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Abortion, Ethics, and the Common Good: Who Are We? What Do We Want? How Do We Get There?

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ABORTION, ETHICS, AND THE COMMON GOOD: WHO ARE WE? WHAT DO WE WANT? HOW DO WE GET THERE?

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I. INTRODUCTION

> In truth, I am as distressed as the Court is—and expressed my distress several years ago [in *Webster v. Reproductive Health Services*] about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment" . . . which turns out to be nothing but philosophical predilection and moral intuition.[1]

"For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[2]

> [A]lthough pro-life forces prevail in some states, pro-choice forces in others, there is no sense in which one can say that the two sides are holding a dialogue. Because they can see no common ground, then, there is a political void to match the void in scholarship. . . . The implication is that the two sides in this battle should

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1. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

2. Webster v. Reproductive Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part).

> be talking *to* each other rather than *at* or *past* each other, a lovely vision of the role of public moral dialogue in the liberal state.[3]
>
> The starting point for a discussion about abortion ought to be the frank recognition that the issue is life or death. To abort a fetus is to kill; to prevent the realization of a human life. But to say that much is not to answer the moral question involved. We (Americans) have just completed a war in which we killed many thousands of people, some of whom were civilians, others of whom were exposed to danger against their will. That we choose to kill does not make it wrong on that score alone; but we surely need a vocabulary for talking about life and death issues in moral terms that underscore the seriousness of any choice for death. Our experience with abortion, and perhaps with war, suggests that the lack of such a vocabulary will lead inevitably to excess. Religion has served for many hundreds of years to offer some hope in the face of despair, to offer life in the face of inevitable suffering and death. *We discard those traditions at our peril.*[4]

Although the previous remarks originate from different sources, each involves the issue of human life and the question of abortion in American society. Each statement also reveals something about different perspectives concerning the subject of abortion. I believe that each of these statements provides a different approach for assessing two major components of the abortion issue. These components are: (1) the ethical issues and (2) the question of the common good.

Almost twenty years ago in *Roe v. Wade*,[5] the American legal and judicial communities, as well as the American public at large, became engaged in the public debate about the legality of abortion. This debate has not abated. The subject of abortion continues to raise many critical issues meriting investigation and discussion (for example, whether the fetus is a "person" within the meaning of the U.S. and state constitutions). I shall examine two areas involving ethics and the common good in the context of a particular state control on abortion rights. This legislative effort imposes the modest restrictions of a twenty-four hour waiting period and informed consent requirements.

In Part II of my investigation, I shall address the medical matters involved. Part III will frame the investigation in the context of the legal is-

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3. Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747, 2749, 2765 (1991) (reviewing LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990)).

4. Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology, and Abortion*, 25 GA. L. REV. 923, 1137-38 (1991) (emphasis added).

5. 410 U.S. 113 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

sues. Part IV will investigate the legal questions in the context of principle-based ethics. Since I find the principle-based ethical approach insufficient, I will proceed to re-examine the ethical questions in the context of a virtue-based ethics in Part V. At this stage, I suggest to the reader that a virtue-based ethics approach effectively raises the subject of the common good that principle-based ethics do not. Consequently, Part V will look at the question of the common good as it relates to informed consent laws regulating abortion.

II. THE MEDICAL ISSUES AND THEIR EVALUATION

The issue of abortion will often raise questions about the medical status of the human fetus. An episode of the popular and thought-provoking television series *Star Trek: The Next Generation*[6] has Lieutenant Commander Data, the android science officer, inquiring of the ship's physician, "Doctor, what is life?" This question is raised when Data discovers that a small, robotic device has developed the ability to think, reproduce, and protect itself. We can apply a parallel question to this inquiry emerging from the investigations of medical ethics and the common good: What is fetal life?

In answering this question, it is helpful to obtain a fundamental understanding of human development that begins with the reaction between the sperm and the ovum. Once the sperm encounters the ovum, the process of fertilization begins. Fertilization does not take place immediately when the sperm penetrates the surface of the ovum; it is the beginning of the process called *syngamy* during which the sperm completes its penetration and exchange with the ovum.[7] That stage takes approximately twelve to twenty-four hours to complete.[8] At the syngamy stage of development, the resulting entity is called a zygote.[9]

According to authors Shannon and Wolter, fertilization accomplishes four things in human embryonic development: (1) It gives the pre-embryo its own complete set of forty-six chromosomes, (2) it determines chromosomal sex, (3) it establishes genetic variability, and (4) it initiates the cell division of the zygote that is now called the pre-embryo.[10] As cell division

6. *Star Trek: The Next Generation: The Quality of Life* (Syndicated television broadcast, fall 1992).

7. *See* Thomas A. Shannon & Allen B. Wolter, *Reflections on the Moral Status of the Pre-Embryo*, 51 THEOLOGICAL STUD. 603, 607 (1990); *see also* Bev Rosenwaks & Owen K. Davis, *In Vitro Fertilization and Related Techniques*, *in* DANFORTH'S OBSTETRICS AND GYNECOLOGY 821, 831-32 (6th ed. 1990).

8. Shannon & Wolter, *supra* note 7, at 607.

9. *Id.*

10. *Id.* at 606-07.

occurs, the pre-embryo travels through the fallopian tube and reaches the uterus around the sixth or seventh day where it commences the implantation process.[11] On or about day fourteen, the implantation process is completed upon the initiation of "primitive utero-placental circulation."[12] Shannon and Wolter also note that the pre-embryo at this stage is still "capable of dividing into multiple entities," i.e., it can divide into human twins, triplets, etc.[13] At some point during the third week, the possibility of division into multiple entities ceases, and the layering process that results in the development of tissues and organs of a distinct human entity (the embryo) begins.[14] Moreover, in the third week of development the embryo's "cardiovascular system reaches a functional state."[15]

I return to my variation of Commander Data's question and rephrase it into the related question: When does human life begin? While recognizing that disagreements exist among scholars, Shannon and Wolter argue that once biological development results in the formation of the zygote, there is "a living entity which has the genotype of the human species."[16] Moreover, the zygote is the "precursor of all that follows."[17] Richard McCormick acknowledges that the zygote is "a new hereditary constitution" that has "the potential to become an adult."[18] In agreeing with the view of Shannon and Wolter, McCormick concludes that "developmental individuality or singleness" is established once the attachment to the uterine wall is completed.[19] Shannon, Wolter, and McCormick concur that a distinction must be made between genetic individuality (the fertilized ovum) and developmental individuality.[20] There is some chance that the genetically unique life implanted on the mother's uterine wall may further divide so that twins, triplets, or other multiple births will result. However, once human development reaches this stage (usually in the third week), when the possibility of

11. *Id.*

12. *Id.* at 608 (quoting KEITH L. MOORE, ESSENTIALS OF HUMAN EMBRYOLOGY 14 (1988)).

13. *See id.* at 608 (relying on BRUCE CARLSON, PATTEN'S FOUNDATIONS OF EMBRYOLOGY 35 (1988)).

14. *Id.* at 609 (relying on CARLSON, *supra* note 13, at 186).

15. *Id.* at 609 (relying on MOORE, *supra* note 12, at 24).

16. *Id.* at 611.

17. *Id.*

18. Richard A. McCormick, S.J., *Who or What Is the Preembryo?*, 1 KENNEDY INST. ETHICS J. 1, 3 (1991).

19. *Id.* at 4.

20. *See id.* at 4; Shannon & Wolter, *supra* note 7, at 612-14.

multiple births ceases, the *ontological unity* (developmental individuality) of a distinct human being is established.[21]

The reasonable response to the question "when does human life begin?" is consequently bifurcated: (1) genetically unique human life begins with the completion of fertilization of the ovum by the sperm (about eighteen to twenty-four hours after the sperm's initial penetration of the ovum), and (2) ontologically unique human life begins during the third week after completion of fertilization. With the completion of fertilization (day one), it may be said that a genetically unique human entity, distinct from the genotype of the mother and father, exists. At the conclusion of the third week after fertilization, there exists an ontologically unique human being who will remain distinct from any sibling who may join this human in a multiple birth.

III. THE LEGAL ISSUES

The questions of ethics and the common good arise in the context of the State of Pennsylvania's legislative efforts to impose the modest restriction of a twenty-four hour waiting period and informed consent requirement on women who seek an abortion. This legislation was at the center of one of the major legal issues in the recent U.S. Supreme Court case of *Planned Parenthood v. Casey*.[22] Planned Parenthood challenged the legality of the informed consent requirement in the Pennsylvania statute on the basis that it placed illegal burdens on a woman seeking an abortion.[23] Justices

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21. *See* Shannon & Wolter, *supra* note 7, at 612, 622 (relying on NORMAN M. FORD, WHEN DID I BEGIN? CONCEPTION OF THE HUMAN INDIVIDUAL IN HISTORY, PHILOSOPHY, AND SCIENCE 158, 212 (1988)).

22. 112 S. Ct. 2791 (1992) (plurality opinion).

23. *Id.* The relevant portions of the statute read in part:

> (a) General Rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:
>
> (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
>
> (i) The nature of the proposed procedure or treatment and the risk and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
>
> (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
>
> (iii) The medical risks associated with carrying her child to term.
>
> (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

O'Connor, Kennedy, and Souter[24] along with Justices Scalia, White, Thomas, and Chief Justice Rehnquist[25] agreed that the informed consent requirement was valid, and voted to uphold it. Only Justices Stevens and Blackmun believed that the informed consent provision constituted an "undue burden" on the pregnant woman, and therefore should have invalidated the provision.[26] Until new Justices are appointed to the Court, it is unlikely that the present Court will revoke a similar informed consent requirement.[27] In order to assess the ethical questions and the subjects of the common good that evolve from the *Casey* decision, it is essential to obtain a general understanding of *Roe v. Wade*,[28] the abortion case that paved the way for virtually all legal discussion on this topic for over the last twenty years.

(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2), and (3) has been provided.

(b) Emergency.— Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily functions.

18 PA. CONS. STAT. ANN. § 3205 (West Supp. 1990).

In the definitions contained in § 3203, a "medical emergency" is defined as:

That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 PA. CONS. STAT. ANN. § 3203 (West Supp. 1990).

24. *Casey*, 112 S. Ct. at 2823 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

25. *Id.* at 2855, 2868 (Rehnquist, C.J., concurring in part and dissenting in part).

26. *Id.* at 2843, 2852 (Blackmun, J., concurring in part and dissenting in part).

27. *See* Linda Greenhouse, *Justices Decline to Hear Mississippi Abortion Case*, N.Y. TIMES, Dec. 8, 1992, at A22. A group of Mississippi physicians challenged their state's informed consent statute, which paralleled the Pennsylvania statute reviewed in *Casey*. *Id.* In the Mississippi case, *Barnes v. Moore*, No. 92-588, the physicians alleged an "undue burden" existed because the rural nature of Mississippi and the location of abortion clinics in only two counties presented "logistical problems" that exacerbated the requirements of the waiting period. *Id.*

28. 410 U.S. 113 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

Under the framework of *Roe*, the legal questions of abortion in the United States are usually framed by two main issues: (1) the privacy right of the individual woman[29] to bodily and reproductive autonomy and (2) the state's interest to protect developing (fetal) human life.[30] Although I shall examine more fully the competition between these two positions in my subsequent discussion of the common good in Part VI, it is important to recount what the Supreme Court actually said about abortion rights in *Roe*. The majority[31] of the Court constructed a compromise position giving "the attending physician, *in consultation with his patient*," the right to terminate the pregnancy during the first trimester without "regulation by the state."[32] The majority's recognition of the physician-patient consultation reveals some understanding about the process of informed consent pertaining to abortion.

The majority did not accept the argument of the appellant Roe (Norma McCorvey)[33] that "she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[34] *Roe* established the rule that the qualified right to abort the fetus during the first trimester belongs to the pregnant woman's physician, not to the woman herself. If the woman has a right to an abortion, it is based on the physician's right, which in turn is established by the physician's *medical judgment* that an abortion should be performed. The woman's right, in short, is qualified by the physician's right; her right is conditioned by and dependent on the physician's right. Under *Roe*, the woman has no right to an abortion that is independent of the physician's determination as based on his or her "medical opinion."

Curiously, as the subject of abortion rights continued to be litigated in succeeding cases, this crucial holding in *Roe* (i.e., the legality of an abortion is "inherently, and primarily, a medical decision" for which the basic responsibility "must rest with the physician") began to blur.[35]

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29. Under *Roe*, the right is actually that of the doctor; however, it has been extended to the woman in other cases. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

30. *Roe*, 410 U.S. at 153-54.

31. The majority opinion was subscribed to by Justices Blackmun (who wrote the opinion), Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger. Justices White and Rehnquist dissented.

32. *Roe*, 410 U.S. at 163 (emphasis added).

33. *See* E.J. Dione, Jr., *On Both Sides, Advocates Predict a 50-State Battle*, N.Y. TIMES, July 4, 1989, at A11.

34. *Roe*, 410 U.S. at 153. To put any doubt of this to rest, Chief Justice Burger, who joined the majority in *Roe*, stated in his concurring opinion in the companion case *Doe v. Bolton*, 410 U.S. 179, 208 (1973), that "[p]lainly, the Court today rejects any claim that the Constitution requires abortions on demand."

35. *Roe*, 410 U.S. at 166.

By the time *Webster*[36] and *Casey* were decided, Justice Blackmun had departed from the original premise upon which judicially declared abortion rights had been established. In *Webster*, Justice Blackmun opined in the first paragraph of his separate opinion (joined by Justices Brennan and Marshall) that "[t]oday, *Roe v. Wade*, . . . and the *fundamental constitutional right of women to decide whether to terminate a pregnancy*, survive but are not secure."[37] One earlier indication that some members of the Court were gradually expanding the qualified abortion rights established in *Roe* came in 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists*.[38] As he did in *Roe*, Justice Blackmun wrote for the majority of the Court. In his *Thornburgh* opinion, he stated, "Again today, we reaffirm the general principles laid down in *Roe*."[39] And what might those principles be? Justice Blackmun redefined them as including "the constitutional principles . . . for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[40] Although he joined the majority in *Roe*, Chief Justice Burger noted the substantive change in what the Court held in *Thornburgh* to be the woman's right—a right that became more distant from the one in *Roe* because it became independent of the physician's limited right.

The Chief Justice, noting this significant development and departure from *Roe*, dissented in *Thornburgh*:

> I based my concurring statements in *Roe* . . . on the principle expressed in the Court's opinion in *Roe* that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle . . . .[41]

In spite of this acknowledgment of what *Roe* stood for—and, perhaps more important, does not stand for—Justice Blackmun complained that the plurality decision in *Webster* sympathized with those individuals who "would do away with *Roe* explicitly."[42] A major part of Justice Blackmun's concern was that the *Webster* plurality is "oblivious or insensitive to the fact

36. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

37. *Id.* at 537 (Blackmun, J., concurring in part and dissenting in part) (emphasis added) (citation omitted).

38. 476 U.S. 747 (1986), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2823 (1992).

39. *Id.* at 759.

40. *Id.*

41. *Id.* at 782-83 (Burger, C.J., dissenting) (citing *Roe*, 410 U.S. at 154-55).

42. Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part).

that millions of women, and their families, have ordered their lives around the *right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life.*"[43] Justice Blackmun also exemplified the altered understanding of *Roe* when he concluded the dissenting portion of his opinion with a warning: "For today, at least, the law of abortion stands undisturbed. For today, *the women of this Nation still retain the liberty to control their destinies.* But the signs are evident and very ominous, and a chill wind blows."[44] Justice Blackmun, in short, took the dependent right of the woman and made it independent of the physician's right. This was an unwarranted extension of the *Roe* compromise about which Chief Justice Burger warned in his *Thornburgh* dissent.

But the legal turmoil about what was decided in *Roe* and what rights that decision conferred did not stop in 1989 with *Webster*. It continued in *Casey*.[45] While my principal examination and analysis of the *Casey* decision involving the informed consent requirement will occur in Part V, I raise here the highlights of this case that are relevant to the discussion thus far. In *Casey*, Justice Blackmun initiated a new line of discussion in the *Roe* context when he presented his "steadfast . . . belief that the right to reproductive *choice* is entitled to the full protection afforded by this Court before *Webster*."[46] He pointed out that the Court reaffirmed "the long recognized rights of privacy and bodily integrity" with judicial precedent dating back to 1891.[47] But Justice Blackmun again departed from the discussion of the attending physician's rights of *Roe* when he argued in *Casey* that "continuation of a pregnancy infringes upon a woman's right to bodily integrity" and that the restrictions on terminating a pregnancy imposed by the Pennsylvania informed consent law "deprive[ ] a woman of the right to make her own decisions about reproduction and family planning."[48] Conspicuous by its absence from Justice Blackmun's discussion was any reaffirmation of the attending physician's exercise of medical judgment, which constituted the heart of the legality of a first trimester abortion under *Roe*.

Justice Stevens made an interesting observation at the outset of his concurring and dissenting opinion in *Casey* when he stated that "[t]he societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and

43. *Id.* at 557 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
44. *Id.* at 560 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
45. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (plurality opinion).
46. *Id.* at 2844 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
47. *Id.* at 2846 (Blackmun, J., concurring in part and dissenting in part).
48. *Id.* (Blackmun, J., concurring in part and dissenting in part).

the basic equality of men and women."[49] Absent from his discussion was the crucial language establishing that the woman's abortion rights were defined by and dependent on the *qualified* physician's rights, which had to be substantiated by the physician's *medical judgment*, not by concern for gender equality or "reproductive autonomy."[50] The fundamental holding of *Roe* that the permissibility of a first trimester abortion is based on the attending physician's professional medical judgment has, in the understanding of some of the Justices (and many abortion advocates), been supplanted by a new doctrine: "[A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience."[51]

As an aside, it should be noted that matters of conscience that emerge from religious belief are, in the minds of Justices Blackmun and Stevens, inappropriate because of the Establishment Clause prohibition of the First Amendment.[52] It can, of course, be argued that the kinds of activities or beliefs that concern these two members of the Court could well be protected by the Free Exercise Clause. I submit that the concern of these two members of the Court about the establishment question is unfounded. Religious as well as secular members of American society share moral views on important topics such as abortion, war, the environment, discrimination, and health care. Laurence Tribe,[53] Michael Perry,[54] Ruth Colker,[55] and Eliza-

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49. *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part).

50. *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).

51. *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part).

52. Justice Stevens opined that the adoption of views which parallel those of religious groups would constitute an unlawful establishment of religion. *See Casey*, 112 S. Ct. at 2839 (Stevens, J., concurring in part and dissenting in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 568 (1989) (Stevens, J., dissenting in part).

53. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 116 (1990).

54. *See* MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 116-19 (1991).

55. *See generally* Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011 (1989). While I do not agree with all of Colker's positions, I join her concern about the need for dialogue among those who hold opposing views on the subject of abortion. Neither the bombing of clinics nor the persecution of peaceful pro-life demonstrators helps the cause of rational and civil discourse that is sorely needed to protect *all* human life. Such discourse is essential, I believe, to moral resolution of the questions surrounding abortion. I note with both sadness and concern that Colker has expressed certain opinions about some of my own views published elsewhere. In her article *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 328 n.15, she argues that I have offered "an especially insensitive account of the impact of reproductive decisions on women's lives." In writing my article *Fetal Jurisprudence—A Debate in the Abstract*, 33 CATH. LAW. 203 (1990), I wrote about the subject of abortion from the perspective of fetal interests. Considering the plethora of articles addressing the subject from a woman's perspective, I considered it responsible then, as I do now, to contribute to the debate arguing fetal interests, which have been presented less frequently. It should be kept in mind that the views of some pro-abortion advo-

beth Mensch and Alan Freeman[56] generally agree that involvement by religious groups in the public debate on abortion and other important issues, and the government's adoption of some of their views, do not automatically constitute a violation of the Establishment Clause.[57] I maintain, as do these authors, that individuals and groups who speak out of their religious convictions permissibly contribute to the formation of the public conscience on questions containing moral implications.[58] It is the "matter of conscience" raised by Justice Stevens that prompts an investigation at this stage into the ethical questions surrounding the informed consent provision. I propose to examine initially the ethical questions associated with the issue from the basis of principles. These principles are four in number: (1) autonomy, (2) nonmaleficence, (3) beneficence, and (4) justice. Ultimately, I conclude in Part IV that these principles fail to adequately address the ethical issues concerning abortion. They leave a void in the discourse of the ethical considerations about abortion. Consequently, I re-examine in Part V these ethical questions about abortion—in light of the specific issue of informed consent—within the framework of virtue ethics. I shall find that an ethics

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cates, while sensitive to the interests of women, can be construed as being "insensitive" to the fetus. I do not find that tacking this or any label on those with whom Colker or I do not share outlooks productive in reconciling the opposing views involved in the debate about human abortion. To suggest that I am "insensitive" comes as an unwelcome and unjustified surprise. The remark that my article may be "insensitive" fails to acknowledge that, in addition to presenting the interests of the fetus, I also addressed the interest of the woman. I pointed out that "there is a second entity who shares with the woman the interest of self-preservation and further development." *Id.* at 230. I would not want any reader of Colker's work or mine to forget that I raised the obligations that our society has to care for both the woman and the fetus. Many of the problems surrounding this difficult question have devastating consequences for both the mother and the fetus. Moreover, these problems contribute to the tragedy

> which has much to do with the ability or inability of our society to treat its current and future members in a humane way that guarantees *all* members of the human race those essentials of a productive human life. . . . The solution to the problem is not the taking of life. Rather, the solution is making available that which life needs, the essential goods and services that cultivate productive lives and promote human flourishing.

Id. at 233 (emphasis added). My position is that the life and flourishing interests of the woman are important, as are those of the fetus. Colker's further remarks about the "abstract" argument and my hiding behind "a veil of ignorance" are misplaced. The use of the word *abstract* in the title was chosen to indicate that the debate between two advocates was abstract, *i.e.*, it really did not take place; however, the issues that they discuss and debate are real. The suggestion that I am "hiding behind a veil of *ignorance*" is unfortunate, particularly in view of my recognition that the question of life and human flourishing extends to both the woman and the child she bears.

56. Mensch & Freeman, *supra* note 4, at 1102.

57. I have treated this subject in much greater detail elsewhere. *See* Robert Araujo, S.J., *A Dialogue Between the Church and Caesar: A Contemporary Interpretation of the Religion Clauses*, 34 B.C. L. REV. 493 (1993).

58. *See also* KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 6, 227-28 (1988).

based on virtue rather than principles leads to a fuller, better understanding of moral concerns associated with the informed consent regulation of abortion. Moreover, it is from the context of virtue ethics that we begin to see the subject of the common good as it surfaces from the legal and moral questions that extend from informed consent regulations.

IV. ETHICAL PRINCIPLES AND THE REGULATION OF ABORTION

At the outset of this portion of the discussion, I acknowledge that there are attractive elements of a principle-based ethical theory. Specific attractions will emerge from the examination of the four principles that I have outlined at the conclusion of Part III. Both principle-based and virtue-based ethical theories generally share a common element: justice. I suggest at this point in my discussion that the component of justice in ethical theories, as well as the search for justice in practice, brings us to a more effective understanding of how virtue-based ethics can raise our consciousness about the common good. In turn, an examination of the common good can provide American society of the late twentieth century with a desirable means of minimizing the entrenched, absolute positions that emerge from many ardent pro-choice and pro-life proponents. In short, I suggest here that a virtue-based ethics theory applied to informed consent abortion regulation can, at this stage in the national debate of a difficult issue, provide hope not only for minimizing conflict but also maximizing the opportunity of achieving the good for all concerned with the question of abortion. I now turn to my examination of the first ethical principle: autonomy.

A. The Principle of Autonomy

The principle of autonomy can theoretically be defined as "self rule." The notion of *autonomy* is based on the Greek roots *autos* (self) and *nomos* (rule).[59] In the context of biomedical ethics, autonomy can be viewed as the principle based on "reflective individual choice" that is sometimes qualified by an authority (*e.g.*, a combination of professional medical advice and legal responsibilities, or by "tradition, or social morality").[60] In general, authority does not constrain autonomous decision-making.[61] It is important to recognize that informed consent is a crucial component of the exercise of autonomy by individuals making medical and health care decisions.[62] A

59. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 67 (1989).

60. *Id.* at 71.

61. *Id.* at 72.

62. *Id.* at 74.

decision made by a patient is not considered to be autonomous if comprehensive disclosures about medical procedures and their known effects are not made, if there is inadequate understanding about the information derived from these disclosures by the person making the autonomous decision, if the decision is not voluntary, and if the person lacks the requisite competence to make the decision.[63] In the context of abortion, a variety of attitudes about autonomy prevail.

In *Roe*, while there was some discussion about the relationship between the woman and the attending physician (which may suggest the need for informed consent before an abortion can be performed), the privacy language that permeates the decision can insulate the woman's autonomy from review by those people (for example, the state) who see a need to protect the interests of the fetus and balance them against those of the pregnant woman.[64] If we see a need to question the woman's autonomous decision to have an abortion and this autonomy's independence from the fetus's interests, we need only re-examine some of the judicial discussion in *Casey*[65] or *Webster*[66] in which the woman's autonomy is insulated from most external controls. In reviewing the nature of a woman's autonomy to abort her child, investigators have arrived at a variety of conclusions about the nature and extent of her autonomy.

James Gustafson, while generally favoring protection of human fetuses from abortion,[67] is willing to grant the pregnant woman who is the victim of "sexual crime" the right to abort the fetus if she is "convinced" that it is "right" to do so.[68] Gustafson believes that moralists must honor a woman's "personal responsibility"; consequently, in his estimation, she cannot be coerced into making a decision that contravenes her own sense of responsibility. Any concern about the extent to which the woman's autonomy can be detrimental to the genetic and ontological existence of the fetus is eliminated in the absolute case made for a woman's autonomy by Mary Anne

63. *Id.* at 78-79. Beauchamp and Childress organize the informed consent process by grouping the components under three categories: (1) Threshold element concerns competence, (2) information elements include (a) disclosure of information and (b) the understanding of that information, and (3) the consent elements consist of (a) voluntariness and (b) authorization. *Id.* at 79.

64. Roe v. Wade, 410 U.S. 113, 154-55 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

65. *Casey*, 112 S. Ct. at 2844 (Blackmun, J., concurring in part and dissenting in part).

66. Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, Brennan, & Marshall, JJ., concurring in part and dissenting in part).

67. James M. Gustafson, *A Protestant Ethical Approach*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 101, 112 (John T. Noonan, Jr. ed., 1970).

68. *Id.* at 116.

Warren.[69] By excluding the fetus as a member of the human community, Warren argues that the pregnant woman has the moral ability and autonomy "to protect her health, happiness, freedom, and even her life, by terminating an unwanted pregnancy" and that this right "will *always* override whatever right to life it may be appropriate to ascribe to a fetus, *even a fully developed one*."[70]

So far, the concerns about autonomy focus on its exercise by the pregnant woman. However, the Catholic Church, through its Congregation for the Doctrine of the Faith (CDF), has addressed the principle of autonomy in a different way. The CDF views this issue quite broadly by looking at every human's autonomy—the pregnant woman or the fetus. The Church constructs its understanding about human autonomy in the context of the human right to life. The right to life is, for the Church, a fundamental principle, the "condition of all others," because:

> It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others: all discrimination is evil, whether it be founded on race, sex, colour, or religion. It is not recognition by another that constitutes this right. This right is antecedent to its recognition; it demands recognition and it is strictly unjust to refuse it.[71]

With the exception of the CDF's understanding of autonomy in the context of abortion, each of the other views already mentioned looks at the subject from the perspective of the woman and—depending on the surrounding circumstances—her autonomous choice to abort a pregnancy with little or no objection from anyone else. On the other hand, the CDF's view can, even in situations when the mother's life is threatened by the fetus, allow the "autonomy" of the fetus to trump the "autonomy" of the mother. We begin to see how the exercise of autonomy can adversely affect the interests of others. For example, the absolute exercise of the woman's autonomy, which Warren is willing to grant, can bring great harm to the fetus by prejudicing its right to live. On the other hand, the CDF's position does not address the difficult case of the harm that the pregnant woman faces when her health is prejudiced by the continued presence of the fetus.[72]

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69. Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 43 (1973), *reprinted in* BIOMEDICAL ETHICS 464-69 (Thomas A. Mappes & Jane S. Zembaty eds, 2d ed. 1986).

70. *Id.* at 469 (emphasis added) (citation omitted).

71. Sacred Congregation for the Doctrine of the Faith, *Quaestiode Abortu*, *in* VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 441, 445 (1982) [hereinafter *Declaration on Procured Abortion*].

72. This statement is not to be construed as a justification to abort the pregnancy when the mother's life is threatened.

Those of us interested in applying ethics to the question of abortion should also be concerned with the harm to another that the exercise of autonomy can produce. While we may disagree on which harms are to be avoided and whose interests are to be protected, we probably agree that harm is to be avoided. Consequently, I shall turn to the principle of nonmaleficence and the contribution it makes to this segment of my investigation.

B. The Principle of Nonmaleficence

Put simply, the principle of nonmaleficence means do no harm.[73] On first examination, the norm of avoiding harm seems rather attractive. Most ethical persons harbor the general notion that no one should harm another. However, an examination of authors who treat this principle reveals that this principle, while attractive by itself, raises questions about the contributions it can make to ethical discourse concerning abortion when we realize that it inadequately deals with the underlying question of: Who is harmed?

For example, in the majority opinion in *Roe*, the Court pointed to the harm that the woman may face if her pregnancy is to continue.[74] Within a narrow application of the principle of nonmaleficence, it might be ethical to abort the fetus in order to prohibit harm to the woman if she is endangered by the pregnancy. However, the *Roe* majority opinion failed to reconcile the harm that the aborted fetus will permanently suffer if removed from the mother's womb by the abortion. James Gustafson presents the case in which the pregnancy is the result of the woman's gang rape by her estranged husband and his accomplices; but like the majority in *Roe*, Gustafson is more concerned about avoiding harm to the woman than harm to the fetus.[75] Warren's concern about avoiding harm is focused solely on the pregnant woman: The only harm to be avoided is the harm that may befall her (the prejudice and harm that befalls the fetus—while perhaps unfortunate—is inconsequential).[76] The view of Warren is countered by the CDF, which acknowledges the irreversible harm suffered by the fetus during an abortion. The CDF contends that the harm to the fetus can only be avoided through the prohibition of abortion.[77] But just as Warren is not

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73. BEAUCHAMP & CHILDRESS, *supra* note 59, at 120, 194.

74. Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

75. Gustafson, *supra* note 67, at 107, 116.

76. Warren, *supra* note 69, at 469.

77. *Declaration on Procured Abortion*, *supra* note 71, at 443-44. In his encyclical letter, *Humanae Vitae* (Encyclical Letter on the Regulation of Births), *in* VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 404 (1982), Pope Paul VI urged the principle of doing no harm to human procreation by avoiding the direct interruption of the generative process.

concerned about the harm done to the fetus, the CDF does not address the harm that may be suffered by the continuation of a life-threatening pregnancy.

As admirable as the principle of avoiding harm is, it does have limitations—particularly when it is only applied to one interest (that of the pregnant woman *or* the fetus) but not both. What constitutes the avoidance of harm for one (and therefore good for the protection of that individual's interests) may be prejudicial to the other. Thus, if we turn to the positive effort to do good (as opposed to the avoidance of doing harm), we might obtain a better principle to address the question of abortion.

C. *The Principle of Beneficence*

Beneficence is the affirmative course of action one takes to do and achieve good. It "require[s] positive acts to assist others."[78] Beauchamp and Childress suggest that beneficence has two components. The first is a positive component that mandates "the *provision* of benefits (including the prevention and removal of harm as well as the promotion of welfare)."[79] The second element is the utilitarian component of beneficence that "requires a *balancing* of benefits and harms."[80] Whereas nonmaleficence requires that a person refrain from doing something (*i.e.*, harm), beneficence imposes an affirmative obligation to take some action that will achieve a desirable, *good* result.[81] The obligation exists even when there is no legal obligation to do so.[82] How is the principle of beneficence applied in the literature that I have been using concerning the topic of abortion?

In the *Roe* majority opinion, there is a weak form of beneficence defined and applied in the context of giving the physician the legal protection from prosecution when he or she performs a first trimester abortion that is justified by his or her medical opinion.[83] A contradiction immediately surfaces in the application of the beneficence principle because the effort by the physician to do good for the pregnant woman harms the fetus. This contradiction also appears in the example developed by Gustafson when action is

78. BEAUCHAMP & CHILDRESS, *supra* note 59, at 194.

79. *Id.* at 195.

80. *Id.*

81. *Id.* at 198.

82. *Id.* at 205; *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 16-88 (1991) (discussing a moral obligation to take action like the Good Samaritan even though there is no legal obligation to do so).

83. Roe v. Wade, 410 U.S. 113, 163-64 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

taken to help the woman who has been gang raped.[84] The obligation to do what is good for the woman is highly prejudicial to the fetus. The strong obligation that emerges from Warren's notion of beneficence to do whatever is necessary to help the woman simultaneously supplies the harm that the fetus will suffer from the obligation to terminate the pregnancy.[85]

Interestingly, the CDF acknowledges that there may be some kind of obligation to assist a pregnant woman when it mentions the need "to free [women] from all unjust discrimination."[86] However, the CDF simultaneously imposes an absolute obligation to do good for the fetus by pointing out that discrimination against the fetus must be combatted by banning abortion.[87] Beauchamp and Childress observe that the exercise of beneficence can be paternalistic and thereby conflict with the exercise of autonomy.[88] In other words, the obligation to protect the fetus as advocated by the CDF constitutes a form of paternalism[89] that challenges the first trimester autonomy of the attending physician and her patient by imposing an absolute obligation to protect the fetus from the discrimination of abortion.

Again, we see that the good that comes from one kind of beneficence may conflict with the good that comes from obligations imposed by other applications of beneficence. Do principle-based ethics offer any resolution of these competing efforts to seek different goods? Perhaps the principle of justice might offer some help, if not a solution, to this predicament that emerges from the applications of the first three principles.

D. The Principle of Justice

Justice has been understood through a wide range of definitions. For Socrates, it was The Good.[90] For Aristotle, it included true friendship.[91] For Mill, it was the utilitarian calculus of the greatest good for the largest number.[92] For H.L.A. Hart, justice is treating like cases alike.[93] For

84. Gustafson, *supra* note 67, at 116.

85. Warren, *supra* note 69, at 469; *see also* Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

86. *Declaration on Procured Abortion*, *supra* note 71, at 446.

87. *Id.* at 445.

88. BEAUCHAMP & CHILDRESS, *supra* note 59, at 209-27.

89. *Id.* at 218-19.

90. PLATO, THE REPUBLIC (Desmond Lee trans., 1974).

91. ARISTOTLE, *Nicomachean Ethics*, *in* INTRODUCTION TO ARISTOTLE 502 (Richard McKeon ed., Modern Library 1992) (1947).

92. JOHN S. MILL, *Utilitarianism*, *in* THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL, AND RELIGIOUS 321, 335 (1961).

93. H.L.A. HART, THE CONCEPT OF LAW 158 (1961).

Rawls, it is the exercise of fairness.[94] For John Finnis, justice is, among other things, the realization of basic human goods for one's self *as well as* for others.[95] Others have seen justice as a synthesis of rewards, punishments, and entitlements.[96] Hart's understanding of justice (like cases being treated alike, different cases being treated differently) constitutes what has been termed as "formal justice." Thomas Aquinas identified several types of justice: (1) the private arrangement between two parties may be understood as "commutative justice"; (2) the just distribution of goods, services, etc. based on needs is "distributive justice."[97] One other type of justice referred to by commentators is social or general justice: the proper ordering of society to minimize and eliminate conflict so that individuals and groups are treated with the respect and dignity that would be accorded every other individual and group.[98]

In turning to the sources cited earlier to develop the first three ethical principles, we see a variety of understandings of justice used to reconcile the conflicts that emerge from the practice of abortion. In *Roe*, the majority attempted to resolve the conflict by working out a type of calculus in which the direct rights of the attending physician and the dependent rights of the woman were given prominence in the first trimester of pregnancy. In the final trimester, the state was given the preference by being able to regulate abortion so as to protect fetal life. The middle trimester became a ground for weighing the two interests and reaching some kind of compromise between them.[99]

Gustafson prefers to protect fetal life.[100] However, while "[l]ife is to be preserved rather than destroyed" and those "who cannot assert their own rights to life are especially to be protected," there are exceptions to this rule.[101] For Gustafson, justice might recognize the following exceptions to the general rule: (1) "medical indications" mandate a therapeutic abortion; (2) the pregnancy is the result of a "social crime"; and (3) "sexual and

94. JOHN RAWLS, A THEORY OF JUSTICE 111-14 (1971).

95. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 161 (1980).

96. *See* BEAUCHAMP & CHILDRESS, *supra* note 59, at 257.

97. THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, Question 61, *Of Commutative and Distributive Justice* (Fathers of the English Dominican Province trans., 1920).

98. *Id.* Question 58, *Of Commutative and Distributive Justice*, art. 5 (*Whether Justice is a General Virtue?*).

99. Roe v. Wade, 410 U.S. 113, 164-65 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

100. Gustafson, *supra* note 67, at 112.

101. *Id.* at 116.

emotional conditions do not appear to be beneficial for the well-being of the mother and child."[102]

Since Warren asserts an absolute right of the pregnant woman to terminate the pregnancy at any time, no conflict can arise challenging the woman's right. If a conflict were to arise, justice would simply require whatever is necessary to protect the woman's absolute right. Any challenge to her right, according to Warren, would lose.

On the other hand, the CDF recognizes that "civil law cannot expect to cover the whole field of morality or to punish all faults . . . . It must often tolerate what is in fact a lesser evil, in order to avoid a greater one."[103] While stating that abortion can never be approved, "political action" ought to be taken to "combat its causes" in a charitable fashion that deals effectively with the human sorrow and misery that accompany those who are most involved.[104] I consider that the position of the CDF is charitable toward and understanding of the interest of the pregnant woman for whom the pregnancy creates major, possibly even life-threatening problems. Individuals, communities, and, more formally, the state through its lawmakers are called upon by the CDF's justice principle to help and improve these difficult situations.[105] Yet, when all is said and done, both politically and legally, the CDF reiterates that "the life of the child takes precedence over all opinions . . . [and o]ne cannot invoke freedom of thought to destroy life."[106] Just as Warren makes the interest of the pregnant woman absolute, the CDF makes just as absolute the position of the fetus. The positions taken by Warren and the CDF mark the outer boundaries of the rights that are in conflict, but neither position can really deal with the other and reach a solution that the other side can view as just.

Does the theory of justice espoused by either the CDF or Warren (or for that matter, the majority opinion in *Roe* or the position of Gustafson) really reconcile the conflict so that the other party or side also receives the respect and dignity that it desires? My answer is probably not. Our civil legal system of rules and the judgments based on those rules make winners and losers. In the questions about life that the pregnant woman and the fetus face, the application of rules and the judgments supplied by them will often result in one party being the winner and the other party being the loser.

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102. *Id.*
103. *Declaration on Procured Abortion*, *supra* note 71, at 448.
104. *Id.* at 450.
105. *Id.* at 448-49.
106. *Id.*

Infrequently, a compromise may be arrived at which gives both parties the decision they seek.

Does this mean that there is no adequate solution founded on principle-based ethics that can give the pregnant woman and the fetus the justice they deserve? The conflicts between principle-based arguments advanced by the woman or on behalf of the fetus suggest not. My point here is not to remake a principle-based ethical system that will provide such justice. The task would be Herculean. Rather, I propose to look for the answer to this conflict of absolutes[107] in a virtue-based ethical system, for I believe that virtue-based ethics is an appropriate realm within which we might find a more satisfactory solution to the question of abortion. The transition between principles-based ethics and virtue-based ethics is the concept of justice that is a component of both ethical systems. Thus, I now turn to the contribution virtue ethics can make to the question I have been examining.

I suggest at this stage that the development of a virtue ethics will offer a better way of addressing the issue of abortion. Moreover, it should provide a consistent and coherent approach to dealing with the important issues and interests at stake. Perhaps above all else, virtue ethics will—unlike principle-based ethics—consider more comprehensively the spectrum of interests and experiences at stake in the matter of abortion.

V. VIRTUE ETHICS AND THE REGULATION OF ABORTION

The title of this Article raises three questions: (1) Who are we? (2) What do we want? (3) How do we get there? These questions are derived from Alasdair MacIntyre's seminal work, *After Virtue*.[108] If the function of ethics is to guide us toward right action,[109] virtue ethics engages us as moral agents who are seeking to make ourselves *better* moral agents in the future.[110] At the heart of both the future of the moral agent *and* the second question posed by MacIntyre (*i.e.*, where do we want to go?, or, what do we want?) is a goal, a *telos*.[111] As James Keenan stresses, "[o]nly in virtue ethics is a *telos* constitutive of method; no other ethical system can make

107. *See generally* TRIBE, *supra* note 53.

108. ALASDAIR MACINTYRE, AFTER VIRTUE (1981).

109. *See* James F. Keenan, S.J., *Virtue Ethics: Making a Case as It Comes of Age*, 67 THOUGHT 115 (1992).

110. *Id.* at 116.

111. MACINTYRE, *supra* note 108, at 189. "[T]here is a *telos* which transcends the limited goods of practices by constituting the good of a whole human life, the good of a human life conceived as a unity . . . ." *Id.*; *see* Keenan, *supra* note 109, at 120, 123; Joseph J. Kotva, Jr., *An Appeal for a Christian Virtue Ethic*, 67 THOUGHT 158, 159 (1992).

that claim."[112] Because we as individual humans are also social beings whose existence is grounded in relationships with others, the concept of the *telos* helps us to understand better the question advanced by MacIntyre (*i.e.*, where do we want to go?) by placing it into a communal setting.[113]

Joseph Kotva has argued that the *telos* of a virtue ethic is inextricably intertwined with the means to achieve the goal because: (1) the means move us toward a better understanding of the end; (2) the end concerns the formation of a specific kind of self; and (3) the end concerns the formation of a specific kind of society, and societies stipulate role-specific behavior.[114]

In the context of the question of abortion, Kotva points out that for some individuals, the kind of person each of us is molds the kind of moral questions we face.[115] He illustrates his point with the example that the "question of the moral appropriateness of aborting a defective fetus never occurs to some people[; t]hey simply proceed to have and raise the child."[116] His observation and conclusion suggest that the practice of virtue ethics acknowledges the sense of "otherness"; that is, in making moral decisions about who we are and what our goal is and what means we use to get there, we necessarily think of other individuals as we work toward the goal. The practice of virtue ethics can therefore be based on a sense of community, on an awareness of relationship with others.

Mary Ann Glendon has recognized and addressed this discovery in the context of the *Roe* decision. While the rhetoric of the majority opinion focused on the individual (*i.e.*, the attending physician or the pregnant woman, and the individual's right to privacy),[117] Glendon expresses her concern that the interests of the *other*—that the concerns of the community most involved with pregnancy and the legality and morality of abortion—are ignored. She addresses this lacuna by stating:

> The voice we hear in the Supreme Court's abortion narrative—presenting us with the image of the pregnant woman as autonomous, separate, and distinct from the father of the unborn child (and from

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112. Keenan, *supra* note 109, at 123.

113. I have developed the idea of a *telos* underlying the social institution of law elsewhere. *See* Robert J. Araujo, S.J., *The Teleology of Law: Citizenship and Discipleship*, 35 CATH. LAW. 57 (1992).

114. Kotva, *supra* note 111, at 159. As Kotva further suggests, "the means cannot be separated from the end because the means are central to the end. A *telos* which embodies the virtues of justice, courage, and fidelity cannot be severed from acts and social arrangements that are just, courageous, and faithful." *Id.* at 160.

115. *Id.* at 166.

116. *Id.*

117. Roe v. Wade, 410 U.S. 113, 152-56 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

> her parents if she is a minor), and insulated from the larger society which is not permitted even to try to dissuade her or ask her to wait to get counseling, information, or assistance—is more distinctively American . . . in its lonely individualism and libertarianism.[118]

Professor Glendon has identified the problem with the ethical principles of *Roe* by suggesting that insulating individuals from one another is not a desirable way of addressing the vital question of whether a woman should have an abortion. Glendon refers to those other individuals who can help the pregnant woman, the fetus, and society at large if they are permitted to participate in the deliberation. The Pennsylvania informed consent regulation enables and encourages such participation. In short, Glendon's insight identifies the core problem with the ethics of *Roe*. She offers a practical solution to the problem of the insulation of the woman prompted by *Roe*. In her text, she suggests a goal (which includes individuals becoming less isolated and more community oriented) and the means to reach the goal (how do we get there?).

At the end of my discussion on principle-based ethics I indicated that the element of justice is a part of both principle ethics and virtue ethics. Since justice is related to both ethical systems, I shall now address it in the context of a virtue-based system. I also mention here that virtue ethics encompasses several other considerations, including the virtues of prudence, courage, and wisdom, all of which will be addressed shortly.[119]

Within the privacy rights rhetoric of *Roe* and the Blackmun-Stevens opinions in *Casey* and *Webster*, the kind of justice that emerges has lost a good deal of its goal-oriented function. The language about "justice" that results is narrowly focused on addressing and protecting the act of abortion on the grounds of protecting individual rights and privacy. As Glendon points out, the social, communal, and *teleological* components of duties that are the correlatives of rights are not discussed. She correctly argues that these components are essential to deal justly with the urgent matter of abortion, which has, in the American context, been cloaked with the absolute rights of privacy, individual autonomy, and isolation.[120] To balance the excessive and narrow focus on the rights that emerge from the principle of autonomy, Glendon draws attention to the importance of understanding the needs of all the parties involved: the pregnant woman, the fetus, and

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118. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 52 (1987).

119. *See* MACINTYRE, *supra* note 108. The author defines a virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." *Id.* at 178.

120. GLENDON, *supra* note 118, at 38.

the community. She further suggests that a just resolution of the difficult questions raised by abortion rests in the development, adoption, and the sustaining of policies that encourage child bearing and the protection of fetal life.[121] While the interests of the fetus are protected under Glendon's proposal, the mother is also helped with concrete programs that give her counselling, health care for herself and her child, and other assistance that she may need.

Lisa Cahill has examined abortion beyond the constraints of principles by probing the realm of virtue. While she understands the predicament of many women who face unplanned pregnancies, Cahill also recognizes that "the principal value at stake . . . is the existence of the fetus itself."[122] To deal justly with the question of abortion, it is essential for Cahill that we first establish an understanding of who belongs to the human community affected by abortion before the moral relationships among these members can be addressed.[123] After ascertaining that the fetus is from its conception a member of the human community, she, like Gustafson,[124] adopts a "strong bias in favor of the fetus."[125] Cahill reveals that her ethical approach to abortion contains some elements paralleling a virtue-based method when she shifts attention from only the woman or only the fetus and refocuses it on "their respective rights" being "defined in relation to one another."[126]

Another source of a virtue-based approach to the question of abortion is the feminist legal scholar Ruth Colker. While Colker considers herself a "pro-choice feminist,"[127] she establishes a foundation for a virtue-based ethics to deal with the issue of abortion. She argues "that both feminist theory and theology can help people *discover and experience* their authentic selves."[128] This author relies on a synthesis of theology and feminism to "guide people to the discovery and experience of their authentic self."[129] For Colker, the goal—the *telos*—is realization of this authentic self: a self

121. *Id.* at 53-57.

122. Lisa S. Cahill, *Abortion, Autonomy, and Community, in* ABORTION AND CATHOLICISM: THE AMERICAN DEBATE 85 (1988).

123. *Id.*

124. Gustafson, *supra* note 67, at 112.

125. Cahill, *supra* note 122, at 86.

126. *Id.* at 87.

127. Colker, *supra* note 55, at 1046.

128. *Id.* at 1011-12 (emphasis added). Colker uses the Buddhist term "authentic self" to mean that "we have control over how the self changes so that we can facilitate its movements toward our aspirations. . . . It is important here for the reader to understand that this conception of the self is *not* static, fixed, isolated, or universal self often described in the western philosophy." *Id.* at 1012 n.4.

129. *Id.* at 1013.

not cut off from others, insulated by some impenetrable "privacy" but, rather, a self, who is a member of a *community*, who "attempt[s] to speak aspirationally because such dialogue may enable us to overcome short-term disagreements and move toward our *common goals*."[130] In order to attain such goals, Colker suggests that we must rely on "[d]ialogue and contemplation, not rhetoric."[131] Colker eschews principles supportive of absolute privacy when it comes to abortion. She relies on relationship and dialogue in order to "approach the abortion cases from the perspective of the kind of people and society that we want to be."[132]

Although the CDF advances a strong principle-based approach in developing its ethical response to abortion, it does raise the *teleological* issue that is constitutive of virtue ethics when it addresses the role of civil law as an instrument of justice. The CDF acknowledges that the civil law "must often tolerate what is in fact a lesser evil, in order to avoid a greater one."[133] While this may make us pause and consider how this comment about civil law constitutes a departure from a principle-based ethics, the CDF enters the realm of virtue ethics when it suggests that the "role of law is not to record what is done, but to help in *promoting improvement*."[134] Just as those of us who make the case for virtue ethics ask ourselves the teleological question what do we want to become (or where do we want to go), the CDF poses the following:

> [The goal of law is] to pursue a reform of society and of conditions of life in a milieux, starting with the most deprived, so that always and everywhere it may be possible to give every child coming into this world a welcome worthy of a person. Help for families and for unmarried mothers, assured grants for children, legislation for illegitimate children and reasonable arrangements for adoption—a

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130. *Id.* at 1042 (emphasis added).

131. *Id.* at 1045.

132. *Id.* at 1047. Another perspective on the need for civil discourse in the abortion debate is offered by Teresa G. Phelps, *The Sound of Silence Breaking: Catholic Women, Abortion, and the Law*, 59 TENN. L. REV. 547 (1992), where the author states:

> We may never live in an ideal world and we may never agree on the morality of abortion or when human life begins. We can, nonetheless, work toward this world, an ideal world in which empowered women live in and are supported by their community. In such a world women are trusted to make their own choices, and both sides of the abortion debate, pro-life and pro-choice, might be surprised at what choices they make. We can begin this essential work *by listening to each other.*

Id. at 569 (emphasis added).

133. *Declaration on Procured Abortion*, *supra* note 71, at 448.

134. *Id.* (emphasis added).

> whole positive policy must be put into force so that there will always be a concrete honourable and possible alternative to abortion.[135]

There is also contained within the justice component of virtue ethics the recognition of what is the goal of society and its members. A virtuous solution to the question of abortion avoids the defect of "winner-take-all" in the justice of a principle-based ethics. But how do we move toward the goal of justice in virtue ethics? This is where the virtue of prudence comes into play.

If the virtue of justice prescribes the just goal or end, then prudence is the means to get to that end.[136] A fundamental approach to obtain the means to the just end has been suggested by the CDF. In its discussion of the role of civil law, the CDF recommended the promotion of improvements in social structures that will simultaneously display greater charity toward pregnant women, their families, and fetuses by making available grants, arrangements for adoption, and other legislation that gives "concrete, honourable and possible alternative[s] to abortion."[137] Paralleling the CDF's recommendations is the United States Catholic Conference's recent election policy statement that urged voters and officials to "support public funding policies that encourage childbirth over abortion, and . . . programs that assist pregnant women and children, especially those who are poor."[138] Similar sentiments were offered eight years ago by New York Governor Mario Cuomo.

In a speech at the University of Notre Dame on September 13, 1984, Governor Cuomo addressed the dual nature of his position on abortion. As a practicing Roman Catholic, he has accepted personally the teachings of the Church and holds a "reverence" for developing human life.[139] However, as a governor of a secular state, he stated that he cannot coerce others to accept the same beliefs that emerge from his religious tradition because of the separation between church and state promoted by the Establishment Clause of the First Amendment.[140] Politics aside, Cuomo then ventured into a realm approaching virtue ethics by raising considerations that every

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135. *Id.* at 449.

136. Kotva, *supra* note 111, at 166 n.9 (acknowledging his debt to James Keenan, S.J., for this insight).

137. *Declaration on Procured Abortion*, *supra* note 71, at 448-49.

138. *See Political Responsibility: Revitalizing American Democracy*, 21 ORIGINS 313, 319 (1991).

139. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 20-21 (1984).

140. *Id.* at 20-23.

member of the secular society can reflect upon and adopt regardless of personal, religious beliefs.

These considerations contain a two-fold goal—the *telos*—for Cuomo. First, "we must work to find ways to avoid abortions without otherwise violating our faith."[141] This search is initiated by education and sustained by elevating the consciousness of fellow citizens through the "weapons of the word and of love."[142] The second goal is developing practical ways in which alternatives to abortion are encouraged through support and assistance (*e.g.*, programs making available nutritional and pediatric care, childbirth and post-natal care, and other relief).[143] Cuomo's recommendations echo those advanced by Glendon.[144] As he develops the virtue of prudence, Cuomo also raises the virtue of courage.

Courage is the virtue that enables us to meet the challenge of harm or danger when we attempt to do something about the care and concern we have for individuals and communities.[145] The exercise of this virtue takes place when the humans facing risks and needing help from others (*e.g.*, the fetus and the pregnant woman) can rely on the response from those others who wish to and are prepared to help.[146] Cuomo serves as one example of courage by taking a stand and publicly addressing the risks that both fetuses and pregnant women face, and by proposing practical means for addressing and minimizing those risks.

Underlying the virtues of justice (which helps us recognize the goal), prudence (which provides the means for acting justly), and courage (which reinforces us as we take the action essential to reaching the *telos*), is the virtue of wisdom. Wisdom provides the insight by which we come to understand who we are and where we ought to be (or, what we want to become). It parallels prudence and works in tandem with it. In a virtue ethics approach to abortion, wisdom guides us in our quest for understanding who we are as individuals and what we want to become. In the American culture that is strongly characterized by the almost absolute right of privacy, "which is so bound up with individual autonomy and isolation,"[147] the focus of our individual and community attention on who we are can be blurred. If it is blurred as Glendon and others suggest, it is difficult to

141. *Id.* at 27.
142. *Id.* at 26-27.
143. *Id.* at 29.
144. GLENDON, *supra* note 118, at 53-57.
145. MACINTYRE, *supra* note 108, at 179.
146. *Id.* at 116.
147. GLENDON, *supra* note 118, at 38; Colker, *supra* note 55, at 1066.

identify not only who we are now, but also what we want to be in the future.

That is why Cuomo urges the need for a wisdom to see what we are; as he says, "the wisdom contained in the words, 'Physician, heal thyself.' "[148] Cuomo identifies the need to increase our understanding, to broaden our knowledge of who we are and what we want to be when he argues that:

> Unless we Catholics educate ourselves better to the values that define, and can ennoble, our lives, following those [Christian social] teachings better than we do now, unless we set an example that is clear and compelling, we will never convince this society to change the civil laws to protect what we preach is precious human life. Better than any law or rule or threat of punishment would be the moving strength of our own good example, demonstrating our lack of hypocrisy, proving the beauty and worth of our instruction.[149]

When this wisdom infects our consciousness, our knowledge of ourselves becomes more secure and more certain. And, when our self-knowledge grows, the vision of who we want to become both as individuals and as communities will become all the more clear. And, when our knowledge of who we want to become is better defined, our "moral idealism [can] be found and maintained."[150] Cuomo synthesized the goals of virtue and the method to attain them when he stated: "We can be fully Catholic, proudly, totally at ease with ourselves, a people in the world transforming it, a light to this nation appealing to the best in our people, not the worst. Persuading, not coercing. Leading people to truth by love."[151] Joseph Kotva reminds us that a virtue ethic has rules. It offers guidance, it does not restrict our freedom or development, and it moves us away from "the kind of behavior that excludes one from the pursuit of the common good."[152] I now turn to an investigation of the common good because it identifies the goal I believe we should seek regarding the general question of abortion and the more specific question of informed consent.

VI. The Common Good and the Question of Abortion

In the previous section, I examined the attractions of a virtue ethics versus those of a principle-based ethics. When we examine abortion rights rhetoric, we find that it is usually cast in a strong "principle language." As a result of *Roe*, this language possesses the architecture of privacy and indi-

148. Cuomo, *supra* note 139, at 26-27.
149. *Id.* at 27.
150. Keenan, *supra* note 109, at 123.
151. Cuomo, *supra* note 139, at 31.
152. Kotva, *supra* note 111, at 169.

vidual liberty, the hallmarks of the liberal state.[153] But, as James Keenan argues, we are in need of a virtue ethics because we need to rediscover the sense of community "[i]n our liberal society where individual rights have replaced the common good."[154] John Finnis has likewise commented on the importance of community to the common good for "the common good is the good of individuals living together and depending upon one another in ways that favor the well-being of each."[155] It is the sense of community and the individuals who are the community on which this part of my examination will focus. My thesis here is that the concerns of the community and the concerns of individuals are related and complementary through the common good. In the context of the abortion debate, I see that the strongly opposed views that favor either an absolute right to abortion or an absolute right to protect the fetus do not promote the common good.

My examination of the common good is based on virtue ethics because this approach raises questions that make us look at who we are, what we want to be, and how we get there. By examining who we are, virtue ethics can help reveal the problems with the strong individual-rights-and-liberties orientation of our contemporary society. When we acknowledge that we are often individual-rights promoters who fail to relate the interests of different individuals to one another, we can then acknowledge that something is wrong: What do we do when rights that we have made "absolute" conflict with one another? We can address this question with the second stage of the virtue ethics inquiry: What do we want to be? If we see that there is a need to see ourselves as individuals in community rather than as isolated beings independent of all others (in other words, we see ourselves as individuals in community), then we can ask the third question of virtue ethics: how do we get there? A response to this inquiry is to acknowledge the need for public discourse. I suggest that through engaging one another in public

153. A source of this contemporary liberal doctrine is MILL, *supra* note 92, at 197, where the author states: "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, *absolute*. Over himself, *over his own body and mind*, the individual is sovereign." *Id.* (emphasis added).

154. Keenan, *supra* note 109, at 123. The author continues—correctly and properly—that the rediscovery of community today is *urgent*. The example he gives is the issue of abortion because the two principal sides often rely on the "liberal" view of a strong rights-orientation without abortion advocates trying to understand fully the interests of the fetus and without fetal-protection advocates comprehending the concerns that women who have unwanted pregnancies may face. Keenan's insight relates to the point that I later advance about the need for engagement and dialogue.

155. FINNIS, *supra* note 95, at 305 (emphasis omitted).

dialogue, we educate ourselves and make ourselves wiser to use virtue language, in the needs of both ourselves as individuals and the needs of others.

I shall now develop this thesis more fully in four segments. The first will refocus the abortion issue as it has emphasized absolute rights language (which I suggest is, if not antithetical to the common good, is at least often in conflict with it). Second, I shall briefly investigate the tradition of the common good that has application to my thesis. Next, I shall focus on the insights of contemporary authors who have made connections between the rights of individuals as balanced by the needs of the community. Finally, I shall make suggestions about how we can better address the abortion controversy through our willingness to serve the common good under virtue ethics.

A. The Abortion Issue Refocused

If I were to identify the major proposition that *Roe* contributes to the issue of abortion, it would be this: There is a qualified right to privacy that precludes the state from interfering with the right to terminate a pregnancy during the first trimester.[156] As mentioned previously, the privacy right was given to the attending physician, not the woman; the pregnant woman's right was derivative of the physician's right.[157] However, with the passage of time, the fundamental declaration of *Roe* became obscured. In this blur, there appeared in the minds of some members of the Supreme Court and abortion-rights advocates "the fundamental constitutional right of women to decide whether to terminate a pregnancy."[158] In *Casey*, Justices Stevens and Blackmun argued that the Pennsylvania informed consent regulation[159]

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156. It is important to note that structuring abortion rights on the foundation of privacy was and continues to be challenged by some abortion-rights advocates. *See, e.g.*, Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (offering an "equal protection" argument); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 266 (1992) ("[I]t is clear that abortion-restrictive regulation can violate the antidiscrimination and antisubordination principles which give the constitutional guarantee of equal protection its meaning."); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 44 (1992) (stating that "laws restricting abortion violate the Equal Protection Clause").

157. Roe v. Wade, 410 U.S. 113, 153-54, 163-64 (1973), *overruled in part*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2818 (1992).

158. Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., concurring in part and dissenting in part).

159. *See* 18 PA. CONS. STAT. ANN. § 3205 (West Supp. 1990).

unlawfully interfered with this "fundamental constitutional right."[160] A majority of the Justices (seven), however, found that the informed consent regulation was valid and upheld it.[161]

The Blackmun-Stevens approach to the resolution of abortion issues strongly supports giving a pregnant woman absolute "reproductive autonomy" during the first trimester.[162] One thrust of their argument is that such autonomy is needed to ensure "both the concept of liberty and the basic equality of men and women."[163] In addition, they consider the right of privacy to be "nothing less than a matter of conscience."[164] Justice Stevens suggested that regulations that "enhance the deliberative quality" of the woman's choice are "neutral regulations on the health aspects of her decision,"[165] but those that "influence the woman's informed choice between abortion or childbirth" are invalid.[166] Stevens concluded that the informed consent regulation in *Casey* constitutes an undue burden and therefore unlawfully interferes with the woman's "fundamental constitutional right" because it: (1) wears "down the ability of the pregnant woman to exercise her constitutional right"; (2) rests "on outmoded and unacceptable assumptions about the decisionmaking capacity of women"; (3) is premised on the assumption that making the decision to terminate the pregnancy with an abortion is made "lightly"; (4) serves no "useful and legitimate state purpose"; (5) presents information "that is either common knowledge or irrelevant" and therefore is "irrational" and "undue"; and (6) places unnecessary burdens on women who attempt to exercise "constitutional liberty," which are therefore "undue."[167] Justice Blackmun shared Justice Stevens's criticism of the informed consent regulation.

While acknowledging that the state "may take steps to ensure that a woman's choice 'is thoughtful and informed,' "[168] Blackmun found that the

160. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2841-43 (1992) (Stevens, J., concurring in part and dissenting in part); *id.* at 2843-53 (Blackmun, J., concurring in part and dissenting in part).

161. *Id.* at 2822-31 (joint opinion of O'Connor, Kennedy & Souter, JJ.); *id.* at 2867-68 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

162. *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).

163. *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part). As Justice Stevens states, "The woman's constitutional liberty also involves her freedom to decide matters of the highest privacy and the most personal nature." *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part).

164. *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part).

165. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part).

166. *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986)).

167. *Id.* at 2841-43 (Stevens, J., concurring in part and dissenting in part).

168. *Id.* at 2849 (Blackmun, J., concurring in part and dissenting in part).

requirements of the Pennsylvania law were "rigid" and "biased."[169] In agreeing with the district court judge, Blackmun considered the one-day waiting period "clearly unconstitutional" because it might require two visits to the attending physician that could increase travel time, provide further exposure for anti-abortion protesters, and present additional financial costs.[170] Once again, Justice Blackmun relied on the foundation of privacy rights to justify his attack on the state regulation.[171]

True, the regulation makes a woman wait twenty-four hours before she can abort the fetus; true, it requires in many cases that certain information be presented to the woman; and true, it may require the woman to return to the clinic, physician's office, or hospital a second time. But what the informed consent regulation does not do, as Blackmun and Stevens suggest, is to stop—or, to use the plurality opinion's language, place an "undue burden" on—the woman from having a first trimester abortion if that is indeed what she decides to do.

What the regulation does is present important information to the woman who is about to make a momentous decision—to promote the virtue of wisdom, or, as David Hollenbach suggests, to be "educated in virtue" by other members of the community.[172] Unlike Justices Blackmun and Stevens, I view the Pennsylvania informed consent regulation as a major step toward opening the dialogue—of increasing the virtue of wisdom—between the woman who believes she wants to rid herself of the pregnancy and those who have information which could show the pregnant woman that this may not be what she wants if she is made aware of concrete alternatives such as health care and financial support.[173] The Pennsylvania regulation can open a dialogue between each pregnant woman contemplating abortion and qualified persons who, while respecting her position, also respect the position of the developing human life of the fetus she carries.

The liberal understanding and emphasis on the right to privacy have severe limitations, which Blackmun and Stevens ignore. In reality, a woman who is pregnant is given little support by those advocating her right to privacy. She may be in need of much more than her "right to be left alone." She may be in need of others who can provide information or physical assistance, which would enable her to have the child whom she would

169. *Id.* at 2850 (Blackmun, J., concurring in part and dissenting in part).

170. *Id.* at 2851 (Blackmun, J., concurring in part and dissenting in part).

171. *Id.* at 2846 (Blackmun, J., concurring in part and dissenting in part).

172. David Hollenbach, S.J., *The Common Good Revisited*, 50 THEOLOGICAL STUD. 70, 77 (1989).

173. *Declaration on Procured Abortion*, *supra* note 71, at 449; Cuomo, *supra* note 139, at 27-29.

rather keep, but physical circumstances (poverty, lack of proper health care for her and her child) militate against her doing so. The right to be isolated from others, which privacy conveniently makes available, could well be the last thing she needs.

Ironically, both the interests of the woman and those of the fetus may not be well served by the right of privacy. Yet this right is urged by many who subscribe to the liberal theory of society. Bruce Ackerman presented one of the most comprehensive outlooks of the liberal position when he stated in reference to abortion that:

> The simple truth is that a fetus is *not* a citizen of a liberal state. While it may possess a humanoid body, we have seen that citizenship is not a biological category. A liberal community does not ask what a creature looks like before admitting it to citizenship. Instead, it asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal polity. The fetus fails the dialogic test—more plainly than do grown-up dolphins.[174]

Ackerman's point focuses on political conversation and participation in public discourse in which only some human entities—and perhaps dolphins—can participate. He excludes the possibility that a third person could speak on behalf of the fetus (as the Pennsylvania regulation, in part, does). Liberal states do not have room for dialogue-through-proxy. But, the tragic irony is that this view of the liberal state offered by Ackerman and others[175] disregards the need for all vital interests to be considered by the state in a matter as important as that involving other human life that would be adversely affected by this "fundamental constitutional right" to privacy.

Decisions of this magnitude need to receive the participation and the views of all vital interests that are at stake: those of the woman along with those of the fetus. To insulate the decision-making of the woman as well as the woman herself from the concerns and interests of those other members of the human community, including those who are not yet but will shortly be born, is to misappropriate the right to privacy by using it not as a protection for, but as a weapon against the moral interests of the community. As Michael Perry has suggested, "moral deliberation requires community."[176]

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174. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 127 (1980).

175. *See, e.g.*, Rachel Pine & Sylvia Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 429 (1992) (offering litigation strategies for "preserving privacy rights for women"); *see also* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 70 (1988) (discussing the need for a liberal response to protect women against "invasions" such as pregnancy).

176. MICHAEL J. PERRY, MORALITY, POLITICS, & LAW: A BICENTENNIAL ESSAY 157 (1988).

Perry further states that "[i]n constitutional deliberation, as in political deliberation generally, what is at issue . . . is not what should I do? or how should I conduct myself? but: how are we to 'be' together, and what is to be the institutional setting for that being-together? . . . It is not self-deliberation about my life, but mutual deliberation conducted between agents implicated in a common life."[177] There is little doubt that the question of abortion places one important set of human values (those of the pregnant woman whose existence is adversely affected by some, but not all, pregnancies) against another important set (those of the fetus she carries). The claim made on behalf of the woman's right to privacy and the exercise of this right do not make this serious conflict disappear; it conceals it to the detriment of the fetus. Perry further argues that: "Politics, then, in a morally pluralistic society, is in part about the credibility of competing conceptions of human good. Political theory that fails to address questions of human good—questions of how human beings, individually and collectively, should live their lives—is, finally vacuous and irrelevant."[178]

Recalling that he suggested that adult dolphins are more a part of the dialogic process than human fetuses,[179] Ackerman argues that in a liberal state, all forms of social dependence "*are subordinated to the dialogic processes of Neutral conversation.*"[180] By this, I believe he means that while individual rights are developed through dialogue in a liberal state, these rights seem to be developed more out of an arms-length negotiation process that is disinterested in the other party's concerns as well as areas of mutual concern. My conclusion about Ackerman's position is based on his statement that:

> Not only is each citizen of a liberal community free from any obligation to love his neighbor; he is even free to believe that his neighbor is a despicable creature who is wasting his own life and corrupting the lives of those stupid enough to call him friend. While citizens will, of course, have available a rich store of associational networks through which they may achieve their own forms of intimacy and community, the fundamental bond that binds them *all* together is not one of fraternity in any meaningful sense of the word. What is forged instead is a bond that ties citizens together without forcing them to be brothers; liberal conversation provides a communal process that deepens each person's claim to autonomy at the same time

177. *Id.* at 156-57 (quoting RONALD BEINER, POLITICAL JUDGMENT 138-39 (1983)) (omissions in original).

178. PERRY, *supra* note 176, at 182. Perry notes that "the protection of fetal life is surely more than a trivial good." *Id.*

179. ACKERMAN, *supra* note 174, at 127.

180. *Id.* at 347.

> that he recognizes others as no less worthy of respect. Liberty, Equality, Individuality are the watchwords of the liberal state.[181]

I agree with Ackerman's assessment that there should be a communal process involved in public life. I am also encouraged by his acknowledgment that there are "others no less worthy of respect" than the autonomous self. However, I disagree with his exclusion of developing human life from his blueprint for the liberal society. He properly includes the important elements of liberty, equality, and individuality that are essential to preserving individual *and* community life. What is conspicuous by its absence from his plan is any appreciation of interdependence among individuals that can be called fraternity.[182]

Mary Ann Glendon has evaluated the political ideals vital to the liberal state.[183] In her recent investigation of American political and social culture, she has noted:

> [The] penchant for absolute formulations [of rights] . . . promotes unrealistic expectations and ignores both social costs and the rights of others. A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civil obligations.
>
> As various new rights are proclaimed or proposed, the catalog of individual liberties expands without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the *general welfare*.[184]

As if specifically referring to Ackerman's position, she notes that the Enlightenment rights of life, liberty, and property are "preeminently rights of separated, independent individuals," and that the separation of one individual from another has reached its apogee in the United States, "where 'liberty,' and 'equality' did not rub shoulders with 'fraternity.' "[185] Glendon

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181. *Id.*

182. Ronald Dworkin suggests by using virtue and communitarian language that law is "a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have." RONALD DWORKIN, LAWS EMPIRE 413 (1986).

183. *See* GLENDON, *supra* note 82.

184. *Id.* (emphasis added).

185. *Id.* at 47-48. Glendon notes that this separation began early in the history of western democracies when

> [t]he path of the United States diverged somewhat from those of most other Atlantic-European nations . . . at each of [the] great watersheds in the history of rights. The parting of the ways was already evident in 1789 when the French *Declaration of the Rights of Man and the Citizen*, in contrast to the [American] *Declaration of Independence*, emphasized that individuals have duties as well as rights.

further argues that this peculiarly American twist of rights exaggeration has manifested itself in the Supreme Court's recognition of "a protected sphere surrounding the individual."[186] Her commentary has particular relevance to the notion of privacy often connected with a pregnant woman's "fundamental" or "absolute" right to have an abortion. Glendon points out that while the "absoluteness" of this right is an illusion, it is "hardly a harmless one" because the "absoluteness of our American rights rhetoric is closely bound up with its other distinctive traits—a near-silence concerning responsibility, and a tendency to envision the rights-bearer as a *lone autonomous individual*."[187]

A major point advanced by the Pennsylvania informed consent regulation is that it offers the pregnant woman (who is caught between the Scylla of having an abortion and the Charybdis of being separated from others by the exaggerated right of privacy) connections with other human beings who can assist her to plan her future by showing her concrete alternatives to an act that is irreversible both for her and her child. Unfortunately, many rights advocates fail to appreciate that her pregnancy also concerns the community, which includes her child. The shroud of the right of absolute privacy conceals many of her vital needs that could be addressed by the community, if only the community were given a chance. The Pennsylvania law challenged in *Casey* is one attempt to give the community such a chance to help both the woman and her child. This law advances the understanding that the political community is a "common project," a project unfortunately "alien to the modern liberal individualist world."[188] It is the political community that I shall examine in the next section on the tradition underlying the common good.

B. The Tradition of the Common Good

The concern about the common good as a social and political issue reaches back to the classical era of ancient Greece and Rome. Aristotle noted that "Every state is a community of some kind, and every community is established with a view to some good."[189] In looking at the state or the political institution established to govern the community, he noted that just governments are those "which have a regard for the common interest."[190] In assessing what Aristotle considered to be just, we can turn to his dis-

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Id. at 11 (footnote omitted).

186. *Id.* at 40.

187. *Id.* at 45 (emphasis added).

188. MACINTYRE, *supra* note 108, at 146.

189. ARISTOTLE, *Politics*, *in* INTRODUCTION TO ARISTOTLE, *supra* note 91, at 589.

190. *Id.* at 629-30.

course on ethics in which he supplied the foundation of a theme we have already seen: Justice is reciprocity and mutuality through relationship.[191] In placing the notion of reciprocity into the human community, Aristotle contends that the truest or best form of justice is the reciprocal display of friendship.[192] The reciprocity found in this truest form of justice was expressed by Aristotle:

> [Reciprocity] is the friendship of [people] who are good, and alike in virtue; for these wish well alike to each other *qua* good, and they are good in themselves. Now those who wish well to their friends for their sake are most truly friends; for they do this by reason of their own nature and not incidentally; therefore their friendship lasts as long as they are good—and goodness is an enduring thing.[193]

Although he was critical of the conditions of political community practiced in the ancient Rome of his time, Marcus Tullius Cicero shared the sentiments of Aristotle when he suggested that a commonwealth or social order emerges from the social spirit of people who make the commonwealth their "property," which is established on the principles of "respect for justice" and "partnership for the common good."[194] Although writing for the emerging Christian community, St. Augustine's view reflected those of Aristotle and Cicero when he argued that the human race is not simply united "in a society by natural likeness" but it is or should be "bound together by a kind of tie of *kinship* to form a *harmonious unity*, linked together by the 'bond of peace.' "[195] Augustine drew a distinction between the "earthly city" and the "city of God," which has relevance to my investigation and analysis of the privacy right that insulates the individual from the rest of the community. Augustine's insight applicable today makes the distinction between the earthly city where self-love is supreme; in the other city, the civic attitude is characterized by love of God and love of the neighbor.[196]

During the Middle Ages, Thomas Aquinas, who was influenced by the ideas of both Aristotle and Augustine, continued the work of identifying the common good. For Aquinas, the object or *telos* of justice is to keep people together in a society in which they share relationships with one another. As he said, "justice is concerned only about our dealings with others."[197] The notion of justice as being the mutuality or reciprocity shared among the

191. ARISTOTLE, *supra* note 91, at 433-34.
192. *Id.* at 502-03.
193. *Id.* at 506.
194. CICERO, DE RE PUBLICA DE LEGIBUS 65 (1966).
195. ST. AUGUSTINE, THE CITY OF GOD 547 (Henry Bettenson trans., 1986).
196. *Id.* at 593.
197. AQUINAS, *supra* note 97, Question 58, art. 2.

members of society was further refined by Aquinas when he argued that "the virtue of a good citizen is general justice, whereby [each person] is directed to the common good."[198] Furthermore, Aquinas stated as follows:

> [T]he good of any virtue, whether such virtue direct man in relation to himself or in relation to certain other individual persons, is referable to the common good, to which justice directs, so that all acts of virtue can pertain to justice in so far as it directs [each person] to the common good.[199]

The modern Christian philosopher Jacques Maritain brought Aquinas's understanding of the common good into the twentieth century. Maritain recognized the need to separate the dignity of the individual human being from the dangers of the primacy of the isolated individual and the promotion of the private good. The common good, for Maritain, is "the *human* common good," which includes "the service of the human person."[200] In large part, Maritain was responding to the threats posed to the dignity of the human person by three forms of states that existed in the first half of the twentieth century: (1) the bourgeois liberal state, (2) the communist state, and (3) the totalitarian state. His concerns about the modern bourgeois liberal state have special application to the abortion question.

Maritain concluded that "bourgeois liberalism with its ambition to ground everything in the unchecked initiative of the individual, conceived as a little God,"[201] was a threat to the dignity of the human person *and* the common good. As if responding to the arguments made by some abortion advocates who claim the fundamental right of privacy on behalf of pregnant women, Maritain stated that the emphasis on individualism at the expense of community results in "the tragic isolation of each one in his [or her] own selfishness or *helplessness*."[202] Through his perceptive understanding of the social conditions of the times during which he wrote, Maritain acknowledged that evil arises when "we give preponderance to the individual aspect of our being."[203] I believe that Maritain saw excessive individualism as an evil because he understood that the human being, who is an individual, is simultaneously a member of the human community. For Maritain, a constitutive element of being human is the "inner urge to the communications of knowledge and love which require relationship with other persons."[204]

198. *Id.* art. 6.
199. *Id.* art. 5.
200. JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 29 (1966).
201. *Id.* at 91-92.
202. *Id.* at 92-93 (emphasis added).
203. *Id.* at 43.
204. *Id.* at 47.

Simply put, Maritain advanced the basic position (with which I agree) that the human person and the community are not in conflict with one another because their vital interests are complementary rather than contradictory. The words of Maritain are compelling and insightful in this regard:

> There is a correlation between this notion of the *person* as social unit and the notion of the *common good* as the end of the social whole. They imply one another. The common good is common because it is received in persons, each one of whom is a mirror of the whole. . . .
>
> The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of *human persons*, just as the social body itself is a whole of human persons, this conception also would lead to other errors of a totalitarian type. The common good of the city is neither the mere collection of private goods, nor the proper good of a whole which, like the species with respect to its individuals or the hive with respect to its bees, relates the parts to itself alone and sacrifices them to itself. It is the good *human* life of the multitude, of a multitude of persons; it is their communion in good living.[205]

Again, as if responding to the advocates of the liberal state and the exaggerated right of privacy, Maritain submits that the rights of the individual human person and the interests of the community are compatible and harmonious. The fundamental rights of persons and those of the society in which each person lives shares as the principal value "the highest access . . . of the persons to their life of person and liberty of expansion, as well as to the communications of generosity consequent upon such expansion."[206] For Maritain, the expansion of each person's rights needs the community; by one's self, cut off from the others, the person is alone and must fend for the self. However, when in community, she or he can rely on the generous support of others to be more, not less, of a human being. In the context of the abortion issue, it would seem that the individuals most concerned (the mother and the fetus) would be better served if society would do more to help them. Programs providing concrete assistance to the mother would

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205. *Id.* at 49-50 (footnote omitted).

206. *Id.* at 51. While writing from the perspective of the eve of World War II, Jacques Maritain stated that:

> It is up to the supreme effort of human freedom, in the mortal struggle in which it is today engaged, to see to it that the age which we are entering is not the age of the masses, and of the shapeless multitudes nourished and brought into subjection and led to the slaughter by infamous demigods, but rather the age of the people and the man of common humanity—citizen and co-inheritor of the civilized community—cognizant of the dignity of the human person in himself, builder of a more human world directed toward an historic ideal of human brotherhood.

JACQUES MARITAIN, CHRISTIANITY AND DEMOCRACY 97-98 (1944).

constitute attractive alternatives to abortion that are respectful of the interests of both the woman and the child whom she bears.

While Maritain's philosophy may present something of an ideal, it is realistic in the sense that it is a goal—a *telos* —toward which our communities can strive. The Pennsylvania informed consent regulation contains elements of the generosity of one person helping another who needs assistance. In the case of the woman who faces the problems of a pregnancy, there is the support of the community—consisting of advice as well as information about how to get concrete assistance—that can help her in a time of great need. Without this regulation, the support of the community disappears, and the pregnant woman is left alone with her right of privacy and the isolation it brings as the only reward.

In the American context, Christopher Mooney has presented the view that an underlying assumption of the United States Constitution is that "the pursuit of the common good was and would continue to be a major motivation of all citizens."[207] Mooney is a realist who acknowledges that rights emphasizing individuation and competition are not always conducive to the common good because their intrinsic attitude enables conflict to prosper and reconciliation to default.[208] Commenting on this attitude, Glendon argues that the "overblown rights rhetoric" nurtures the autonomous individual and directs our "thoughts away from what we have in common and focus[es] them on what separates us."[209] For Glendon,

> [T]he new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires [whose] legitimation of individual and group egoism is in flat opposition to the great purposes set forth in the Preamble to the Constitution: "to form a more perfect Union, establish Justice, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[210]

Glendon aptly illustrates her critique with an example taken from the legal profession. She points to those advocates who rely on "exaggeration and absoluteness" and neglect any other view, regardless of how legitimate or how important, to win a case or to take over some company; on the other hand is the "rank and file" counselor who recognizes that the client must be protected but must also continue to live in relationships with others "that depend on regular and reliable fulfillment of responsibilities."[211]

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207. CHRISTOPHER F. MOONEY, S.J., PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION 59 (1986).

208. *Id.* at 60.

209. GLENDON, *supra* note 118, at 143.

210. *Id.* at 171-72.

211. *Id.* at 175.

In their seminal work on individualism and commitment in American life, Robert Bellah and his colleagues discovered during their research into the American culture of the 1980s that "dependence and independence are deeply related, and that we can be independent persons without denying that we need one another."[212] But these researchers, like Glendon, see that the tendency of late twentieth century American individualism prompts citizens to isolate themselves from their neighbors and to take care of "their own," the result of which makes them suspicious of, and withdrawn from, the public world.[213] The language and the practice of individualism-above-all-else has led to what Bellah and his colleagues have called the *cardinal sin* of the Founders: "[W]e have put our own good, as individuals, as groups, as a nation, ahead of the common good."[214] Nevertheless, the authors of *Habits of the Heart* have identified an antidote to the poison of individualism-above-all-else: The seeds of a renewal of a world waiting to be born lay in the realization that "the processes of separation and individuation [that] were necessary to free us from the tyrannical structures of the past . . . must be balanced by a renewal of commitment and community if they are not to end in self-destruction or turn into their opposites."[215]

Six years later, the same authors have found that the maxim "plus ça change, plus çe le meme chose"[216] is an accurate description of the status of individualism and public commitment in the United States. In their most recent work, *The Good Society*, they note that "to frame the abortion debate only in terms of rights has been to inhibit realistic, morally engaged social debate about the nature of abortion."[217] In referring to Mary Ann Glendon's work on the question of abortion in the United States, Bellah and his collaborators argue that we as a nation cannot "deal realistically with the conditions that lead to abortions on the one hand and the moral complexities of abortion decisions on the other" because our national urge to be preoccupied with rights rhetoric "cuts off debate, polarizing society politically" between two groups unable to talk with one another.[218]

To conclude this section of the evolving tradition of the common good, I turn to the work of Benjamin Barber. He also has concluded that the excesses of liberalism have led to an insularity among people that tends to

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212. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 111 (1985).

213. *Id.* at 112.

214. *Id.* at 285.

215. *Id.* at 277.

216. "The more things change, the more they stay the same."

217. ROBERT N. BELLAH ET AL., THE GOOD SOCIETY 130 (1991).

218. *Id.*

erode democratic institutions. He argues that being an individual and being a citizen are compatible with one another:

> Autonomy is not the condition of democracy, democracy is the condition of autonomy. Without participating in the common life that defines them and in the decision-making that shapes their social habitat, women and men cannot become individuals. Freedom, justice, equality, and autonomy are all products of common thinking and common living; democracy creates them.[219]

As seen elsewhere, protection of the human person in all of his or her dignity requires insertion and participation in, not insulation and separation from, the community. The community prospers when its members contribute of themselves in making it prosperous; it withers when they turn within and tend only to their private cares.[220] The threat to a free world of the good citizen is stated as:

> The world in which men and women do not exist for others; in which there can also be no public goods. In this world, there can be no fraternal feeling, no general will, no selfless act, no mutuality, no species identity, no gift relationship, no disinterested obligation, no social empathy, no love or belief or commitment that is not wholly private.[221]

Like other contemporary writers who have addressed the issue of the common good, Barber also turns to the abortion question and the issue of privacy to illustrate his concern with the erosion of democracy and its vitalizing force of citizenship. Engagement of people with opposing views is essential to resolving the issue and of reconciling differences caused by "absolutizing" positions. Barber warns:

> Unless the debate over abortion permits people to discuss the social conditions of pregnancy, the practical alternatives available to the poor, and the moral dilemmas of a woman torn between her obligations to her own body and life and to an embryo, such debate will treat neither pregnant women nor unborn babies with a reasonable approximation of justice.[222]

David Hollenbach has raised his hope that the search for "communitarian objectives" is not incompatible with the achievements of and progress

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219. BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE at xv (1984).

220. Barber continues by stating, "From this precarious foundation [of individualism and privacy], no firm theory of citizenship, participation, public goods, or civic virtue can be expected to arise." *Id.* at 4.

221. *Id.* at 71-72.

222. *Id.* at 182.

for humanity up to the present age.[223] I submit here that his concern is legitimate, and his theory is supported by others who recognize that our world and our national community of today are established on the interdependence of individual human beings. We seem to do better, if not prosper, when the spirit of fraternity and cooperation prevails. We suffer (as we do in our abortion clinics, in Somalia, in Bosnia) when the spirit of isolation and separation reigns. It is important, to be sure, to pay attention to the individual who cries out, "Look at me! I'm different." It is equally important when we do so, however, to also say, "Look at *us*! We are the same."

In the next section of my discussion, I shall focus on how the issue of the common good emerges in the abortion debate when we look at the "me" and the "us."

C. Current Perspectives on Abortion That Relate to the Common Good

Within the present day context of abortion, we can identify the "me" in the debate as those individuals and groups who hold what I call absolutist positions on the issue. The example on the pro-abortion side could well be the pregnant woman whose own life has been threatened by a difficult pregnancy. On the other side would be the devoted individual who holds the view that all human life is sacred and that no other human being has the right to take such life, especially the life of the fetus. I am confident that in between these two positions, most if not all the other positions, which can be viewed as pro-abortion, pro-choice, or pro-life, fall. The "us" generally would include all members of the specific society or community that is concerned about the abortion issue. I suggest that the community or society might be composed of several levels that, in addition to the woman and her baby, include the hospital or other medical center that treats pregnant women, the woman's family, the state that has (or may be developing) a program for regulating abortion, the national government that has (or may be developing) a program to regulate abortion, and any other groups that have come together to express and advocate their views about abortion in public arenas.

One avenue for proceeding into the contemporary scholarly debate on abortion is through the work of Judge John Noonan.[224] Judge Noonan has taken the Jewish[225] and Christian[226] scriptural admonition "to love your

223. Hollenbach, *supra* note 172, at 94.

224. Judge, United States Court of Appeals, Ninth Circuit.

225. *Leviticus* 19:18.

226. In the New Testament, the command to love your neighbor as yourself is found at *Mark* 12:30, *Matthew* 22:39, and *Luke* 10:27. The Golden Rule ("do unto others as you would want them to do to you") is found at *Matthew* 7:12.

neighbor as yourself" and put the fetus into the position of the neighbor so that the fetus's life can arguably have parity with one's own life.[227] In order to be of greater appeal to secular interests, Noonan recasts his argument by saying that the religious commandment has its humanistic counterpart: "Do not injure your fellow [hu]man without reason."[228] He goes on to say that:

> In these terms, once the humanity of the fetus is perceived, abortion is never right except in self-defense. When life must be taken to save life, reason alone cannot say that a mother must prefer a child's life to her own. With this exception, now of great rarity, abortion violates the rational humanist tenet of the equality of human lives.[229]

However, even this humanist approach can fail to convince some individuals that the life of the fetus is like mine or yours. This has prompted one commentator to point out that the British Parliament recently rejected legislation ensuring that medical practitioners delivering a fetus capable of sustaining life outside of the womb be required to protect its life at the conclusion of the abortion.[230]

Ronald Dworkin has also examined the question of how to consider the status of the life of a human fetus. He readily admits that "it seems undeniable that in the ordinary case a fetus is a single living creature by the time it has become implanted in a womb, and that it is human in the sense that it is a member of the animal species *homo sapiens*"; however, the protection to be accorded this human interest in Dworkin's estimation is quite another matter.[231] After making this observation, Dworkin proceeds to liken fetal human life to a piece of sculpture, or the assemblage of Dr. Frankenstein's monster, or a baby carrot: He suggests that smashing the sculpture, destroying the mechanism that would vitalize Frankenstein's monster, or picking the baby carrot prematurely are no different than aborting the fetus

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227. John T. Noonan, *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1, 58 (John T. Noonan, Jr. ed., 1970).

228. *Id.*

229. *Id.*

230. John Finnis has recently noted that this humanist approach did not appear to move the British Parliament into taking legislative steps to help a fetus sustain his or her life in the performance of an abortion. *See* John Finnis, *The Legal Status of the Unborn Baby*, 43 CATH. MED. Q. 5 (1992). There the author relates the following legislative tactic: "In the final stages of Parliament's consideration of the 1990 amendments to the Abortion Act, a Conservative woman peer moved two amendments intended to secure that when an abortion is being performed under the Abortion Act . . . , the medical practitioner doing the termination should use 'all reasonable steps to secure that the child is born alive.' Each amendment was comfortably defeated." *Id.* at 7.

231. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 397 (1992).

before the third trimester.[232] His grounds for making this comparison rest on his premise that the fetus's interests parallel those of the sculpture, the baby carrot, and the monster because "nothing has interests unless it has or has had some form of consciousness—some mental as well as physical life."[233]

Dworkin anticipates arguments against his analogy by referring to the "fallacious argument that abortion must be against the interests of a fetus, because it would have been against the interests of almost anyone now alive to have been aborted."[234] Dworkin then goes on to suggest that a fetus may develop interests in retrospect, and he draws upon the following illustration:

> [T]hat it was good for [Dworkin] that [his] father was not sent on a long business trip the night before [his] parents conceived [him], rather than, as in fact happened, two days later. It does not follow that it would have been bad for anyone, in the same way, had [Dworkin's father] left on the earlier date. There never would have been anyone for whom it could have been bad.[235]

Dworkin argues that if he were *not* conceived because his father had left for the business on the earlier date, there would be no Ronald Dworkin who would have interests. But Dworkin's argument fails because it makes suppositions that disregard the facts. His father did not leave early; Ronald Dworkin was conceived; Ronald Dworkin had interests that would have been adversely affected if his mother decided to have an abortion. And what might that interest be? No Ronald Dworkin among many other things, including his impressive scholarship.

Dworkin relies on one further example to make his point, but this example fails as well. He argues: "[I]f a woman smokes during pregnancy, someone will later exist whose interests will have been seriously damaged by her behavior. If she aborts, no one will exist against whose interests that will ever have been."[236] If the woman aborts because of natural causes, that is one thing; however, if she willingly and knowingly terminates her pregnancy, that is quite another. In this latter case, the woman who smokes or drinks or takes dangerous drugs (all of which can adversely affect her child who is still in her womb) and then voluntarily aborts is like the person who commits a murder and then tries to remove the evidence by burning the body and dissolving the ashes in acid. Dworkin's basic argument seems to

232. *Id.* at 402-03.
233. *Id.* at 403.
234. *Id.* at 404.
235. *Id.*
236. *Id.* at 405.

focus on the ability of a born human because it has "some form of consciousness—some mental as well as physical life."[237] Patricia King has an important counter to this problematic reasoning. She points out that neither fetuses nor newborn infants nor comatose adults have "consciousness," yet there are important interests worth protecting in each of these cases.[238] John Hart Ely, who holds a pro-abortion position, has indirectly pointed out the fallacy of Dworkin's reasoning:

> Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.[239]

Dworkin's approach to the issue of abortion is troublesome. He attempts to eliminate the fact that the fetus is a human entity who has vital interests that are worth discussing and protecting. Perhaps in some cases these rights are not absolute because there are other rights involved—particularly those of the mother whose own existence may be compromised in a small number of cases by the fetus. That is my point; that is Glendon's point. We cannot afford to look at one interest and neglect the other competing interests that are simultaneously involved. Rosalind Hursthouse has cast the issue involved here well. In a recent article, she relies on virtue theory not to "solve the problem of abortion" but to illustrate how we ought to "think about it."[240] I suggest that how we think about the interest of the fetus cannot be the fashion in which Dworkin casts the reflection: It is wrong to say that an interest that once was, never was if it is destroyed (as Dworkin implies in the case of abortion). To borrow from Hursthouse, we must think about what it is we are doing before we do it; then, we must talk about what it is we contemplate doing before we do it. To act in a prejudicial way toward the fetus by aborting it, and then think about it and talk about it ex post facto and say that it never was because it no longer exists is not only illogical, it is also wrong.

Patricia King has taken a thoughtful approach in considering how we think and talk about the interests of the fetus. She concludes that the viable fetus (one capable of life outside the womb) has a greater interest in protec-

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237. *Id.* at 403.

238. Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of The Unborn*, 77 MICH. L. REV. 1647, 1669 (1979).

239. John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973).

240. Rosalind Hursthouse, *Virtue Theory and Abortion*, 20 PHIL. & PUB. AFF. 223, 233 (1991).

tion than the previable fetus because, in her view, "the fetus should not be entitled to the same degree of protection at every stage of development."[241] While I do not concur with this particular judgment she makes, I do join in her more general opinion that this does not mean that the previable fetus has no interests at all worth protecting. King asserts that the previable fetus does have interests and those interest merit discussion and protection. As she states, "the unborn fetus, the newborn child, and the mature adult are all at different stages of development, and the fact that a fetus is not conscious or socially responsive should not preclude all legal protection."[242]

But how do we discuss the level of protection to be given the fetus? And, how do we discuss the level of protection to be given the mother? If the rights and interests of the fetus change, might we not expect that those of the woman undergo change as well? Alan Brownstein and Paul Dau have recently argued that a proper assessment of the abortion issue necessitates our realization that the pregnant woman's interests are not static but vary during pregnancy:

> [T]he woman's right also varies during pregnancy and that this change in interest shifts the balance of state interests against fundamental rights in many cases. Indeed, if the woman's interest in terminating her pregnancy declines to a sufficient extent, the balancing necessary to justify abortion restrictions may be accomplished without determining exactly when the conceptus experiences a life worth living.[243]

How we go about evaluating the interests of the principals, vis-à-vis the woman and the fetus, can only be achieved by frank and honest discussion among all of us who hold a substantive view on abortion. Ruth Colker has offered some helpful insights on how this kind of discussion can proceed. Although she is a feminist who holds pro-choice views, Colker nevertheless acknowledges that women have responsibilities along with rights when the subject of abortion is examined.[244] She further acknowledges that the right to an abortion cannot be grounded in disrespect for the fetus.[245] Colker calls upon the woman considering abortion to appreciate the virtue of wisdom needed to make a decision that is not only important to herself but to

241. King, *supra* note 238, at 1673.

242. *Id.* at 1672.

243. Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 749 (1992); *see also* Cahill, *supra* note 122, at 87, where the author argues that the woman's and fetus's "respective rights must be defined in relation to one another (and, in a less immediate sense, to the rights of others, for example, family members)." *Id.*

244. Colker, *supra* note 55, at 1050.

245. *Id.* at 1055.

the fetus as well.[246] But a pregnant woman does not obtain this wisdom in the vacuum of her privacy and isolation from others. She obtains the wisdom she needs through dialogue with others. As Colker argues:

> I oppose a complete prohibition of abortion regulations, because it would prevent the state from developing mechanisms to encourage women to consult other people. I would support legislation requiring hospitals and clinics that perform abortions to make available group counseling sessions . . . for all pregnant women so that they can be exposed to competing viewpoints in a safe space.[247]

This is basically what the Pennsylvania informed consent regulation is all about. Another feminist who is pro-life, Lisa Cahill, has emphasized the need for community and individual understanding that the respective rights of the mother and the fetus must be defined in relation to one another.[248] "Where those rights can conflict, neither can be absolute. The rights of both are *limited*, but still significant."[249]

Laurence Tribe has made a recent contribution to the debate and dialogue on abortion. He is somewhat critical of informed consent regulations, which he believes can be burdensome to some women, especially those from rural areas. He does not think that these kinds of regulations can "serve their ostensible purpose of fostering consideration of the gravity of a decision to abort a pregnancy."[250] He rhetorically asks the question: "What woman who would take lightly the decision to have an abortion will rethink it more seriously simply because a law says she has to wait a day before having the procedure?"[251] While Tribe displays no enthusiasm for this kind of informed consent regulation, neither does he find the harsh, one-sided rhetoric helpful in the effort to reconcile the absoluteness of some pro-life and pro-choice advocates. I doubt that he finds the threat made to legislators of "[t]ake our rights, lose your job"[252] a conducive way of attempting to reconcile the differences. After all, Tribe demonstrates his appreciation of the need to inject abortion alternatives, such as the "humane options" of pre- and post-natal care and education about human reproduction.[253] Reviews of Tribe's approach are mixed; however, both Michael McConnell[254]

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246. *Id.* at 1063-64.
247. *Id.* at 1066 (citation omitted).
248. Cahill, *supra* note 122, at 87.
249. *Id.*
250. TRIBE, *supra* note 53, at 203.
251. *Id.*
252. *Id.* at 179.
253. *Id.* at 209-12.
254. Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181 (1991) (reviewing TRIBE, *supra* note 53).

and Stephen Carter[255] agree with Tribe on the need for public discourse and dialogue on the divisive issue of abortion. McConnell, while arguing that Tribe's position fails to do this, nevertheless finds the general project of moving beyond the clash of absolute positions about abortion to be a "worthy purpose." As he suggests, "There is too much shouting and too little serious discussion of the law and morality of abortion."[256] Carter, while giving reasons why dialogue may not resolve the question "in the near term," nonetheless generally agrees that discussion and examination of alternatives to abortion are vital to resolution of the conflict.[257] I will conclude this section of my presentation with the advice given by Michael Perry on the subject of political dialogue.

Perry believes that the goals of the liberal state which are based on individualism and privacy have proved to be futile.[258] The alternative he constructs begins with what Perry terms "deliberative, transformative politics" in which he calls for members of American society to engage one another "in productive moral conversation."[259] Perry has taken recent steps to develop more fully this process of public dialogue:

> [He proposes the need for] a politics in which citizens meet one another in the public square, sometimes to reach consensus, more often diminish dissensus, and most often, perhaps, simply to clarify, to better understand, the nature of their disagreement, but always to cultivate the bonds of (political) community, by reaffirming their ties to one another, in particular their shared commitment to certain authoritative political-moral premises.[260]

Of course, for politics to be effective, it must include more than talk, more than public discourse and dialogue on the pressing issues of the day, and Perry acknowledges this. But in doing so, he emphasizes that the need for "dialogue and tolerance" he advances has to be more than something that will be "devalued and marginalized."[261] The dialogue and tolerance Perry finds necessary to deal with the difficult public issues of the present day are the kind that will *nourish* "a form of political community in which, notwithstanding our sometimes radical disagreements with one another [perhaps like the disagreements that surround abortion], we always strive to understand one another, to know one another, to serve one another, better

255. *See* Carter, *supra* note 3.
256. McConnell, *supra* note 254, at 1181.
257. Carter, *supra* note 3, at 2763-65.
258. PERRY, *supra* note 176, at 55-56.
259. *Id.* at 4.
260. PERRY, *supra* note 54, at 125.
261. *Id.* at 144.

than we now do."[262] Perry's understanding of dialogue, tolerance, and a community in which individuals sincerely work at understanding, knowing, and serving one another leads into my own reflection about the common good that underlies the subject of abortion.

D. Abortion and the Common Good: Coming to Know Ourselves

In constructing my own understanding of the common good in the context of the abortion debate, I return to the informed consent regulation. I do so with the goal of determining whether Perry's notion of "dialogue and tolerance" can help us understand the important human issues at stake, and, if so, how we can then go about addressing them. I conclude that Perry's approach, which shares elements of the works of other authors I have investigated, can help construct both (1) an understanding of the common good and (2) how it can be advanced. Both constructions rest on a foundation in which the underlying, diverse views come together and share their individual perspectives. Both perspectives must be considered in order to ascertain what is, if not the best solution to the problem, then a better solution than we have now.

While there may be problems of communication in defining solutions to moral issues like abortion and identifying a "shared notion of virtue or the common good" as Mary Ann Glendon acknowledges, this does not mean that the public decision-making in which we as citizens engage one another can "remain resolutely neutral on all controversial questions involving moral issues."[263] With the deep insight that characterizes much of her work, Glendon argues that "it is only natural that ideas of law as embodying a social dialogue should come to have a special appeal."[264] I would add that not only does social dialogue have "special appeal," but that it is urgently needed in order for American society to begin the construction of helpful, concrete solutions to the divisive issue of abortion. Only then can we properly take into account the variety of significant and valuable interests that now seem to be insulated from one another by the cries of absolute rights, which are increasing rather than diminishing in volume. Glendon states that "it does not seem too soon to say that although modern law cannot establish or enforce a single vision of virtue, it can play its part in promoting the potentially self-correcting processes of dialogue and dialectic."[265]

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262. *Id.* at 145.
263. GLENDON, *supra* note 118, at 139.
264. *Id.*
265. *Id.* at 140.

The Pennsylvania informed consent regulation at the heart of the *Casey* decision is one reasonable approach to facilitate dialogue and dialectic in the abortion controversy. While some critics of the Pennsylvania regulation argue that it imposes an "undue burden" on pregnant women,[266] in reality, it presents an opportunity for pregnant women to consider that there is an important interest of another, as well as her own, at stake. The attending physician must first of all inform the woman at least twenty-four hours before the abortion about the nature of the proposed procedure, the procedure's risks, the estimated age of the fetus, and the medical risks to her associated with carrying the child to term.[267] The information is presented orally, which is more expeditious than requiring the woman to read some document that may be written in technical language and difficult for a person not schooled in the language of the health care profession to understand.

The second component of the twenty-four hour waiting period mandates that prior to the abortion, either the physician or some other qualified person designated by the physician informs the woman about state publications containing information on alternatives to the abortion, information on medical assistance (including prenatal, child birth, and postnatal care), and information that the father is liable for support (even if he has offered to pay for the abortion). An exception to this last component is in cases of rape.[268] It is significant to note that this section of the informed consent regulation gives the woman the option to review printed materials; if she exercises that option, the materials are provided free of charge. If she does not elect the option, she only receives the information verbally.[269] Prior to the abortion, the woman signs a form certifying that she has received this information.[270] What she does with the information is left up to her: She can consider it, she can discuss it with others during the twenty-four hour period, or she can disregard it. The choice is hers alone.

It is important to acknowledge that in cases of a medical emergency,[271] the physician is under a duty to explain to the pregnant woman, if possible, the medical indications supporting his or her judgment about the medical

266. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2851 (1992) (Blackmun, J., concurring in part and dissenting in part); *id.* at 2843 (Stevens, J., dissenting in part); Pine & Law, *supra* note 175, at 411.

267. PA. CONS. STAT. ANN. § 3205(a)(1) (West Supp. 1990).

268. PA. CONS. STAT. ANN. § 3205(a)(2) (West Supp. 1990).

269. PA. CONS. STAT. ANN. § 3205(a)(3) (West Supp. 1990).

270. PA. CONS. STAT. ANN. § 3205(a)(4) (West Supp. 1990).

271. PA. CONS. STAT. ANN. § 3203 (West Supp. 1990) defines "medical emergency" as that "condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy

emergency and why the "abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function."[272]

I do not suggest that this regulation is the most desirable for giving equal consideration to the interests of the woman and those of her child when an abortion is being considered. These provisions are weighed heavily in favor of the woman's interest notwithstanding the charges of some that they constitute undue burdens. Still, this regulation is one small step in the direction of opening a dialogue between the two principal interests that are at stake; moreover, it encourages some measure of tolerance on each side of these interests to understand the concerns of the other party.

To draw from Mensch and Freeman, I suggest that the Pennsylvania informed consent regulation is a step toward putting aside the abortion perspective of "rational secular individualism" in favor of a more generalized appeal toward the common good of appreciating and balancing (ever so slightly) the significance of competing interests.[273] The Pennsylvania regulation is only the first step in the direction of helping women see the moral issues, the issues of conscience that are a vital part of the abortion debate. As Mensch and Freeman also state, the rights-based language of *Roe* and other pro-abortion advocacy "fails to capture the moral and social experience of many women."[274]

In the realm of the practical, the informed consent regulation in *Casey* helps to educate a woman about concrete alternatives she may have in lieu of proceeding with the abortion. Verbally, she is given information about health care and other financial support options. These options reflect some of the practical alternatives to abortion mentioned by Governor Cuomo.[275] Ironically, many pro-abortion advocates term their movement the "pro-choice" position. But what real choice is there in taking the narrow view that a woman has a fundamental right to an abortion; this is not a position of choice, it is rather a position of absoluteness without alternative. On the other hand, the Pennsylvania scheme gives the woman some real choice that includes the choice to terminate or to continue the pregnancy with the assistance of counseling, health care, and other support. Again, as Mensch and Freeman point out:

> [E]ven for those [pregnant women] not facing extreme economic hardship, there are other social pressures that can give one the expe-

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to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function."

272. PA. CONS. STAT. ANN. § 3205(b) (West Supp. 1990).

273. Mensch & Freeman, *supra* note 4, at 1095, 1105.

274. *Id.* at 1123.

275. Cuomo, *supra* note 139, at 27-29.

> rience of having "no choice." Those pressures include an internalized feminist pressure to be successfully autonomous and independent, and, as pro-life advocates have argued with some force, male pressure for women to be sexually available without reproductive consequences. . . .
>
> "Choice" contains its own coercions, in other words, which may be a necessary price to pay but should not go unnoticed. Ironically, it is the pervasiveness of the language of choice and freedom in our culture which makes a forthright examination of those coercions so legally and politically out of bounds.[276]

It is worth noting that Mensch and Freeman are wife and husband who have either had abortions or have been the responsible other in abortions.[277] They speak with the conviction of understanding that comes from experience. They now present that experience so that others may share their understanding of what is at stake in an abortion. For them, the starting point for discussion is the discussion itself; the discussion then must move into recognition that abortion is about "life or death."[278] They acknowledge that "[t]o abort a fetus is to kill, to prevent the realization of human life."[279] In pointing to the circumstances of the 1991 war against Iraq, Mensch and Freeman opine that the choice:

> [T]o kill does not make it wrong on that score alone; but we surely need a vocabulary for talking about life and death issues in moral terms that underscore the seriousness of any choice for death. Our experience with abortion, and, perhaps with war, suggests that the lack of such a vocabulary will lead inevitably to excess.[280]

I find it necessary to take the conclusion of Mensch and Freeman at least one step further: Once we discover the vocabulary, we must use it. Moreover, its use must be regular and frequent. With the dormancy of the vocabulary comes the insularity of the conversationalists; and with their insularity comes the isolation of individualism that makes one person (or one interest) forget the concerns of the other.

At its most fundamental level, that is what the common good is all about: the *one* being with the *other*, the *me* with the *you*. Ruth Colker and Michael Perry both refer to the scriptural commandment to love your neighbor as yourself.[281] Their recognition of this scriptural commandment

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276. Mensch & Freeman, *supra* note 4, at 1125-26 (citation omitted).

277. *Id.* at 933-34.

278. *Id.* at 1137.

279. *Id.*

280. *Id.* at 1137-38.

281. *See, e.g.*, PERRY, *supra* note 54, at 50-51; Colker, *supra* note 55, at 1075 (quoting *Leviticus* 19:15-18).

is important because the command makes us intimately aware of our similarities as human beings. But, specifically, what does the commandment mean in the context of abortion and the debate about it?

I think it means this: When we are willing to discuss the question of abortion, we can and often do learn a lot more about the subject, especially when we are talking with others who hold different views. As we dispose ourselves to engage one another in a difficult but still important discussion, we come together in a community that does not necessarily share the same views but that does share the same interest in this topic. As a community, we can build a foundation of recognition that we have something in common (our humanity that begins and ends in the same way: with life and death). This mutual interest forges the foundational link between us and helps us recognize that we share a "likeness to one another."[282]

Some of us may be reluctant to approach this recognition of likeness with the other because it seems incompatible with our individuality and freedom. Yet, as Philip Rossi has noted, the mistake we often make about ourselves and our freedom is that "we conceive of freedom primarily, if not exclusively, by reference to human agents in their individuality and independence, rather than in terms of their shared human communalities and their fundamental interdependence."[283] While many of us think that it is our independence that makes us human, it is really our social dimension, the fact that we are individuals who are members of a society, that we are distinct human beings who nevertheless flourish when we relate to one another—not when we are isolated from one another. It is, after all, our interdependence that brings us together into the community of human beings.[284] Community fosters exchange between people (and their interests). The exchange, in turn, promotes the opportunity to see that human interaction is mutually beneficial, that it serves and promotes our common good to "care for one another's total well-being."[285]

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282. PHILIP J. ROSSI, S.J., TOGETHER TOWARD HOPE: A JOURNEY TO MORAL THEOLOGY viii (1983).

283. *Id.* at 5.

284. As Philip Rossi argues:

> This community is, first and foremost, a community of mutuality: a community of those who conscientiously foster the skills that enable the essential interdependence of their lives to work for the attainment of good for one another. Mutuality fostered in this way constitutes the core of the charity or love that in the Catholic tradition has been claimed to be the fundamental form of the life of virtue. Thus the human community that provides a condition fundamental for satisfying, for each and all, our basic human cravings is a community in which charity gives form to virtue.

Id. at 68.

285. *Id.* at 145.

I enter the conclusion of this Article (but not the debate, nor the discussion) on abortion by drawing our attention to one final insight from Rossi. Rossi's notion of the common good emerges from "the recognition of communality at the heart of moral life: 'I am as she; she is as I.' "[286] He transfers this fundamental point into the abortion controversy when he states: "[A]cceptance of abortion by our contemporary culture has as one of its major engendering factors the massive failure of many of the practices of our social, political, and economic life to establish, foster, and be at the service of human mutuality."[287]

This brings me to the my last words. The notion of the common good that I have attempted to present in this discussion about abortion (and I suspect of applicability to many other issues that challenge the human community today) is this: When we engage one another in conversation, we can and do learn about one another. We learn what we did not know before; often, we also learn what we thought but what we did not want to admit. We discover that we are different because that is what makes us individuals. But, more important, we discover—and this is the part that is not easily admitted—that we are also similar in many ways. Each time we engage the other in conversation, we see a reflection of ourselves in the other. I suspect that our rights-oriented culture reinforces the differences that superficially make us different but, in truth, mask our fundamental similarity. We discover our resemblance each time we engage one another in conversation, in dialogue, even debate. We see in each of our conversations a piece of a mosaic that reflects the other. And, when we assemble more of the mosaic, as we see more of the pieces come together, not only do we see the other, we also see ourselves.

This is how the questions about abortion and the common good come together: The more we discuss these issues, the more we see that the concerns of the pregnant woman are our concerns. And, just as significantly, when we hear about the concerns of the fetus, we see the concerns that belong to us. For in the fetus, in the mother, we see another human being with whom we have so much in common. And when we see that other human being, we see ourselves. When we make this discovery, when we allow it to seep into our deepest consciousness, we can then acknowledge that the portrait that emerges from our many conversations belongs to all of us because it represents all of us. It is both our portrait *and* the portrait of the other.

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286. *Id.* at 154.
287. *Id.* at 155.