executive response. It is, in other words, a cheap method of pricking powerful consciences . . . .") (footnote omitted).

342. See K. O'Connor, Women's Organizations' Use of the Courts 98-99 (1980); E. Rubin, Abortion, Politics, and the Courts 57-62 (1982); see also, e.g., Morgan, *Roe v. Wade* and the Lesson of the Pre-*Roe* Case Law, 77 Mich. L. Rev. 1724, 1730 (1979) ("[T]he Court reached out to grab the abortion question and thereby impaired its ability to construct a sound opinion.").

343. See, e.g., Ely, supra note 212, at 926; Miller, The Elusive Search for Values in Constitutional Interpretation, 6 Hastings Const. L.Q. 487, 495-96 (1979).

344. See City of Akron v. Akron Center for Reproductive Health, Inc., 426 U.S. 416 (1983).

345. See Planned Parenthood v. Ashcroft, 467 U.S. 476 (1983); see also Simopoulos v. Virginia, 462 U.S. 506 (1983) (interpreting "hospital" to include licensed outpatient clinics).

346. See Mackenzie, A Test of Fitness for Presidential Appointment?, in The Abortion Dispute and the American System 47, 60 (G. Steiner ed. 1983).

activist controversy and the differing positions on abortion might be purely instrumental.

There is, however, a deeper connection, which can be understood as a contrast in degrees of skepticism. Why is it that the nonactivist is skeptical of the possibility of working out, in a structured and principled fashion, a concrete constitutional doctrine of fundamental rights and basic social norms, while the activist is not? Before addressing this question it may be helpful to point out in greater detail the nature of this divergence over skepticism.

Roe and other privacy cases, like *Griswold*, represent for the activist an attempt to work out a structured doctrine of the right to privacy. Similarly, "institutional" cases are attempts to make concrete, in a principled way, some broad social norm that is as abstract and important as the right to privacy.[347] For example, in the activist view, the prison cases have gradually built up a jurisprudence of the constitutional prohibition of cruel and unusual punishment.[348] Few would argue that each and every aspect of that jurisprudence is logically entailed by the abstract concept of humane treatment. Nevertheless, the activist would still claim that there exists a substantial relationship between the statements "prisoners must have adequate medical care and decent living arrangements" and "the Constitution forbids cruel and unusual punishment," or between the statements "there is an almost absolute right to abortion in the first trimester of pregnancy" and "the Constitution guarantees the right to privacy." *Roe* and institutional cases meet with a favorable or at least sympathetic reception on the activist's part, then, because they represent the courts' rejection of the notion that such a structured working out of substantive norms like the right to privacy is impossible.

For the nonactivist, on the other hand, it is the fact that those cases do represent such a rejection that gives rise to the general attitude of disapproval. To the nonactivist, the notion that the Constitution requires a particular temperature for hot water in prisons is absurd on its face; the idea that the Founders fought at Bunker Hill to ensure that minors would have access to contraceptives makes a travesty of the Revolution;[349] and the holding in *Roe* that a "right to privacy" mandates judicial abrogation of anti-abortion statutes is, at best, a betrayal of the judicial role.[350] Any connection between the abstract principles of fundamental rights and the particular decisions issued by the courts lies solely in the judges' personal and political preferences.[351]

347. On the relation between activism and skepticism, see M. Perry, supra note 204, at 100-02; Fiss, supra note 296, at 16-17; Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982); Richards, supra note 296, at 328-30.

348. See, e.g., Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv. L. Rev. 626 (1981).

349. Carey v. Population Servs. Int'l, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting).

350. E.g., Epstein, supra note 229, at 184-85.

351. E.g., Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash. U.L.Q. 695, 697-98; Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693 (1976).

The connection between disapproval of activism and skepticism toward attempts to elaborate doctrines of fundamental human rights needs to be explained, then, as does the connection between approval of activism and a relative lack of skepticism toward such doctrines. This connection can be understood in terms of both aspects of the activist controversy—the divergence of views over how the exercise of power can be made compatible with respect for others, and over the nature of judicial power.

With regard to the first, the activist sees no insurmountable institutional barrier to prevent judges from developing and implementing a detailed doctrine of fundamental rights. The expansion, and indeed transformation, of the judicial role into one that is more managerial, interventionist, and flexible poses no serious problem because of the underlying view that there is no established, presumptively "correct" structure for judicial review in the first place.

For the nonactivist, however, such an effort is dangerous, even apart from the possibility that the courts will come to the wrong conclusions about human rights, precisely because it disregards the idea of a fixed, established, and proper role for the judiciary. The nonactivist sees a powerful institutional reason for *not* attempting to set out a judicial doctrine of fundamental rights and basic social norms. And to the extent that such doctrine does develop, its results must be placed in some fixed framework. Thus, nonactivists may accept, as binding, the specific holdings in earlier privacy cases, but reject the notion that any general principle capable of reasoned elaboration underlies them.[352]

The same differential attenuation of skepticism appears when one considers the second aspect of the controversy, the nature of judicial power. For the activist, individuals and social institutions are constituted by the activities of the state. Thus, judicial inaction simply represents a shaping of those institutions in a particular way. For example, when a court sanctions parental power over minors by allowing parental consent statutes to stand (with some modifications), that very "inaction" represents a policy choice as much as would striking such statutes down; the court's decision must be justified in either

352. Thus, for example, Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), rehearing en banc denied, 746 F.2d 1579 (D.C. Cir. 1984) (per curiam), accords with the nonactivist perspective. Judge Bork, writing for the majority, extensively reviewed the Supreme Court's privacy cases and concluded that the Court had merely created a number of specific rights regarding varied matters, including "marriage, procreation, contraception, family relationships, and child rearing and education." 741 F.2d at 1395. Because there was no "general principle that explain[ed] these cases and [was] capable of extrapolation to new claims not previously decided by the Supreme Court," id. at 1396, the D.C. Circuit refused to go beyond those cases and recognize a right to engage in homosexual conduct.

The dissenters accused the panel majority of disregarding judicial restraint and "conduct[ing] a general spring cleaning of constitutional law." 746 F.2d at 1580 (Robinson, C.J., dissenting from denial of rehearing en banc). Nevertheless, underlying the majority opinion was the skeptical view that no principled elaboration of a "right to privacy" was possible, together with a belief that "courts ought not to invade the domain the Constitution marks out for democratic rather than judicial governance." Id. at 1583 (statement of Bork, J.). In that sense, even decisions that aggressively confine the right to privacy are "nonactivist."

case.[353] From this perspective, there is strong reason to develop an explicit doctrine of fundamental rights which can guide judicial policy choices of intervention and deference.

For the nonactivist, in contrast, individuals and social institutions are constituted apart from the exercise of state power. This places the desirability of judicial activism in a very different light. On the one hand, judicial action always risks undermining the essential character and strengths of those institutions. On the other hand, judicial inaction (like state inaction in general) has the peculiar quality of needing no particular justification in itself; it simply lets things be, rather than makes a positive policy decision to arrange things in a certain way. Recall the same differences between the nontraditionalists, who characterized parental consent statutes as the state delegating decision-making power to parents, and the traditionalists, who saw such statutes as merely recognizing parental authority.[354] For the nonactivist, judicial inaction lacks the formative or constitutive quality that it has for the activist. Thus, there is no urgent need to develop a doctrine to guide intervention and deference, while the cost—the possible undermining of the essential nature of some institution of social life—is quite high.

Together, these perspectives on the justification and nature of power explain the different levels of skepticism concerning the possibility of working out a coherent and principled doctrine of fundamental rights and basic social norms. Certainly, they do not explain the incoherence of liberal legal doctrine, an incoherence which gives us a repertoire of arguments, criticisms, and replies on which we can always draw. Moreover, just as the traditionalist and nontraditionalist perspectives are not uniformly associated with a set of particular positions concerning abortion,[355] so too, the activist and nonactivist perspectives are not uniformly associated with any set of particular positions concerning the exercise of judicial power.[356] I have attempted to show here

353. See Chayes, supra note 326, at 58-60.

354. See text accompanying notes 183-184 supra.

355. See text accompanying notes 187-189 supra.

356. The various positions taken on the Human Life Bill (which would have defined fetuses as "persons" under the fourteenth amendment) and on proposals to restrict or eliminate federal court jurisdiction over certain issues, such as abortion and busing, make this clear. See generally 1 & 2 Human Life Bill Hearings, supra note 246; Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981).

The traditionalist and nonactivist perspectives render the Human Life Bill attractive. While the nonactivist might have theoretical doubts about the precise scope of Congress's power to enforce the fourteenth amendment, the personhood of the fetus is, for the traditionalist, an established biological fact, and so provides a firm basis for "a very limited and precise means[,] . . . in a traditional way, to correct the exercise of raw [judicial] power," 1 Human Life Bill Hearings, supra note 246, at 273 (statement of Prof. John Noonan). Moreover, the nonactivist fears little harm from the Bill's attack on the judicial enterprise of elaborating a doctrine of human rights.

For the nontraditionalist and activist, however, the personhood of the fetus is an intensely subjective matter, and the enactment of legislation based upon such a determination would suggest that there are no definable limits to Congress's power to overrule decisions by the

that the differential way in which skepticism is attenuated in theoretical argument—the dramatically different sorts of "judgments" people reach in considering abortion and privacy as constitutional issues—reflects two opposing visions of how the exercise of power can comport with respect for others, and of the possibility and desirability of actively shaping personal and social life.

3. *The Traditionalist and Activist Controversies*

There is a unity to the social visions that underlie the judgments people make in the face of the arbitrary and inherently endless theoretical moral, political, and legal arguments possible within liberal thought. This unity extends to both aspects of the traditionalist and activist controversies.

For the traditionalist, respect for others in personal life is impossible if relationships are conducted outside some given, established, and intrinsically right framework. And for the nonactivist, the avoidance of domination in the exercise of judicial power is impossible if the courts stray outside a given, right framework. For the nontraditionalist and activist, on the other hand, there is no one such framework, in personal or public life.

Similarly, for the traditionalist, individual development and self-realization are bound up with some established, right framework or role. One realizes oneself by cultivating the inherent possibilities of that role, rather than by attempting to create one's own framework. And for the nonactivist, social

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courts that protect individual rights under the fourteenth amendment. Cf. Ely & Tribe, Let There Be Life (Op-Ed), N.Y. Times, Mar. 17, 1981, at A17, col. 4, reprinted in 2 Human Life Bill Hearings, supra note 246, at 860 (referring to "dizzying implications well beyond the abortion controversy"). Moreover, for the activist, the cost of enacting the Human Life Bill is extremely high because it represents an attack on the courts' efforts to protect basic human rights. Thus, the most natural response might be to resolve any theoretical uncertainties about the scope of Congress's power against the Human Life Bill.

The same considerations can be seen in reactions to jurisdiction-stripping proposals. For the traditionalist/nonactivist, the courts' "social engineering" undermines the naturally right and necessary frameworks for personal and political life, and the jurisdiction-stripping bills protect those frameworks. That those bills would stunt the whole activist enterprise is, for the same reason, no occasion for theoretical doubt about the proper scope of congressional power vis-à-vis the jurisdiction of the federal courts. But the nontraditionalist/activist sees no given, necessary frameworks for personal life or for the exercise of state power and does not believe that the activity of the courts since *Brown* threatens to undermine the essential contexts for morality and freedom. The activist has, however, an acute sense of loss at the prospect of calling a halt to the courts' efforts to define basic social values and fundamental rights.

Still, it would be mistaken to suppose that a position on either of the proposals follows logically from each perspective. The activist might accept relatively unlimited congressional discretion to limit federal court jurisdiction or enforce the fourteenth amendment because the existence of such discretion would accord with the idea of a flexible relationship between the courts and Congress, unconstrained by some fixed set of precepts. Cf. M. Perry, supra note 204, at 128-37 (endorsing congressional power to withdraw jurisdiction over "noninterpretive" review cases). Conversely, the apparent looseness or flexibility of that power might dispose the nonactivist to view it as dangerous. See 1 Human Life Bill Hearings, supra note 246, at 313-15 (statement of Prof. Robert Bork) (condemning Katzenbach v. Morgan, 384 U.S. 641 (1966), and opposing the Human Life Bill). What gives each vision its unity is not any one list of positions, but its basic perspective on the indispensability of some given, established framework for the practice of morality and the exercise of power.

institutions and the actors within them are constituted apart from state power in an established, right way. Thus, when power is exercised, it interferes with a preexistent and intrinsically right set of frameworks for personal and collective relationships. For the nontraditionalist and activist, the opposite holds on both counts. They believe that individuals are stunted if they fail to recognize that they can create their own frameworks for self-realization, or are constrained from doing so. Equally, society is stunted if it either fails to recognize that it can shape the conditions of personal and social life, through the exercise of collective power, or is constrained from doing so by fixed notions of the proper forms of state power.

An understanding of this unity illuminates one of the paradoxes discussed in the Introduction: the paradox of selective skepticism. The pro-life view is often associated both with a position on the morality of abortion which rejects skepticism, and with a critique of judicial activism that depends heavily on a skeptical attitude toward theories of fundamental rights and basic social norms. Conversely, pro-choice advocates often seem much more sympathetic to judicial activism. Strikingly, though they argue for the pro-choice position (in part) by pointing skeptically to the impossibility of knowing the status of the fetus or the ultimate morality of abortion, that skepticism disappears when they evaluate the prospects for success in judicial efforts to work out a right to privacy or a theory of fundamental rights.

This paradox cannot be explained by asserting that a convincing argument can be put forth in one area but not the other—at least not if we accept the earlier argument that the nonpolar moral, political, and legal arguments of liberal thought are incoherent.[357] Rather, the explanation for this selective skepticism lies in the way the traditionalist and activist controversies act together to make the "costs" of overcoming skepticism vary according to one perspective or the other. One can see this process at work in the differential ways that skepticism is attenuated or heightened.

a) Attentuated Skepticism: Traditionalist and Activist

For the traditionalist, the skeptical critique of the pro-life view poses little obstacle to proclaiming that abortion is wrong. Even if the conclusion about the status of the fetus were incorrect, little harm is done by prohibiting abortions. The correct framework by which men and women can truly respect one another will be reenforced; further, women will merely be required to conform to the one right role by which they can realize their true autonomy. In contrast, the risk for the pro-life advocate of erroneously concluding that the fetus is not a person is very high.

A similar attenuation of skepticism can be discerned in the activist perspective. The activist is willing to set aside or minimize skeptical doubts about doctrines of fundamental rights because the activist rejects the idea that an

357. See text accompanying notes 156-159 supra.

established, presumptively right role for judicial power will be endangered by the intervention and activism of such a doctrine. Activists believe that even judicial "deference" or "self-restraint" is more properly understood as a decision to shape things in a particular way. Thus, there is no strong sense that undertaking a program of judicial elaboration and enforcement of fundamental rights will risk subverting the essential and naturally right character of those relationships and institutions. There is, then, no sense that serious costs will necessarily be incurred in undertaking such a venture.

Thus, the sense of the incoherence of arguments about the morality of abortion (for the traditionalist) and of the proper scope of a right to privacy (for the activist) is attenuated.

b) Heightened Skepticism: Nontraditionalist and Nonactivist

For the nontraditionalist the conclusion that we can "know" that abortion is wrong is particularly objectionable, not to say dangerous. At stake is whether women will be forced to relate to others in a fixed, established way, as wife and mother in a "traditional" family. Prohibiting abortion stunts women's individual development and self-realization by forcing them into a given, established role which may or may not suit their own personal needs. The skepticism regarding arguments that attempt to prove the immorality (or the morality, for that matter) of abortion is therefore acutely felt.

For the nonactivist, the attempt to develop a doctrine of fundamental rights protecting private life and reshaping social institutions endangers the established framework for judicial power that ultimately protects individual autonomy from domination by the state. And because social institutions and personal relations are constituted apart from the exercise of state power in a given, naturally right way, the risk of setting out a doctrine of "fundamental" personal rights, or of otherwise adopting an active policy toward social institutions is felt to be especially high.

Thus, just as the sense of the incoherence of the arguments about the morality of abortion is especially acute for the nontraditionalist, so is the sense of the incoherence at its sharpest for the nonactivist when considering the propriety of the judicial elaboration of a doctrine of fundamental rights.

4. Conclusion

Liberal moral, political, and legal doctrine regarding abortion and privacy is fundamentally incoherent. The traditionalist/nonactivist and nontraditionalist/activist perspectives, however, attenuate the consciousness of the incoherence in a patterned way. This pattern reflects opposing ideals of human association and individual development, and opposing visions of the justification for and nature of judicial power.

The analysis up to this point is unsatisfying, however. Because the social visions do not eliminate or "resolve" the incoherence, the possibility of normative doctrinal judgment is thrown into doubt. One possible response is to

conclude that doctrinal debate represents nothing more than a contest of wills, with each side attempting to impose its vision of society on the other. As seen at the end of Section I, though, there is reason to doubt that conclusion.[358] There is another possible response: to develop a form of doctrine that explicitly acknowledges, indeed heightens awareness of the two opposing social visions, and in so doing, opens the possibility of a normative judgment less vulnerable to the charge that it is the mask for this or that interest. In order to evaluate the possibility of developing such a form of doctrine, we must first critically examine the traditionalist and activist controversies themselves.

III
ABORTION, PERSONAL LIFE, AND CAPITALIST DEVELOPMENT

A. Introduction

The existence of two opposing social visions, traditionalist and nontraditionalist,[359] might suggest an entirely skeptical conclusion regarding the normative claims of doctrinal arguments over abortion and privacy. Indeed, these visions may suggest an instrumental conception of the relationship of the traditionalist and nontraditionalist visions to the social and political struggles over abortion and related issues such as women's rights and family policy. One might be tempted to view the doctrinal arguments as little more than instruments that each side employs in its struggle to impose on society its own vision of the social order. In fact, one common response to disputes about the status of the fetus or the proper scope of a woman's right to privacy does just that: "traditional" sex roles and family structures are breaking down, and a conservative reaction aims to put women back "in their place."[360] The fight to repeal or limit abortion rights occupies a key place in this strategy. By this understanding, arguments about the status of the fetus simply divert attention from the real issue.

This section argues against the adequacy of this understanding of the character of liberal doctrinal arguments and their relation to the legal and political struggles over abortion. The traditionalist controversy has not only a "timeless" aspect, but also a dimension that is historically specific to the liberal capitalist welfare state. These two aspects must be carefully distinguished. On the one hand, the traditionalist controversy is a manifestation of certain dilemmas that any society must face. Individual development and respect for others seem inconceivable apart from some structure that transcends,

358. See text accompanying notes 189-197 supra.

359. Throughout the rest of this article, the terms "traditionalist" and "nontraditionalist" should be taken to encompass the nonactivist and activist perspectives as well, unless the context clearly indicates otherwise.

360. On the connection between the New Right and the pro-life movement, see, e.g., Gordon & Hunter, Sex, Family, and the New Right: Anti-feminism as a Political Force, Radical Am., Winter 1977-1978, at 9-25; Oliker, Abortion and the Left: The Limits of "Pro-Family" Politics, Socialist Rev., Mar.-Apr. 1981, at 71, 78-84; see also Eisenstein, The Sexual Politics of the New Right, 7 Signs 567 (1982).

or is in some way prior to, the individuals within it. However, *any* such structure may appear inevitably to constrain freedom as well, because it "prostrat[es] . . . the personality to an idol that it mistakes for its own indefinite or even infinite self."[361]

With regard to the activist/nonactivist controversy, if individual freedom is to be preserved, it seems that the exercise of state power must be subject to some kind of constraining structure that takes certain aspects of individual and social life as given and places them beyond the reach of the state. Equally, *any* such structure appears to cripple collective efforts to root out the sources of inequality and hierarchy in private and public life.[362]

These general dilemmas assume a particular form in liberal capitalist democracies. The traditionalist controversy reflects an ambivalent response to the contemporary state and possible future development of liberal welfare capitalism. To understand that response, we must seek a deeper appreciation of the nature of the abortion and privacy struggles than can be gained by an instrumental conception of those struggles.

This section sets aside the doctrinal arguments over abortion and privacy, and examines the relationship of the traditionalist controversy to capitalist development. It first argues that abortion is a social construct, and then argues that the fight over abortion rights is, in addition to being a struggle over access to abortion, a struggle to constitute abortion in a particular way. The section then places the abortion controversy in the context of the central trends of twentieth century capitalist development—the degradation of labor, the rise of the consumption ethic, the growth of bureaucracy and the welfare state, and the breakdown of the sexual division of labor—which are crucial to an understanding of abortion as a social construct. Finally, this discussion sets the stage for the effort in Section IV to sketch out the possible shape of a nonliberal form of a moral, political, and legal doctrine of abortion and privacy.

B. Abortion as a Social Construct

1. Introduction

The problem of abortion cannot be understood in any meaningful way as purely a biological matter, or as merely a matter of medical technique; neither can it be understood as a biological or medical matter about which distinctly *moral* questions may arise. Rather, abortion is a complex of socially constituted experiences which women and men may go through at some point in their lives. It is, more generally, "the *social organization* of sexuality, reproduction, motherhood, the sexual division of labor, and the division of gender itself" which merit our attention.[363]

361. Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563, 660 (1983).

362. For a slightly different statement of the same dilemma, see Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 205, 211-13 (1979).

363. Thorne, Feminist Rethinking of the Family: An Overview, in Rethinking the Family:

There are three aspects to this claim. The first is a rejection of the idea that biology or nature can determine any aspect of social structures or values; the second is the notion that any understanding of biology or nature is immediately social and political; and the third is the assertion that abortion and related social constructs, such as femininity, masculinity, and privacy, can be adequately understood only in relation to the development of capitalism, which forms their context. I will discuss each claim in turn.

First, in analyzing any aspect of society, nothing of importance ever follows logically from biological or natural facts. Of course nature does place some constraints upon social organization. For example, human beings need food to survive; consequently, every society must have some means of providing sufficient food for its members. But because constraints of this sort are quite broad, they cannot account for any particular, concrete aspect of social structure.

This point can be seen with respect to all the issues which make up the traditionalist controversy. There are, of course, biological differences between male and female, but those biological differences cannot account for the differences between "men" and "women," or between "masculinity" and "femininity." Apart from broad parameters set by biology, what it is to be a "man" or a "woman" is a socially determined matter.[364]

The same is true with respect to the family. It is hard to imagine any society in which nurturance and dependence are entirely lacking. Even these needs, however, cannot account for the particular form that the family takes in contemporary society.[365] The "traditional" family—by which its supporters generally mean a private economic unit consisting of husband, wife, and children, supported by the husband's earnings and tended to at home by the wife—is certainly only one of many possible forms that family life can take.[366]

A similar indeterminacy applies to sex and the body. There is, once

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Some Feminist Questions 6 (B. Thorne & M. Yalom eds. 1982) [hereinafter Rethinking the Family]. For a useful analysis of the matters discussed in this subsection, see Jaggar, Human Biology in Feminist Theory: Sexual Equality Reconsidered, in Beyond Domination: New Perspectives on Women and Philosophy 21-42 (C. Gould ed. 1983).

364. It is true, for example, that women, not men, bear children. Yet it does not follow from this fact—or from any biological differences between women and men—that it is natural or inevitable that women will bear primary responsibility for child care. See generally A. Oakley, Subject Women 41-134 (1981); A. Rich, Of Woman Born: Motherhood as Experience and Institution (1976); Sexual Divisions and Society (D. Barker & S. Allen eds. 1976); Women in Society 201-75 (Cambridge Women's Studies Group ed. 1981); Chodorow, Mothering, Male Dominance, and Capitalism, in Capitalist Patriarchy and the Case for Socialist Feminism 83-106 (Z. Eisenstein ed. 1979) [hereinafter Capitalist Patriarchy]; see also text accompanying notes 429-586 infra.

365. See Zaretsky, The Place of the Family in the Origins of the Welfare State, in Rethinking the Family, supra note 363, at 188, 192-96.

366. See text accompanying notes 429-586 infra. See generally Frankfurt Institute for Social Research, Aspects of Sociology 129-47 (1973); M. Poster, Critical Theory of the Family (1978); E. Zaretsky, Capitalism, the Family, and Personal Life (1976); Jordanova, The History of the Family, in Women in Society: Interdisciplinary Essays 41-54 (Cambridge Women's Studies Group 1981).

again, a biological component to sexuality. Nevertheless, "[s]exual interaction within society is not ruled by biological sex drives, but rather by conceptions of morality and marriage."[367] These conceptions cannot be derived simply from a knowledge of human biology, but can only be understood by a study of cultural values and social structure.

The same point can also be made even with respect to defining something as obviously biological as the body. Is a pregnant woman an instance of one body or two bodies? A fetus may develop its own circulation, nervous system, and so on, but it may also be quite sensitive to drugs that the woman takes; further, pregnancy has extensive effects on the woman herself. Such facts by themselves cannot possibly provide an answer to this question; for that we must look to social practices and beliefs. In a society in which pregnancy provided the occasion for detailed and intrusive state regulation of the woman's conduct in order to protect the health of the fetus,[368] and in which the medical management of pregnancy emphasized "the separation of mother and fetus, their needs seen as being at odds with each other,"[369] one would be likely to conclude that the fetus is not part of the woman's body. Conversely, a set of medical practices which treated the needs of mother and fetus as inextricably intertwined, so that what makes the mother healthy benefits the fetus, and which viewed pregnancy, not as a "stress" on the woman's body but as a normal (if temporary) condition, would point towards the opposite conclusion.

Up to this point, the argument might sound like a simple assertion that biological facts and social roles and values are sharply distinct from one another. That, however, is quite the opposite of my argument. Rather, the second aspect of the claim that "abortion," "men" and "women," and so on, are social constructs is that biological facts themselves can be understood or experienced only through social structures and values. Such facts are immediately social and cultural, not "natural"; indeed, the very idea of the purely natural or biological is "the most speculative, most ideal, and most internal element" of a *cultural* representation.[370]

Suppose, for example, that we simply wish to define what abortion "is." We might begin by making an apparently apolitical, descriptive distinction between induced and spontaneous abortions, defining an induced abortion as "the intentional termination of a pregnancy before the fetus is likely to be viable." This distinction, however, has already implicitly raised a whole set of

367. J. Matthaei, An Economic History of Women in America: Women's Work, the Sexual Division of Labor, and the Development of Capitalism 5 (1982).

368. For an example of what such regulation could look like, see Robertson, Procreative Liberty and the Control of Contraception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405 (1983).

369. B. Rothman, In Labor: Women and Power in the Birthplace 276 (1982).

370. 1 M. Foucault, The History of Sexuality 155 (trans. R. Hurley 1978) (speaking of sex and sexuality); see Jaggar, supra note 363, at 39 (noting that the distinction between sex "as a fixed set of biological characteristics" and gender "as a set of variable social norms about the proper behavior of sexed individuals" is unsupportable).

political issues. For one thing, "spontaneous" abortion, along with various other problems in pregnancy like prematurity or low birth weight, cannot be seen as essentially medical or biological, rather than social, matters. The incidence of problems in pregnancy depends upon social factors such as the availability of health care services and proper nutrition for the pregnant woman. Teenagers and very young girls, for example, appear to have a higher tendency towards "problem pregnancies" than do other age groups.[371] While that might in part reflect biological facts,[372] it clearly has much to do with social factors as well. Single pregnant teenagers often suffer from poor nutrition, whether because of poverty or social pressure to be thin. They may also find it difficult to confront their condition until they are well into the pregnancy; therefore, they are unlikely to receive adequate early prenatal care. One simply cannot understand the "medical" problems of adolescent pregnancy without comprehending these social factors.[373] Apart from the problems of adolescents, "spontaneous" abortions (and other problems in pregnancy and childbirth) may depend very heavily on social and political factors such as the degree of workplace exposure to hazardous chemicals.[374]

Thus, we cannot distinguish sharply between "induced" and "spontaneous" abortion, viewing the latter as a matter of biology generated from outside the social structure, while regarding the former as a matter of individual

371. See, e.g., H. Marieskind, Women in the Health System 213 (1980) ("[a]dolescent pregnancies are characterized by increased health risk to the mother and to the infant"); Note, Parental Consent Abortion Statutes, 52 Ind. L.J. 837, 845-46 (1977).

372. See Battaglia, Frazier & Hellegers, Obstetric and Pediatric Complications of Juvenile Pregnancy, 32 Pediatrics 902 (1963) (claiming increased likelihood of complications for pregnancy in very young girls whose bodies are not fully developed).

373. Indeed, one study concluded that "adolescents who receive adequate prepartum care have good obstetric outcomes, despite their young age." McAnarney, Roghmann, Adams, Tatelbaum, Kash, Coulter, Plume & Charney, Obstetric, Neonatal, and Psychosocial Outcome of Pregnant Adolescents, 61 Pediatrics 199, 203 (1978) (footnote omitted). The conclusions of earlier studies showing "a high incidence of toxemia, anemia, cephalopelvic disproportion, and either prolonged or abrupt labors among adolescent mothers," id. at 203-04, were attributed to a failure to control for race and socioeconomic factors in the groups of adolescents studied.

I am certainly not arguing that pregnancy, itself, is never a problem for teenagers; on the contrary, there may well be good reasons why an adolescent wishes not to become a mother. She may, for example, simply feel unprepared or unwilling at that particular stage of her life to take on the task of raising a child. For that reason, access to contraceptives and abortion is essential. My argument, however, is that the problem of teenage pregnancy is a socially (and individually) determined one, not simply a matter of biology. To cite statistics on the medical or social problems in adolescent pregnancy—as if they were simply given, natural facts from which we should conclude that pregnancy "is" a problem for teenagers—is the height of obfuscation. See, e.g., G. Steiner, The Futility of Family Policy 74-75 (1981).

374. On the effect of occupational exposure to chemicals on spontaneous abortions, see S. Barlow & F. Sullivan, Reproductive Hazards of Industrial Chemicals 32-34 (1982). On health hazards to women in the workplace generally, see H. Marieskind, supra note 371, at 176-86. See generally N. Ashford, Crisis in the Workplace: Occupational Disease and Injury: A Report to the Ford Foundation (1976). For analyses of the political dimension of the issue, see, e.g., Trebilcock, OSHA and Equal Employment Opportunity Laws for Women, 7 Preventive Med. 372 (1978); Williams, Firing the Woman to Protect the Fetus, 69 Geo. L.J. 641 (1981).

choice and decisionmaking.[375] A woman ingests lead—for a brief period a relatively popular abortifacient[376]—with the hope of producing an abortion; another has a miscarriage because lead has entered her system from exposure at work.[377] One woman takes a "morning after" pill to prevent further development and implantation of a possibly fertilized egg after unprotected intercourse; another woman suffers a disproportionately high risk that a fertilized egg will be damaged, and thereby fail to implant in her womb, because of workplace exposure to hazardous substances or radiation.[378] In all these cases, the individual experience is mediated by the social and political structures which (among other things) bear heavily on the woman's decision to use contraceptives or seek an abortion, and on an employer's decision to allow dangerous levels of lead or other hazardous chemicals to persist in the workplace environment.

Of course, this is not to deny that there is a sense in which one can speak of the "biological" or "medical" aspects of abortion. To say that the experience of those aspects is always socially mediated is not to put forth a caricatured idealism which asserts that "abortion" is whatever we choose to think it is, or that illness can be cured by espousing the correct political line. Rather, it is an error to believe that we can have any understanding of biology apart from an analysis of cultural and social factors.[379] In asking, "what is abor-

375. The same point can be made regarding "viability," or differing rates of infant mortality, which cannot be understood as medical or biological matters alone, for they depend crucially on the social distribution of income and health care and on social and political decisions about the direction and emphasis of medical research.

376. See E. Shorter, A History of Women's Bodies 211-13 (1982); Hricko, Social Policy Considerations of Occupational Health Standards: The Example of Lead and Reproductive Effects, 7 Preventive Med. 394, 395-96 (1978).

377. Exposure to lead historically has been linked to a higher rate of spontaneous abortion, though it appears that only relatively high levels of exposure are likely to have this particular effect. See Silbergeld, Effects of Lead on Reproduction, in Lead versus Health: Sources and Effects of Low Level Lead Exposure 217, 224 (M. Rutter & R. Jones eds. 1983); Bridbord, Occupational Lead Exposure and Women, 7 Preventive Med. 311, 318 (1978). Nevertheless, it is well established that occupational exposure to hazardous chemicals can have an effect on the likelihood of miscarriage and on the fetus's chances for normal development. See, e.g., Haas & Schottenfeld, Risks to the Offspring from Parental Occupational Exposures, 21 J. Occupational Med. 607, 609-12 (1979) (nurses and female anaesthesiologists exposed to anaesthetic gases appear to have disproportionately high rates of spontaneous abortions and low-birthweight babies). See generally S. Barlow & F. Sullivan, supra note 374. Indeed, there is evidence that exposure of men to hazardous substances may have adverse effects on pregnancy and fetal development, though the existence of the link and the causal mechanisms are harder to establish. See, e.g., Bell & Thomas, Effects of Lead on Mammalian Reproduction, in Lead Toxicity 169 (R. Singhal & J. Thomas eds. 1980); Manson, Human and Laboratory Animal Test Systems Available for Detection of Reproductive Failure, 7 Preventive Med. 322, 327-28 (1978).

378. Haas & Schottenfeld, supra note 377; cf. id. at 610 ("Studies of pregnancy outcome (i.e., spontaneous abortion, late fetal death [stillbirth], low birth weight, neonatal death) in other settings have shown the profound and subtle effects of . . . variables such as race, socioeconomic status, maternal age, birth order, parity, smoking and alcohol exposure during pregnancy, maternal infections, and previous pregnancy outcomes.").

379. On the social constitution of illness, see L. Doyal, with I. Pennell, The Political Economy of Health 49-95 (1979); Eyer & Sterling, Stress-Related Mortality and Social Organization, Rev. Radical Pol. Econ., Spring 1977, at 1-44; Figlio, Sinister Medicine? A Critique of Left

tion?" one necessarily undertakes an analysis of social structures and values, even if the aim is to examine abortion solely as a biological or medical matter. The only question is whether to make the political element explicit, or leave it implicit and unexamined.[380]

I will elaborate this second aspect to the claim that abortion is a social construct in subsections 2 and 3 below. Before turning to that, I will briefly sketch out the implications of this second aspect for understanding the various aspects of the traditionalist controversy. As noted earlier, the differences between "men" and "women" cannot be reduced to the differences between biological male and female. Equally so, the differences between biological male and female cannot themselves be understood apart from an understanding of the social relations which make up "men" and "women." For example, one might claim that it is a biological fact that women alone become pregnant (while conceding that their role as primary childraisers is socially determined). But to become "pregnant" means not only to have a whole set of socially formulated attitudes come to the fore, but also to subject oneself to a whole set of social practices; it may, for example, involve the expectation of an extended absence from the workplace, or, in the case of the teenage girl, an early termination of education. In this sense, it is a socially determined fact that women rather than men become pregnant.

It might be replied that such an approach conflates the biological fact of "pregnancy" with a social role, "pregnancy," built around it. Nothing of any significance, however, can be said even about the biological or medical aspects of pregnancy that does not, at the same time, entail an understanding of the social relations between men and women, doctor and patient, and so on. A woman's attitude towards being pregnant or towards the prospect of having a child—which may range from unqualified joy to profound anxiety—may well affect the course of her physical reactions to it. More broadly, many illnesses characteristic of women reflect equally their social circumstances as women

Approaches to Medicine, 9 Radical Sci. J. 14-68 (1979); Stark, What is Medicine?, 12 Radical Sci. J. 46-89 (1982); see also Stark, Flitcraft & Frazier, Medicine and Patriarchal Violence: The Social Construction of a "Private" Event, 9 Int'l J. Health Servs. 461 (1979). For further references see L. Doyal, Women, Health and the Sexual Division of Labor: A Case Study of the Women's Health Movement in Britain, 13 Int'l J. Health Servs. 373, 381-83 (1983) (development of "socialist feminist epidemiology").

380. For this reason the generally insightful approach of Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984), seems mistaken in resting the analysis on "the reality of categorical biological differences between men and women." Id. at 962. To the extent that the statement, "[w]omen have . . . [the] experiences" of pregnancy and abortion, while "[m]en do not," id. at 1007, rests on a biological difference, that statement is only trivially true. If we attempt to say *anything* significant about the experience of abortion, we immediately leave the realm of purely biological understanding. Moreover, while the experience of abortion might well be different for women and for men even in a society that respected sexual equality and reproductive freedom, nothing in human biology dictates that it would only be women who have the "experience" of abortion. Nor does anything in human biology determine how much significance people would perceive in the differences between the woman's and the man's experiences of abortion. See text accompanying notes 386-420 infra.

and their biology; depression among housewives is one example.[381] Finally, our understanding of sexuality and the body cannot be clearly separated into two components, one pertaining to biology or nature, the other to social roles built up around them. The "idea that the sexual is some naked and primordial realm of individual human being is itself a fully cultural representation."[382]

The third and final aspect to the assertion that abortion is a social construct is the claim that we can understand the outcome of struggles to constitute abortion in one way or another only within the context of capitalist development. My intention is not to present some sort of functionalist perspective, in which social "needs" are taken inexorably to shape the structure of the family or the production and allocation of social roles. Neither the family nor the existence of masculine and feminine roles allocated by biological sex is peculiar to capitalism. Nevertheless, the particular form they take is closely related to the capitalist order of work and consumption. Thus capitalist development has had, and continues to have, a deep and lasting impact on the struggles over abortion.

2. *The Experience of Abortion*

In one sense, the phenomenon of abortion is constituted by decisions concerning the use of contraceptives, or more generally, by the extent to which individuals explicitly think about and make plans regarding the possibility of conception. The question of abortion would arise far less often if men and women who desire not to have children at a particular time consistently used effective contraceptive methods. Yet decisions whether to use contraception are not reducible to technical factors,[383] nor can they be understood simply in terms of individual rationality (or lack of it) or personal morality. One needs to consider the impact of sex roles and other social factors in addition to the technology of birth control.

With respect to sex roles, socially ingrained beliefs about women's sexuality may lead an unmarried woman to fear that conscious, advance planning for sex—which many methods of contraception such as the pill or the IUD require—will mark her as the "wrong" type of woman, in her own eyes as well

381. See generally G. Brown & T. Harris, The Social Origins of Depression (1978). The social element in women's health problems perhaps becomes most obvious when we consider domestic violence against women.

382. S. Heath, The Sexual Fix 11 (1982).

383. See L. Rainwater, with K. Weinstein, And the Poor Get Children: Sex, Contraception, and Family Planning in the Working Class 21 (1960) (effectiveness of contraceptive methods is not a purely technical or medical matter, because "the total contraceptive act of which the method or appliance is only one part is complex, and in the dynamics of the required cooperative act there are many ways performance can fall short of that necessary for effectiveness"); Rakusen, Depo-Provera: The Extent of the Problem—A Case Study in the Politics of Birth Control, in Women, Health and Reproduction 75, 100 (H. Roberts ed. 1981) ("effectiveness" of contraceptive method inextricably tied up with question whether abortion is freely available as a back-up).

as in her partner's.[384] Similarly, she may not think ahead about contraceptives because to do so would foster feelings of guilt or shame within her that she would not feel if the act of sex appeared to be the product of the passions of the moment.[385] Conversely, refraining from using contraceptives may result in a pregnancy with a number of benefits for the woman, even if the pregnancy ultimately is terminated. In a society in which women are still very much defined as reproductive beings, becoming pregnant may have the benefit of proving one's "womanhood" and fertility. Furthermore, the occasion of discovering pregnancy may force sexual partners, whether married or not, to define their commitment more fully.

For men, the decision whether to use contraceptives is marked by different considerations. Men generally do not fear being seen as sexually active, and while fatherhood, or at least fertility, certainly is important to many men, the greater importance of work in their lives generally makes this factor much less influential.[386] In fact, the very decision whether to use contraceptives at all may not even be a "decision" as far as the man is concerned, if—married or not—he takes it to be the woman's responsibility.

Other factors, such as age and class differences, similarly affect contraceptive decision making. For the professional couple who feel solidly in control of their future, family planning may be the obvious course of action. For a working class couple with far less control over their future prospects, in contrast, leaving things to chance may seem the more rational response: it makes much less sense to plan things if all the options involve a high degree

384. Here, I draw heavily on K. Luker, Taking Chances: Abortion and the Decision Not to Contracept (1975); see also M. Zimmerman, Passage Through Abortion: The Personal and Social Reality of Women's Experiences 76-91 (1977); Folbre, Of Patriarchy Born: The Political Economy of Fertility Decisions, 9 Feminist Stud. 261 (1983).

385. L. Rainwater, with K. Weinstein, supra note 383, at 134, suggests that this may be a factor for some married women as well.

386. See id. at 82-86.

This is not to suggest that individuals explicitly weigh the various costs and benefits of contraceptive risk-taking. Indeed, in extreme cases, the decision to use contraceptives may not have been made by either partner but by a doctor: the abuse of Depo-Provera, a long-lasting contraceptive given by injection to a number of women without their consent, is a case in point. For a thorough and balanced discussion, see Rakusen, supra note 383, at 75-108; see also Gillie, Pressing the Needle But Not the Facts, The Sunday Times (London), Apr. 24, 1983, at 3, col. 2; cf. H. Marieskind, supra note 371, at 103 (involuntary sterilization of lower-income women). Only somewhat less coercive are the cases in which women must "agree" to be sterilized in order to avoid being fired or transferred from their current job in which they are exposed to hazardous substances. See Hricko, supra note 376, at 399; Williams, supra note 374, at 641-43, 647-51.

The point is that these factors make up a context, rooted in socially constructed definitions of "manhood" and "womanhood," which exerts a powerful influence on patterns of individual contraceptive use. Thus, a woman who does not want children at a particular time but who fails to use contraceptives is not necessarily acting out of ignorance, irrationality, or an unconscious wish to have children. If single, she may be "affirming her femininity" by refusing to define herself as a sexually active person. If married, she may be pressured by her husband into not using contraceptives at all, or using them only sporadically. Conversely, using an "effective" method may not indicate a conscious, rational choice at all, as when a doctor injects her with Depo-Provera without telling her.

of job insecurity, financial worries, and general unpredictability.[387] Age differences play a role as well; the sexually active teenager may find that access to many contraceptives is effectively barred by parental notification or consent statutes, or by the difficulties of finding a doctor, scheduling an appointment, paying for the contraceptives, and a host of other social barriers.

Even the technology of birth control itself is socially constituted. In turn, this technology exercises a powerful influence on patterns of contraceptive use. Most contraceptive research has focused on the woman's reproductive system, producing most notably the oral contraceptive and the IUD. With the rise of these two female-oriented methods to prominence—partly blunted by fears of their effects on the woman's health—the tendency to see contraception as the woman's exclusive responsibility is strengthened. Yet the focus of contraceptive research is neither neutral nor technologically ordained. Perhaps biological differences between male and female—such as the fact that a woman produces one egg at a time and a man millions of sperm, possibly giving a male contraceptive a more difficult task—explain to some degree the emphasis of contraceptive research on women's reproductive processes. In part, however, this emphasis results from the socially determined fact that women bear the major consequences of pregnancy, and so, it is thought, have the greater incentive to use whatever contraceptives are developed. Because actual patterns of usage are crucial to a contraceptive's effectiveness, the decision to concentrate on developing methods aimed at women appears a natural one—so long as one accepts the existing social division of labor with regard to pregnancy and childraising. Thus, the emphasis on contraceptives that are used by women reinforces the notion that reproduction is necessarily a concern peculiarly for them.[388]

The decision as to *which* types of female-oriented contraceptive methods on which to concentrate in research is also influenced by social factors. Much research emphasis is placed upon developing long-term injectable contraceptives that could last for several months or possibly longer. There is much to be said in favor of having the choice of such a contraceptive, if safe and effective; its development is by no means objectionable *per se*. Clearly, though, much of the impetus behind the focus of research on this method stems from the "advantage" that, "by being injectable [and long-lasting], control need not lie in the woman's hands."[389] Behind the perception of this advantage lies stereotyped notions about women (especially in the Third World), such as the idea that "[e]ither because of indifference or sheer forgetfulness many women

387. On class differences in the use of contraceptives, see L. Gordon, Woman's Body, Woman's Right: Birth Control in America 403-09 (1976); L. Rainwater, with K. Weinstein, supra note 383, at 27-28, 153-54 (use of diaphragm positively correlated with level of formal education); Roberts, Women, Social Class and IUD Use, 2 Women's Stud. Int'l Q. 49, 51-52 (1979) (in British study, IUD found to be prescribed relatively more frequently to wives of manual workers).

388. See K. Luker, supra note 384, at 125-26.

389. Rakusen, supra note 383, at 77.

who at least pay lip service to birth control are incapable of using an oral contraceptive successfully."[390] Long-term injectable contraceptives—developed, tested, and distributed by a population control or family planning establishment permeated by sexist assumptions—can easily play a part in removing control of contraception from women's hands while maintaining the focus of contraception on women.[391]

If abortion is constituted in part by patterns of contraceptive use that are themselves deeply influenced by social practices and beliefs about men, women, and sexuality, it is also a product of decisions taken once pregnancy is discovered. The character of the experience of deciding whether to terminate a pregnancy rests in large part upon structures of class, sex role, family life, and age. For example, middle- and upper-class couples may have adequate financial resources to make the choice free of such considerations; those with lower-income or unsteady jobs may feel constrained to have an abortion because they cannot afford to have a child at that time. Pregnant single women typically find such constraints especially strong because of the continued impact of sex discrimination on women's wages, so that having children on their own is simply "unrealistic." Conversely, the necessity of a large cash outlay for an abortion if no public funding is available may effectively leave a poor woman with no choice but to continue with the pregnancy.[392]

Consider the impact of sex role, family structure, and age differences in the abortion decision: a woman planning a career must realistically expect much more difficulty pursuing it if she becomes a mother than her husband need expect upon becoming a father.[393] In making the actual decision, moreover, the woman's relationships with others, which depend heavily on differences in sex role and family structure, can be crucial. For example, one minor may feel free to tell her parents and seek their advice; another may fear being thrown out of the house.[394] One woman may reach a genuinely mutual deci-

390. C. Wood & B. Suitters, The Fight for Acceptance: A History of Contraception 211 (1970); see id. at 211-12; see also Sher, Subsidized Abortion: Moral Rights and Moral Compromise, 10 Phil. & Pub. Aff. 361, 365 (1981) ("most women who become pregnant without wanting to, appear to do so because they neglect to take rudimentary contraceptive precautions (or to see that such precautions are taken)").

391. Although his general thesis is to the contrary, the discussion of the abortifacient "apiol" in E. Shorter, supra note 376, at 214-224, indicates clearly how the politics of medicine and sex intertwine to shape decisions about the direction of contraceptive research, which in turn produces a particular range of options not explicable solely in terms of the general state of technical knowledge.

392. See The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 98 n.13 (1980). For a good discussion of the experience of deciding what to do once pregnancy is discovered, see M. Zimmerman, supra note 384, at 109-50.

393. Class differences are important as well; in the case of professional or middle-class couples with the means to hire help or pay for day care, the woman's dilemma is less severe. See generally R. Petchesky, Abortion and Woman's Choice 148-55 (1984).

394. See M. Zimmerman, supra note 384, at 126-33; Dembitz, The Supreme Court and a Minor's Abortion Decision, 80 Colum. L. Rev. 1251, 1255-56 (1980); cf. State v. Koome, 84 Wash. 2d 901, 530 P.2d 260, 265 (1975) (father sought to force minor to continue pregnancy in order to deter future pregnancies).

sion with her husband or partner; another woman who discusses the matter with the husband may find him "ordering" her not to have an abortion; still another may encounter assurances of mutual decision making accompanied by subtle threats and coercions.[395] Or, anticipating unwanted pressure one way or the other, a woman may not confide in her partner or family at all, seeking advice or support from other relatives or friends.[396] Finally, the very aura of deviance that still surrounds abortion may itself color the woman's perception of her own choice. In one study, most women who had had abortions expressed some doubts and misgivings about its morality—doubts which they tended to resolve by "portray[ing] themselves as having 'no choice' in the matter of abortion, being 'forced' [by circumstances] to have the abortion."[397]

Whatever the woman decides to do, her next step will bring her in close contact with the medical profession. If she decides on abortion, she will not experience some abstract procedure terminating a pregnancy. She may go to a hospital, where she will be admitted as a patient, assigned to a hospital bed, wheeled to an operating room, and fully anaesthetized. Or she may go to a clinic where conscious efforts are made to deviate from the traditional medical model, with group counseling and discussions of future contraceptive use. In such clinics the actual abortion will be treated much more like a minor procedure, generally performed under local anaesthetic.[398] Similarly, the woman who decides to have the baby finds herself subject not to "pregnancy" in some abstract sense, but to a particular set of social and personal expectations—which vary considerably for, say, the married professional and the single teenager.[399] The woman will not merely "have a baby" but will, for example, go to a hospital, where she will enter into a particular set of social relations in which she is treated as an object of medical intervention, and moved along from one stage to the next according to predetermined notions of "normal" labor. For many women, participation will be limited for the most part to conscious attempts to control their pain in lieu of being heavily drugged. They will be subject to a whole host of medical rituals—shaving, enemas, episiotomies—more notable for their efficaciousness in securing wo-

395. See L. Rubin, Worlds of Pain: Life in the Working-Class Family 96-98 (1976).

396. See M. Zimmerman, supra note 384, at 113-38.

397. Id. at 193. Obviously, more practical factors, like a lack of resources to care for a child, may contribute to the perception as well.

398. For descriptions of the abortion experience, see id. at 151-87; L. Franke, The Ambivalence of Abortion (1978); Hollway, Ideology and Medical Abortion, 8 Radical Sci. J. 39-59 (1979); see also B. Benderly, Thinking About Abortion 84-86 (1984). For descriptions of the abortion experience before *Roe* was decided, see M. Denes, In Necessity and Sorrow: Life and Death in an Abortion Hospital (1976); N. Lee, The Search for an Abortionist 78-102 (1969).

399. Macintyre, Who Wants Babies? The Social Construction of Instincts, in Sexual Divisions and Society: Process and Change 150-73 (D. Barker & S. Allen eds. 1976), documents how the different expectations pervade medical practice, concluding that medical theories of women's desire for children "*systematically* vary according to social or civil status, the main distinction being between married and unmarried persons. To the question—'Who wants babies?'— their response on the one hand is that 'all women want babies,' but on the other, that 'only married women want babies.' " Id. at 167-68.

men's status as patients than in protecting their health. Childbirth becomes an event at which they are present, not an activity that they perform.[400]

3. *The Struggle to Constitute Abortion*

Abortion is not purely an individual moral dilemma; nor is it a technical medical issue that can be understood apart from political and social structures. For this reason, the dispute over abortion is not concerned only with "access" to abortion, but also with what abortion is. Similarly, the struggles over the right of privacy are not just attempts to establish a relationship between given spheres of state power and private life, but are also efforts to constitute what those spheres are.

The constitutive nature of the struggle concerning abortion emerges from a close examination of the attempts to restrict abortion since *Roe*. Through anti-abortion regulations, pro-life advocates have attempted not only to limit access to abortion, but also to constitute it as a grave and tragic course of action—one which only a selfish and uncaring woman would undertake lightly, and which a normal woman would choose only for the most compelling of reasons (such as a threat to her own life). This is not just a matter of promoting a certain view of abortion, but of embedding that view in the actual experience of abortion.

For example, mandatory twenty-four hour waiting periods, and so-called informed consent requirements—which require that the woman seeking an abortion be told, among other things, that the fetus is a person and is sensitive to pain—are intended to reduce the number of abortions, and certainly may do so.[401] But they are also intended to constitute abortion as a grave matter—the taking of human life—to be undertaken only after prolonged (and doubt-

400. For discussions and critiques of the experience of childbirth, see A. Rich, supra note 364, at 156-85; B. Rothman, supra note 369. For a concise critique, see Richards, Innovation in Medical Practice: Obstetricians and the Induction of Labour in Britain, 9 Soc. Sci. & Med. 595, 595-96 (1975).

401. These and other restrictions on "access" were reviewed by the Supreme Court in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983), and Simopoulos v. Virginia, 462 U.S. 506 (1983). In essence, the Court reaffirmed its commitment to *Roe v. Wade*, see *Akron*, 462 U.S. at 420 & n.1, and struck down a number of restrictive regulations on abortion. Among these were an "informed consent" provision (requiring the attending physician to inform the woman of various matters, including the statement that "the unborn child is a human life from the moment of conception," id. at 423 n.5), a twenty-four hour waiting period between the time consent was given for an abortion and the time of the abortion itself, id. at 424, and a requirement that fetal remains be disposed of in a "humane and sanitary" manner. Id. In addition to striking these down, id. at 442-46, the Court also held invalid a provision requiring all second- and third-trimester abortions to be performed in a hospital, ruling that the accepted medical view today is that second-semester "dilatation-and-evacuation" abortions may be safely performed in clinics, and that the extra expense of a hospital abortion impermissibly burdens a woman's right to privacy. Id. at 434-39. The Court also struck down a provision requiring parental consent or a court order for a minor (under 15) to have an abortion, because no provision was made for such minors to be able to demonstrate their maturity. Id. at 439-42. The Court did uphold a number of regulations, however, including requirements that a second physician attend at all post-viability abortions, that a pathology test be performed on the fetal remains in all abortions, *Ashcroft*,

less agonizing) consideration. Similarly, statutes banning abortions outside of hospitals, requiring that two physicians consent to the abortion, or prohibiting less drastic methods such as saline induction in favor of either more intrusive methods such as hysterotomy or riskier methods like the use of prostaglandins to induce the expulsion of the fetus,[402] cannot be understood simply as limiting access to abortion (although they have that effect by making it more expensive, time-consuming, and dangerous). Such efforts are also attempts to transform abortion into a major medical event, "to make it a carefully considered decision supported by something like a consensus of impeccable medical opinion in the confines of a distinguished hospital."[403]

Equally constitutive are the abortion funding cut-offs. Once again, the aim in part is to reduce the number of abortions.[404] But the argument that taxpayers should not be expected to pay for something which they believe to be murder is more than a gloss on that purpose. The cut-off of funds has the effect of a public declaration of the abnormality, if not the immorality, of abortion; it is too dirty a business for the government to be funding. Abortion is thereby labelled as so uniquely immoral that it should not be publicly funded, despite the general policy of requiring individuals to finance government programs they may consider deeply abhorrent (such as the nuclear arms race and attempts to overthrow leftist Latin American governments). For an individual woman with a limited income, a lack of funding may turn an abortion decision into a desperate search for money. This may be a pale version of pre-1973 search for an illegal abortionist[405]—the illegality, secrecy, and potential dangers of which contributed to the stigma of abortion and to accompanying feelings of guilt and remorse[406]—but the effect is similar: no woman in such a position will come to see abortion as a simple, routine matter.

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462 U.S. at 482-90, and that all second-trimester abortions be performed in licensed clinics, *Simopoulos*, 462 U.S. at 516-17.

Two cases currently pending before the Supreme Court raise many of the same issues. Those cases are: Thornburg v. American College of Obstetricians and Gynecologists, No. 84-495 (S. Ct. argued Nov. 5, 1985), and Diamond v. Charles, No. 84-1379 (S. Ct. argued Nov. 5, 1985). As noted earlier, the Reagan Administration has asked the Court to overturn the *Roe* decision. See note 4 supra. Whether the Court will treat these cases as the occasion for reconsidering its earlier rulings is unclear.

402. See Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976). For a description of the various techniques, including the saline method (in which the fluids in the womb are replaced by a saline solution, thereby inducing labor) and hysterotomy (surgical removal of the fetus), see M. Potts, P. Diggory & J. Peel, Abortion 178-252 (1977); World Health Organization, Induced Abortion: Guidelines for the Provision of Care and Services (1979).

403. Charles, Abortion and Family Planning, in Legal Aspects of Health Policy 331, 337 (R. Roemer & G. McKray eds. 1980).

404. See, e.g., Horan & Marzen, The Moral Interest of the State in Abortion Funding: A Comment on *Beal*, *Maher*, and *Poelker*, 22 St. Louis U.L.J. 566, 566 (1978) (funding restrictions "represent the first step toward the ultimate goal" of eliminating abortion); see id. at 573-75.

405. See N. Lee, supra note 398.

406. See M. Zimmerman, supra note 384, at 19-31 (noting that studies demonstrating that abortion "necessarily" has bad psychological effects on the woman were often biased by failure to take into account the fact that its illegality made it more traumatic). See generally Shus-

Similarly, statutes requiring parental consent for a minor's abortion are more than just attempts to restrict the incidence of abortion among minors; they are efforts to constitute it as an abnormal, grave decision, made only with the concurrence of a mature adult who has considered it very seriously. As some commentators have noted, parental consent requirements cannot be explained simply as intended to ensure that significant decisions will be made with the parents' advice, for nothing requires that a minor seek her parents' advice or consent to continue with the pregnancy. Under such statutes, then, minors are considered too immature to consent to an abortion yet mature enough to decide to become a mother.[407] To argue against these statutes solely on the basis of this paradox, however, is to miss the point. Abortion—constituted as a grave moral dilemma, a major medical event, and a deviation from what is normal, right, and healthy for any pregnant female—could present a uniquely serious threat to the emotional and psychological health of the minor undergoing it.

Finally, the requirements that a woman give "informed consent" to abortion, that two physicians be present at any post-viability abortion (one to attend to the woman and the other to the fetus), and that a separate examination of the fetal tissue be performed by a pathologist,[408] are efforts to embed in the very practice of abortion its character as the taking of human life. These requirements not only discourage women from having abortions by increasing their cost,[409] but also help constitute abortion in a way consistent with the pro-life advocates' views. To the extent that such efforts succeed, it is simply inadequate to speak of "less" access to "abortion"; in a very real sense, that which women have access to has itself been transformed.[410]

Pro-choice advocates have made their own efforts to constitute abortion in a way that conforms to their visions. Basically, the idea is to constitute abortion as a relatively minor and normal medical procedure which any woman may undergo if she so chooses. In part, these efforts are positive ones; they support abortion clinics in which simple procedures and local anaesthet-

terman, The Psychosocial Factors of the Abortion Experience: A Critical Review, 1 Psychology of Women Q. 79 (1976).

407. See, e.g., Comment, Constitutional Law— Civil Rights—Consent Requirements and Abortions for Minors—*Bellotti v. Baird*, 26 N.Y.L. Sch. L. Rev. 837, 849-50 (1981); Note, Parental Consent Abortion Statutes, 52 Ind. L.J. 837, 847 (1977).

408. See note 401 supra.

409. Indeed, in *Akron* and *Ashcroft*, the Supreme Court considered the impact of most of those requirements on the abortion decision solely in terms of whether they created too great a financial obstacle to abortion. See, e.g., *Akron*, 462 U.S. at 435 (in-hospital requirement); *Ashcroft*, 462 U.S. at 489 (pathology test).

410. In this respect, anti-abortion demonstrations, sit-ins, and picketing at clinics cannot be understood solely in terms of their impact on "access"—that is, in terms of whether demonstrators physically block access to the clinic or discourage women from coming at all. See B. Harrison, Our Right to Choose: Toward a New Ethic of Abortion 1 (1983); H. Marieskind, supra note 371, at 106-07. Once again, such actions also contribute to making abortion a difficult decision personally and a divisive issue politically. Abortion cannot be a normal, routine matter so long as it is the object of such tactics.

ics are used, in which the routine nature of abortion is emphasized by abortion counselors, and in which women are urged to learn about their bodies and assert more control over their own health care.[411] Much effort has been expended since *Roe*, however, in defensive actions against the pro-life forces' legislative successes in regulating abortion. Here, too, the opposition to "informed consent" provisions, hospitalization requirements, funding cut-offs, and the like, is more than a matter of ensuring "access" to abortion. Opposing such measures is perfectly consistent with the idea of abortion as an accepted, routine measure taken by those women who personally feel it to be acceptable and who do not wish to continue with their pregnancy.

In short, the struggle is not simply over the availability of abortion, but also over what abortion is. Pro-life advocates seek to constitute abortion as a grave, agonizing, and necessarily tragic matter. On the other hand, pro-choice advocates attempt to constitute it as a relatively minor procedure, routinely available and chosen by the woman (in consultation with whomever she involves in the decision) on the basis of her own personal deliberations. There is, however, another dimension to this constitutive struggle over abortion. Pro-life advocates seek to make abortion not just "grave" in general, but in a particular way—grave because abortion undermines those structures which are indispensable to caring for others and for individual self-realization. Conversely, pro-choice advocates seek to constitute abortion not *just* as a routine and relatively minor procedure, but one which heightens the woman's independence from traditional sex roles and family structures. Thus, the struggle over abortion is intimately connected with the traditionalist controversies over women and the family, sex, and control over human biology.

The reaction to the breakdown of the "traditional" family has taken many forms, including opposition to the Equal Rights Amendment, support for the proposed Family Protection Act,[412] and attacks on what is perceived as the welfare state's undermining of traditional virtues and morals. The struggle between traditionalists and nontraditionalists over these issues has a dual relation to the struggle over abortion.

On the one hand, the traditionalist aim is to reaffirm "that woman's vocation of homemaking is a God-given and exalted one"[413]—to constitute "woman" as mother and wife, fulfilling herself by subordinating her own needs to the family's and thereby facilitating and providing the emotional support which gives family life its special meaning. Clearly, women so constituted would be less likely to seek or desire abortion in the first place, viewing it as a selfish sacrifice of their natural function. Conversely, by constituting abortion as necessarily degrading and abnormal, even the act of having an abortion

411. See S. Ruzek, The Women's Health Movement: Feminist Alternatives to Medical Control 103-42 (1978).

412. S. 1378, 97th Cong., 1st Sess., 127 Cong. Rec. S6324 (daily ed. June 17, 1981).

413. Matthaei, supra note 367, at 275; see id. at 275-77; see also Z. Eisenstein, Feminism and Sexual Equality 47-52 (1984).

would serve only to reaffirm the traditional role of women, heightening the abnormality of those who seek it.

Attempts to require a husband's consent for abortion illustrate this dual relationship well. To force a woman to engage in such a submissive act as seeking a note from her husband to have an abortion would give powerful reinforcement to the structures of male domination within the family—even if the woman had in fact arrived at the decision jointly with her husband.[414] In turn, this reinforcement of the traditional role of women might lessen the chance that a woman would wish to have an abortion in the first place. Conversely, giving the husband veto power would also set abortion apart as an abnormal, deviant procedure, thereby contributing to the constitution of "abortion" as a negation of the woman's natural and normal role as mother.

Traditionalists have also sought to reassert the necessity of a given framework for morality in sexual relations—essentially, a marriage relationship in which the woman is subordinate to the husband's authority. For example, attempts to condition the availabilty of contraceptives to young unmarried girls on parental consent are not merely efforts to limit access to birth control, or to shore up parental authority over children. They are also efforts to constitute sexuality as something inappropriate for unmarried teenagers. The effectiveness of this approach in discouraging sexual activity among minors is questionable. That such discouragement is an aim of parental consent statues, however, is evident from the traditionalist rejection of the argument that teenagers will have sexual relations even if denied contraceptives; the solution in the long run is to teach minors to be chaste. Once again, to the extent that sexuality is tied into the framework of marriage and family—constituted in a "traditional" way—abortion would be much less sought after in the first place. It is when women actively seek to take control over their sexuality, whether within or without marriage, that an "abortion-consciousness"[415] arises. Conversely, the constitution of abortion as a major medical event, as an occasion of agonizing, as a point of tragic breakdown in the normal conduct of life, would contribute to the constitution of sexuality as a matter tied up with traditional family life and marriage.

Finally, the same relationship can be seen with regard to efforts to assume greater control over human biology. To take one example, opposition to *in vitro* fertilization makes sense from a traditionalist point of view because the technology greatly facilitates (though does not necessarily lead to) the separation of reproduction from the family; more generally, *in vitro* fertilization marks a conscious will to assert active control over human biology. Constituting it as necessarily degrading and leading to abuses once again contributes to constituting abortion in the particular pro-life form. This relationship can be

414. Cf. Tribe, The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 39-41 (1973) (requiring consent of husband for wife's abortion inevitably binds her to unequal power relation).

415. V. Greenwood & J. Young, Abortion in Demand 33 (1976).

quite direct. Forbidding the fertilization of more than one egg at a time (out of fear that unneeded fertilized eggs would be disposed of) would have the same effect as statutes mandating a pathology test on fetal remains, or requiring that fetal remains be disposed in a "humane" manner: it would help to constitute the fetus as a human being. Conversely, constituting abortion (as well as any experimentation on fetal remains) as an example of human experimentation or Nazi-like manipulation of individuals would support the social construction of active intervention into human biology as necessarily dangerous and incompatible with morality in human relations.

Up to this point we have focused on the traditionalist controversy, but the activist controversy is implicated as well. Closely bound up with the pro-life effort is the attempt to constitute *Roe* as a particularly horrifying and abusive exercise of judicial power. *Roe* may be questioned for doctrinal reasons, but there is another dimension to the pro-life opposition to *Roe*. The very act of making it controversial, presenting it as highly problematic for anyone who believes that judicial power should be exercised on a principled basis, has the same dual relationship to abortion as do the other efforts to constitute abortion as a grave matter incompatible with morality and freedom.

Constituting the legalization of abortion as an example of raw judicial power contributes to constituting abortion as a tragic, immoral matter, which no plausibly justifiable exercise of power could sanction.[416] Whatever moral force or authority the decision might otherwise have in persuading people to accept at least a right to abortion is undermined. More broadly, the controversy itself contributes to the construction of abortion as a difficult and agonizing problem—for society as well as for individuals—and prevents its being seen or practiced as a normal, routine matter.[417]

Conversely, constituting *Roe* as an intrinsically abusive decision precisely because it did sanction abortion would promote the perception that activist exercises of judicial power necessarily undermine the framework for morality and freedom. There is a certain logic to the pro-life choice of the *Dred Scott*[418] decision over *Brown* as the closest parallel to *Roe* even apart from whatever doctrinal arguments might be made to support the choice. Judicial activism of the sort represented by *Roe*, in their view, necessarily upsets the

416. See, e.g., Byrn, Abortion-on-Demand: Whose Morality?, 46 Notre Dame Law. 5, 36-39 (1970) ("quality of life jurisprudence" of pro-choice advocates breaks down moral fabric of society); 1 The Human Life Bill: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 89 (1981) (public policy cannot today foster respect for human life because "the edict of *Roe v. Wade* dictates a totally contrary policy . . . . It is a legal, constitutional premise that gives aid and comfort to the abortion clinic society.") (remarks of Sen. John East); id. at 623, 625 (abortion decision is an aspect of general "judicial imperialism," and typical of "autocratic actions of Federal judges") (remarks of Prof. Charles Rice).

417. See, e.g., J. Noonan, A Private Choice 190-91 (1979) (legalization of abortion has sundered family unity and plunged the nation into agonizing conflict; lower courts which ruled that abortion funding restrictions were unconstitutional were forcing individuals to "cooperate" with the practice of abortion).

418. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

political balance and imposes on society immoral choices. In other words, when judges begin "social engineering," the risk is always unacceptably high that their decisions will be politically and morally disastrous.

While pro-life advocates link abortion with the unravelling of society's moral fabric, for most pro-choice advocates there is no strict linkage between the recognition of the right to abortion and other aspects of society. Abortion does not inevitably lead us toward any particular social order; it simply leads us away from a society in which women are constrained to one particular role, in which sex is confined to one particular context, and in which control over human biology is tightly circumscribed by one moral code. Most pro-choice advocates seek to constitute abortion as a procedure that is routine precisely because it is an instance of personal decision making divorced from any intrinsic connections to the social structure in which the decision is made.[419]

Thus, if abortion is a routine, minor, and easily available procedure, the woman makes her own personal decision about it; even if she rejects abortion, the fact that she could easily have had one emphasizes that the decision was indeed her own. In turn, constituting the abortion decision as a matter of personal choice lends powerful support to the nontraditionalist idea that individuals are free to the extent that they choose their own roles and structures. Even a woman who accepts motherhood as her primary role will be more likely to see herself as having chosen that role, rather than fulfilled a God-given plan, if she knows that she could control her fertility by routinely available abortion and birth control. Conversely, if individuals do observe traditional constraints on sex, the fact that abortion is a minor, routine procedure easily available to correct failures of contraception makes that observance a matter of personal choice, not part of a larger set of inexorable necessities. Further, the routine nature of abortion emphasizes that control over human

419. The accuracy of this characterization might be challenged by pointing to feminists for whom the individual woman's right to choose makes a meaningful contribution to women's freedom and equality only to the extent that recognition of the right is tied into a thorough transformation of society. See text accompanying notes 587-650 infra. Radical or socialist feminist arguments like these take us a long way to overcoming the deficiencies of any liberal right, including the right to abortion. But my attention here is focused on the mainstream liberal feminist arguments which have dominated the pro-choice side of the abortion controversy, as well as other feminist issues. See Z. Eisenstein, The Radical Future of Liberal Feminism 229-32 (1981) (noting dominance of liberal feminism); cf. Law, supra note 380 (noting that dominant vision of sexual equality "is an assimilationist one, which conceives of a society in which sex would be a wholly unimportant characteristic of individuals, having no greater significance than eye color has in our own society"). And these mainstream pro-choice arguments have generally sought to dissociate the right to abortion from any necessary link to a broader transformation of society. This tendency is most clearly manifested in efforts to present the right to abortion purely as a matter of private, individual choice. See, e.g., P. Rothstein & M. Williams, Westchester Coalition for Legal Abortion, Choice—Legal Abortion: Arguments Pro & Con (pamphlet distributed by National Abortion Rights Action League) ("The right to abortion is based on the right of privacy, not equal rights. . . . ERA and abortion funding are entirely separate issues."); cf. B. Harrison, supra note 410, at 50 (noting and criticizing tendency to depict argument for right to abortion in terms of "choice for choice's sake") (emphasis deleted).

biology is not in itself degrading, and that it has no one determinate meaning. The moral significance of such control is for people to decide, just as the moral significance of abortion does not somehow inhere in the nature of abortion but rather is something individuals determine for themselves.

Finally, for pro-choice advocates abortion is not intrinsically connected with some special possibility of abuse of judicial power. Despite the controversial nature of the subject, in their view, *Roe* is a strikingly normal opinion; the decision may not have been logically necessitated by existing precedent, but the Court did not step much further beyond precedent than it has in other important constitutional decisions. Thus jurisprudentially, too, abortion is a normal, routine matter; it is not the case that everything that touches on (and legitimates) abortion is an excruciatingly difficult and agonizing problem. Conversely, constituting abortion and *Roe* as relatively normal matters helps to constitute judicial activism as an accepted feature of social life, and tends to disprove the notion that such activism intrinsically has immoral or antimajoritarian consequences.

4. Intentions and Outcomes

In sum, abortion is not something that simply exists as a given, which is either repressed or permitted; the struggles over access to abortion have a constitutive character as well. It is not simply a matter of cultivating a certain attitude "toward" abortion, but of incorporating that attitude in a set of material practices—settings for the abortion, techniques, things said by one person to another—that constitute the totality of the experience of abortion.[420]

That each side aims to constitute abortion in a particular way does not, however, ensure that the actual outcome of the struggle will be what either side intends. In part, this is so because each side wins on some issues and loses on others. More important, the various victories and defeats for each side may well form a pattern that neither side seeks or anticipates.

The possibility of unanticipated results emerges most strikingly with respect to the legal doctrine set out by the Supreme Court in response to challenges to abortion regulations. Neither pro-life nor pro-choice advocates have particularly sought to "medicalize" the abortion issue or to make it an issue peculiarly for the courts, at least not in the way the Supreme Court has done.[421] Yet the Court has consistently construed a woman's right to an abor-

420. See generally Gabel, Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory, 61 Minn. L. Rev. 601, 601-07 (1977).

421. Admittedly, neither pro-life nor pro-choice advocates have been absolutely opposed to making abortion a medical issue. Opponents of abortion have, as noted earlier, sought to transform it into an occasion of major medical intervention, while those who favor abortion often invoke the doctor's counseling role as a substitute for parental involvement in cases involving minors. But pro-life advocates surely have not aimed at anything like what the Supreme Court has had in mind: the wise doctor dispassionately counseling the woman and thoroughly exploring all the options, including abortion. And it is hard to believe that, apart perhaps from the cases of minors, the idea of the doctor as counselor in the decision whether to

tion as a right to decide, in consultation with her doctor, whether to terminate her pregnancy.[422] This qualification is more than a matter of rhetoric, for the Supreme Court has struck down regulations that unduly impinge on the doctor's discretion, in addition to those that unduly limit the woman's ability to reach her own decision.[423] The issue of abortion has also been medicalized in the sense that the determination whether the state has a "compelling interest" in any particular health regulation of abortion turns on whether that regulation comports with "present medical knowledge."[424]

Moreover, abortion has evolved into a judicial or constitutional issue to a large degree, and once again, neither side seems to have sought this outcome. To be sure, both sides in the abortion dispute have always demonstrated a readiness to resort to the courts when such action appeared to have immediate gains; pro-choice advocates have done so consistently over the past fifteen years or so, and pro-life advocates have not foresworn judicial actions of their own.[425] The Court's involvement in the abortion controversy, however, has gone far beyond that of the occasional or one-time intervention which the rhetoric of "striking down" or "upholding" statutes would indicate. Indeed, "[t]he Supreme Court is the principal creator of current federal abortion policy."[426]

One might, therefore, discern an emergent pattern in the Supreme Court's rulings on abortion. "Abortion" is a relatively routine, private, medical procedure which may pose difficult moral questions for the woman and difficult political questions for society; the moral questions are resolved by individual women under some form of professional guidance, and the political questions are resolved by society under the guidance of (or in a dialogue with) the courts. It would be a mistake, however, to take the Court's rulings on abortion as the way that abortion is actually constituted in contemporary social practices, just as it would be incorrect to assume that those practices necessarily reflect the intended aims of the advocates on both sides of the abortion issue.[427] To understand what sort of "abortion" may emerge from the moral, political, and legal struggles over abortion, then, requires an examination of the larger context in which those struggles take place.

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have the abortion (as opposed to the choice of technique) is viewed as desirable in its own right by pro-choice advocates.

422. E.g., *Akron*, 462 U.S. at 427 (physician is to advise woman whether to have abortion and what procedure to use); *Roe*, 410 U.S. at 164.

423. See, e.g., *Akron*, 462 U.S. at 449-51; Colautti v. Franklin, 439 U.S. 379 (1979).

424. *Akron*, 462 U.S. at 437 (quoting *Roe*, 410 U.S. at 163).

425. See Byrn v. New York City Health & Hosp. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972) (pro-life challenge to New York's liberalized abortion statute), appeal dismissed, 410 U.S. 949 (1973).

426. Mackenzie, A Test of Fitness for Presidential Appointment?, in The Abortion Dispute and the American System 47, 60 (G. Steiner ed. 1983).

427. Indeed, the ultimate significance of the Court's medicalization of the abortion issue quite possibly will lie less in its effect in subjecting the abortion decision to professional medical control than its possible effect in transforming abortion into another "private" act of alienated consumption.

C. *The Larger Context*

In this subsection, I will argue that the breakdown of the "traditional" sex roles and family structure has ambiguous implications for the prospects for individual freedom generally, and for women's freedom from male domination in particular. First, on an individual level, one can discern the emergence of a particular notion of individual "choice." By this notion, people are expected to shape their lives in terms of patterns of consumption, to identify their own self-realization with the shaping of a consumer lifestyle. At work, as highly stratified, bureaucratic hierarchies increasingly become the norm, people are expected to internalize company policy and shape a "career" for themselves as they adapt their capacities, talents, and aims to the needs of their corporate employer. Second, on a political level, there emerges a concomitant tendency toward a conception of power in which the state does not simply regulate the economy or support the family (or alternatives to it), but reconstructs them in a detailed, particularized way. As the distinction between public and private breaks down, aspects of society formerly thought to be "private" become the subject of political debate and state planning.

These developments take on additional significance as women struggle for equality at home, at work, and in politics. Men and women have in the past defined themselves and ordered their relationships with each other primarily in terms of a structure for personal life—masculinity, femininity, the family—that is historically specific to capitalist development in the nineteenth and twentieth centuries. Moreover, public policy has generally been founded upon these constructions, which embody societal ideals of what it meant to be "masculine" or "feminine" and a member of the "family."[428] The strict sexual division of labor underlying these constructions is beginning to break down, however, undermining the apparently natural character that the traditional family and sex roles had taken on. Increasingly, it becomes clear that men and women need not structure their lives around socially-determined constructs of masculinity and femininity, and that society need not treat as immutable and natural any given family structure or gender-based allocation of roles.

The opening up of such possibilities is not inherently liberating, for one possible outcome of the breakdown of the traditional family and the sexual division of labor is what has been called a "narcissistic" society. In such a society, men abandon their role as breadwinners and women their role as loving and caring wives and mothers, and both join an endless individualistic pursuit of self-gratification.[429] As individuals accept the ideology of personal consumption or advancement in the corporate hierarchy, and do not question the structure of personal and social life, their critical capacity diminishes at the very time that the whole public apparatus of capitalism—bureaucratic

428. For example, welfare programs have been premised upon the assumption of the nuclear family as the normal one. See Zaretsky, supra note 365, at 188-224.

429. See generally C. Lasch, The Culture of Narcissism (1979).

government programs, experts and professionals devoted to the dispensing of "advice," and advertising, among other things—increases in its power. As a result, the very capacity for subjecting existing forms of public and private life to transcendent standards of judgment or morality begins to disappear.[430]

Such a development is a possibility rather than an inevitability. The combination of the breakdown of the sexual division of labor with the constant degradation of individuality and the "rationalization" of all areas of society also has the effect of politicizing personal life to an unprecedented degree, as the intense struggle over abortion itself demonstrates. From this politicization, new forms of freedom as well as of domination may yet emerge. How we might increase the likelihood of the former is the subject of Section IV; the danger that it might be the latter is the focus of attention for the rest of this section.

1. The "Traditional" Family and the Sexual Division of Labor

As noted earlier, one common explanation for the rise of the New Right, and the associated anti-feminist, anti-abortion movements, is that these phenomena are a reaction to the breakdown of the traditional family and sex roles. The "traditional" structures that these movements seek to preserve, however, are not rooted in some timeless set of social practices, nor are they in any sense natural structures occurring in any society that does not vainly attempt to suppress them. Rather, they are historically specific constructs whose form can be traced to late nineteenth century capitalism.

a) The Rise of the "Traditional" Family

The late nineteenth century bourgeois family was, ideally, a place "wherein order and authority were unchallenged, security of material existence could be a concomitant of real marital love, and the transactions between members of the family would brook no outside scrutiny."[431] A key aspect of this structure was that men and women developed their own personalities, and related to one another, on the basis of socially constructed definitions of "masculinity" and "femininity." The man was the breadwinner, responsible for the family's material support. With the demise of the family-based economy and the ascendance of corporate structures in economic life,[432] this role entailed a life outside the family as well. Men became entrepreneurs or wage laborers,

430. See generally text accompanying notes 512-520 infra. See also C. Lasch, supra note 429, at 154-86. Lasch's analysis is useful in many respects. A notable exception is his strident criticism of feminism; see, e.g., C. Lasch, Haven in a Heartless World xvi-xvii (1979) [hereinafter Haven].

431. R. Sennett, The Fall of Public Man 20 (Vintage ed. 1976). I rely heavily in the following discussion on id. at 130-255, and on J. Matthaei, supra note 367, at 99-232. Also helpful are: A. Kessler-Harris, Out to Work: A History of Wage Earning Women in the United States 75-319 (1982); Jameson, Imperfect Unions, 1894-1904, in Class, Sex, and the Woman Worker 166-202 (M. Cantor & B. Laurie eds. 1977); and Welter, The Cult of True Womanhood: 1820-1860, 18 Am. Q. 151 (1966).

432. See generally J. Matthaei, supra note 367, at 101-06.

participating with, or competing against, other men in work and public life. Inside the family, the man's role as the breadwinner gave him a position of authority. Women, on the other hand, were confined to the family; their special role was to care for and socialize their children as well as provide a caring refuge to which the husband could retreat after a day in the harsh world of work. In order to realize this role—and especially in order to ensure that their children received the proper upbringing and education—women had to develop their own talents and abilities. While women were subordinate to the man's authority within the family, they were nevertheless perceived as performing an important social function.[433]

Men and women thus related to each other through a set of well-defined, complementary roles. Ideally, men provided economic support while women nurtured the family's emotional life. Far from interfering with their relationship, these roles were seen as providing the necessary context for love to flourish between men and women, and between parent and child. Similarly, the masculine and feminine "roles" were not experienced by most men and women as restraints on individual development and fulfillment; rather, for the most part they uncritically accepted the constructs of masculinity and femininity, and cultivated their personalities through them.[434]

For men, to be masculine *meant* that one's wife need not work, that one

433. Id. at 110-12. In this respect, the analysis here differs from one strand in feminist thought which portrays the system of family and gender roles that arose in the late 19th century as tending to reduce women to "mere biological existence" because of its emphasis on motherhood. B. Ehrenreich & D. English, For Her Own Good: 150 Years of the Experts' Advice to Women 13 (1978). See generally id. at 101-40. Such a perspective, while rightly deploring the horrifying abuses of women that the "cult of womanhood" produced, see, e.g., Barker-Benfield, Sexual Surgery in Late-Nineteenth-Century America, 5 Int'l J. Health Servs. 279, 287 (1975) (gynecological surgery aimed at "reimposing order, of the kind conventionally expected of female behavior"), overlooks the respects in which women were seen—by themselves and by men—as having an important social role, albeit carried out in the home. The significance of this point will become clear in text below. For now it will suffice to say that it was in part because women's role was seen as "social" and not purely "natural" that women were eventually impelled out of the home. They sought both to reform society so that they might carry out their role more effectively (as in the case of the Temperance Movement), and to cultivate their skills on an individual basis (as women came to believe that education was valuable to them in raising their children).

434. Clearly, not all women accepted the ideals of family and motherhood; for example, some sought to enter men's professions. See note 446 infra. The increase in the incidence of abortion in the nineteenth century, see text accompanying notes 452-455 infra, demonstrates that incompatibility with the developing ideal of womanhood was not always sufficient to stamp out a practice. In fact, in the case of abortion, legislation was required. Nor would it be correct to say that those women who largely accepted the ideal of femininity never experienced unhappiness or a sense of constraint as a result of its limitations. See B. Ehrenreich & D. English, supra note 433, at 1-29, 101-40. My point is rather that most women (and men) did accept the structures of the family and of masculinity and femininity in a largely uncritical way, viewing them as "natural." Women who succeeded against all odds in pursuing a career did not, from this perspective, provide evidence against the naturalness of this structure, but rather evidence of their own abnormality or "masculinity." See J. Matthaei, supra note 367, at 193. Moreover, dissatisfaction with one's life need not necessarily lead to questioning of the family and the associated sex roles. A woman who was frustrated at having to stop working upon getting married might view her dilemma as an unavoidable conflict between her needs and

earned enough to support a family, and that one competed with or worked under other men.[435] For women, being feminine entailed marriage and child-rearing. If economic circumstances required that a woman work in her youth, it was hoped that employment would be a temporary phenomenon before getting on with the real business of life. Moreover, a woman who rejected marriage and motherhood did not undermine this construction of femininity; on the contrary, she simply called her own femininity into question.[436]

To be sure, as one commentator has put it, "[t]his form of family life was not universal in nineteenth-century America, but it was almost universally aspired to."[437] Obviously, poverty prevented many men and women from attaining the ideal family. The man had to earn enough to support the family without the help of his wife or their children, and—though unions sought a "family wage"—many men did not achieve this goal.[438] Further, there were important differences between blacks and whites, with the former accepting the domestic ideal to a lesser degree and with different effects.[439] Nevertheless, this "family," premised on allocation of masculine and feminine roles became a widely shared ideal, and, increasingly, a reality for many people throughout the twentieth century.[440]

Though it became widespread, the growth of the "traditional" family and sex roles was not ordained by nature; rather, it received powerful support from the development of industrial capitalism from the late nineteenth century onwards. The removal of production from the home, and the rise of the corporation and factory as the site of work, provided the basis for the growth of the idea of the family as a special, private domain devoted exclusively to emotional interaction and the cultivation of individuality. At the same time, "the centering of caring for others in woman and home life meant that capital expansion could take on a heartless character, ignoring the suffering of its workers or consumers, without being challenged by its masculine personifiers."[441] In turn, the knowledge that their family's economic support rested on them alone could make men more hesitant to challenge their employers.[442] Further,

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her children's or husband's, rather than as the product of a particular, socially determined conception of what it is to be a woman.

435. See J. Matthaei, supra note 367, at 248-49, 301-02.

436. See note 434 supra.

437. Epstein, Family Politics and the New Left: Learning from Our Own Experience, Socialist Rev., May-Aug. 1982, at 141, 145.

438. See Jameson, supra note 431, at 172-76. Indeed, even in upper- and middle-class society the masculine and feminine ideals were not accepted in an uncritical fashion. See J. Dubbert, A Man's Place 80-121 (1979).

439. See J. Matthaei, supra note 367, at 133-36.

440. See also L. Tilly & J. Scott, Women, Work, and Family 176-213 (1978) (similar development in France and Britain in early twentieth century).

441. See J. Matthaei, supra note 367, at 119.

442. See Jameson, supra note 431, at 195; cf. A. Skillen, Ruling Illusions 159 (1977) ("[B]y being brought up to confine his concerns to the family unit, the male child is being prepared to take on anything that will pay him enough to wear, before real and imaginary spectators, the badge of proud husband-and-father.").

in the twentieth century, capitalism gave this domain of private experience a specific content—the consumption of commodities—that powerfully reinforced the economic system in ways that I will describe in subsection *b* below.

The development of separate masculine and feminine identities resulted in part from deliberate efforts by employers. Employers often sought to place women workers in separate, lower paying jobs than men.[443] But the sex-typing of jobs, and, more important, the general exclusion of women from the workplace, were not simply the product of employers' efforts. For men, women as co-workers posed both a material threat—because of women's willingness to accept lower wages—and a threat to their masculinity. If the man's own wife had to work, it meant that he had failed as a man; having to work with or under the supervision of a woman represented a similar threat.[444] Thus, unions, dominated by men, actively sought to exclude women from the workplace, or at least to keep them confined to women's jobs.[445] Nor was it simply a matter of men—employers and unions—oppressing women, for many women themselves felt a powerful need to preserve their "femininity" and to keep to the role of wife and mother. Women who did commit themselves to a professional career did so nearly exclusively in "feminine" professions—nursing, teaching, and social work—in which they could act as "mothers" to society under the direction of male doctors and administrators.[446]

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443. This sex-typing was often purely arbitrary; indeed, what might be typed as women's work in one factory was often considered men's work in another. See J. Matthaei, supra note 367, at 211-18; Hartmann, Capitalism, Patriarchy, and Job Segregation by Sex, in Capitalist Patriarchy, supra note 364, at 206, 229-30.

For employers, sex-typing had several advantages. Women, by socialization, were more pliable and less demanding; further, because their primary commitment tended to be to marriage and family, they often saw their employment as temporary and supplemental, and could be persuaded to take lower wages than a man would. In order for employers to gain these benefits, however, women had to be given separate jobs; to employ them side-by-side with men, but at lower wages, would have been too blatant. Moreover, in those cases where male workers were unable to exclude women from their work, as they often attempted to do, they "demanded that women be paid equally with men and even helped them unionize, thus eliminating both the competition and attractiveness [for the employer] of women's labor." J. Matthaei, supra note 367, at 217; cf. W. Chafe, The American Woman, 1920-1970, at 79 (1972) ("For a brief period after the Supreme Court invalidated minimum wages for women in the 1923 Adkins case [Adkins v. Children's Hospital, 261 U.S. 525 (1923)], the AF of L revived interest in unionizing female workers.").

444. See J. Matthaei, supra note 367, at 248-49, 301-02.

445. See Hartmann, supra note 443.

446. See J. Matthaei, supra note 367, at 203-09. Some women did seek to enter "men's professions," like medicine and law. When they did so, they encountered discrimination at every step of the way. On women's efforts to become doctors, see B. Ehrenreich & D. English, supra note 433, at 58-68; P. Starr, The Social Transformation of American Medicine 117 (1982); M. Walsh, "Doctors Wanted: No Women Need Apply": Sexual Barriers in the Medical Profession, 1835-1975, at 176-93 (1977); cf. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (upholding Illinois' refusal of admission of women to the bar) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.") (Bradley, J., concurring). Clearly such coercive measures and discrimination were an important component of the constitution of "femininity;" my point is that they

These concepts of family and sex roles arose in a context in which men and women took the existence of the capitalist system for granted. The more entrenched "traditional" family and sex roles became, the more those structures took on a natural character, making it even more difficult to imagine alternative forms of personal life.[447] In political as well as personal life, moreover, men and women came to take these structures for granted. Unions, for example, tended to envision the institution of a "family wage" as a better solution to family poverty than raising women's low wages.[448] And when women entered the world of political and social activity, they did so in a manner calculated to realize their true vocation as social guardians of family and morality. Thus the Voluntary Motherhood movement sought to ensure that women could limit the number of children they had so that they could give them the personalized attention they needed.[449] Voluntary Motherhood advocates did not, in other words, question the idea of women's role as wife and mother—indeed, they opposed birth control and abortion[450]—but sought instead to reform existing social arrangements to allow women to perform their true functions more effectively.

The passage of the anti-abortion laws provides a good illustration of the social construction of marriage and family.[451] Abortion and birth control were utterly inconsistent with the ideal of the bourgeois family. A woman who sought to avoid motherhood flouted her moral duty—a futile and dangerous act because she thereby simultaneously denied her biological destiny and threatened the foundations of the stable and caring family order. Abortion, then, was seen as an expression of shameless self-indulgence in defiance of moral duty and as an unnatural and dangerous assertion of control over human biology.[452]

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were far from being the sole means by which women (and men) came to identify themselves with a particular, socially determined structure for family and personality.

447. See Gordon, supra note 387, at 132-33 (persistence of traditional roles precluded even a desire for birth control on the part of many women).

448. See W. Chafe, supra note 443, at 77 (noting the "conviction of union leaders that women could be helped most if their husbands earned enough to support the entire family."). That is not to say, however, that a "family wage system" was ever put into practice. See id. at 61-64; Lescohier, Working Conditions, in 3 History of Labor in the United States, 1896-1932, at 54-55, 72-73 (J. Commons ed. 1935).

449. See L. Gordon, supra note 387, at 95-115, 123; J. Matthaei, supra note 367, at 170-78, 183-84; see also B. Ehrenreich, The Hearts of Men 150-51 (1983); J. Weeks, Sex, Politics and Society: The Regulation of Sexuality since 1800, at 160-67 (1981); Smith, Family Limitation, Sexual Control, and Domestic Feminism in Victorian America, 1 Feminist Stud. 40 (1973).

450. They insisted, instead, that a wife should have the right to refuse sex with her husband. L. Gordon, supra note 387, at 97-104; J. Matthaei, supra note 367, at 170.

451. I rely heavily in the following account on J. Mohr, Abortion in America (1978); see also Special Project, Survey of Abortion Law, 1980 Ariz. St. L.J. 67, 95-111; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968); Quay, Justifiable Abortion—Medical and Legal Foundations, 49 Geo. L.J. 395, 430-38 (1961). See generally B. Harrison, supra note 410, at 165-68.

452. See, e.g., Howe, Sermon on Ante-Natal Infanticide 4 (1869), reprinted in Abortion in Nineteenth-Century America (C. Rosenberg & S. Smith-Rosenberg eds. 1974) (the "hard

These fears were given special significance as the period between 1840 and 1880 saw a sharp upsurge in the incidence of abortion and a change in the character of the women who sought it. Earlier in the century, the typical woman seeking abortion had been a young, unmarried woman who had "made a mistake," or who had been seduced, and who could therefore merit some sympathy.[453] Moreover, since the quickening theory was still widely accepted, abortion was not generally seen as the taking of a human life. As the nineteenth century progressed, however, married, upper-class women—women who had no "excuse"—increasingly sought abortions.[454] The very character of abortion itself was changing: rather than being the occasion for the correction of a mistake or the rectification of a wrong done a young woman, abortion signified the prospect of a more activist attitude by women toward their own bodies. After 1840, "American women began to learn more about their own bodies and their bodies' reproductive functions, and learned, as a result, that it was perfectly possible to intervene in those functions from knowledge rather than from ignorance or folk superstition."[455] These attitudes were incompatible with the idea that women could fulfill themselves only as mothers. Moreover, women developed networks of shared information about abortions and how to obtain them;[456] this assertion of control over their reproductive processes threatened the structure of male authority within the home.

Abortion did not, however, become the subject of mass political agitation that it is today. The late nineteenth century campaign to enact strict anti-abortion laws was closely connected to the long drive by physicians to secure their status as professionals.[457] The so-called regular physicians, with whom the American Medical Association was aligned, opposed abortion for several reasons, including loss of potential customers to the "irregulars," who were more willing to perform abortions.[458] The regulars' ultimate success in having abortion made illegal represented one triumph over their competitors.[459]

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hearted woman of fashion and lover of pleasure" who seeks an abortion destroys the home and deprives herself of "a joy sweeter, deeper, and more satisfying than any other of earth") [hereinafter Abortion in Nineteenth-Century America].

453. See L. Gordon, supra note 387, at 51-60; J. Mohr, supra note 451, at 86-102.

454. J. Mohr, supra note 451, at 86-102. Petchesky offers a slightly different account, arguing that most likely it was not the incidence, but the visibility, of abortion that increased as more middle- and upper-class women sought abortions. R. Petchesky, supra note 393, at 78.

455. J. Mohr, supra note 451, at 69.

456. See id. at 106-07.

457. See generally id. at 147-70; P. Starr, supra note 446, at 79-144.

458. J. Mohr, supra note 451, at 37. Until the late nineteenth and early twentieth centuries, the difference between the "regulars" and "irregulars" was not a difference between accomplished practitioners and quacks; indeed, if anything, the irregulars' practices were less dangerous than were the regulars'. The difference, rather, was that the regulars constituted a more socially elite group who saw themselves as rational and scientific. The irregulars included everyone else who held themselves out as healers, including "self-taught lay healers and part-time folk doctors," id. at 32-34, and more organized groups like homeopaths, id. at 173.

459. See L. Gordon, supra note 387, at 59-60, 162-67; J. Mohr, supra note 451, at 34-37, 160.

More important, the issue of abortion enabled the regulars to enhance their own status by aligning themselves with science, morality, and the proper role for women (and more generally, the family). The regulars rejected the quickening doctrine as unscientific,[460] and saw abortion not only as murder but as undermining the very possibility of morality itself—a concern they believed to be within their proper domain as, in effect, moral counsellors or ministers to society at large.[461] The chief purpose of women, in their view, was to produce and raise children; a married woman in particular had no business interfering with that function.[462] Yet abortion continued to spread, particularly among married, upper-class women.[463]

As a result, the regulars conducted a sustained campaign between 1860 and 1880 for the enactment of anti-abortion laws, and by the turn of the century, all the states had made abortion illegal.[464] The outlawing of abortion cemented in place one more aspect of the traditional family and sex roles. Most directly, women's inability to control their own fertility reinforced their exclusion from the labor market; employers could refuse to hire married wo-

460. See J. Mohr, supra note 451, at 35-36, 165; Louisell & Noonan, Constitutional Balance, in The Morality of Abortion 220, 224-25 (J. Noonan ed. 1970); see also Hodge, Foeticide, or Criminal Abortion; A Lecture Introductory to the Course on Obstetrics, and Diseases of Women and Children 14-23 (1869), reprinted in Abortion in Nineteenth-Century America, supra note 452.

461. L. Gordon, supra note 387, at 170-171 ("Perhaps the best analogy for this new self-image of a profession is to say that the doctors were the new ecclesiastics"); J. Mohr, supra note 451, at 163-64.

462. One physician argued that married women sought abortions solely from "the fear of labor, from indisposition to have the care, the expense, or the trouble of children, or some other motive equally trifling and degrading." Hodge, supra note 460, at 32. For a modern statement of the same view, see Quay, supra note 451, at 446 (In addition to the selfish women who want abortion, "[t]here are many others who cry out for abortion at some time during pregnancy when pain and discouragement are hardest, but who will be grateful that an existing law prevented the plea from being heeded."); see also J. Mohr, supra note 451, at 108 ("The practice of abortion was destroying American women physically and mentally, and worst of all, undermining the basic relationships between them and men insofar as a willingness to abort signified a wife's rejection of her traditional role as a housekeeper and child raiser.").

Another possible explanation for the regulars' opposition might logically be thought to be the physical dangers attendant upon the abortion procedure itself. Such an explanation would have little support, however. For one thing, the regulars engaged in many other techniques that posed great physical dangers to their patients, most notably in the case of "heroic medicine," involving heavy use of bleeding and cathartics. See B. Ehrenreich & D. English, supra note 433, at 44-48; P. Starr, supra note 446, at 42, 94-95. Moreover, abortion was not (by nineteenth century standards) a particularly dangerous procedure. See L. Gordon, supra note 387, at 52-54; J. Mohr, supra note 451, at 18-19; see also E. Shorter, supra note 376, at 177, 207-08 (claiming that in the twentieth century, illegal abortions were not that much more dangerous than legal abortions; rather, the type of risk—perforation of the uterus in legal abortions, and infection in illegal abortions—was what varied); cf. J. Noonan, supra note 417, at 51 (no evidence that nineteenth century hospital abortions were more dangerous than childbirth). But see Means, supra note 451, at 511-12. Finally, and most ironically, the last wave of anti-abortion statutes in the last quarter of the nineteenth century coincided roughly with the introduction of aseptic and antiseptic techniques, which laid the basis for abortion to be made much safer than it had ever been before. P. Starr, supra note 446, at 156.

463. See J. Mohr, supra note 451, at 46-47.

464. See id. at 200, 229-30.

men, or could confine them to less skilled jobs for which no long-term commitment was needed, on the ground that they might become pregnant at any time and leave work. Less directly, the constitution of abortion as something that only a depraved woman would seek reinforced the notion that marriage and motherhood was the natural state for a woman.[465]

The "traditional" family structure and the sexual division of labor, in sum, are historically specific phenomena, with roots traceable to the latter part of the nineteenth century. It should be emphasized that to say these phenomena are social constructs is not to assert that they were simply imposed on people.[466] Although these social constructs did limit and constrain women (and, to a lesser extent and in a different way, men), these constraints and the conflicts that arose out of them were not viewed as artificial, but rather as an unavoidable aspect of the human condition. For most men and women, in other words, the very possibility of individual self-realization and of respect and caring for others came to be identified with particular ideals of "masculinity," "femininity," and the "traditional" family. A challenge to the latter became a threat to the former. This identification, which we have by no means overcome, lies at the root of the divisiveness and painful uncertainty that characterize the politics of personal life today.

b) The Breakdown of the Traditional Family and the Sexual Division of Labor

In recent years, the sexual division of labor and the traditional family structure have shown increasing signs of breaking down. While this development has become the focus of political controversy only in the past fifteen to twenty years, it is the product of a long and complicated process spanning the twentieth century. Women's entry into the labor market on a permanent basis has been crucial to this development.[467]

Two long-term factors account for the large-scale entry of women into

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465. See id. at 240 ("[A]bortion began to be associated once again, as it had been at the outset of the nineteenth century, with the poor, the socially desperate, and the unwed—usually seduced or misled—girl."). My point is not that the "real" motive behind the anti-abortion statutes was simply to put women in their place. There is no reason to disbelieve the sincerity of the physicians who also denounced abortion as murder. Nevertheless, the fact remains that abortion was not viewed as an abstract action stripped from all social context, but as an act that carried with it a denial of "women's nature." The outlawing of abortion both reflected and reinforced the "traditional" conception of family and sex roles.

466. Indeed, it is far from clear that the campaign for anti-abortion statutes could have succeeded had it not been able to draw so successfully on a certain degree of popular acceptance of the prevailing image of women as wives and mothers. "Femininity" is not a role invented by doctors in order to enhance their own professional status, as some accounts may be taken to imply. E.g., B. Ehrenreich & D. English, supra note 433, at 133-40. In fact, as we have seen, many feminists were themselves ambivalent about abortion. See L. Gordon, supra note 387, at 108-09.

467. See W. Chafe, supra note 443; Kahne, Economic Perspectives on the Roles of Women in the American Economy, 13 J. Econ. Lit. 1249, 1251-56 (1975); see also H. Marieskind, supra note 371, at 162-73.

the labor force. First, private life, and family life in particular, are defined increasingly in terms of the consumption of commodities. The origins of the "consumption ethic" can be traced to the rise of monopoly capital at the turn of the century. With the task of developing an industrial infrastructure largely completed, capitalist production oriented itself toward the consumer market, and capitalists sought to create a consumer goods industry.[468] The distinctive characteristic of this new market was mass advertising, which endeavored to create an image of a world in which all problems could be solved on an individual basis through the consumption of commodities. For example, if the urban environment was unhealthy or unsafe, the solution was not collective action to improve living conditions, but the purchase of a health or beauty aid or the installation of a better lock on one's door.[469]

These appeals could succeed because of the context in which they were made. As work was transformed from craft labor into repetitive, unskilled work,[470] the call to look for happiness and self-expression in private life gained strength. At the same time, the development of the consumer commodities and advertising industry gave the private sphere a particular form and meaning. A man who had no control at work could be self-directed at the wheel of his car; a woman could show her love for her family and her skill as a homemaker by purchasing all the latest appliances and devices that capitalism had to offer. Consumption came to be seen as a special activity requiring skilled application and effort on the part of the woman.[471] Moreover, the aspirations of women themselves aided the "commoditization" of housework. The "scientific homemaking" movement at the turn of the century sought to rationalize housework, as a way of upgrading the status of homemaking from folk wisdom to domestic science. In theory, domestic science heralded the application of the scientific management techniques of Frederick Taylor to make housework more efficient;[472] in practice, it meant reliance on "store-bought" goods and (supposedly) labor-saving devices.[473] These factors, and a host of others (such as urbanization, which cut people off from traditional home craft skills, and the social pressure to prefer modern goods to old-fashioned home goods) combined to produce a "universal market"—that is, "the development of market relations as the substitute for individual and community relations."[474]

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468. See J. Matthaei, supra note 367, at 235-45.

469. See S. Ewen, Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture 97-99 (1976); S. Ewen & E. Ewen, Channels of Desire (1982).

470. See text accompanying note 477 infra.

471. See J. Matthaei, supra note 367, at 165; cf. L. Tilly & J. Scott, supra note 440, at 205-10 (wife as "manager" of family's spending and consumption in early twentieth century France and Britain).

472. On Taylorism and scientific management, see H. Braverman, Labor and Monopoly Capital 85-123 (1974).

473. See B. Ehrenreich & D. English, supra note 433, at 141-42, 162-64, 179-80; J. Matthaei, supra note 367, at 162.

474. H. Braverman, supra note 472, at 277; see id. at 271-83.

As consumption increasingly defined private life, the pressure on women to seek paid work grew. Scarcity, after all, is a relative term; as individual self-realization and relationships with others came to be mediated by consumption, the need for commodities increased.[475] More specifically, status and wealth were no longer measured by fixed differences in consumption or income: "wealth became having the most commodities, having commodities that others did not own."[476] It became intrinsically impossible ever to have "enough," and the pressure to increase consumption—to buy the newest goods, enjoy the latest amenities—provided a powerful impetus for women to supplement their family income.

The rise of the consumption ethic, then, provided a powerful stimulus for women to seek wage work. Yet a second, equally important factor was the Taylorization of work, which created many of the jobs these new labor force entrants took. The constant Taylorization of work lies at the heart of capitalist efforts to assert and maintain control over the labor process. By breaking skilled work down into repetitive fragments, capital appropriates workers' collective knowledge and control of the labor process as a whole.[477] One effect was the constant creation of unskilled jobs which could be sex-typed and filled by women, whose willingness to work for lower wages (for the reasons outlined earlier) has always made them a reserve army of cheap labor.[478] Another result of this process was that more highly skilled—and highly paid—jobs tended to decline in relative importance.[479] Finally, the "separation of conception from execution,"[480] which lay at the heart of Taylorism, necessitated the rise of a white-collar industrial bureaucracy. In order to control a productive process constituted by repetitive fragments, it became necessary that "the process of production [be] replicated in paper form before, as, and after it takes place in physical form."[481] The growth of this bureaucracy was also spurred on by the increasing importance of sales and clerical work, as advertising and marketing came to play a larger role in corporate strategy.[482] In turn, these white-collar jobs were themselves subjected to Taylorization,

475. See W. Leiss, The Limits to Satisfaction 38-42 (1976).

476. J. Matthaei, supra note 367, at 243.

477. See H. Braverman, supra note 472; D. Clawson, Bureaucracy and the Labor Process: The Transformation of U.S. Industry, 1860-1920, at 11-70 (1980). For a somewhat different approach, see R. Edwards, Contested Terrain 11-16 (1979). I discuss the issue of Taylorism in greater detail in text accompanying notes 499-511 infra.

478. See J. Matthaei, supra note 367, at 281-84.

479. See H. Braverman, supra note 472, at 388-401.

480. Id. at 114 (emphasis deleted).

481. Id. at 117, 125. Obviously this process did not occur smoothly; indeed, as Clawson observes, "it is not capitalists who force bureaucracy on us, it is the class struggle." D. Clawson, supra note 477, at 24. It is not my purpose in this article, however, to give a general account of the struggle over control at the workplace, something which Clawson and Edwards, despite their differences, see D. Clawson, supra note 477, at 31-33, together provide.

482. See R. Edwards, supra note 477, at 85-89 (1979); see also S. Aronowitz, False Promises 291-322 (1973).

creating still more unskilled jobs.[483]

These related developments—the rise of the consumption ethic and the Taylorization of work—helped bring women into the labor force in two ways. First, at the same time that consumption increasingly defined the family's "needs," and thus endlessly expanded those needs, the relative decline of higher-paying, skilled work made it more difficult for most men to support their family on the strength of their own paycheck. Indeed, many families today find that two earners are necessary simply to maintain their standard of living, let alone raise it.[484] Second, the constant creation of routinized, menial jobs which could be sex-typed as "feminine" provided openings for women into the labor force.[485] Moreover, the fact that they would be doing "women's work" eased women's entry into the labor force, for it attenuated the sense that they were casting their femininity into doubt by taking a job.[486]

The increase in women's labor force participation has had profound effects on women, men, and the family. As women become more committed to the labor force, they are less inclined to accept lower wages. Further, while the continued sex-typing of jobs still lends strong support to the ideas of "masculinity" and "femininity,"[487] such stereotypes are significantly weakened as women demand not only equal pay for the same work, but also equal pay for jobs of "comparable worth." If the demand for comparable worth were satisfied, the essential economic underpinning of sex-typing in the labor market would be undermined: no longer could employers promote and then exploit the relative cheapness of women's labor power.

Women's labor force participation has also affected relationships within the home. As the woman's paycheck becomes less a supplement and more a necessity to the family's standard of living, she becomes less dependent on her

483. See H. Braverman, supra note 472, at 271-83, 291-374.

484. See C. Bird, The Two-Paycheck Marriage (1979); B. Ehrenreich, supra note 449, at 173.

485. Perhaps the most widely remarked example is the transformation of the male, craft-like secretarial labor early in the twentieth century into less-skilled—increasingly so, as clerical and secretarial work have been Taylorized—women's jobs. Nothing inherent in the nature of the work, or of men and women, necessitated such a transformation. See H. Braverman, supra note 472, at 293-358; Glenn & Feldberg, Degraded and Deskilled: The Proletarianization of Clerical Work, 25 Social Problems 52-64 (1977); see also J. Matthaei, supra note 367, at 281-85; Davies, Woman's Place is at the Typewriter, in Capitalist Patriarchy, supra note 364, at 248-66; cf. L. Tilly & J. Scott, supra note 440, at 156-62 (feminization of clerical work in Britain and France).

486. J. Matthaei, supra note 367, at 281-88. It might be thought that another factor drawing women into the labor force has been overlooked in this description—a desire for the personal fulfillment that can come with a job or career. But this factor has little explanatory force, for it cannot explain why women would come to see wage work as potentially offering them such fulfillment. Indeed, the causal connection works more in the opposite direction. People are unlikely to demand personal fulfillment from their work until they perceive themselves as having made a permanent or long-term commitment to the workforce.

487. Many women work in jobs as assistants to men—as secretaries, for example—and even within professions like law, women tend to be overrepresented in some areas (such as family law) and underrepresented in others (such as corporate practice). See Winter, Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy, 69 A.B.A. J. 1384 (1983).

husband, undermining the basis of his authority. Women often question their "traditional" role when they find that it leaves them with a double-shift: wage work during the day and housework in the evening.[488]

For men, the potential transformation is also great. When their wives must work, men may doubt their own masculinity. As women generally become less dependent economically on men, a second response becomes possible; men may question "masculinity" itself. If his wife and children are not entirely dependent upon his paycheck, a man may have a sense of greater freedom; he may be more willing, for example, to leave a secure but uninteresting job in favor of a less secure but more fulfilling one.[489]

Finally, the rise of the two-earner marriage, combined with other factors, makes it even less possible for the family to maintain an appearance of independence from the world around it. Mass education and day care make the family less important as an agent of socialization, while the rise of welfare and unemployment compensation further weakens the economic ties holding the family together. In turn, these developments undermine the notion of the family as a place of refuge where mothers can cultivate their children's individuality, husbands can escape the rigors of competition at work, and members of the family can stand together against a cold and alien world outside.[490]

The effect of these changes is not surprising: people have begun to question the naturalness or inevitability of traditional family and sex roles. In personal life, many men and women seek alternatives to relationships based upon a complementary system of masculine and feminine difference; one possibility is the rise of a companionate marriage in which both partners work and attempt to share equally the domestic tasks and the joys and burdens of parenthood.[491] Others reject the institution of marriage or heterosexuality itself. In political life, there is increased recognition that attempts to support "the family" can be oppressive, leaving many people with the dismaying and painful choice of traditional family or complete loneliness.[492] One response is

488. The introduction of "labor-saving" devices into housework seems to have facilitated a rise in housekeeping standards rather than a reduction in time spent on housework. Though difficult to estimate, the average number of hours spent per week on housework has apparently not declined during this century. See R. Edwards, supra note 477, at 196-97; A. Oakley, The Sociology of Housework 92-95 (1974). Thus a woman must either become a "superwoman," combining career and traditional homemaking, or else question the content of the latter role. See J. Matthaei, supra note 367, at 304-07.

489. For an account of the "male revolt," see B. Ehrenreich, supra note 449.

490. See C. Lasch, The Culture of Narcissism, supra note 429, at 125-236; C. Lasch, Haven, supra note 430, at 167-89.

491. See J. Matthaei, supra note 367, at 312-20.

492. As noted by M. Barrett & M. McIntosh, The Anti-social Family 80 (1982):

> The world around the family is not a pre-existing harsh climate against which the family offers protection and warmth. It is as if the family had drawn comfort and security into itself and left the outside world bereft. As a bastion against a bleak society it has made that society bleak. It is indeed a major agency for caring, but in monopolizing care it has made it harder to undertake other forms of care. It is indeed a unit of sharing, but in demanding sharing within it has made other relations tend to become more mercenary. It is indeed a place of intimacy, but in privileging the inti-

to develop policies that will support not "the family," but "families"[493]—a variety of arrangements in which people can find some context for love, nurturance, and personal growth.[494] Similarly, the oppressive character of male authority over women comes to be seen as something that can be attacked and undermined in specific ways, such as criminalizing a husband's rape of his wife, or providing shelters for battered women.[495] It becomes increasingly clear that efforts to remake personal life entail a radical restructuring of work and community.[496]

One aspect of this questioning of traditional sex roles has been the intense demand for abortion and effective birth control. To be sure, the causation works in both directions. On the one hand, the more that women are able to control their reproductive capacities, the more possible it is for them to make long term commitments to the labor force. On the other hand, the demand for safe and effective birth control and abortion—though never entirely absent[497]—clearly receives a powerful impetus from the breakdown of the traditional sex roles. Women no longer unquestioningly accept motherhood as their most important fulfillment, taking automatic precedence over everything else. Few reject motherhoood itself; but many seek to accomodate it to work and career. Indeed, as women find themselves more or less permanently committed to the work force—often, as stated earlier, out of economic necessity—it becomes less feasible to choose to exercise no control over fertility. Further, as marriage itself has become less secure and divorced women still tend to be given custody of the children, the potential "price" of a large family becomes even higher.[498]

While it brings a great deal of personal pain and political conflict, the weakening of the traditional family and sex roles also raises the prospect of greater individual and social choice over the constitution of personal life. For example, though many women sought illegal abortions in the past, many others doubtless did not consider it seriously as a possible response to an unwanted pregnancy. As abortion becomes not only legal but also socially ac-

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> macy of close kin it has made the outside world cold and friendless, and made it harder to sustain relations of security and trust except with kin. Caring, sharing and loving would be more widespread if the family did not claim them for its own.

See also id. at 76-80.

493. See G. Steiner, supra note 373, at 11-12.

494. See, e.g., M. Barrett & M. McIntosh, supra note 492, at 140-42.

495. See, e.g., R. Dobash & R. Dobash, Violence Against Wives (1979); Note, Domestic Violence, 2 Harv. Women's L.J. 167 (1979).

496. See, e.g., Hunt & Hunt, Dilemmas and Contradictions of Status: The Case of the Dual Career Family, 24 Soc. Probs. 407-16 (1977) (arguing that women's equality requires both restructuring of work to make it more flexible and building of community network or support systems for raising children); see also Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487, 490-91 (1981) (discussing "comparable worth").

497. See L. Gordon, supra note 387, at 26-46; N. Himes, Medical History of Contraception 185 (1970).

498. On the economic consequences of divorce, see Weitzman, The Economics of Divorce, 28 UCLA L. Rev. 1181 (1981).

ceptable, it becomes more likely that a woman will give consideration to abortion as one response to pregnancy.

One might leave the analysis at this point: people have more choice in shaping their lives, and whatever else may be said, more choice is better than less choice. I wish to consider, however, what sort of choice these developments may open up.

2. *Capitalism, Social Control, and Personal Choice*

The breakdown of traditional family and sex roles has long term significance for both social structure and social vision. One possible outcome of the structural changes that have played such an important role in bringing women into the workplace on a permanent basis is the emergence of a "corporate welfare society." Though one may discern the contours of such a social order, it is only a possible prospect, not a present reality or inevitable development. Nevertheless, it is worth examining in some detail. The nontraditionalist perspective, I will argue, represents the destructive vision of such a social order, while the traditionalist vision represents opposition to it, though on a basis that is ultimately unsatisfactory and contradictory.

a) The Corporate Welfare Society

The possible emergence of this social order can be discerned in both personal life and the exercise of state power.

(i) The Personal Experience of Work and Consumption

Until the early twentieth century, capitalist control over the work process was characterized by two features.[499] First, though capitalists had formal property rights over the workers' labor power—the right to "consume" (that is, to direct the use of) the commodity that they had purchased—their ability to exercise those rights was limited by the fact that workers still retained much knowledge, individually and collectively, of the actual work process. Full control over the pace and character of the work eluded the capitalist. Second, the exercise of power depended crucially on the personal presence and charisma of the capitalist-entrepreneur himself, or, in larger industries, on foremen who had nearly absolute power to hire, fire, and discipline the workers.[500]

With the transition from competitive to monopoly capitalism, the nature of this control began to undergo a transformation that has continued through the present.[501] Control has become more particularized and substantive. The

499. I rely in the next four paragraphs on the analysis in R. Edwards, supra note 477; see also D. Clawson, supra note 477.

500. See R. Edwards, supra note 477 at 18-19, 23-36; see also Stone, The Origins of Job Structures in the Steel Industry, 6 Rev. Radical Pol. Econ. 113 (1974).

501. See R. Edwards, supra note 477, at 90-162. My account here is greatly simplified, and three qualifications are worth noting. First, Edwards describes a long and complicated struggle for control over the workplace in which employers tried and rejected various solutions—such as "welfare capitalism," see id. at 91-97—while groping their way towards more

work process is increasingly fragmented into unskilled tasks, a development that not only results in a largely uncreative and powerless experience for individuals, but also strips the workers, individually and collectively, of their knowledge of the labor process. In turn, this "separation of conception from execution"[502] necessitates supervision and control by managers who can base their power over the work process on a claim to expertise not possessed by the workers.[503] The degradation of labor, moreover, has spread beyond the factory to include white-collar employees like clerical workers and mid-echelon managers and bureaucrats, who find that the same techniques of "scientific management" are applied to their jobs.[504]

Moreover, control is woven into the very structure of work; the technology of the workplace is structured in such a way as to make the pacing of the work dependent not upon the individual foreman, but upon the technology itself. The assembly line is the clearest example of such "technical control."[505] Increasingly, an alternative form of control is employed in which the social structure of work itself necessitates obedience. This "bureaucratic control"

> rests on the principle of embedding control in the social structure or the social relations of the workplace. The defining feature of bureaucratic control is the institutionalization of hierarchical power. "Rule of law"—the firm's law—replaces "rule by supervisor command" in the direction of work, the procedures for evaluating workers' performance, and the exercise of the firm's sanctions and rewards; supervisors and workers alike become subject to the dictates of "company policy." Work becomes highly stratified; each job is given its distinct title and description; and impersonal rules govern promotion.[506]

As control becomes more bureaucratic or structural, one result is the encouragement of a particular attitude towards work. It is not enough for individuals passively to obey orders; they must internalize the company's policy,

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effective control. Thus, the transformation has been neither as smooth nor as logically worked out as the text might imply. Second, I have emphasized the role of Taylorization in the process, something which Edwards believes to have been overstressed. Id. at 104. I agree with Clawson, however, that the differences between the two on this point are not particularly great. D. Clawson, supra note 477, at 33 n.*. Finally, as Edwards stresses, the transformation is not utter; while "structural control," discussed in text below, is the predominant and distinctive form of control today, it is not the exclusive one. See R. Edwards, supra note 477, at 21, 163-99.

502. H. Braverman, supra note 472, at 114 (emphasis deleted).

503. Cf. 1 K. Marx, Capital, ch. XIV, sec. 5, at 355 (Int'l Pub. ed. 1967) ("The knowledge, the judgment, and the will, which, though in ever so small a degree, are practised by the independent peasant or handicraftsman, . . . are now required only for the workshop as a whole . . . . What is lost by the detail labourers, is concentrated in the capital that employs them.") (footnote omitted).

504. See H. Braverman, supra note 472, at 293-374.

505. See R. Edwards, supra note 477, at 111-29.

506. Id. at 21.

shaping themselves to the needs of the bureaucratic hierarchy.[507] Relations of authority and domination simultaneously become more and less personal. They become less personal in the sense that all take it for granted that the "situation rules." All are subject to the same company policy or rule of law no matter what their positions in the hierarchy, and that policy is taken as the unavoidable expression of technological and organizational imperatives.[508] The "rules of the game" are internalized and applied according to the spirit or purpose of the capitalist enterprise, which is identified with the very possibility of collective economic effort.[509]

At the same time, control becomes more personal in that it is seemingly humanized. Job enrichment programs, for example, seek to involve workers in the work process, to make them happier and more fulfilled, without threatening the basic structure of the enterprise.[510] Indeed, to the extent that human relations approaches are successful, they tie workers into the hierarchy all the more strongly; even the workers' "contentments [are] designed for them."[511]

These tendencies are complemented by similar trends in the sphere of consumption and leisure. Life outside work becomes increasingly devoted to the purchase and use of commodities.[512] As noted earlier, the creation of the family as a haven from the coldness and ruthlessness of industrial capitalism was accompanied, especially in the twentieth century, by the definition of private life in terms of consumption. With the rise of a consumption ethic, individuals are expected to define themselves actively by their choices at the marketplace, shaping a lifestyle for themselves.[513] Moreover, just as the Taylorization of work gives rise to an industrial bureacracy on which the workers as a whole become dependent, so does the creation of a universal market, through which all needs are mediated, produce a growing dependence upon experts and professionals of all sorts. The rise of dieting regimes, sex manuals, books on parenting, and the like are symptomatic of this need.[514]

507. Cf. A. Skillen, supra note 442, at 79 (salesman is "to find his soul in the very act of selling" what his firm makes).

508. Cf. Kovel, Rationalization and the Family, Telos, Fall 1978, at 5, 6 ("[B]ureaucratic rationality . . . seems perfectly transparent and banal, yet invariably gives the impression of unseen forces at work. This is partly the result of a high degree of technological elaboration, and partly the function of the extreme degree of alienation and division of labor characteristic of bureaucratic rationalization.").

509. See R. Edwards, supra note 477, at 150-52; Kinsey, Despotism and Legality, in Capitalism and the Rule of Law 46, 58-63 (B. Fine, R. Kinsey, J. Lea, S. Picciotto & J. Young eds. 1979).

510. See R. Sennett, Authority 84-116 (1980).

511. Id. at 115. See generally id. at 15-49, 84-121.

512. See W. Leiss, supra note 475, at 21-42.

513. See R. Sennett, supra note 510, at 90 ("For us, discipline means organizing and orchestrating [one's] panoply of inner resources so that it *coheres*. The task for us is not to repress part of the psyche, but to give the whole a shape."). For a good illustration of this point as it affects women specifically, see Winship, "Options—For the Way You Want to Live Now," or a Magazine for the Superwoman, in Theory, Culture & Soc'y, Vol. 1, No. 3, at 44-65 (1983).

514. See R. Sennett, supra note 510, at 90; Featherstone, The Body in Consumer Culture,

Finally, this tendency both draws on and reinforces the breakdown of the traditional family; as people become more dependent upon a whole public apparatus of experts, family ties weaken further, which in turn reinforces dependency on professional advice and counselling.[515]

The epitome of consumer culture today is perhaps a sexuality "spread like butter on all . . . [consumer] products."[516] Indeed, sexuality is taken both as the key to one's own inner truth and as a revelation of the self outside all established roles and conventions.[517] Its importance in the first respect leads one to accept sexuality as a discipline to be guided by expert advice, manuals, and regimes, all to the end that by enmeshing ourselves in these discourses we might know ourselves better.[518] The latter aspect leads us to view the entire discipline as a private or natural matter in which we are freed from the constraints of power and social convention. In imagining that sex "is now a matter of an emotional affinity which *in esse* stands outside the web of other social relations in a person's life,"[519] we forget that it is an act in which individuals implicate themselves in social conventions and relations of power. Sex is seen as something inherently challenging to power, when in fact it is inextricably tied up with it.[520]

(ii) The Interventionist State

The other aspect of the corporate welfare society is the growth of the interventionist state.[521] With the rise of monopoly capitalism,[522] in which large corporations dominate whole industries and indeed much of the econ-

in Theory, Culture & Soc'y, Vol. 1, No. 2, at 18-33 (1982); Turner, The Discourse of Diet, in Theory, Culture & Soc'y, Vol. 1, No. 1, at 23-32 (1982). For a critique from a conservative viewpoint, see Riga, The Impersonal Decision Maker: Courts of Equity and the Right-to-Die Cases, 24 Cath. Law. 301, 308-09 (1979).

515. See C. Lasch, Haven, supra note 430, at 134-66. The same cycle of breakdown and dependence is replicated in a different context in the replacement of immigrant and indigenous working-class culture by homogenized mass culture in which the media, and advertising in particular, play a part. See S. Aronowitz, supra note 482, at 15-16, 51-134; B. Ehrenreich & D. English, supra note 433, at 170-78.

516. S. Heath, supra note 382, at 149. It is also this aspect which has constituted one of the most important bases for the traditionalist counterreaction; cf. J. Weeks, supra note 449, at 279 ("[F]or the moral conservative it was this area of privacy [sexuality] that had been most invaded, and desecrated by the post-war world. Sexual change therefore became the symbol of all changes that had destroyed the stability of the pre-war moral order.").

517. See generally L. Gordon, supra note 387, at 411-13; S. Heath, supra note 382; J. Weeks, supra note 449, at 249-72.

518. See M. Foucault, supra note 370.

519. R. Sennett, supra note 431, at 8.

520. See, e.g., J. Mitchell, Woman's Estate 142 (1971) (noting that for women, sexual freedom can mean greater vulnerability to exploitation if the roles of masculinity and femininity are unchallenged).

521. See generally J. Habermas, Legitimation Crisis (1975); J. O'Connor, The Fiscal Crisis of the State 1-12 (1973); R. Unger, Knowledge and Politics 174-88 (1975); Heilbroner, The Demand for the Supply Side, N.Y. Rev. Books, June 11, 1981, at 37. See also R. Unger, supra, at 176 (describing it as "less an accomplished reality than a project or tendency at work in the transformation of liberal society").

522. See R. Edwards, supra note 477, at 72-89.

omy, there is a strong tendency for the process of capital accumulation to become dependent upon the state. Part of the reason lies in the growing interdependence of the economy, making it unprofitable for individual corporations to take on the burden of social or infrastructural costs such as education, job training, and transportation. Since the Progressive Era, these matters have tended to become the responsibility of the state.[523] Moreover, with the rise of large private centers of economic power, detailed intervention in and regulation of the economy become necessary as the market fails to perform all its functions. The management of the economy, too, becomes a problem for state policy.[524] In addition to undertaking this kind of direct intervention in the economy, the state also incurs what have been called "legitimation expenses," including welfare, social security, food stamps, and unemployment benefits.[525] These programs, enacted in response to popular unrest (and cut back at other times), are as necessary to allow the economic system to function as is the state's role in ensuring the general conditions of production by the maintenance of order and a system of property relations.[526]

If the state is to have any chance of success in its managerial efforts, its power must be flexible and relatively unconstrained by fixed institutional forms. In law, this conception appears in several forms.[527] The rigid distinction between public and private as a guide to the proper purposes and scope of state power breaks down.[528] Rights are instrumentalized and interpreted flexibly according to their purpose rather than being taken as fixed entitlements. Law becomes increasingly "oriented not, as legal formalism had been, to the protection of private autonomy through the use of objective rules and impartial procedures, but rather towards the achievement of substantive goals and purposes through positive, programmatic action."[529] The activist role of the federal courts since *Brown* is one indication of this change in the conception of state power.

The rise of the interventionist state both reinforces and is strengthened by the developments discussed above regarding personal life. The growth of legitimation expenses and the rise of mass education tend to undermine family and community supports, making individuals less dependent on them and more dependent on the state. The tendency toward the breakdown of family ties is thereby given an important boost. Moreover, the rise of a company

523. See J. O'Connor, supra note 521, at 40-63, 97-149.

524. See J. Habermas, supra note 521, at 41-75.

525. See J. O'Connor, supra note 521, at 150-74.

526. See F. Piven & R. Cloward, Regulating the Poor (1971).

527. For an excellent description of the emerging form of law characteristic of the corporate welfare state, see Fraser, The Legal Theory We Need Now, Socialist Rev., July-Oct. 1978, at 147; see also Klare, Law-Making as Praxis, Telos, Summer 1979, at 123; Miller, Privacy in the Modern Corporate State: A Speculative Essay, 25 Ad. L. Rev. 231 (1973); Tushnet, Truth, Justice, and The American Way, 57 Tex. L. Rev. 1307, 1345-59 (1979).

528. See generally Symposium: The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

529. Fraser, supra note 527, at 149.

"rule of law" and the constantly growing tendency for all needs to be mediated by consumption displaces what were formerly thought of as private struggles in the political sphere.[530]

Social life thus comes to be seen not as composed of particular shared values, cultures, or traditions that are just "there," but as the product of a bureaucratic or administrative planning process. This planning apparatus shapes competing interests into a whole that is consistent with the functional requirements of capitalism, and in so doing, comes to be seen as constituting those particular individual and group interests.[531] Thus, for example, "the family" is seen less as a natural entity that the government regulates or intrudes in in varying degrees, and more as something whose very structure can be shaped by the appropriate family policy. Similarly, in the abortion and birth control debate, teenage sexuality becomes a problem in the management of social policy, whether one takes a "repressive" view (encouraging chastity) or a more "enlightened" one (favoring sex education or access by minors to birth control clinics).[532]

More generally, individual rights are no longer taken as rooted in transcendent ideals, but instead are treated instrumentally as a way to realize social goals and policies. Individuals become bearers of particularized policies defined by their membership in particular corporate welfare state groups.[533] This bureaucratic planning process does not appear to be directed by any absolute moral imperatives or transcendent objectives, but by capitalist rationality itself; a "perfected form of formal and instrumental thought" comes to be accepted as "marking the perimeter of legitimate aspiration."[534]

b) The Traditionalist Controversy and the Corporate Welfare Society

Though it draws on fundamental, long-term trends in the development of capitalist society, the emergence of a corporate welfare society is by no means inevitable. For one thing, that areas of private life are increasingly becoming the focus of political dispute opens the way for efforts to restructure society along more communitarian and egalitarian ideals. Domestic violence, for example, is no longer easily ignored as a private family matter. Nor is it inevitable that a perfectly functioning system of state power will be able to order all areas of social life to keep the capitalist system running smoothly. The very insatiability of material needs in a society in which most needs are mediated

530. See R. Edwards, supra note 477, at 159-62.

531. See Fraser, supra note 527, at 164-79.

532. Cf. Flax, Women's Rights and the Proposed Family Protection Act, 36 U. Miami L. Rev. 141, 143 (1981) (noting irony of fact that proposed Family Protection Act would establish a national policy on the family, sexuality, and education).

533. See Fraser, supra note 527, at 180-81; cf. R. Unger, supra note 521, at 162 (with emergence of "secular transcendence," "[e]ach man will be what society makes him because there is no suprasocial basis upon which the sense of self might be brought to rest.").

534. Tribe, Ways Not To Think About Plastic Trees, 83 Yale L.J. 1315, 1336 (1974) (denial of "the existence of anything sacred in the world and [reduction of] all thought to the combined operations of formal reason and instrumental prudence in the service of desire").

by consumption, and in which relative status is determined by having the most and the latest goods, puts a constant strain on the economic system to produce more. As this comes to be seen as the responsibility of the state, economic crises potentially become political ones. At the same time, the state's ability to manage the economy is limited. The socialization of many costs and the tendency for legitimation expenses to grow over time as family and community supports are weakened presents the state with a seemingly endless crisis, given that profits continue to be privately appropriated.[535]

If there is a great deal of room to determine the direction of future developments, most of the initiative to determine that direction has come in recent years from the Right. The most important aspect of this initiative for our purposes is the attempt to reinforce "traditional" values and to reduce the expenses of legitimation in the form of social welfare programs. As the role of women as housewives and mothers is re-emphasized, the availability, and even the legality, of abortion and birth control are threatened, and "permissive" sexual mores are decried.[536] At the same time, conservative advocates advance the idea that welfare programs are simply "charity"[537] or are inherently wasteful. This is an aspect of a larger ideology in which the legitimacy of the system rests on blaming rather than aiding those who are displaced by capitalist development.

The cultural aspects of the New Right program are intimately tied up with an attempt to deal with some of the economic difficulties discussed earlier. Social welfare programs are not implemented as part of a grand design to bring about a corporate welfare state; rather, such programs are implemented when both popular insurgency and economic crises threaten the stability of the system.[538] If a renewed traditionalist ethic can serve to restrain demands for participation and expectation of personal gains, a great source of difficulty for the capitalist state will have been considerably alleviated.[539]

At the same time, capitalist development and the traditionalist ethic are also in tension with each other. The more the functioning of the market is uninhibited, the stronger are the forces that constantly attack and break down the very structures the traditionalist seeks to promote, such as the traditional family.[540] Only a massive program of family assistance and government inter-

535. For detailed analyses of these difficulties, see J. Habermas, supra note 521; J. O'Connor, supra note 521.

536. On the New Right generally, see S. Ewen & E. Ewen, supra note 469, at 268-79; Gordon & Hunter, supra note 360, at 9-25; Resnick, The Right's Prospects: Can It Reconstruct America?, Socialist Rev., Mar.-Apr. 1981, at 9-35. See also J. Weeks, supra note 449, at 277-82; Eisenstein, supra note 360; Epstein, supra note 437, at 141-61.

537. See, e.g., Are There Limits to Compassion?, Time, Apr. 6, 1981, at 12.

538. See generally F. Piven & R. Cloward, supra note 526.

539. See B. Ehrenreich, supra note 449, at 174; M. Walzer, Radical Principles 92-106 (1980). For an analysis of "Reaganomics," see F. Ackerman, Reaganomics: Rhetoric versus Reality (1982).

540. On the contradictory aspects of New Right conservatism, see Wolfe, Sociology, Liberalism and the Radical Right, New Left Rev., July-Aug. 1981, at 3.

vention into the workplace could make it feasible for most women to leave the workforce and once again become housewives. Indeed, even a "return" to older norms will be to norms the natural quality—and legitimating power—of which is significantly weakened, because their reassertion appears as a social act.[541]

The outcome of these struggles is difficult to predict. The purpose of this article, however, is not to make predictions but to analyze the way in which one might understand these struggles and make them more likely to promote the achievement of sexual equality and reproductive freedom. And that requires an understanding of the competing social visions, nontraditionalist and traditionalist, that underlie the contests over abortion and privacy.

One way to understand the two perspectives would be to view each as ideological in a derogatory sense: each obscures people's true interests. In this view, the nontraditionalist perspective represents and promotes a vision of the social order appropriate to the corporate welfare society. The more the nontraditionalist perspective becomes accepted, the more likely it is that the struggles to free women from the constraints of the traditional family and sex roles may, however inadvertently, promote the rise of a corporate welfare society. The notion that no one given structure or role is inherently right—that any such structure necessarily constrains individuals in their relationships with others and in their self-realization—might too easily take on the concrete form of the "flexible self," a self composed of or at least revealed by an endless array of market-mediated experiences. Thus, the nontraditionalist perspective could be understood as the ideology of more "progressive" times, identifying struggles for liberation with the emergence of a "repressive desublimation."

The traditionalist perspective, on the other hand, might be viewed as representing opposition to this prospect on a basis that is ultimately unsatisfactory as well as difficult to impose. The attempt to "preserve" traditional structures that in fact are social constructs ultimately cannot succeed, except perhaps at the cost of significant repression, as people—women in particular—are forced back into traditional roles and structures. The traditionalist perspective might therefore be deemed ideological in the sense of obscuring people's true interests in a repressive way, equating the breakdown of a particular form of social structure that denies equality to women with a threat to the very possibility of morality and freedom.

The basic flaw in such an approach, however, is that neither perspective can be so easily dismissed. Though they are partial and mutually incompatible, both visions have compelling aspects, for each has a firm basis in a reflec-

541. See J. Habermas, supra note 521, at 70-71 ("A cultural tradition loses precisely . . . [its "nature-like" quality] as soon as it is objectivistically prepared and strategically employed."); MacLean, Democracy and Social Decay, Socialist Rev., July-Oct. 1978, at 42-45 (reimposition of traditional roles would constitute statement that they must be forced on men and women and so undermine their sense of "naturalness"); see also P. Berger, Pyramids of Sacrifice: Political Ethics and Social Change 185-88 (1976); text accompanying notes 191-196 supra.

tive understanding of the experience of life in modern capitalist society. It is neither the traditionalist nor the nontraditionalist perspective alone that is "ideological," but rather the idea that they present the only alternative visions of society.

The need to go beyond the two perspectives, but without simply dismissing them, becomes evident if we examine each one critically. In the particular form it takes in contemporary society, the nontraditionalist perspective looks less than liberating. With respect to sexual relations, the liberation of women from the constraints of the family has ambiguous implications. So long as women remain economically dependent on men and marriage, their need for marriage will be greater than men's, yet the easing of traditional constraints on sexual relations tends to undermine marriage at the same time. But even with the achievement of full economic equality between men and women, sexual freedom could, once again, lose much of its emancipatory potential, enmeshing men and women alike in a sexual "discourse" in which they invest all their energy searching for individual private truths while abandoning collective efforts to transform the structure of the society in which they live. With respect to the family and the role of women, the breakdown of the sexual division of labor and the achievement of complete equality of the sexes could all too easily represent nothing more than the freeing of women into an alienated world of work, and the dedication of personal life to an atomized pursuit of self-gratification via consumption. Finally, efforts to achieve control over human biology look less than promising from the nontraditionalist perspective. To the extent that couples show a preference for male first-born children, the freedom of couples to choose the sex of their child may be the freedom for male domination to manifest itself in one more area.[542] Or control over fertility might mean that women are free to sterilize themselves in order to work in factories where chemical agents capable of harming the fetus are present.

Similarly, the activist perspective has a disquieting side when we look at the transformation of the judicial role since *Brown*. As the judiciary itself increasingly becomes another bureaucratic actor run by "managerial judges,"[543] the notion of the malleability of social institutions and basic social

542. On the question of parental preferences for their children's sex, see Westoff & Rindfuss, Sex Preselection in the United States, 184 Science 633 (1974); Etzioni, Sex Control, Science, and Society, in The Family in Transition 83-89 (A. Skolnick & J. Skolnick eds. 1971); Steinbacher, Sex Preselection: From Here to Fraternity, in Beyond Domination 274-82 (C. Gould ed. 1983). Obviously, parents may in certain situations prefer a girl over a boy, as well as *vice versa*; the point is that the preferences reflect and reinforce stereotyped notions of men and women, or boys and girls. See Hanmer, Sex Predetermination, Artificial Insemination and the Maintenance of Male-Dominated Culture, in Women, Health and Reproduction 163-90 (H. Roberts ed. 1981).

543. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); McRee, Bureaucratic Justice, 129 U. Pa. L. Rev. 777 (1981); see also Estreicher & Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681 (1984).

norms becomes questionable. For example, the idea that the norm itself is constituted by the process of adjudication and formulation of remedies[544] may have a perverse effect. Will not the judge's (and the litigants') desire to be efficacious cause the remedies, the norms worked out, and, ultimately, the institutions thereby restructured, to be profoundly shaped by the constraints of the social structure with all its inequalities and hierarchies?[545] This possibility—and the general prospect of an interventionist judicial-administrative bureaucracy that concerns itself with the task of "shaping and structuring more and more of the substantive interests and orientations rooted in the spontaneous private life of bourgeois civil society in accordance with the logic of a system of total administration"[546]—is not a reassuring one. Thus, the notion of limits to judicial power, of a fixed structure within which courts must operate, gains some attractiveness in light of the dangers of elevating judges into prophets calling us back to our basic values.

The traditionalist vision can be understood most sympathetically as a reaction to this darker side of the breakdown of "traditional" roles and structures. Capitalist development *is* highly dislocating, tearing down established structures for relationships and individual development; and because we do see a need for some sort of structure in our lives, the traditionalist perspective strikes a responsive chord. The notion of deliberate "social reconstruction" does indeed carry with it undertones of a system of total administration and domination. Thus, the current attack on abortion, equal rights for women, and judicial activism cannot be dismissed as nothing more than a repressive trick (though it has that aspect). Indeed, as one commentator has observed: "the dominant trend of grassroots political action these days bears hard to the *right*. For example, the largest popular movement against bureaucratic usurpation is the *anti-busing movement*."[547] To be sure, much New Right organizing, centrally run and hierarchically organized with an efficiency that any devotee of scientific managment would envy, reminds one more of the managment of a modern corporation than of grassroots politics.[548] But it is clear

544. See, e.g., Note, Complex Enforcement, 94 Harv. L. Rev. 626 (1981).

545. See, e.g., Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 57-58 (1979).

546. See Fraser, supra note 527, at 149.

547. Davis, Socialist Renaissance or Populist Mirage?, Socialist Rev., July-Oct. 1978, at 53, 55; see also R. Petchesky, supra note 393, at 273-74.

548. See, e.g., Nyhan, The Conservative Crusade, The Boston Globe, May 3, 1981, (Magazine), at 26-34. Indeed, the political candidate himself becomes a cog in a machine in an ideal organization, which:

> would recruit a candidate, give him a package of stands on key issues, bring him to Washington, 'arrange the hotel, the escort, the schedule,' and showcase him or her to groups of political action committee representatives who could be tapped later for funds. Then they would send the candidate, presumably with his head spinning at the pace of it all, back to the district or state, with the [organization's] . . . pollster and media adviser ready to take charge of the ensuing campaign.

Id. at 31.

that the anti-abortion movement has attracted active support among large numbers of people.

Nevertheless, the traditionalist vision is as unsatisfactory as the nontraditionalist, though in a different way. In identifying the possibility of morality and respect for others with a specific conception of femininity and a specific conception of family, it ignores the reality of inequality and domination within those conceptions. While sexual freedom indeed has its darker side, the notion that any one form of relationship is *the* form in which sexual relations can be premised on mutual respect, or that sexual relations intrinsically have one meaning—such as a procreative one—is profoundly misguided.[549] Nor is there any reason to suppose that control over human biology is necessarily decadent or conducive to domination. The traditionalist argument that abortion is *inherently* selfish is belied by the experience of the past ten years in which women who have had, for the first time in modern U.S. history, relatively free access to contraception and abortion. The spectre of amoral women having abortions to preserve their figure or avoid rescheduling their vacations, to use two common anti-abortion images of the way that women will decide, bears no relation to reality.[550]

Similarly, while the fears about the effects of allowing the Supreme Court to become a prophet proclaiming our deepest values are by no means baseless, the nonactivist perspective overlooks the fact that since *Brown* the courts have indeed responded to and attempted to alleviate oppression caused by systematic abuses of power. They have condemned racial discrmination in all areas of society; they have ordered massive improvements in brutally inhumane conditions in prisons and mental hospitals; they have struck down laws that forced women to risk their lives in needlessly dangerous illegal abortions. The extent to which these achievements would have come about had the judiciary remained steadfast in its adherence to the traditional dispute resolution model is necessarily a matter of speculation, but it is clear from the experience of the past thirty years that if the judiciary is to play any effective part at all in restraining the power of the modern bureaucratic welfare state, a more activist role is essential. Exclusive reliance on judicial action as a means of reform is surely mistaken; but the same could be said of any approach that attempted to foreswear any resort to the courts.

Finally, the traditionalist perspective is internally contradictory. The aim may be to "preserve" traditional structures, but the political actions necessary to that aim rob these traditions of their seemingly natural character. Thus, the preservation of these structures inevitably appears as a forcing of certain

549. Cf. J. Mitchell, supra note 520, at 150 (need to attack "oppressive monolithic fusion" identifying both child care with the family as presently constituted and sexuality with reproduction).

550. Cf. Petchesky, infra note 560, at 669 ("Admitting that we have not fully articulated a feminist morality of abortion . . . does not imply that all or most women who get abortions do so thoughtlessly or irresponsibly. On the contrary, women who seek abortions know and experience better than anyone else the difficulty of that decision.").

roles on people, rather than an attempt to maintain something that is already there. Moreover, the very attempt to "preserve" the traditional family can embark the government on a course of massive and detailed state intervention, as the more wide-ranging features of the proposed Family Protection Act show.[551]

Though neither the traditionalist nor the nontraditionalist perspective is satisfactory, each captures an undeniable aspect of our experience. It is unacceptable, however, to identify the need for structure of some sort both in personal life and in the exercise of state power with the "traditional" role for women, conservative positions on sexual practices, traditional constraints on the judiciary, and the like. Equally unacceptable is the identification of individual and social freedom with the nontraditionalist vision of a world run by progressive technocrats and populated by rootless individuals seeking only their own gratification.[552] But while they are unaccaptable for different reasons, the two visions share two common traits: each is identified with an aspect of the existing social structure and a particular experience associated with it, and each is made to seem exclusive of the other. Thus, in both the traditionalist and nontraditionalist perspectives, a historically conditioned dilemma is mistaken for a "timeless" one.[553] It is this misidentification that must be overcome in a critical theory integrated with a movement for progressive social change.

c) Abortion and Privacy

At the beginning of this section, I argued that the struggles over abortion are constitutive, seeking to determine not merely the degree of access to abortion, but also what abortion is. To gain a full understanding of how abortion may in fact be constituted, however, it was necessary to go beyond the terms of the struggle as it is currently conducted, by subjecting both the "traditionalist" and "nontraditionalist" perspectives to criticism. That criticism makes possible a deeper understanding of the nature and limits of the contemporary debate over abortion and privacy.

The conflicting efforts by traditionalists and nontraditionalists to constitute abortion have so far produced deeply ambiguous results. Every gain in women's freedom seems clouded by the prospect of heightened domination. This paradox is perhaps most evident in the parental consent issue. On the one hand, freeing teenagers from possibly vindictive parental control represents a gain in freedom and dignity. Those children whose parents will be

551. See Flax, supra note 532, at 142-44.

552. One image of such a world is the "superwoman" counterweight to the image of the traditional housewife. See Winship, supra note 513. See generally M. Walzer, Radical Principles 22-53 (1980).

553. A good example of the false identification I have in mind is provided in La Follette, Licensing Parents, 9 Phil. & Pub. Aff. 182, 196 (1980) (proposing that the state license parents and arguing that the only possible basis for opposition to his proposal is "a long-held deeply ingrained" belief that parents "have natural sovereignty" over their children).

helpful and understanding can seek their guidance, and those parents whose primary concern would be to punish the daughter by forcing her to have the baby can be bypassed. On the other hand, leaving a young girl to her own devices may, in the end, simply heighten her vulnerability to the biases of professionals and experts. Does a lower-income teenager who wishes to have her baby, but decides upon an abortion after being advised by doctors that pregnancy is a "problem" for teenagers, or after being advised by social workers of the sacrifice to her education that raising a child on her own will entail exercise her right of self-determination any more than one whose parents forbid her from getting an abortion? Though freed from the constraints of the family, the girl may be subject to the domination of a welfare state that deals with the phenomenon of unwed motherhood among teenagers by counseling abortion rather than by making more politically difficult reforms that would, for example, facilitate early access to adequate prenatal medical care for young single teenagers. These reforms would give a teenager a true choice, not an accommodation to economic and social inequality, as to whether to bear a child.[554]

The existing doctrine on a minor's right to an abortion epitomizes this paradox. Under the Supreme Court's decisions,[555] it appears that a parental consent or notification statute will be upheld if it allows a minor who wishes to have an abortion to persuade a court that she is mature enough to make her own decision without consulting her parents. If she fails to persuade the judge of her maturity, she may argue to the judge that an abortion—without notice to or consultation with her parents—is in her "best interests."[556]

The possibilities for heightened domination are obvious. In practice, the judge will have the choice either of rubber-stamping the girl's request, or of deciding the matter for her. The only way he—the judge is likely to be a man—can decide whether the minor is mature, or whether an abortion is in her best interests, is by reference to his own preconceptions about abortion and sexuality. Moreover, if the judge were to go beyond those preconceptions and look into the minor's life, evaluating her feelings and probing her family situtation in detail, the inquiry would be even more intrusive.[557] White, male, middle- and upper-class judges—the bulk of the judiciary—are unlikely to exercise this responsibility in a liberating way.[558]

554. On the need for a critical approach to abortion counseling, see V. Greenwood & J. Young, supra note 415, at 133-34; Hollway, supra note 398, at 42-43.

555. See *Akron*, 462 U.S. at 416, 427 n.10; H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion); see also text accompanying notes 256-260 supra.

556. See *Bellotti*, 443 U.S. at 644.

557. See Buchanan, The Constitution and the Anomaly of the Pregnant Teenager, 24 Ariz. L. Rev. 553, 587-88 (1982).

558. Certainly, sterotypes of sex, race, and class heavily influenced the decisions of mostly white, male doctors whether to grant an abortion under pre-*Roe* laws that required a "medical" indication for abortion. See The Right to Abortion: A Psychiatric View, in 7 Group for the Advancement of Psychiatry 197, 207-08 (1969) (Committee for the Advancement of Psychia-

Equally disturbing is the absence of any real place in the procedure for consideration of the moral issues. Indeed, if a judge declared that he believed abortion to be wrong, and denied the minor's request on that basis, we would properly condemn that action. Of course, such biases may well enter in a less obvious fashion into the determination of the girl's maturity: for example, if she does not appear to take abortion seriously enough, or shows no regret over her "promiscuity," the judge may label her "immature." On the other hand, if the judge attempted instead to take the immature minor's own moral conceptions into account in deciding her best interests, he clearly could not—given her immaturity—accept her statements entirely at face value. To try to determine what she really believes, however, would open up an obvious route for even subtler domination. More likely, then, consideration of moral issues will drop out completely, and the moral questions will be translated into matters of mental and emotional health to be dealt with on the basis of what is best for the normal child according to medical and psychiatric experts. We began with a right to privacy premised on each individual's right to define for herself her basic moral values; we end up with a decision made by the judge for the minor on the basis of what is healthiest for her, i.e., most conducive to her present and future functioning in society.

It would be wrong to depict the Supreme Court's doctrine on a minor's right to abortion as making that domination an actuality for minors. In fact, it is hard to know what the exact effect of the court's decisions will be.[559] In practice many judges might, for example, take the approach of deferring to the minor's wishes on the ground that if she had a good family relationship she would not be appearing in court in the first place. Nevertheless, the potential for domination that could emerge from the minor's right to abortion under current law provides a glimpse of how abortion might generally be constituted within a corporate welfare society as yet another aspect of social control.

While the issue of parental consent poses this possibility most strikingly, the same ambiguities can be seen in the areas of spousal consent, abortion funding, and the controversy over *Roe v. Wade* and the Supreme Court's proper role. With respect to the first of these issues, the Supreme Court's decision to strike down statutes requiring a husband's consent for his wife to have an abortion gives women control over their bodies and strikes a blow against male domination within the family. Yet the exclusivity of the woman's right can imply that reproduction is peculiarly a woman's concern—and responsi-

try) (most "therapeutic" abortions performed on wealthy women); see also S. Macintyre, Single and Pregnant 126-42 (1977); Young, The Politics of Abortion, 2-3 Radical Sci. J. 51, 55-64 (1975).

559. Indeed, it is hard to know exactly what the Supreme Court's own position is. In *Matheson*, the Court stated that the appellant had made "no claim or showing as to her maturity or as to her relations with her parents," 450 U.S. at 407, and confined its holding to the conclusion that a requirement of notice does not *per se* violate the Constitution. In holding so narrowly, the Court left open the possibility of further variation in future cases. See generally The Supreme Court, 1980 Term, 95 Harv. L. Rev. 91, 142-52 (1981).

bility.[560] The fact that the husband cannot veto his wife's abortion decision has been used to support the argument that the woman should bear the sole financial responsibility for the child.[561] This ambiguity is reflected more generally in the idea that women will and should work after divorce, rather than be entirely dependent upon support from their former husbands.[562] On the one hand, women's entry into the labor force does lessen their dependence on men; but without a radical, thorough attack on wage and job discrimination, the independence won may represent for many women a right to heightened economic insecurity or outright poverty.[563]

The question of public funding for abortion is equally ambiguous. Abortion funding, many pro-choice advocates argue, is essential to ensure that a woman's choice is not effectively denied to some. Without funding, middle- and upper-class women will always have easy access to abortion while poor women will be forced to make a desperate search for money, risk a less safe abortion by a clinic or doctor operating outside the law, or bear an unwanted child.[564] Moreover, the fact that abortion is funded along with a wide variety of medical procedures could signify its normal and routine nature. At the same time, however, such funding could stand as a concrete indication of the state's interest in controlling or regulating reproduction. And abortion funding by no means guarantees that lower-income women will enjoy full reproductive freedom in any meaningful sense. It may only affect the relative economic pressures on the choice. A single pregnant woman on welfare, or working in a low-paying, insecure job, may conclude that it is simply not realistic to have a child. Of course, conditioning welfare benefits on agreeing to an abortion would make the denial of choice obvious; but even without such blatant restrictions on her decision, the freedom gained by abortion funding is not without its questionable aspects. From one point of view, abortion funding might be said to remove a technical barrier to obtaining an abortion—lack of cash—thereby allowing poverty and sex discrimination in wages and job opportunities to influence a woman's decision about pregnancy all the more effectively.[565]

560. See, e.g., Petchesky, Reproductive Freedom: Beyond "A Woman's Right to Choose," 5 Signs 661, 669-70 (1980) [hereinafter Reproductive Freedom] (noting the danger that the "assertion of women's right to control over reproduction as absolute or exclusive . . . can be turned back on [women] to reinforce the view of all reproductive activity as the special, biologically destined province of women").

561. See, e.g., Sobran, Abortion: Rhetoric and Cultural War, 1 Human Life Rev. 85, 97 (1975); Swan, Abortion on Maternal Demand: Paternal Support Liability Implications, 9 Val. U.L. Rev. 243, 269 (1975).

562. See Hauserman, Homemakers and Divorce: Problems of the Invisible Occupation, 17 Fam. L.Q. 41, 55-56 (1983); Weitzman, supra note 498, at 1228-32.

563. See Pearce, The Feminization of Poverty, 11 Urb. & Soc. Change Rev. 28 (1978); Weitzman, supra note 498, at 1229-31.

564. See, e.g., Harris v. McRae, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting).

565. See Petchesky, Reproductive Freedom, supra note 560, at 680 ("In the absence of either adequate shared material support (incomes, child care, health care, housing) or shared male responsibility for contraception and child rearing, women—particularly unskilled and

Finally, the very issue of the right to abortion is itself ambiguous. The Supreme Court's ruling in *Roe* has surely resulted in an increase in freedom and an improvement in the quality of life for countless women who would otherwise have been forced to bear unwanted children or risk their lives in illegal abortions. Yet as the experiences of the Soviet Union, several Eastern European countries,[566] and Japan[567] show, governments may liberalize abortion when they wish to limit population growth, and restrict or outlaw abortion when they want to increase the population. In this context, abortion represents less the freedom of the woman to control her body than the power of the state to regulate her fertility.[568] In the United States, population concerns have been present in the abortion debate, but they have not been paramount. Nevertheless, apart from the ever-present threat that lower-income and minority women will be "encouraged" in some way to forego having children or limit their numbers,[569] the legalization of abortion presents two other ambiguities.

The first concerns the role of the courts. In deeming abortion a fundamental right and striking down anti-abortion statutes, the Supreme Court affirmed the notion of individual rights that transcend the political process. Yet in its funding decisions,[570] the Court has countenanced attempts to limit access to abortion and define it in a way incompatible with true reproductive freedom. To the extent those decisions were based on a sense of institutional compromise, i.e., leaving funding to the legislature while insisting on the right to abortion, the concretization of the privacy norm upon which *Roe* was based has been deeply influenced by the constraints of the political structure.

The second concerns the "medicalization" of the right to abortion. On the one hand, there seems little doubt that "[n]othing the Supreme Court has ever done has been more concretely important for women."[571] Yet it is unclear whether *Roe* granted an individual right, or, by legalizing an activity that would go on anyway, allowed abortion to be more effectively controlled as a medical procedure.[572] Before *Roe*, for example, some illegal clinics attempted

low-income women—seem left, after these reforms [such as liberalized abortion], in some ways more vulnerable than before.") (footnote omitted); Oliker, supra note 360, at 91-92.

566. See generally M. Potts, P. Diggory & J. Peel, supra note 402, at 377-409.

567. See id. at 412-14; V. Greenwood & J. Young, supra note 415, at 100-02.

568. Cf. A. Rich, supra note 364, at 270 ("Abortion legislation has always come and gone with the rhythms of economic and military aggression, the desire for cheap labor, or for greater consumerism."); Petchesky, Reproductive Freedom, supra note 560, at 679 ("In general, where reforms such as liberalized abortion and divorce have been introduced as a fundamental aspect of socialist revolutions—for example, in the Soviet Union and eastern Europe—the purpose has been mainly to facilitate women's participation in industry and the breakup of feudal and patriarchal forms.").

569. Cf. Hayler, Review Essay: Abortion, 5 Signs 307, 320-21 (1979) (sterilization of poor).

570. *Harris*, 448 U.S. at 297; Williams v. Zbaraz, 448 U.S. 358 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

571. Law, supra note 380, at 981.

572. See Grey, Eros, Civilization and the Burger Court, Law & Contemp. Probs., Summer 1980, at 83, 97.

to develop an alternative to the prevailing professional model of medicine, including the use of non-physicians to perform abortions.[573] Even more enforceable since legalization of abortion, the common requirement that a doctor perform the abortion[574] is a potential barrier to the feminist and radical aim of demystifying and undermining professional power.[575]

The struggle for abortion rights, then, has had paradoxical results which cannot be ignored. The difficulty is that attempts to overcome these ambiguities threaten only to replicate the dilemma on a larger scale. For example, as noted earlier, abortion funding could at worst simply remove a technical barrier—lack of ready cash—to the power of poverty and sexism to influence a woman's decision. Clearly, broader social reforms are needed to ensure that women have a true choice, and are not manipulated by economic circumstances or government policies. These efforts can take several forms. Discrimination in wages and job opportunities must be attacked so that women have the same opportunities in the job market as men; Social Security credit might be granted to women who choose to be homemakers. Women must also be relieved of their disproportionate share of the burdens of childrearing by the provision of day care and by the development of alternatives to private homemaking (ranging from cooperative living arrangements to the establishment of housecleaning firms, and the sharing in housework by men). Finally, rights to welfare, food stamps, unemployment benefits, and other such programs must be defended—and expanded—to ensure that real freedom to have or not to have children will not be effectively denied to all but a wealthy few.[576]

None of these broader reforms, however, entirely overcomes the ambiguities that a narrower approach presents. There is nothing inherently liberating about participation in a capitalist labor market (even a non-sexist one), and the prospect of drawing all areas of life even more into the market, or of making people even more dependent upon bureaucratically run assistance programs, is not an attractive one. Even an expanded pro-choice approach to various medical regulations could easily go astray. It is clearly not enough to aim solely for greater "access" to abortion as presently constituted. An integral aspect of the constitution of an abortion that gives women true control over their reproductive destinies is an attack on the notion of a value-free

573. See Bart, Seizing the Means of Reproduction: An Illegal Feminist Abortion Collective—How and Why It Worked, in Women, Health and Reproduction 109-28 (H. Roberts ed. 1981); R. Petchesky, supra note 393, at 128-29.

574. See *Akron*, 462 U.S. at 430 n.12 (upholding the requirement); Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam); *Roe*, 410 U.S. at 165.

575. An example of an alternative procedure is "menstrual extraction" or "regulation." This procedure is somewhat like a vacuum aspiration abortion, but is much simpler, and can be performed after a missed period, before the woman even knows whether she is pregnant. See M. Potts, P. Diggory & J. Peel, supra note 402, at 230-34; S. Ruzek, supra note 411, at 54-58. Such a technique would open the way for feminist clinics to dispense with doctors for such "abortions" and use trained lay persons instead. If it is considered to be an abortion, however, the licensed physician requirement might well apply and block that aim.

576. For a good discussion of the need for a broader approach to the abortion issue, see Petchesky, supra note 560.

medical science that presents society with various means of abortion and birth control.[577] As noted above, the very technology of birth control and abortion is socially constituted.[578] If women are to gain control over their own bodies, they must demand that more emphasis be placed on developing methods of safe and simple abortion, such as menstrual extraction,[579] and especially on methods which can be performed by trained lay persons in feminist clinics.[580] But here again, the broadening of the horizons, while imperative, threatens simply to reproduce the ambiguities that led us beyond a liberal pro-choice position.

Consider, for example, the requirement that a licensed physician perform the abortion. From the liberal pro-choice point of view, this requirement is objectionable as one more attempt to constitute abortion as a major (and more expensive) medical procedure. From a more radical feminist point of view, too, having lay persons perform abortions would be desirable as a way of helping to demystify professional medical power. Suppose, then, that the licensed physician requirement were eliminated or restricted. As profit-making corporations move into medicine to a growing extent,[581] one can envision a depressing outcome. The abortion procedure itself could be Taylorized, broken down into deskilled fragments that could be performed by cheaper labor—quite possibly women.[582] The counseling function is another one that could easily be made more "efficient," and the feminist ideal of group counseling as a means of consciousness raising could be transformed into a money-saving means of dispensing standardized information quickly.[583] A woman having an abortion could, in effect, be pushed along an assembly line from one point to the next, attended to at every point by "deskilled" workers supervised by the clinic's management.[584]

The abortion that *might* emerge from the struggles to constitute it, then, could be very unliberating—even if we attempt to take it beyond a narrow

577. See generally Rose & Hanmer, Women's Liberation, Reproduction, and the Technological Fix, in Sexual Divisions and Society 199-223 (D. Barker & S. Allen eds. 1976).

578. See text accompanying notes 387-391 supra.

579. See note 575 supra.

580. See generally S. Ruzek, supra note 411, at 143-80.

581. See P. Starr, supra note 446, at 428-49.

582. Indeed, such a division between more expensive and cheaper labor exists to some extent now. In "two-stage" abortions—where some procedure to induce labor is first performed, followed by expulsion of the fetus usually some twenty-four hours later, see M. Potts, P. Diggory & J. Peel, supra note 402, at 188-206—it is generally doctors who perform the initial procedure and nurses who attend to the more time-consuming second stage. See generally M. Denes, supra note 398, at 43-90.

583. See M. Zimmerman, supra note 384, at 173-75.

584. See Aries, Abortion Clinics and the Organization of Work: A Case Study of Charles Circle, 12 Rev. Radical Pol. Econ. 53-62 (1980); Hollway, supra note 398, at 44-49. For this reason, exclusive emphasis on criticizing (mostly male) professional control of women would be misguided. It is not that critiques of sexism in medical practice are unimportant or unhelpful, but that it is a mistake to overemphasize the power of the medical profession in itself; the independence of the medical profession from corporate domination is becoming increasingly tenuous.

struggle for individual choice. Section IV discusses how such an outcome could be avoided, for it is by no means inevitable. The point here is that the present struggle over abortion has two severe limitations, apart from the obvious one that individual choice is always severely constrained by oppressive structures of sexual and economic inequality.

First, pro-life forces have attempted to constitute the abortion decision as a sorrowful, tragic event, which, if not so treated, indicates selfishness on the part of the woman. Liberal pro-choice advocates correctly counter that abortion is not inherently selfish, but in so doing threaten to constitute it as an entirely amoral matter—a technical, routine procedure and nothing more.[585] Such an approach is quite compatible with the weakening of critical capacity characteristic of a corporate welfare society. Similarly, opponents of *Roe* have presented that decision as a necessarily dangerous and abusive use of judicial power. It is tempting to respond with a disclaimer of the notion of judging the exercise of judicial power against anything other than its "results" or its "moral vision;"[586] but that approach is too reminiscent of the notion of a bureaucratic planning apparatus shaping society according to technical needs to be acceptable.

Second, pro-life advocates have, as noted, put forth and attempted to concretize a notion of abortion as inherently tied in to a particular state of society—a degraded and Nazi-like one, lacking in any respect for human life. By the very emphasis on choice as the central feature of the argument for the right to abortion, pro-choice advocates have tended to deny the connection of abortion not only to that particular outcome, but also to any sort of social structure at all, other than one in which individuals are free to plan their own way of living and choose their own forms for relationships. Yet, as seen earlier, that freedom can all too easily be translated into nothing more than the "freedom" of the marketplace and the consumption ethic. The particular connection the traditionalists have drawn must be denied, then, without denying that the struggle over abortion is indeed bound up with a larger contest over

585. Cf. Colen, Test Tube Baby Experiment Near at Norfolk School, Washington Post, Sept. 28, 1979, at A1, A12, col. 3 (quoting fetal researcher on the status of the fetus) (" 'I am basically a biologist' . . . 'and I have not tried to resolve such unresolvable problems. When does the soul enter the embryo? For me, it is not a problem.' ").

In her study of abortion, Zimmerman noted that in the counseling, the women who had undergone abortions at two clinics reported that, while the counselors gave each group an opportunity to discuss their problems and feelings, most patients did not do so; there was very little reported group discussion. Instead, the counseling sessions appeared to consist primarily of a talk given by the staff member, detailing the technical aspects of the abortion and describing various contraceptive methods for the women's future use. M. Zimmerman, supra note 384, at 174. Of course, forcing counseling on women can be oppressive too. My point, which I will elaborate in Section IV, is simply that a critique of the way particular contexts affect the woman's ability to decide the moral issues ought to be a major consideration.

586. This is true to some extent of some mainstream theorists, e.g., J. Choper, Judicial Review and the National Political Process 118-22 (1980), and even more so of some radical critics who dispense with any normative analysis at all, Friedman, The Conflict over Constitutional Legitimacy, in The Abortion Dispute and the American System 13 (G. Steiner ed. 1983). See, e.g., Roelofs, The Warren Court and Corporate Capitalism, Telos, Spring 1979, at 94, 99.

the social order. To put it differently, private life has become politicized, and today at least, much of that politicization can be attributed to pro-life advocates who refuse to let the abortion issue sink into the private oblivion to which the Supreme Court would relegate it. The response should be, not to try to depoliticize it—as the liberal pro-choice position would—but to politicize abortion and personal life generally in a way that helps to move us beyond the fragmentation, alienation, and inequality of liberal capitalist society. An essential first step in that direction is the development of a critical theory of the morality and politics of abortion, to which we now turn.

IV

TOWARDS A CRITICAL THEORY OF ABORTION AND PRIVACY

A. Introduction

One task of a critical analysis of abortion and privacy is to bring out the interrelationship of knowledge, social vision, and social structure in liberal theories. That has been the purpose of the analysis up to now. Liberal moral, political, and legal doctrines, I have argued, are incoherent. Yet few people take an utterly skeptical stance. Instead, most people respond to intractable theoretical dilemmas by falling back on common sense or their judgment of what is reasonable or realistic. The differing judgments that people thereby reach on the abortion issue are informed by opposing visions of what the social order is and ought to be. These visions, traditionalist and nontraditionalist, do not rest on neutral evaluations of experience or reflect commonly shared ideals, but are themselves highly controversial. Further, by identifying timeless dilemmas concerning how we relate to one another and develop our own selves with specific, historically conditioned sets of alternatives, these opposing visions limit our ability to work towards an alternative social structure in which full sexual equality and reproductive freedom would be possible.

Exposing the incoherence of liberal theories and drawing the connection to the flawed social visions which underlie them (and make meaningful social change more difficult) is worthwhile in itself, regardless of whether we can formulate an alternative theory.[587] But a critical analysis can go beyond this purely negative function to include some attempt to sketch the contours of an alternative doctrine of abortion and privacy.[588] At the same time, though, any

587. See Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 59 (1984) (advocating "the persistent demonstration in all doctrinal fields that both the legal rules in force and the arguments that are presented to justify and criticize them are incoherent," because "[t]his kind of criticism would be useful even if we could not imagine a satisfactory alternative to traditional legal theory") (footnote omitted).

588. Especially helpful discussions of the abortion issue in this respect are: R. Petchesky, Abortion and Woman's Choice (1984); Petchesky, Reproductive Freedom: Beyond "A Woman's Right to Choose," 5 Signs 661 (1980) [hereinafter Reproductive Freedom]; Riley, Feminist Thought and Reproductive Control: the State and the "Right to Choose," in Women in Society 185-99 (Cambridge Women's Studies Group 1981); and Rose & Hanmer, Women's Liberation, Reproduction, and the Technological Fix, in Sexual Divisions and Society: Process and Change 199-223 (D. Barker & S. Allen eds. 1979). For an account that is at odds in

such effort must necessarily be partial and tentative, for the three paradoxes noted at the beginning of this article cannot be "resolved" merely by attempting to set out an alternative doctrinal formulation.

1. Skepticism

A critical doctrine of abortion cannot neatly resolve the problem of skepticism. Indeed, in one sense, any effort to indicate the content of a critical doctrine of the morality and politics of abortion will always be vulnerable to the same criticisms set forth earlier regarding liberal doctrine. It would be wrong to pretend otherwise: my aim is not to replace one mystification with another. There is, for example, nothing to stop us from asking at the end of any argument, including a critical one, "Still, how do we know that the fetus isn't really a human being and that abortion isn't therefore really murder?" No critical doctrine can have a satisfactory answer to objections premised upon a thorough, radical skepticism that denies the possibility of ever knowing anything at all about morality or politics.

The importance of this fact should not be overestimated, however, for most skepticism is more selective. What distinguishes a critical doctrine from a liberal one is that the former makes explicit the way in which the underlying social vision selectively attenuates skepticism. A critical doctrine, in other words, must place at the very center the alternative ideal of the social order that informs the judgments it makes. At the unavoidable juncture in the argument when we fall back on our judgment or appeal to an intuitive notion or a partial insight, a more radical skepticism forcefully brings home the fallacy of taking judgments of this sort as glimpses of unconditional truths. Acknowledgement of that limitation, however, does not vitiate the point of critical doctrine; on the contrary, it highlights the necessity of a form of doctrine that is utterly self-conscious of the conflicts and visions of which it is a part.

2. Social Vision

This response to the paradox of selective skepticism brings to the fore the question of what alternative vision of the social order might underlie a critical doctrine. Such a counterideal—more a recognition of certain (currently) inescapable tensions in the struggle for women's rights, especially the right to abortion—is suggested by our analysis and criticisms of the traditionalist controversy. With respect to the family and the role of women, a defense of the right to abortion is absolutely crucial to women's attempts to gain control over their own destiny both in personal relations and in social life generally. Yet there is equally a need to promote the ideal of shared responsibility—as between men and women and parents and society—for reproduction and the upbringing of children. This second aim is potentially in tension with the first, as the argument for a woman's exclusive right to make the abortion decision

important respects with the views I put forth in this section, see Himmelweit, Abortion: Individual Choice and Social Control, 5 Feminist Rev. 65-68 (1980).

can be turned back on women by reinforcing the stereotypes of them as essentially maternal beings.

With regard to sexual relations and the body, moreover, the individual woman's right to abortion is indispensable to freedom of sexual expression for women and (in a different way) for men. A woman's control over her own body must be taken as an essential starting point for any critical doctrine: for anyone else to have such intimate power over a woman as to be able to force her to carry a pregnancy to term is utterly incompatible not only with personal freedom but also with women's efforts generally to free themselves from structures of male domination. On the other hand, the aim must equally be to avoid promoting a "discourse" of sex in which sex is taken as the core of self-knowledge, intrinsically alien to and potentially liberating from power. The idea of control over one's body must also be sharply distinguished from consumption ethic notions of finding personal meaning through health "disciplines" and "regimens" and, more broadly, from the idea that there exists some enclave of personal freedom in which one defines oneself apart from any relations of power.[589]

3. Power

Finally, it is necessary to promote the ideal of individual and social control over—and indeed, the constitution of—the terms of social and biological life through the collective exercise of power. The right to abortion is essential to promoting one aspect of that control—reproductive freedom—a substantive freedom that depends for its meaningfulness on far greater democracy and equality in childraising and economic and political life. More generally, we must reject the idea that biology is something given, with inevitable consequences for social organization or beliefs. This is not to say that there are absolutely no biological constraints of any sort, but that claims of biological determination must be subjected to the most rigorous scrutiny, and that few if any determinist claims can withstand such scrutiny.[590] At the same time, however, it is crucial that the ideal of greater control over biology and over the conditions of social life not be transformed into a social control in which an array of experts, professionals, and bureaucracies assumes ever greater power to "rationalize" all areas of life according to the logic of the capitalist system, all the while under the guise of the idea that "we" are taking active control of our social and political destiny. Equally unacceptable is the notion of biology or nature in general as the infinitely plastic material in which humankind's

589. See Diamond & Quinby, American Feminism in the Age of the Body, 10 Signs 119 (1984).

590. Cf. M. Poster, Critical Theory of the Family 149 (1978) (given lack of convincing evidence for the contention that family or sex roles are natural or biologically determined, "the most reasonable position the theorist can take on epistemological grounds is that biological limitations do not provide a basis for justifying any particular pattern of domination of children or restrictive sex role"); Olsen, The Family and the Market, 96 Harv. L. Rev. 1497, 1571 (1983).

needs are expressed and satisfied—a heightened "domination of nature" in which nature itself becomes "potential instrumentality."[591]

4. The Critical Project

It is impossible at this stage to go beyond this obviously partial formulation of a countervision. It is not a static, fully elaborated countervision, but a *project* for working one out through social transformation that lies at the heart of a critical theory. The project begins with a tentative counterideal of the social order, and by using it as a guide to particular social reforms, attempts to institutionalize it at least in part—to move it from the realm of purely verbal formulations to that of concrete social practices. Existing structures of sexual discrimination, stereotyping, and domination; differential opportunities for forming and pursuing one's own vision of the good life, as well as for securing basic material necessities; the pervasively undemocratic character of much of social and economic life; and the formal, lifeless character of what passes for democracy in political life—all these must be the subject of sustained, progressive, mass-based movements. From the experience thus gained we may hope for further insights to enrich and redefine the counterideal itself, which can, in turn, provide the basis for a still more comprehensive and radical social transformation.[592]

A critical theory, therefore, cannot resolve the paradox of selective skepticism; but it can make us conscious of the developing social vision by which one comes to some judgment in the face of skeptical doubts, which can never be eliminated entirely. It cannot resolve the paradox that abortion and privacy present as a matter of social vision; but it can permit us to affirm the commitment to the freedom of individual women to make the abortion decision, while helping to make it less likely that our commitment to that right sustains a vision of an atomized society in which the capacity for normative judgment is weakened. Finally, a critical theory cannot resolve the paradox that the same developments which have played such an important role in opening the way for the struggle for women's equality could also produce a society of heightened domination; but it can show how we might both argue and work more productively to move instead in the direction of sexual equality and reproductive freedom.

B. The Morality and Politics of Abortion

A critical doctrine of abortion will necessarily fail if it makes unthinking use of the liberal dichotomies of rights and the Right, politics and morality, public and private. At the same time, however, any effort simply to collapse them would be profoundly misguided.

591. H. Marcuse, One Dimensional Man 153 (1964). See generally W. Leiss, The Domination of Nature (1972).

592. See generally Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563, 579-80 (1983).

It would be untenable simply to accept the dichotomy of public and private in the context of abortion for two reasons. First, the "abortion" to which individuals have (or are denied) access is a social construct. We cannot make decisions about a right to abortion, and then permit individuals to exercise that right as a private matter, because it is out of "public" struggles over abortion that the "abortion" regarding which individuals may make their own "private" decisions will emerge.

Second, the struggles concerning abortion help to constitute the "women" and "men" who do the choosing as much as they help to constitute the "abortion" that those individuals will have the option of choosing. A general practice of abortion as an act of consumption, planned by the dictates of a job or career in a corporate bureaucratic hierarchy, and in the context of a society which distributes the burdens (and benefits) of parenthood between women and men and rich and poor in a tremendously unequal way, would contribute to constituting what it means to be a "woman" or a "man" in one way. A practice of abortion as an aspect of reproductive freedom in the context of a more communitarian society in which production is geared to human needs, with worker and community control of a democratically planned economy, and in which political and social life are premised upon the fostering of each individual's potential for self-realization, would constitute "womanhood" or "manhood" quite differently.

Thus, the distinction between a right to abortion and the morality of abortion must be attenuated. The argument for an individual woman's right to choose abortion must be accompanied by a moral and political justification of the "abortion" that will thereby be socially determined and made available. And that justification must be given a concrete connection to an analysis of the structure of the society in which moral choices are made by individuals. Such a connection is essential not only because that social structure accounts for the range of options available to individuals, but also because their capacities as moral agents cannot be understood apart from it.

But if arguments for the right to abortion cannot be sharply separated from arguments concerning its morality, neither can the two be equated. Ultimately the goal is to replace the liberal dichotomy of abstract, general rights and the particular exercise of rights with a notion of concrete self-realization within community.[593] It would be premature, however, to act as if that integration were now within reach. Indeed, it would be dangerous as well as premature, for it would ignore the threat that the greater community implied in any "public morality" of abortion might facilitate heightened domination in a society in which inequalities of power remain the rule. The effort to develop a

593. For a helpful exposition of this notion, see Arthur, Editor's Introduction, in E. Pashukanis, Law and Marxism 9-31 (C. Arthur ed. 1978). For a critique, see Fraser, Legal Amnesia, Telos, Summer 1984, at 15-52; Lukes, Marxism, Morality and Justice, in Marx and Marxisms 177-205 (G. Parkinson ed. 1982) (Royal Institute of Philosophy Lecture Series, Supplement to Philosophy 1982).

"public" doctrine of the morality of abortion could be used to weaken women's right to abortion and to reinforce the oppressive social structures. This would be a perverse result, for the attempt to formulate a critical doctrine of the morality of abortion is not intended to provide the basis for forcing women to justify their choice to (mostly male) doctors, legislators, or judges by criteria that make sense in terms of a capitalist society.

Moreover, while a critical doctrine of the morality of abortion must incorporate an analysis of the social structures which shape both the available choices and the decision makers themselves, it must not equate the critique of the social context with an analysis of the personal decisions that individuals make.[594] A critical doctrine that equated individual responsibility with social context would trivialize personal morality and weaken critical capacity. To avoid this outcome, which is so compatible with a corporate welfare society, something like the right to privacy—a recognition of individual autonomy and responsibility in decision making—appears indispensable.

There is no simple way to reconcile these two imperatives. Just as the alternative underlying conception of the social order must remain incomplete—an ideal in tension with itself—so, too, is the relationship between a critical doctrine of privacy and of the morality of abortion impossible to set out with full clarity and resolution. Instead, it is necessary to develop a moral and political doctrine that constantly highlights the inescapable tensions in the critical project; the right to abortion in its current liberal form (a right of individual women to make their own private moral choices) must be defended even by those who strive to move beyond the liberal conception to one in which morality and politics are integrated in the concrete activity of social individuals.

1. Abortion and the Right to Privacy

The central thrust of a critical justification of a right to privacy encompassing abortion is that in the concrete social context of sexual discrimination and inequality, recognizing the right enhances individuals' ability to consider and decide the moral questions concerning abortion. The aim of a critical theory of the right to privacy is to weaken and undermine social structures that limit individuals in their own development and in relationships with others, and that inhibit individuals' ability to act in a moral way. A critical theory of the right to privacy begins with a notion of diversity or tolerance, rejecting the idea that the "traditional" or currently prevailing forms of relationships and institutional structures embody the ideals of human association and individual development. It then seeks to identify and protect those alternative arrangements that more fully allow those ideals to be realized. Finally,

594. Petchesky, Reproductive Freedom, supra note 588, at 675 (noting that "[t]he fact that individuals themselves do not determine the social framework in which they act does not nullify their choices nor their moral capacity to make them").

it looks to those alternative arrangements to provide insight into the ideals themselves as a guide to further social change.

Thus, a critical doctrine of privacy cannot premise the individual woman's right to choose on some timeless need of individuals to control their own bodies or reproductive processes, as if that were part of some essence of personhood. Rather, it rests on the socially determined fact that having a child may have a profound (and in some respects adverse) impact on a woman's life in a way that it does not for men. Moreover, control of the decision by the state, the medical profession, husbands—anyone but the woman herself—gives crucial support to the whole system of sexual stereotyping and discrimination that oppresses women. In those circumstances, placing the abortion decision in the hands of the state or doctors or husbands gives them unacceptable power over women.[595]

Up to this point, the right sounds rather like a liberal one with a feminist tinge: "whether one person's body shall be the source of another life must be left to that person alone to decide."[596] But it differs from a liberal right of individual choice in two ways. First, it is not premised upon a notion that the decision over abortion is by its nature an individual matter.[597] In a radically different society which practiced a substantively equal sharing of reproductive decisions and childrearing among men and women (and between parents and society), it is possible that the claim that women alone must decide would be less supportable.[598] Second and more immediately important, a critical justifi-

595. Thus we need not choose between grounding the right to abortion on privacy or on sexual equality. The notion of the right to privacy set forth here incorporates sexual equality as an integral aspect.

596. L. Tribe, American Constitutional Law § 15-10, at 923 (1978) (emphasis deleted) (footnote omitted).

597. See Riley, supra note 588, at 185 ("[F]eminism, in so far as it's also socialism, can't tacitly assume a timeless irreconcilability between 'women' and 'State' on the point of reproductive choice. The question then becomes: what are the social conditions under which the most genuinely 'free' choices can be made by women . . . ?").

598. By this I do not mean to question the need for the right to remain in the individual woman's hands alone now and for the foreseeable future; it would be premature to envision such a reconsideration on an individualized basis. To suggest, for example, that an individual husband might be given a veto over his wife's abortion decision if he was willing to undertake the care of the child himself, see Tribe, The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 41 (1973), is to overlook the fact that the strong personal and social impact of becoming a mother is not within any one individual's or couple's control. Indeed, even the most personal consequence that the wife seeking abortion might wish to avoid—that is, the love for a child and the consequent pain of giving it up if she cannot care for it—would be a problem peculiarly for her (in comparison to her husband) precisely because society does not invest fatherhood with the same significance that it does motherhood. For references to giving up the baby for adoption, see R. Gardner, Abortion: The Personal Dilemma 175-76 (1972); D. Schulder & F. Kennedy, Abortion Rap 16, 23-28 (1971). These problems—and other considerations such as the fact that it is the woman who would be most burdened by the pregnancy—cannot simply be eliminated by individual action.

Further, I am not arguing that in a nonsexist, egalitarian society a woman should not have a right to abortion free of intervention by the state or her partner. My aim is not to replace timeless statements about "controlling one's body" with dogmatic assertions about what an

cation for the right of the individual woman to decide is concerned with more than the exercise of power by one actor over another. It is concerned with the nature of the actors themselves and the processes of moral deliberation in which they engage. For women, the very fact of having the power to choose can be personally transformative:

> When a woman considers whether to continue or abort a pregnancy, she contemplates a decision that affects both self and others and engages directly the critical moral issue of hurting. Since the choice is ultimately hers and therefore one for which she is responsible, it raises precisely those questions of judgment that have been most problematic for women. Now she is asked whether she wishes to interrupt that stream of life which for centuries has immersed her in the passivity of dependence while at the same time imposing on her the responsibility for care.[599]

Thus the individual woman's own nature as a moral agent, and not simply her freedom from external constraint, is at stake.[600]

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ideal society would look like. Rather, my argument is that we ought to be aware that our characterization of the right as necessarily individual is historically conditioned. Perhaps there is an unavoidable tension between individual and society in any possible form of social organization; but just as assertions of biologically determined differences between masculinity and femininity cannot be accepted uncritically, neither ought the existence of a tension between individual and society be elevated to a timeless verity. For a helpful discussion of this issue (concluding that it is difficult to imagine a society in which such a tension has been eliminated—a point with which I would agree), see Petchesky, Reproductive Freedom, supra note 588, at 676-85.

599. C. Gilligan, In a Different Voice: Psychological Theory and Women's Development 71 (1982).

600. Gilligan describes two languages or modes of moral reasoning. Whereas men tend to view moral questions in terms of a hierarchy of formal rights, she concludes, women generally see them as involving a web of concrete relationships in which responsibilities—particularly the responsibility not to hurt others—are foremost. See id. at 24-105. Neither language is entirely adequate in itself. Basing one's actions exclusively in terms of abstract rights ignores concrete human needs, see id. at 24-39, and ultimately can corrode relationships. Cf. M. Sandel, Liberalism and the Limits of Justice 34-35 (1982) (noting adverse effect on friendship of acting out of a misplaced sense of justice rather than benevolence and fraternity). On the other hand, exclusive emphasis on caring for others and acting responsibly towards them can blind oneself to one's own legitimate needs. See C. Gilligan, supra note 599, at 138-40.

Gilligan's analysis suggests that having the right to make the abortion decision can provide the occasion for individual women to develop a morality that goes beyond exclusive concern for others. See id. at 149 ("[C]hanges in women's rights change women's moral judgments, seasoning mercy with justice by enabling women to consider it moral to care not only for others but for themselves."). Similarly, where men are involved in the abortion experience but lack power to impose a decision, they may be forced to consider the woman's point of view more seriously and gain an appreciation of conflicting needs and responsibilities that a language of abstract rights cannot capture. See A. Shostak & G. McLouth, Men and Abortion 196-99 (1984).

There is no guarantee that some perfect synthesis will emerge. See C. Gilligan, supra note 599, at 173 (noting possibly that different "languages" that men and women tend to use "contain a propensity for systematic mistranslation, creating misunderstandings which impede communication and limit the potential for cooperation and care in relationships"). Moreover, it is obviously difficult to make general characterizations of the way women and men approach the abortion issue, and it is unlikely that any one account can be definitive. For an analysis that

The justification for the right to abortion, in short, includes but goes beyond an analysis both of men's power over women and of the socially determined burdens that pregnancy and childcare place on women. Recognizing a woman's right to decide allows individuals to address more fruitfully the moral issues surrounding abortion. This relationship between the right to privacy and the process of individual moral deliberation can be illustrated concretely by exploring five issues: spousal consent, parental consent, medical regulations of abortion, abortion funding, and sexual freedom.

a) Spousal Consent

Spousal consent requirements are unjustifiable not because the abortion decision is a "fundamentally personal one" in some timeless, analytical sense, but because they perpetuate a particular pattern of sexual inequality, in which the man retains ultimate control over the woman's body. Spousal consent requirements reinforce power structures that make it more difficult generally for women and men to relate to each other and reach joint decisions as equals. A child born as the result of the exercise of power by the husband over the wife represents a failure of the possibility of morality in human relationships, not "respect for human life" or "equal participation" by husband and wife in the abortion decision. Moreover, men and women cannot, as individuals, simply free themselves from the distorting effects of this unequal power on their relationships.[601] Even if the man attempted to foreswear use of his veto, nothing could change the fact that he would have it. Ultimately, he *could* use it; the distorting element of unequal power would remain.[602]

This argument envisions a transformation of the personal conditions in which women make decisions about abortion and consult with others. It is not enough, therefore, to present as incidental the fact that most women con-

differs in significant respects from Gilligan's, see J. Smetana, Concepts of Self and Morality: Women's Reasoning about Abortion (1982). In any event, the fundamental point is that women's right to choose opens the possibility of a transformation of personal moral conceptions and reasoning.

601. On this point Tribe's discussion is quite helpful. See Tribe, supra note 598, at 41 (noting that "[e]ven a woman who is not pregnant would inevitably be affected by her knowledge of the power relations . . . created" by giving the husband a veto over his wife's decision); see also id. at 39-41.

602. The argument concerning spousal consent statutes can be generalized to the question whether abortion should be legal. See, e.g., M. Denes, In Necessity and Sorrow: Life and Death in an Abortion Hospital, at xv-xvi (1976) ("[I]f we remove abortions from the realm of defiance to authority, remove them from the category of forbidden acts whose commission is the embodiment of risk and the embodiment of self assertion in the face of coercive forces, if we permit them to be acts of freedom as they should be, their meaning, private and collective, will inescapably emerge in the consciousness of every person."). Unfortunately, Denes' analysis is marred by the assumption that the legalization of abortion is sufficient in itself to make abortions "acts of freedom," and, still worse, by her conclusion that the meaning which necessarily will emerge is that "abortion is an abomination unless it is experienced as a human event of great sorrow and terrible necessity." Id. at 245.

sult their husbands or partners, their family members, or their close friends.[603] The point of opposing consent requirements is not to promote isolated decision making by individual women. Rather, it is to allow women, where they feel appropriate, to consult on a more truly equal basis with their partner or with others they choose to consult. The less power men exercise over women, the more it becomes possible for decisions concerning reproduction to be truly shared and to be made with an eye toward the interests of the children and the relationship into which they would be born.[604] So constituted, the right of the woman to obtain an abortion without her husband's consent is compatible with requiring men and women to share equally in child support: both are attempts to give life to the ideal of reproductive freedom and genuinely mutual decision making.

b) Parental Consent

A similar shift of emphasis is needed in discussions of parental consent requirements. All minors are dependent and vulnerable, and pregnant minors are especially so. In our society, a minor's dependence on her parents implies particular forms of power over her as well as particular contexts for loving and caring. Parental consent or notification requirements are objectionable because they identify the possibility of loving and caring for children with those particular forms of power. This identification ignores the reality that many families bear little resemblance to the idealized "traditional" family. By itself, the fact of dependence cannot "legitimate any [one] historical family structure."[605] Moreover, the power of the parents to block their daughter's access to abortion and contraceptives is not "natural" or inevitable; nor does it follow logically from the fact that the family in some form remains a primary context of socialization.[606] Given that parental power may be exercised in vindictive

603. See M. Zimmerman, Passage Through Abortion: The Personal and Social Reality of Women's Experiences 113-36 (1977).

604. How individuals work it out and what they do obviously varies; there is no guarantee that they will always reach the right decision. The important point is that removing—or, more realistically, weakening—this structural aspect of inequality creates some "space" for working out the decision with an eye toward what is right. To a certain extent, then, this argument resembles the theory underlying feminist consciousness-raising groups. These groups propose to give women some space, relatively free of the pervasive effects of sexism, in which to develop their own bonds of mutual support and to explore and to understand better the impact of sexism on their own personal lives. The idea of consciousness-raising groups as a larger political strategy, see MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515 (1982), however, is a different matter entirely. See R. Sennett, The Fall of Public Man 221, 294-312 (Vintage ed. 1978).

605. M. Poster, supra note 590, at 149.

606. Similarly, it is profoundly mistaken to posit some intrinsic nature of the abortion experience when dealing with the question of minors' abortions. Noonan, for example, poignantly recounts an incident in which several minors sought abortions:

> [With the striking down of parental and spousal consent requirements, the woman] became a solo entity unrelated to husband or boy friend, father or mother, deciding for herself what to do with her child. She was conceived atomistically, cut off from family structure. The *Boston Herald* ran a picture of young girls seeking an

or harmful ways, there is no justification for forcing all minors to consult their parents.

As with arguments against spousal consent, however, the reality of the decision-making process as it currently operates cannot be presented as an incidental matter. In the first place, the point of opposing parental consent requirements is not to promote atomization of personal relationships. Thus, minors' free access to abortion and contraception clinics must be justified in part by claiming that, uninhibited by fears of absolute parental power, many minors could consider more calmly whether they wanted to consult their parents. It would be a profound mistake, however, to attempt to outflank the New Right and develop a "pro-family" leftist politics.[607] Many minors would legitimately fear that threats or even violence—as well as unwanted motherhood—might constitute the outcome of parental "consultation." It would be politically disingenuous as well as theoretically untenable to argue that true support for "the (idealized) family" requires opposition to parental consent statutes. A critical perspective must support attempts to create other contexts in which the minor's special vulnerability and dependence can be dealt with in a caring way.

At this point, many arguments against parental consent statutes suggest the physician or social worker as an alternative source of guidance. A critical analysis of parental consent statutes, however, must go beyond reliance on images of the wise doctor or the understanding counselor. Such guidance may merely serve to accommodate the minor to the "reality" of her situation

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abortion in the same months that Justice Blackmun wrote *Planned Parenthood v. Danforth*. The girls wore bags over their heads. Without a family identity, these carriers of children were anonymous and parentless. As they prepared to destroy their own children, they put on masks and became faceless.

J. Noonan, A Private Choice 95 (1979).

There *is* something saddening and indeed degrading about this picture, but there is nothing that makes abortion intrinsically so. On the contrary, it is a perfect illustration of how abortion—even legal abortion—can be socially constituted as an inherently tragic, degrading, or brutal act, whether directly (as when opponents of abortion blockade clinics, and throw out cries of "murder" at women seeking abortions) or indirectly (as when abortion is treated as a deviant, shameful act, burdened by special consent procedures and hospitalization requirements). Equally important, we must ask—as Noonan does not—why the girls were nevertheless driven to commit an act of which they were so ashamed. To ask that question need not be to attack feminism or to rest on an assumption that women have such a strong natural desire for children that only some powerful and unnatural force can drive them to seek an abortion. It can instead be the occasion for a feminist critique of the social practices and beliefs that make motherhood the unsupportable burden it is for those women or minors who seek abortion.

Of course, there are good reasons for wanting an abortion, especially as far as most minors are concerned. I am not arguing that in a perfect society there would be no abortion or contraception. What I am arguing is that the "choice" opened up by the right to abortion risks being radically deficient if we are not as critical of the reasons for wanting it as we are of the obstacles limiting access to it. To put it another way, we cannot understand the masks the "young girls" wore as social constructs while we uncritically take their desire for an abortion to be a purely private, individual matter, given for the sake of analysis.

607. See Oliker, Abortion and the Left: The Limits of "Pro-Family" Politics, Socialist Rev., Mar.-Apr. 1981, at 71-95.

without questioning that reality in the slightest. The issue of what sort of medical care and counseling the minor will receive if she chooses not to consult her parents is thus not incidental to opposition to parental consent requirements. On the contrary, making a minor's freedom to have an abortion or obtain contraceptives truly meaningful requires that she have effective access to clinics that make conscious efforts to help her make her own decision and raise her political consciousness of the impact of sexual stereotyping and inequality on her. For example, contraceptive counseling must attempt to make minors (and adults) aware of how beliefs about women and sexuality may pressure them into certain patterns of contraceptive use (such as avoiding methods that require advance planning).[608]

c) Medical Regulations

A critical analysis of medical regulations of abortion, like the critique of spousal and parental consent requirements, needs to go far beyond liberal criticism. It must incorporate a critique of medicine in a capitalist society and support attempts to create alternative approaches to the abortion procedure itself. Strong pressures exist to integrate feminist abortion clinics into the capitalist health care establishment in a way that would blunt the liberating potential of abortion.[609] Thus, it is essential to organize clinics oriented to the needs of patients rather than the logic of profits. Apart from their ultimate practical success, such efforts have value in giving content to alternative visions and experiences of individual development and human association.

Anti-abortion "regulations" moreover, must be opposed not simply because they limit access to abortion, but also because they seek to constitute abortion and women's decision making in an anti-feminist way. For example, "informed consent" requirements (ranging from mandatory waiting periods to requirements that the woman be told that the fetus "is" a person) are objectionable not because they intrude into a zone of personal privacy, but because, in playing on traditional stereotypes of women, they limit an individual woman's ability to make her own moral choice by creating guilt about choosing not to become a mother.[610] Such restrictions constitute every abortion as a "hard case," and weaken the individual woman's own ability actively to confront and decide the moral issues.[611]

608. See generally K. Luker, Taking Chances: Abortion and the Decision Not to Contracept 138-53 (1975); text accompanying notes 383-385 supra.

609. See generally Aries, Abortion Clinics and the Organization of Work: A Case Study of Charles Circle, 12 Rev. Radical Pol. Econ. 53-62 (1980).

610. See, e.g., Hollway, Ideology and Medical Abortion, 8 Radical Sci. J. 42 (1979).

611. Harrison's discussion of the need to promote the availability of abortion in the early stages makes this relationship clear:

> Those who recognize that the processes of fetal development should be terminated early, precisely to avoid the "hard cases," where a woman's rights as a moral agent come to loggerheads with the value she imputes to the individuated human life form in her womb, need also recognize that only social conditions that make early abortions feasible are those that make it *both* legal and, at least in the early stages, elective. To

In this respect, it is crucial to go beyond criticisms of medical regulations that are incompatible with the woman's power to choose; support for the development of alternative technologies of abortion is also essential. Of course, no technology can guarantee that women will gain control over their reproductive lives. But certain technologies—such as menstrual regulation—are more compatible with the aim of enhancing women's control over the abortion decision than others.[612]

d) Funding

Abortion funding is also an integral aspect of the right to choose. Here, too, the way the right to abortion is conceived and defended is crucial. Arguments that abortion is a "medical" procedure and should be funded along with other "medical" procedures are fundamentally misguided because they might reinforce the structures of professional control over the abortion decision.[613] Equally unsatisfactory are arguments that simply contrast a formal right and the effective power to exercise it. These arguments overlook the character of what women would have access to if abortion were publicly funded. Certainly, cutting off federal funds for abortion may effectively destroy the right for poor women.[614] Yet, while correct, this objection is also generally true of any right inhering in abstract citizens regardless of their particular circumstances. This objection is a powerful criticism of the idea of individual rights in general,[615] but it overlooks the aspect peculiar to the abortion controversy: the cut-off represents an attempt to reinforce the social structures which keep

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guarantee the feasibility of early abortion in any society, abortion must be decriminalized and pregnant women granted early discretion to choose it, medical reasons aside . . . . *When the authority to make fundamental moral choices over one's own life is denied and placed at someone else's discretion, procrastination in confronting one's own reality, particularly if it means confronting another's power over you, is bound to ensue.*

B. Harrison, Our Right to Choose: Towards a New Ethic of Abortion 228 (1983) (emphasis in last sentence added).

612. And, on the other hand, making those technologies effective requires changes in social practices and beliefs. The earlier pregnancy is discovered, for example, the simpler the abortion procedure can be. Thus, undermining those factors that may cause women to hesitate to confirm their suspicions of pregnancy is as crucial to the development of effective methods of abortion as is scientific research.

613. That could easily have been the result if, for example, the Supreme Court had distinguished *Maher* in *McRae* by holding that Congress could cut off funding only for "medically unnecessary" abortions. This is important at a symbolic as well as a practical level. Cf. Lichterman, Social Movements and Legal Elites: Some Notes from the Margin on *The Politics of Law: A Progressive Critique*, 1984 Wis. L. Rev. 1035, 1046 (criticizing proposal to treat pregnancy as "disability" under worker insurance programs for failure to consider "the implications of classifying pregnancy, a central and essential aspect of any human way of life, as a 'disability' "); see also id. ("Otherwise, we may find that our 'winning' arguments bind us, in the end, even more closely to existing forms of domination—forms that reduce living human beings with unique places in history to the status of abstract objects, mere bundles of legally cognizable interests.").

614. See The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75, 98 n.13 (1980).

615. See Marx, Critique of the Gotha Program, in 3 K. Marx & F. Engels, Selected Works 18-19 (Progress Publishers 1970).

women in their place by forcing them into the role of mother. This negative impact remains even if the cut-off of federal funds has little effect because of alternative state or private funding, and even if anti-abortion advocates act solely out of concern for the fetus. Labelling abortion as too immoral to be federally funded, or as a delicate moral matter that cannot be funded so long as *some* people object, helps constitute abortion as an unnatural act in which normal women would not engage. In turn, constituting abortion in this way lends powerful, indirect support to the constitution of women primarily as mothers.

Precisely because of this connection, there is a particularly strong case within a critical doctrine of abortion for a right to funding. Abortion funding supports the woman's autonomy in a way that undermines the constraining power of the present institutions of marriage, family, and motherhood. It is crucial not simply because of any abstract arguments about individuals' ability effectively to realize their rights, but because it plays (or can play) a role in the larger transformative project in which "traditional" or "natural" constraining roles for women are progressively criticized and loosened. In turn, this undermining of women's identification with a particular role allows the morality of abortion to be considered without the distorting effects of that identification. The less abortion is an assertion of individual autonomy against the state (as it inevitably becomes when it is criminalized), or against the stunting and constraining effects of being forced into a particular role, the more productively abortion may be considered as a moral matter.[616]

e) Sexual Freedom

Finally, the right to abortion is closely tied to a right to sexual freedom; prohibiting abortion is one means of tying sexuality to reproduction.[617] Yet, as seen earlier, advocacy of sexual freedom can all too easily take its meaning in practice from a "discourse" of sexuality that falsely presents it as a realm of private meaning free from domination. Further, sexual freedom has particularly ambiguous implications for women so long as the general structures of

616. Looked at this way, lack of adequate funding for child care is as serious a problem as lack of access to abortion and contraception, not a separate issue from the right to abortion. Funding of abortion would still leave women radically unable to control their own destinies, as long as women bear the burdens of child raising disproportionately and class differences place greater burdens on the opportunities and joys of parenthood for some people than for others. Abortion funding, in other words, can help constitute the range of choices available to women in a way that undermines existing structures of sex and class discrimination only if it is part of a larger program of a radical restructuring of work and a shift in the control of economic and political life from the logic of capitalist development to that of autonomously and collectively determined human needs. See generally L. Gordon, Woman's Body, Woman's Right: Birth Control in America 403-18 (1976); Riley, supra note 588.

617. Cf. Hilgers, Mecklenburg & Riordan, Is Abortion the Best We Have to Offer? A Challenge to the Aborting Society, in Abortion and Social Justice 177, 182-84, 188-90 (T. Hilgers & D. Horan eds. 1972) (in general, aim of social policy regarding abortion should be to tie sex to marriage and family).

sexual stereotyping and inequality remain intact.[618] This fact is easily overlooked if sexual practices are seen as purely private, individual matters.

Arguments for sexual privacy, therefore, must be closely connected to a notion of sexual morality that is substantially different from either the traditionalist or nontraditionalist conceptions. Indeed, drawing this connection is not only desirable but inescapable. Consider, for example, laws which make discrimination based on sexual preferences illegal. Such laws do not simply allow the individual more "choice" in a private matter that concerns no one but the individual.[619] If laws prohibiting discrimination based on sexual preference were passed and effectively enforced, so that there were more gays openly holding jobs and playing roles in social and political life, this would have precisely the same kind of effect that affirmative action is intended to have on our perceptions of women and minorities: it would help redefine our conception of "men" and "women," and of heterosexuality and homosexuality. Similarly, recognizing a right to abortion and funding the exercise of that right cannot plausibly be seen as simply permitting or facilitating totally "individual" choices. On the contrary, it would be incredible to assert that the general acceptance of a right to abortion in any given society has no impact on each of its members' perception of the morality of abortion.[620]

Thus a critical doctrine cannot address matters like sexual practices and abortion by a theory that simply deems them private or fundamentally personal and leaves substantive discussion of them to individuals in their privacy. Rather, the right to privacy must rest on a respect for personal decision making, a respect that is informed from the start by a substantive ideal. This ideal of diversity is premised not on the notion of morality as irrelevant to public discussion of sexuality, but on the affirmation that morality in relationships can be embodied in many more forms than the "traditional" ones.[621]

In particular, the right to abortion and contraception is a key aspect of

618. See J. Mitchell, Women's Estate 141-42 (1971).

619. For examples of such an approach, see Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421, 454 n.101 (1980) ("The fact that X prefers to have sex with people of his own gender does not seem relevant . . . to his qualifications as a clerk or even a teacher."); Chemerinsky, Sexual Identity Is Private, N.Y. Times, Mar. 13, 1985, at A23, col. 1.

620. The general social acceptance of abortion does not mean, of course, that everyone finds it acceptable. Nevertheless, to the extent that social practices do influence belief, that influence will work in the direction of approval of abortion.

621. Thus, my criticism of liberal arguments about laws regulating sexual preference is precisely that which I made of the pro-choice argument at the end of Section III. See text following note 586 supra. Traditionalists who seek to ban gays from teaching positions, for example, focus on the idea that school does more than teach technical skills; it also serves as a moral influence. It is wrong to respond by attempting to depoliticize both education and sexual preference, as does the argument that the latter issue is irrelevant to one's qualifications as a teacher. On the contrary, what is needed is a critical theory both of education and of sexual preference. The former must expose the ways in which the educational system "produces, rewards, and labels personal characteristics relevant to the staffing of positions [in the hierarchical division of labor and] . . . through the pattern of status distinctions it fosters, reinforces the stratified consciousness on which the fragmentation of subordinate economic classes is based." S. Bowles & H. Gintis, Schooling in Capitalist America 130 (1976). The latter must affirm that

sexual expression for (heterosexual) women because it frees them from the risk of unwanted pregnancy.[622] But the kind of sexual freedom that emerges from the separation of sexuality and reproduction must constantly be subjected to critical evaluation, and tied to attacks on sexist structures generally. For example, attacking the husband's right to have sex with his wife against her consent—to rape her—is every bit as much a part of the struggle for sexual freedom as is ensuring access to abortion. More generally, there is nothing contradictory about campaigning for increased access to abortion and contraceptives as part of an effort to increase the freedom of individuals to explore alternative relationships, while at the same time condemning the commercialized "freedom" of the objectified sexuality which pervades the capitalist media.

2. *The Morality of Abortion*

Arguments for the right to abortion are closely connected with arguments concerning its morality. It is therefore worthwhile to consider in some detail what a critical theory of the morality of abortion might look like.

Clearly, a critical analysis of the morality of abortion cannot take the form of some timeless, ahistorical verdict like, "abortion is right under circumstances *a*, *b*, and *c*, and wrong under circumstances *x*, *y*, and *z*." A critical theory cannot accept the notion of a general verdict on abortion that provides answers for each individual, as does the pro-life approach, asserting that abortion "is" murder whether others acknowledge it or not. Rather, the right to abortion must be tied to a normative justification which, while not purely subjective and arbitrary,[623] subsists in the personal judgments of individuals. Perhaps the best way to recognize the personal nature of the decision while maintaining an appreciation of the element of social determination in that decision is to distinguish two levels of evaluation: individual and social. The difference is not absolute, but rather a provisional distinction between two "moments" in the determination of the morality of abortion. Our judgment of one moment need not be identical with that of the other.

At the individual level, a decision to have an abortion can be an act of concern and caring for the potential child, a refusal to subject it to a life burdened by poverty or extreme handicap;[624] it can also represent a valid concern for the woman's own life and future prospects, refusing to sacrifice herself in

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a child's understanding of sexuality, masculinity, and femininity would be enriched by seeing that they need not be confined to any one particular form or model.

622. See Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1019-20 (1984).

623. Cf. Fraser, The Legal Theory We Need Now, Socialist Rev., July-Oct. 1978, at 147, 182-83; cf. id. at 182 ("The law is neither a thing nor a mere tool, conceptual or otherwise, in the hands of dominant classes. Rather, it is a social process, heavily distorted by the reality of domination, which generates a structure of normative ordering binding on all the members of a social collectivity.").

624. See Ross, Abortion and the Death of the Fetus, 11 Phil. & Pub. Aff. 232, 237-43 (1982).

order to have a child. Any such judgment, however, is provisional only. To say that the individual woman or couple have acted morally is not to pronounce some absolute verdict on the question, for the matter may appear entirely different from a social perspective. There is something seriously wrong with a situation in which a woman feels she must have an abortion because a child does not fit in with her job or career. There is something equally wrong with a woman deciding against an abortion and having a baby because that is the only way to express her femininity or because childraising is the only possible creative outlet she may have. Both situations are two sides of the same coin:[625] a socially determined structure of femininity and parenthood that sees the two as uniquely and intrinsically related to each other in a way that masculinity and parenthood are not. Such decisions against abortion are wrong because they reflect a whole set of social relations that define women as primarily concerned with parenthood, while relegating them to an even greater extent than men to alienated and low-paying work outside the home. When poverty or job conflicts lead to decisions in favor of abortion, we ought to condemn the inequality of income and inadequate public provision of health care and child care which resulted in that decision.

In the second "moment" of this analysis, the need for a thorough critique of the pervasiveness of economic and sexual inequality is just as clear in the case of minors' abortions. A rule requiring a minor to leave high school upon becoming pregnant presents an obvious example of an instance in which the judgment at the social level would differ from that at the individual. Even the greater health risks a minor faces must be judged at both levels. If a minor faces greater risks to her health from continuing with pregnancy, it is not immoral for her to take that into account. But for a minor who becomes pregnant, the social definition of her situation as a problem at best, a moral failure at worst, may produce intense pressure to deny that she is even pregnant, and thus not receive adequate care, until well into the pregnancy. Clearly this factor and others[626] can produce ill effects on any pregnancy. To the extent that these and other socially determined factors create the "problem" of teenage pregnancy and motherhood, the individual minor's accomodation of herself to her situation is something about which we must remain deeply ambivalent.

Finally, a similar distinction between two moments is also useful in considering how aspects of the biological development of the fetus might enter into an individual's decision making. Obviously, a critical approach cannot simply pronounce the fetus to be a person or nonperson based on the facts of biology. As seen earlier, every attempt to grasp biology involves a political and social analysis as well. The meaninglessness of "pure" biological facts

625. Cf. Hayler, Review Essay: Abortion, 5 Signs 307, 320 (1979) ("Forced motherhood and forced sterilization are two sides of the same coin . . . .").

626. See also text accompanying notes 371-373 supra.

emerges clearly if we examine two issues: the significance of our reaction to the appearance of the fetus, and the morality of aborting female fetuses.

To deny the pro-life view that biological facts establish that the fetus becomes a person at conception is not to assert that the fetus is really *not* a person at conception. Rather, we merely affirm that the matter of its personhood is socially determined and that the morality of abortion is not reducible to that one issue alone. This approach differs from a "purposive" approach in that it rejects the idea that some abstract, timeless, classless "we" determines the morality of abortion.[627] Decisions by individuals and by society about abortion are made under a specific set of social and political circumstances, which cannot be taken for granted, as they are in liberal purposive approaches. Moreover, any assertion that "we" are absolutely free to define the fetus as we see best, or judge the morality of abortion as we deem most appropriate, overlooks a crucial aspect of the way in which we are constituted socially: the idea, deeply rooted in our culture, of biological individuality. It is this socially determined biological "necessity" that accounts for the inescapable sense most individuals have that their reaction to the facts of fetal development should count in formulating their view of the morality of abortion.

Thus, at an individual level, we could not pronounce immoral a determination by a woman that, for her, the fetus is not a "person" in the moral sense.[628] But in viewing a woman's decision at a social level, we might take other considerations into account, as well. In part, her own determination concerning the "personhood" of the fetus might be heavily influenced by the way the whole question of the status of the fetus has largely become the province of anti-abortion and anti-feminist advocates. Individual decision making is distorted by this development as much as it is by the fact that women bear a disproportionate share of the burdens and joys of childraising. There is nothing inherently anti-feminist about serious inquiry into the status of the fetus or, more generally, into the morality of abortion. At a social level, the political context which today makes it appear that way must itself by criticized.

With respect to the other issue concerning biology, to abort a fetus because it is a female would constitute a denial of individual integrity for sexist reasons. Because children are always to some extent a projection of their parents' beliefs and desires, an abortion as part of a plan to have a male would constitute the son born later as an embodiment of discriminatory attitudes against women. Nor would this effect be felt in purely individual terms. Children born into a world in which sons are valued over daughters would inevitably find their own potentials limited by the structures of sexual discrimination

627. Cf. W. Leiss, supra note 591, at 189 ("Domination over nature is wrongly represented as an achievement that will bind together a bitterly divided species; conversely, the abstract idea of man (in the phrase 'man's conquest of nature') hides the fact that the actual agents in this process are individuals and societies in violent conflict over themselves."). See generally id. at 178-98.

628. See, e.g., B. Harrison, supra note 611, at 208-30.

and stereotyping, structures that would be strongly reinforced by a practice of aborting female fetuses.[629] One might ask whether abortion of a fetus for sexist reasons is worse than using a drug that increases the chance of conceiving a male. It might be, not because of some objective biological difference compelling such a distinction, but because aborting a developing fetus because of its sex would be for most people a more concrete and definite assertion of sexism than would increasing the probabilities of conceiving a male. The meaning of the action for the actors, in other words, is as constitutive of the action as are its "objective" aspects.[630]

These last two issues concerning the fetus demonstrate, however, that the distinction between the two "moments" cannot be maintained absolutely. In particular, we cannot simply justify any individual action because it is explicable in terms of some aspect of sexual stereotyping or discrimination, and then displace the moral judgment to the level of social structure, where one condemns inequality and sexism. We do not render meaningless the moral judgment of an individual's action by noting that it occurred in response to social pressure. It would be wrong for a woman who sincerely believed that abortion involved the wrongful taking of a human life to have an abortion. If we add the additional element that she aborted a female fetus in response to sexist stereotypes, we do not thereby render meaningless the moral judgment of the action in the individual case (though our judgment of the woman might well be affected). The point of using the provisional device of viewing our judgments as having two moments is, rather, to undermine the false sense of entailment that so easily comes to the fore in considering the abortion issue. Failure to condemn any woman who believes that an abortion is the right decision in her circumstances—acknowledging that abortion can be a deeply moral choice in some circumstances and parenthood as a deeply troubling one in others—does not mean that all such choices are entirely unproblematic morally at a broader social level. Conversely, to affirm the right to abortion as a woman's fundamental, individual right is not necessarily to conclude that abortion is a purely individual, arbitrary, subjective matter. If a critical theory of the morality of abortion is to develop into something satisfactory, it is necessary at least to dispel such false notions of consistency.

629. See Hanmer, Sex Predetermination, Artificial Insemination and the Maintenance of Male-Dominated Culture, in Women, Health and Reproduction 163, 185 (H. Roberts ed. 1981) ("Sex predetermination is unlikely to change the patriarchal emphasis of our society but, adopted on a wide-scale, and this depends on the technique developed, it offers the possibility of strengthening son preference and daughter non-preference, of reinforcing sex roles by underwriting the conflation of sex and gender, of altering the sex ratio further in favour of males, of placing greater restriction on women's limited control over their reproductive capacities.") (footnote omitted).

630. See R. Unger, Knowledge and Politics 109-10 (1975).

C. Towards a Critical Legal Theory of Abortion and Privacy

1. Introduction

Much of the preceding discussion is directly relevant to an understanding of abortion and privacy as legal issues. The dilemmas of liberal legal thought are precisely those of moral and political theory, and the clash of opposing visions of the social order represented by the activist controversy is part of the broader opposition between the traditionalist and nontraditionalist perspectives. Thus, in developing an alternative to liberal legal theory, we cannot take seriously the distinction between legal theory and moral and political theory. Nevertheless, two specifically legal questions remain to be answered. One concerns the approach to legal doctrine; the other concerns the question of judicial legitimacy.

With respect to the first, one might adopt a purely instrumental approach towards "authoritative" legal materials.[631] That is, one could work out an alternative, critical doctrine of abortion and privacy in detail, and then use it as a benchmark against which to condemn or approve particular decisions. Concurrently, one could set out a program for social and political reform and then evaluate pragmatically whether litigation might be of help. One would thus go to court not to vindicate rights but simply to get a useful judgment.[632] Behind this approach lies a deep suspicion of any suggestion that existing legal doctrine be taken seriously, except in a pragmatic and instrumental (as opposed to normative) way. Why, after all, should we expect the Constitution, as interpreted authoritatively by an organ of the government, to have anything to do with the content of a critical legal theory?[633]

The second concern—judicial legitimacy—might also seem most properly to be addressed by an instrumental approach. One could argue that it makes no sense from a critical point of view to ask whether, apart from its result, *Roe* constituted a legitimate exercise of judicial power. Instead, on this view, "legitimacy" turns solely on whether the Court reached a correct decision from the perspective of a critical theory. From this perspective, *Roe* was a legitimate exercise of power because it promoted women's freedom, but it was not wholly legitimate because it cast the right to abortion as a purely private, individual matter, not as part of a larger critique of sex discrimination. Behind this approach lies a recognition that objections to the institutional legitimacy or craftworthiness of *Roe* have often amounted to little more than thinly disguised attacks on the right to abortion itself.

631. By "authoritative" materials, I mean those legal materials which are taken to have binding effect, such as cases, statutes, and administrative regulations.

632. Cf. G. Lukacs, Legality and Illegality, in History and Class Consciousness 263 (1971) ("The risk of breaking the law should not be regarded any differently than the risk of missing a train connection when on an important journey."). See generally id. at 256-71; Law Against the People (R. Lefcourt ed. 1971).

633. Cf., e.g., Law, supra note 622, at 1005 (criticizing advocates of a broad doctrine of sexual equality as "overestimating judges' capacity to identify and avoid socially imposed constraints on equality").

The instrumental approach implicates strategic as well as purely intellectual concerns. For example, at first glance there appear to be powerful reasons for viewing legal arguments in an instrumental way where abortion and sex discrimination are concerned. On this view, while true sexual equality requires not only a right to abortion but also a general transformation of male and female roles, arguments about what equal protection or the Equal Rights Amendment requires should be more limited. To expect that judges will readily accept an expansive notion of sexual equality is unrealistic. Further, the very act of pressing an expansive claim of sexual equality on the courts may be highly damaging because it bolsters their legitimacy. Thus it may be wise to limit the scope of claims brought before the courts.[634]

In the end, however, the distinction between believing that sexual equality really entails a right to abortion and a restructuring of sex roles, and appealing to a more limited conception of sexual equality for tactical reasons, is impossible to maintain. More generally, the whole instrumental approach to legal argument is a chimera. The courts' decisions regarding sexual equality and privacy inevitably contribute to the constitution of "abortion," or of what "women" and "men" are. The courts cannot be used merely to gain increased access to abortion, or to further some limited aspect of sexual equality. The social actors who make use of and are subject to the law are themselves inevitably transformed by it. To adopt a limited conception of sexual equality and its relation to abortion and privacy, even for purely strategic reasons, will inevitably stunt the development of the underlying countervision.[635]

In addition to being illusory, an instrumental approach is also misguided. To collapse legitimacy into result—even a correct result from a critical point of view—is to overlook that which is potentially most distinctive about a critical theory: its conception of a cycle of social change and normative insight.[636] There is, indeed, a valid basis for a concern with the legitimacy of a decision apart from its particular holding, and that concern does implicate the relationship between democracy and judicial review. A critical theory, however, must reject the impoverished concept of democracy that underlies liberal theories of judicial review. The legitimacy of a particular exercise of power must, in a critical theory, rest on the extent to which it "provide[s] opportunities for collective mobilization"[637] and transformation of social structures, thereby concretizing—and enriching our conception of—alternative social visions.

634. See, e.g., Kennedy, Toward an Historical Understanding of Legal Consciousness, 1850-1940, 3 Research in Law & Soc. 3, 6 (1980); Law, supra note 622, at 1005-06.

635. See Unger, supra note 592, at 616.

636. In that sense, an instrumental approach is not even particularly radical, for it accords well with the trend towards the instrumentalization of law. It reduces reason to nothing more than "an individual mechanism for the execution of collective or individual decisions reached through the clash of interests, passions, or capacitites," and thereby rejects "the notion that the ideal of justice is accessible to the reason of people acting in the real situations of political and economic life." Kennedy, supra note 634, at 6.

637. Unger, supra note 592, at 667.

2. Constitutional Interpretation and the Role of the Courts

A critical doctrine of constitutional interpretation and the role of the courts must bring to the fore the two issues on which the activist and the nonactivist perspectives are divided. How can the exercise of the state power be made to comport with democracy and individual autonomy? And to what extent are social institutions, the actors within them, and the norms that govern them shaped or constituted by the exercise of power? Just as a critical doctrine of the morality and politics of abortion must place at its center the issues involved in the traditionalist controversy, so must a critical legal theory heighten our awareness of, and contribute to the development of an alternative to, the activist and nonactivist perspectives. As in the case of the traditionalist controversy, however, it is impossible to lay out a fully elaborated critical alternative to the activist and nonactivist perspectives. The ideal cannot be more than a recognition of certain (currently) inescapable tensions with an eye towards some kind of necessarily tentative resolution.

On the one hand, gains in the protection of human rights and the reformation of institutions such as schools and mental hospitals could have been achieved only with much greater difficulty, if at all, without the courts' post-*Brown* adoption of a more flexible role. In the abortion context in particular, gains in women's freedom would probably be far smaller, absent expanded class actions, broad-ranging relief, relaxation of standing and mootness barriers, and the willingness of the judiciary to confront basic political issues through protecting privacy and fundamental rights. In general, any effective effort to root out inequality and domination in private life requires a more flexible exercise of state power than is envisioned by approaches which purport to protect freedom by constraining the exercise of power to given, established forms.

Further, the activism of the courts in the past thirty years since *Brown* represents a concrete commitment to the notion that the exercise of state power is more than a matter of expediency and the pursuit of state interests. It *is* an achievement that abortion has become the subject of intense and widespread moral and political debate, rather than being a matter of technical state planning concerned with population growth and eugenics. By casting the abortion issue in terms of a fundamental right, *Roe* surely contributed to that achievement.

On the other hand, the gains that the straining of the "traditional" judicial role has produced over the past thirty years are subject to severe limitations; a critical legal theory must take into account the very specific ways in which judicial activism presents the possibility of an increase in social control. If "the decision in *Brown* served both as a catalyst for and as a legitimator of social change,"[638] the transformation of the attack on racism and other forms

638. Horwitz, The Jurisprudence of *Brown* and the Dilemmas of Liberalism, 14 Harv. C.R.-C.L. L. Rev. 599, 609 (1979).

of inequality into primarily legal battles has had a number of distorting effects. For example, the schools, being "public," have tended to be the most congenial focal point for the constitutional attacks on racial discrimination. Segregation in schools, however, often reflects to a large extent discrimination in housing and employment; yet "[t]he more intractable problems of jobs and housing—which were also far less 'public' in terms of legal conceptions—were thus relatively immune from legal attack."[639] Equally disturbing is the temptation to elevate such institutional distortions to the level of high principle. For example, one commentator argues that "[c]onstitutional attacks [on racism] understandably began in the area of elementary education because undoing racial segregation at this point cuts racist isolation and misunderstanding at its roots."[640] This is a particularly dubious theory of racism, locating its origins in attitudes inculcated in youth while minimizing the continuing, powerful support racism receives from the structures that systematically bolster it, especially the labor market. Similarly, as the Supreme Court increasingly tailors its rulings on state regulation of abortion by the principle that abortion is a purely private, "medical" matter (in which undue interference with the integrity of the physician's professional judgment is as forbidden as is undue interference with the woman's autonomy), the Court helps to embed relations of professional control into the very experience of abortion.

If a critical legal theory is to contribute to the development of an alternative vision that recognizes both of these aspects, it must reconceive the meaning of the authoritative materials and the role of the courts in a way that attenuates the distinction between the two. We must envision the relationship between the role of the courts and the meaning of the Constitution as a process of successive concretization of abstract constitutional norms by judicial activity. Yet we must always retain an awareness of the political struggles that form the context of that process, and of the risks to the transformative project posed by its engagement with a judiciary not committed to it. This interrelationship implies that the meaning of the authoritative materials must be understood and explicitly treated as socially constituted, both in the activity of the courts and in the broader social and political struggles.

One cannot simply look to the text of the Constitution, a statute, or a line of cases, and find some determinate meaning inhering in them; rather, the meaning is always open to revision. In the judicial process itself, the meaning of previous cases or of constitutional provisions is recreated with every new decision. No matter how clearly and unambiguously written, previous opinions are always legitimately subject to markedly different interpretations. As noted earlier, one can argue with equal facility and legal craftmanship that *Eisenstadt* misinterpreted *Griswold* by declaring the privacy right to inhere in individuals rather than in the traditional marriage relationship, or that the

639. Id.

640. Richards, Sexual Autonomy and the Constitutional Right to Privacy, 30 Hast. L.J. 957, 989 n.136 (1979).

Court finally managed to articulate in acceptable form the privacy right which *Griswold* established, without *Griswold*'s misleading glosses about the sanctity of the marital bedroom.[641] An embarrassment for liberal theories, this ambiguity is a source of strength for a critical theory: the recognition that the meaning of the authoritative materials is never finally or exhaustively determined.

Interpretation, however, cannot be limited to legal argument and judicial decision making. It is also a matter of social and political struggle. For example, the meaning of *Brown* has been the object of a social struggle over the very question of whether it calls for a more activist role by the courts. Of course, the discomfort felt by some conservative academics at the time *Brown* was decided[642] may have stemmed from a vague perception that the Court would have to take action in many fields on the scale of its sweeping declaration that segregated schools are unconstitutional. But it seems implausible to argue that the courts' adoption of a more activist role was in any way inevitable. Without the pressure exerted by the civil rights movement, it is unlikely that the courts would have undertaken serious efforts to desegregate Southern school systems. It would be a mistake to think that the question of that which *Brown* "really" stands for can be resolved purely as a matter of legal reasoning.

These two forms of interpretation—legal and social—are related in a dual way. On the one hand, the legal interpretation of the authoritative materials depends heavily on the broader political context—on the "inevitable social and cultural constraints on judicial intention and impact."[643] The aim of a critical approach must be to make this context explicit in legal reasoning. A critical legal theory must take seriously the aim of purposive legal reasoning and refuse to accept the stereotypes and caricatures of the underlying social and political struggles that pass for the "purpose" of a statute or the meaning of a line of cases in most liberal arguments. Legal arguments about privacy and abortion, for example, must depend upon an understanding of the family and personal life as they actually exist in contemporary capitalist societies, not upon general notions of "withdrawal into small-group relations" or the place of the family in centuries of "Western cultural tradition."[644] On the other hand, the political context itself is deeply influenced by the Supreme Court's own opinions. *Brown*, for example, stamped the demand for racial equality with the authority and legitimacy of the Constitution and thereby gave an

641. See text accompanying notes 267-273 supra.

642. See Bell, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 519-21 (1980).

643. L. Tribe, supra note 596, at iv.

644. Similarly, a critical legal theory must aim to demystify assertions of natural differences between men and women, upon which much legal doctrine concerning sexual equality rests. For an excellent example of such an analysis of the Supreme Court's decisions concerning sexual equality, see Law, supra note 622, at 987-1002. See also Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487 (1981).

important boost to the civil rights movement; but it also molded the struggle for equality in ways that blunted its radical potential.[645]

Roe illustrates well the ambiguous relationship between the legal and social forms of interpretation. It is practically inconceivable that the Supreme Court would have given a pro-choice content to the right to privacy, absent an active and organized women's movement. This observation does not depend upon any assertion about the psychology or intentions of the Supreme Court justices. Rather, the idea that abortion might be included among rights necessary to self-determination would be unlikely even to have appeared plausible without the political "consciousness-raising" performed by women's rights organizations.[646] In turn, *Roe*'s legalization of abortion not only freed countless women from unwanted pregnancy and motherhood, but also strengthened many women's determination to control their own destinies. The concrete experience that so many women have had of the freedom and personal growth that control over their reproductive capacities brings provides powerful support for the pro-choice movement. More generally, the gain in women's freedom represented by abortion has weakened the "traditional" roles for and beliefs about women. *Roe*'s undermining of the entrenched structures and beliefs limiting women's equality is comparable to *Brown*'s role in helping to give substance to democracy for blacks.

The relationship between social context and legal interpretation suggests an alternative to liberal debates about the legitimacy of judicial review. Just as the arguments over abortion and privacy cannot rest on broad, stereotypical notions of intimate relationships or retreat into the haven of the home, so, too, arguments over the compatibility of judicial review with majoritarian democracy cannot be allowed to draw uncritically on established assumptions about how "democracy" actually functions. Those assumptions systematically obscure the reality of "[t]he routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens."[647]

To be sure, concerns about the fact that a federal, appointed body overrides a local, elected one whenever the Supreme Court strikes down state legislation are not *per se* invalid. But such concerns are fundamentally unreal and obfuscatory when expressed in the context of *Brown*, for example, because they fail to consider the near meaninglessness of "democracy" for southern blacks (and to a lesser extent whites opposed to racism) in a social structure dependent upon "terror as the principal means of social control."[648] Simi-

645. A useful discussion of this relationship is F. Piven & R. Cloward, Poor People's Movements: Why They Succeed, How They Fail 181-263 (1977).

646. Cf. Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 649 (1982) ("If the others in whose interest you have to act are mobilized, it's more likely that you will have some intuitive knowledge of them, because they will have the means of group expression.").

647. Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223, 249 (1981). See generally id. at 235-59.

648. F. Piven & R. Cloward, supra note 645, at 256.

larly, notions of a "dialogue" with the courts or of judicial activity as the process of defining public values[649] are profoundly misleading without an explicit acknowledgment and analysis of the systematic limitations on the courts' ability to attack racism.[650] The ultimate legitimacy of the Supreme Court's exercise of power in *Brown* lies in the opportunities it helped to create for mobilization and collective action against the racist structures that drained the "majoritarian democracy" of much of its meaning in the South.

The legitimacy of *Roe* is similarly qualified. Much of the opportunity for collective action opened up by *Roe* has been unrealized, perhaps because *Roe* appeared to confirm the advantages of an elite lobbying and litigation approach to women's issues rather than mass mobilization. Nevertheless, it would be mistaken to ask whether it was wise from the point of view of a critical theory to pursue a litigational strategy. Given the "legalization" of American society, it was practically inevitable that the courts would be asked to rule on the constitutionality of the anti-abortion statutes and regulations. To ask what would have happened in the absence of court challenges is to speculate as to what would have happened in an entirely different society. The relevant question is what to do with *Roe* given that it was decided as it was. In that respect, *Roe* was not rendered worthless as a means of exerting pressure for further change simply because the opinion failed to address the abortion and privacy issues in terms of a critical approach, for the meaning of *Roe* is not fully within the control of the Court. A broad-based movement could do much to make the meaning of *Roe* into something entirely different, something with great transformative potential. The potentially transformative nature of *Roe* has undeniably been blunted, however, by the weakness of feminist movements and of progressive movements generally. As a consequence, the abortion issue has remained entrenched in the incoherence of liberalism as a dispute between the pro-choice and pro-life positions.

If we conclude that the liberating potential of the right to abortion remains in many respects an unrealized one, we should not overlook the substantial gain in women's freedom that it has brought about. Beyond that, it is impossible to predict. No irresistible march of historical progress ensures that the right to abortion will turn out to be a significant step towards true reproductive self-determination for women and men. Equally important, no inexorable logic of capitalist development dictates that the right to abortion will prove to be a cruel hoax, the occasion for intensified control of individuals in a system of total domination. Like the broader significance and impact of the right to abortion, the ultimate meaning of *Roe* itself remains to be determined. Because of its sweeping scope and the incoherence of the legal universe within

649. See Fiss, The Supreme Court, 1978 Term—Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979); Perry, Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 UCLA L. Rev. 689, 718 (1976).

650. See, e.g. Horwitz, supra note 638. On the limits of judicial activism generally, see Miller, Judicial Activism and American Constitutionalism, in 20 Nomos 333, 364 (J. Pennock & J. Chapman eds. 1979).

which it operated, *Roe* laid down a challenge as much as it decided an issue. To take up that challenge by seeking to constitute *Roe*'s potentially radical meaning is to engage in an important aspect of building a more communitarian and nonsexist social structure.

CONCLUSION

It would contradict my analysis to proclaim its perfection. With respect to the political process it envisages, there is simply no denying the sense that something like a leap of faith must be taken at the outset. No amount of recognition of the concreteness of the abortion issue, and the consequent dubiousness in one sense of taking a stand on abortion—especially about "access" to it—can negate the political need for strong opposition to anti-abortion measures by those who recognize the oppressive and distorting effects of sexism and the identification of one particular family form with the possibility of loving and caring. Yet no movement for social change can expect to control fully the events that it sets in motion, not only because it lacks the political, economic, and social power to do so, but also because the articulation of a concretely justifiable critical perspective, by definition, remains incomplete. Whenever profound transformation rather than stabilizing reform is the aim, the struggle inevitably is one to reshape society in an image whose contours are only dimly perceived.

This difficulty expresses itself most forcefully in the effort to think about abortion and privacy, especially for one who attempts to go beyond pure criticism of liberal theory and formulate an alternative. The language of liberal theories of privacy and abortion is fundamentally inadequate to the requirements of a critical theory. The only way to develop such an alternative is to engage in a self-conscious attempt to refashion our way of speaking about abortion and privacy. That effort poses constant threats of failure in the form of purely verbal "resolutions" of the issues, or esoteric formulas devoid of any connection with our experience. The reward for even partial success, however, is great, and amounts to more than the simple overcoming of a methodological hindrance. The refashioning of our moral, political, and legal language—which in the abortion context means transcending the terms of the debate between "pro-life" and "pro-choice," between "democracy" and "judicial review"—can itself provide an intimation of the future even as it helps us to come to grips with the present.