THE MEANING OF "LIFE": BELIEF AND REASON IN THE ABORTION DEBATE

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In 1993, a man named Michael Griffin killed David Gunn, a forty-seven-year-old doctor who provided abortions at a clinic in Pensacola, Florida. Before shooting Gunn three times in the back, Griffin yelled, "Don't kill any more babies!"[1] According to news reports, protestors present at the clinic that day, members of a "militant" anti-abortion-rights group, were elated, shouting, "Praise God! Praise God! One of the baby-killers is dead."[2] Yet "mainstream" anti-abortion-rights groups, who are more representative of the majority of abortion-rights opponents, were quick to renounce the murder,[3] sensing "a public-relations disaster."[4]

In August 2008, then-presidential nominees Senators Barack Obama and John McCain appeared separately at a religious forum hosted by best-selling author and evangelical pastor, Rick Warren. Warren asked

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[1] William Booth, *Doctor Killed During Abortion Protest*, WASH. POST, Mar. 11, 1993, at A1; Eloise Salholz & Peter Katel, *The Death Of Doctor Gunn,* NEWSWEEK, Mar. 22, 1993, at 34.

[2] Salholz & Katel, *supra* note 1, at 34.

[3] *Id.* Since Gunn's murder, several other abortion providers have been killed by anti-abortion-rights protesters. In the most recent incident, Dr. George Tiller was gunned down in the foyer of his church in Wichita, Kansas. Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES, May 31, 2009, at A1. Following his death, Tiller's clinic was shut down permanently. Monica Davey, *Kansas Abortion Clinic Operated by Doctor Who Was Killed Closes Permanently*, N.Y. TIMES, June 9, 2009, at A16.

[4] Steve Goldstein, *Killer at Abortion Clinic Believes His Act Was Right*, PHIL. INQUIRER, May 6, 1999, at A29.

each candidate at what point "a baby [is] entitled to human rights."[5] McCain responded simply, "At conception." This position appears consistent with Griffin's view that abortion amounts to killing babies, and at odds with McCain's own support for stem cell research and for abortion under limited circumstances.[6] Yet, far from challenging McCain, Warren seemed satisfied that McCain's answer encapsulated a complete and coherent moral position on abortion. Suggesting that no further examination was warranted, he remarked, "Okay. We don't have to go longer on that one."[7] For his part, Obama answered that "if you believe that life begins at conception, then—and you are consistent in that belief—then I can't argue with you on that."[8] Obama's response mirrored the standard liberal position, which divorces the moral question of "life"—what it means and when it begins—from the legal questions of abortion and personhood.[9]

It is ironic that in the abortion debate, one of the most pressing moral controversies of our time,[10] we condemn apparent moral consistency

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[5] Pastor Rick and Kay Warren Broadcast Transcript Service: Saddleback Civil Forum on the Presidency (Aug. 16, 2008) (transcript on file with the author).

[6] McCain supports rape and incest exceptions for abortion. *See* OntheIssues.org, John McCain on Abortion, http://www.ontheissues.org/Social/John_McCain_Abortion.htm (last visited Oct. 1, 2009); *see also infra* Part II.A.

[7] Saddleback Civil Forum, *supra* note 5.

[8] *Id.*

[9] *See infra* Part II.B & C. This Article assumes that a "liberal" claims that "the collective power of the state [should not be used] to impose a highly personal or religious value on those who do not accept it." Thomas Nagel, Letter to the Editor, *The Case for Liberalism: An Exchange*, THE N.Y. REV. OF BOOKS, Oct. 5, 2006, at 56–57 (an exchange between Thomas Nagel and Michael Sandel); *see also* Michael Sandel, *id.* at 56 (continuing the aforementioned exchange). It further assumes that a "liberal" position on abortion holds that a woman has a constitutional right to end her pregnancy, while a "conservative" position claims that a woman has no such right and that the state may prevent women from obtaining abortions in order to further the state's own interest in the life of the embryo or fetus. In this Article, the term "person" refers to a rights-holding person in the constitutional sense. The somewhat cumbersome phrase "embryo or fetus" is used throughout the Article to highlight the often overlooked fact that the embryo does not become a fetus until approximately eight weeks after fertilization, or ten weeks of pregnancy following the convention of dating pregnancy from the beginning of the last menstrual period. The vast majority of abortions, therefore, are of embryos, not fetuses. *See* Guttmacher Institute, Facts on Induced Abortion in the United States, http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Oct. 1, 2009) (noting approximately eighty percent of all abortions occur within the first ten weeks of pregnancy).

[10] *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 4 (Vintage 1994); *see also* J. Harvie

and conviction and defer to moral incoherence and superficiality. We revile and dismiss as a fanatic the man who thinks abortion is murder and who acts upon his belief, saving thousands of "innocent children" from imminent death by attacking their would-be killer. Yet, we acknowledge respectfully as "mainstream" one who professes the identical belief, but for whom the claim is seemingly nothing but hollow rhetoric. If abortion opponents in 1993 believed that abortion was murder, why did they denounce Griffin?[11] If, as Flip Benham, leader of the anti-abortion-rights group Operation Rescue, declared after the slaying of another doctor, the doctor had "murdered countless thousands of innocent children" and would have continued to do so, why was Benham "sad to learn of his death,"[12] and why did he describe the murders of abortion doctors as acts of "cowardice, terror and murder?"[13] Would he have been equally sad to learn of the death of Adolf Hitler? Would he label an assassin of Osama bin Laden a coward or a murderer? "Mainstream" opposition to abortion clearly is more complex than the rhetoric indicates. Given this, why do liberals like Obama feel they cannot question the belief that human rights vest upon conception?

As Warren's forum demonstrates, the declaration that "life begins at conception" has become a conversation-stopper that has stymied the national debate over abortion.[14] We have grown accustomed to thinking of the abortion debate as a furious and irreconcilable conflict. The abortion controversy is commonly called a war.[15] This is not surprising when one considers the absolute nature of anti-abortion rhetoric: Abortion is murder.

Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009) (describing *Roe v. Wade* as "by any measure" one of the "most important decisions of the modern judicial era").

[11] *See* Matt Trewhella, *Abortion and Punishment*, THE COVENANT NEWS, Oct. 24, 2007, http://www.covenantnews.com/trewhella071024.htm ("[M]ost Christians . . . have not come to grips with the humanity of the preborn child; they view the child as less than human. This is also why every time someone uses force to protect the preborn, Christians cannot get to their fax machines quick enough to be the first to condemn such actions.").

[12] *Murder of New York Abortion Doctor Denounced as "Terrorism,"* CNN.COM, Oct. 24, 1998, http://www.cnn.com/US/9810/24/doctor.killed.02/.

[13] *See* Goldstein, *supra* note 4, at A29.

[14] *See also* Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1–6 (1994).

[15] *See, e.g.*, JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR (1999); ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000 (Rickie Solinger ed., 1998).

Abortion kills innocent babies. Abortion is like the Holocaust.[16] Abortion often appears to inspire more passion than actual instances of war or genocide. If we take conservative rhetoric on abortion at face value, the abortion issue seems hopeless and intractable.[17] The Supreme Court has thrown up its hands and excused itself from this conversation, even as it has upheld the constitutional right to abortion. In *Roe v. Wade*, the Court declared, "We need not resolve the difficult question of when life begins."[18]

Any moral position on abortion, if society is to accept it, must appeal to both belief and reason.[19] Moral judgments need beliefs for substantial content. But they gain validity only when they are supported by reason. This conjunction of belief and reason is known as "reflective equilibrium."[20] Moreover, if they are to bind a pluralistic society, beliefs about abortion must be articulated in a way that satisfies public reason.[21] This Article argues that both conservatives and liberals have failed to meet these requirements in the abortion debate. In invoking claims of embryonic personhood, conservatives have eschewed demonstrating the coherence

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[16] *Pope Likens Abortion to Holocaust,* BBC NEWS, Feb. 22, 2005, http://news.bbc.co.uk/2/hi/europe/4288103.stm.

[17] *See* Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFF. L. REV. 107, 109 (1982) ("The abortion debate has become an area of impasse, not argument.").

[18] Roe v. Wade, 410 U.S. 113, 159 (1973).

[19] "Reason" is used here in the instrumental sense, i.e., as a means of checking clarity and consistency. Substantive reason may also play a part in the abortion debate. But nearly everyone can agree that, at minimum, the debate over abortion will be advanced by an insistence on instrumental reason.

[20] *See* JOHN RAWLS, A THEORY OF JUSTICE 48 (Belknap Press 1971) ("[T]he best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium."). Rawls's notion of reflective equilibrium is one of two methodologies in *A Theory of Justice* (the other being the "original position"). These two are succeeded by still others, including the "overlapping consensus."

[21] *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 92 (Erin Kelly ed., Belknap Press 2001) (arguing that public reason reflects "our willingness to settle the fundamental political matters in ways that others as free and equal can acknowledge are reasonable and rational"); Jürgen Habermas, Speech upon Accepting Peace Prize of German Publishers & Booksellers Assn. (Oct. 14, 2001) (discussing religion and public life and the need to "search for reasons that aspire to general acceptance"); *see also* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002) (discussing "public justification").

among their beliefs about fetal personhood and their other considered judgments. But conservatives' positions on abortion are inconsistent with a moral view that recognizes embryos and fetuses as full, legal persons. Conservatives have been conscious of the need to appeal to public reason rather than relying on peculiarly religious justifications. But these efforts have been deceptive and disingenuous. Conservatives often invoke the universal value of "human life" in opposing abortion. But they can commit only to a "thin" conception of life (that an embryo or fetus is a human organism in the process of developing into a person), even as they trade on the more compelling "thick" notions that the word "life" invokes.[22] The unsurprising fact that an embryo or fetus is, biologically, "human life" simply does not answer the moral (or legal) question whether and when that "life" is to be accorded some or all of the rights of a person.[23]

On the other hand, liberals, who tend to distrust beliefs as a basis for moral theory, prefer to dodge conservatives' beliefs in the abortion debate. Rather than directly challenging claims of embryonic or fetal personhood as unreasonable, liberals often profess respect for these beliefs.[24] Some liberals have argued that abortion should be allowed even if conservatives are right that the embryo or fetus is a person.[25] However, this Article claims, these arguments fail to respond effectively to claims of embryonic or fetal personhood.[26]

More importantly, they are fallback arguments to liberals' real position on abortion. Liberals, of course, do not in fact believe that the law should recognize the embryo or fetus as a person. Instead, they assume that

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[22] *See infra* text accompanying notes 189–201.

[23] Conservatives have sometimes attempted to appeal to public reason and avoid framing their positions in explicitly religious terms by alleging improbably that their references to "human life" are merely biological in nature. *See, e.g.*, Planned Parenthood v. Rounds, 530 F.3d 724, 728 (8th Cir. 2008) (accepting this argument in the context of an "informed consent" abortion law); Letter from Samuel B. Casey & Harold J. Cassidy (Law Life Project, Christian Legal Society) to Members of the South Dakota Pro-Life Leadership Coalition (Oct. 10, 2007) (on file with the author) (arguing same). For analysis of this trend, see Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 954 (discussing a South Dakota "informed consent" law), and Caitlin E. Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL'Y 101, 123–28 (2009) [hereinafter Borgmann, *Judicial Evasion*] (discussing *Planned Parenthood v. Rounds*).

[24] *See infra* Part I.B.

[25] *See id.*

[26] *See id.*

society, or the Supreme Court, can determine that women's liberty demands the right to choose abortion, while leaving the moral question of abortion and personhood unanswered and thus open for each individual to decide.[27] Michael Sandel calls this "bracketing" the question of fetal personhood.[28] But, this Article argues, neither the Supreme Court nor the public can successfully "bracket" the question of when personhood begins.[29] As a moral question, personhood is too important to leave to individual choice. And the constitutional question of personhood goes hand in hand with the moral question.[30] If, as a moral matter, an embryo or fetus is a person, then ultimately this must be reflected in the interpretation of our Constitution just as, for example, the moral recognition that slaves were persons led ineluctably to their recognition as full persons under the Constitution.[31]

By purporting to leave the question for each individual to decide, the Court has not dodged the question but rather has effectively rejected a belief in fetal personhood, for if an embryo or fetus is a person, abortions must be prohibited, and women who obtain abortions are as culpable as the doctors who perform them.[32] Indeed, the positions of even the Court's most conservative members implicitly disavow that a fetus is a person.[33] Moreover, by avoiding the question of embryonic and fetal personhood, liberals have neglected the important role women's autonomy and dignity should play in the debate, leading to a perception of abortion as a morally bankrupt choice.[34]

This Article argues that, rather than avoiding the most critical moral question in the abortion debate, conservatives and liberals must engage in a public conversation about abortion that seeks reflective equilibrium on the

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[27] *See supra* note 9 and accompanying text.

[28] Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 521 (1989) [hereinafter Sandel, *Moral Argument*]. Sandel argues that the question cannot be bracketed. *See id.*; *see* also *infra* Part I.C.

[29] *See infra* Parts I.C., II.A.

[30] *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1696–98 (2008) (assuming that "debates about constitutional rights at bottom are or ought to be debates about moral rights").

[31] *See infra* Part I.C.

[32] *See id.*

[33] *See infra* Part II.A.

[34] *See infra* Parts I.C, III.

status of the embryo or fetus, one that satisfies the demands of public reason. This conversation would be a very different, and more fruitful, public debate: one that would seek to understand the real reasons why conservatives oppose some abortions and not others, for example, and to see whether these newly surfaced reasons might yield some common moral ground on the issue.[35] In such a conversation, liberal and conservative positions on abortion would likely converge on a gradualist view of the embryo's moral status (that an embryo has moral significance that grows as the embryo, and later fetus, matures).[36] This Article argues that such a view of the fetus neither relieves the Court of its obligation to protect women's rights nor sanctions onerous state regulation of abortion.[37] The primary aim of this Article, however, is not to answer definitively the questions of the value of fetal life and of morally defensible abortion regulation. Rather, it is to argue for the importance of a discussion that assesses the consistency and coherence of asserted moral positions on abortion and that demands that these positions be supported by public reason. In particular, the Article exposes and examines how the abortion debate has become polarized and intractable because of both sides' failure to satisfy this demand with respect to the issue of personhood.

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[35] Although it is beyond the scope of this Article to suggest what these reasons are, other scholars have addressed this question. Reva Siegel, for example, has done extensive research on the antiabortion movement and posits that "antiabortion advocates now assert that women seeking abortions are vulnerable, dependent, and confused, and need restrictions on abortion to protect them from coercion and their own mistaken decisionmaking and to free them to fulfill their natures as mothers." Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1773 (2008) (internal citations omitted) [hereinafter Siegel, *Dignity*]; *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 993 [hereinafter Siegel, *New Politics*] ("analyz[ing] the state's claimed interest in protecting women from abortion and show[ing] that these justifications rest on gender stereotypes about women's capacity and women's roles"); *see also* GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT 85, 101 (2004) (arguing that "[c]onservatives . . . are not really pro-life in any broad sense" and that abortion is a "stand-in" for "general strict father values" and "control of women's lives"). Michael McConnell suggests that "the pro-life movement sees itself as devoted to the woman's interests as well as the child's" and also that it seeks to protect women from men who prefer "to engage in sex without risking any consequences." Michael W. McConnell, *How Not To Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1191–92 (1991); *see also* Martin Rhonheimer, *A Constitutionalist Approach to the Encyclical Evangelium Vitae*, 43 AM. J. JURIS. 135, 142–43 (1998) (abortion laws may be premised upon protecting women from predatory men).

[36] *See infra* Part III.

[37] *See id.*

This Article proceeds in three parts. Part I addresses the concept of the embryo or fetus as a person. It examines the apparent trend in many areas of the law to recognize embryonic or fetal personhood. It then considers defenses of the right to abortion that assume embryonic or fetal personhood and argues that these defenses are ultimately unpersuasive. Part I next examines the standard liberal approach to abortion regulation—which asserts that the question of fetal personhood should be left to individuals to decide—and counters that any decision about the legality or illegality of abortion demands that the question of embryonic or fetal personhood be answered.

Part II takes up that question, focusing on how conservatives' ambiguous rhetoric helps to obscure their actual position on abortion. Part II first examines claims of fetal personhood and concludes that exceedingly few people hold positions that consistently treat a fetus, let alone an embryo, as a person. It then examines the rhetoric of "life" and "motherhood" commonly used in the abortion debate and argues that the use of these terms is misleading, suggesting a belief in embryonic or fetal personhood that the speaker does not consistently hold. Part II describes "thick" and "thin" versions of these terms and concludes that conservatives commit only to thin versions of "life" and "motherhood" while capitalizing on the emotions and moral judgments that the thick versions invoke for most people.

Part III considers how we might view the abortion decision as a moral issue once the murky rhetoric is clarified and the apparently overriding question of embryonic and fetal personhood is laid aside.

I. LIBERAL RESPONSES TO CLAIMS OF EMBRYONIC AND FETAL PERSONHOOD

A. Embryonic and Fetal Personhood in the Law

The conservative portrayal of fetuses as persons pervades public discourse about abortion. Conservatives typically refer to a fetus or even an embryo as the "unborn *child*," suggesting that the fetus or embryo is equivalent to a baby or child and is distinguished solely by the happenstance of its physical or temporal location. Consistent with this rhetoric, conservatives have attempted, often successfully, to have the embryo or fetus treated as a legal person in many contexts outside abortion. Fetuses have been made crime victims in their own right under laws punishing fetal homicide.[38] Some states allow civil suits to be brought on

[38] *See, e.g.*, Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841 (2009).

behalf of fetuses for wrongful death.[39] Federal Department of Health and Human Services regulations define children eligible for health insurance under the federal State Children's Health Insurance Program as "an individual under the age of 19 *including the period from conception to birth.*"[40] Wisconsin allows the state to incarcerate pregnant women during pregnancy in order to prevent harm to the fetus.[41] Some state statutes and proposed state constitutional amendments would define legal personhood as beginning upon conception.[42] Within the abortion context, trial court judges have sometimes appointed a guardian *ad litem* to represent the embryo or fetus in judicial proceedings in which minors seek court permission for a confidential abortion.[43] States have passed laws that require abortion providers to anesthetize the fetus before an abortion if the woman consents.[44] Doctors who provide abortions have been sued for malpractice for failing to tell the woman that her embryo is "a complete, separate, and unique human being" and that she would be "responsible for killing her own child."[45]

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[39] *See* Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 43–45 (2004) (reviewing state causes of action for wrongful death of in utero embryos or fetuses).

[40] 42 C.F.R. § 457.10 (2007) (emphasis added).

[41] WIS. STAT. § 48.01 (2009).

[42] *See, e.g.*, MO. REV. STAT. §§ 1.205.1(1), (2) (2009) (requiring that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons); H.R. 3284, 117th Gen. Assem., Reg. Sess. (S.C. 2007) (bill establishing that due process and equal protection rights "vest at fertilization"); *see also* Colorado for Equal Rights, November 2008 Ballot Initiative, http://www.coloradoforequalrights.com/files/initiativetext.pdf (last visited Oct. 1, 2009) (discussing proposed constitutional amendment extending "inalienable rights, equality of justice, and due process of law" to "any human being from the moment of fertilization"). The Supreme Court has interpreted the Missouri provision to have no legal effect upon the availability of abortion in Missouri. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 505–06 (1989).

[43] *See generally* Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69 (2001).

[44] *See, e.g.*, ARK. CODE ANN. § 20-16-1104 (2009).

[45] *See, e.g.*, Acuna v. Turkish, 192 N.J. 399, 407 (2007); Tina Kelley, *Trenton: Abortion Malpractice Appeal*, N.Y. TIMES, Sept. 26, 2007, at B8. South Dakota now has a statute that requires that abortion providers give patients a written statement making similar assertions. *See* S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(i), (ii) (2009).

No existing legal recognition of the embryo or fetus renders it a constitutional person; any such recognition would conflict with the constitutional right to abortion. Rather, the laws treat the embryo or fetus as a separate, rights-holding entity in a particular context. Drafters of such legislation often actively resist rewriting these laws in ways that would avoid treating the embryo or fetus as a distinct entity from the woman carrying it. For example, they have rejected proposals to substitute fetal homicide legislation with "harm to pregnant women" statutes.[46] The transparent goal is to undermine support for abortion by making the fetus a person in so many other legal settings that abortion comes to be viewed as a morally unacceptable exception to a general principle.[47]

These types of legislative measures and litigation strategies are proliferating. Some considered an abortion ban enacted in South Dakota in 2006, which contained only a limited exception for abortions necessary to prevent the woman's death,[48] to demonstrate vividly an irrevocable slide toward a public consensus that the embryo or fetus is a person.[49] South Dakota is not the only state to introduce a near-total abortion ban in recent years. Several states have enacted contingent bans that are intended to take

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[46] *See generally* Sandra L. Smith, Note, *Fetal Homicide: Woman or Fetus as Victim? A Survey of Current State Approaches and Recommendations for Future State Application*, 41 WM. & MARY L. REV. 1845 (2000).

[47] *See* Memorandum from James Bopp, Jr. & Richard E. Coleson, Attorneys at Law, Bopp, Coleson & Bostrom, To Whom It May Concern, at 6, 8 (Aug. 7, 2007), *available at* http://personhood.net/docs/BoppMemorandum1.pdf (addressing "pro-life strategy issues" and describing a "statute including unborn victims in homicide laws" as one of many "helpful legal changes" to "keep the abortion issue alive and . . . translate into more disfavor for all abortions"); Casey & Cassidy, *supra* note 22, at 3, 13, 15 (discussing need for "incremental approach" to outlawing abortion, fighting on "favorable terrain" in order to change "hearts and minds").

[48] The abortion ban was ultimately defeated by voters. *See* Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8. South Dakota voters rejected a similar ban, which included limited exceptions for rape and the woman's health, in 2008. *See* Tiffany Sharples, *Ballot Initiatives: No to Gay Marriage, Anti-Abortion Measures*, TIME, Nov. 5, 2008, *available at* http://www.time.com/time/politics/article/0,8599,1856820,00.html.

[49] *See, e.g.*, Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173 (2007).

effect if the Court should overturn *Roe v. Wade* and would allow abortion only to prevent the woman's death.[50]

Some commentators have identified a recent shift in the rhetoric of the anti-abortion-rights movement away from fetal personhood and toward the woman.[51] This shift has gained strength in the wake of the Supreme Court's decision upholding the federal Partial Birth Abortion Ban Act in *Gonzales v. Carhart* (*Carhart II*).[52] Under this approach, the movement characterizes abortion as harmful to the mental and/or physical health of the pregnant woman. Women are portrayed as "mothers" from the very inception of even unwanted or untenable pregnancies, and abortion is seen as slashing the bonds of motherhood. Viewed in this light, abortion restrictions are transformed into measures that promote women's health and well-being and that protect women from the exploitation and deception of abortion providers.[53]

This approach is epitomized by another South Dakota law recently upheld by the Eighth Circuit Court of Appeals.[54] The law requires doctors to inform women seeking abortions that the procedure may cause "[d]epression and related psychological distress" and "[i]ncreased risk of suicide ideation and suicide."[55] Justice Kennedy, in *Carhart II,* echoed this rhetoric when he suggested that abortion harms women. For example, he wrote:

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women

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[50] Louisiana, Mississippi, and South Dakota have passed such contingent bans. North Dakota has passed a similar ban that would allow a doctor to claim rape, incest, or risk of death as an affirmative defense. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: ABORTION POLICY IN THE ABSENCE OF ROE (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf.

[51] *See, e.g.*, Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) [hereinafter, Seigel, *The Right's Reasons*].

[52] 550 U.S. 124 (2007). In *Stenberg v. Carhart* (*Carhart I*), the Supreme Court invalidated a nearly identical Nebraska ban. 530 U.S. 914 (2000).

[53] *See generally* Siegel, *The Right's Reasons*, *supra* note 51.

[54] Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 734 (8th Cir. 2008) (en banc); *see also* Borgmann, *Judicial Evasion*, *supra* note 23, at 123–26 (discussing *Rounds*).

[55] S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(i)–(ii) (2009).

> come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[56]

The question whether to shift attention from the fetus toward abortion's impact on women has been the source of a long-festering rift in the anti-abortion-rights movement. However, the two approaches, while differing in emphasis, are of a piece. Pregnant women seeking abortions are portrayed as mothers because the embryo or fetus is portrayed as already a person. Women have a "constitutionally protected relationship" (as the South Dakota law puts it) with the embryo or fetus because it is already a child. Women will have post-traumatic stress syndrome, it is claimed,[57] because of their regret over the abortion (again, because the woman ended her child's life).[58]

Despite the apparent progress toward embryonic and fetal rights in a number of legal contexts, the Supreme Court has yet to reverse its essential holding in *Roe v. Wade* that women have a constitutional right to abortion. Each time it has reaffirmed this holding,[59] the Court has implicitly rejected claims of fetal personhood.[60] Even in *Carhart II*, where the Court

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[56] *Carhart II*, 550 U.S. at 158–59 (2007). Two anti-abortion-rights lawyers who were architects of the South Dakota strategy wrote that the South Dakota law and its defense in federal court have "been litigated with an eye towards Justice Kennedy in particular," and that "[i]t was not a coincidence that Justice Kennedy cited to [an amicus brief] which related the experiences of post abortive women." Casey & Cassidy, *supra* note 23, at 10, 12.

[57] As Justice Kennedy admitted, no credible evidence for this claim exists. *See, e.g.*, *Carhart II*, 550 U.S. at 183–84 (Ginsburg, J., dissenting); Post, *supra* note 23; REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 5–6 (2008), *available at* www.apa.org/releases/abortion-report.pdf.

[58] Significantly, these arguments are generally not focused on abortion as *physically* dangerous for women, an argument opponents can no longer plausibly make now that the procedure has become so safe. *See* Henshaw SK, *Unintended Pregnancy and Abortion: A Public Health Perspective*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 11–22 (Maureen Paul et al. eds., 1999) (Fewer than one percent of all U.S. abortion patients experience a major complication. The risk of death associated with abortion in the United States is less than 0.6 per 100,000 procedures, less than one-tenth as large as the risk associated with childbirth). Nevertheless, claims that abortion is physically harmful to women persist, especially the claim that abortion causes breast cancer. *See, e.g.*, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf.

[59] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart (*Carhart I*), 530 U.S. 914 (2000).

[60] *See infra* Part I.C., II.A.

refused to reaffirm *Roe*'s validity,[61] the Court implicitly denied the embryo or fetus's constitutional personhood by failing to overturn *Roe* and to grant constitutional rights to the fetus.[62] So although the Court has formally declined to answer the question of fetal personhood, it has made it impossible for states to protect fetuses as full persons outside of these discrete contexts. Moreover, until the Court is ready both to overrule *Roe v. Wade* and to declare fetuses to be persons under the Constitution, an unlikely scenario, conservatives' ultimate goal to outlaw abortion nationwide will remain unmet.[63]

B. Liberal Defenses of Abortion that Assume Embryonic or Fetal Personhood

The widespread legal recognition of embryonic and fetal personhood in specific contexts outside of abortion has led some pro-choice scholars to hedge their bets by reviving arguments, prominently made by Judith Jarvis Thomson in the early 1970s,[64] and adopted in various forms by other scholars,[65] that abortion should be permissible even if the fetus is a person.[66] The arguments often compare abortion to self-defense. These

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[61] *See* Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 160–61 (2007) (referring to "precedents we here assume to be controlling"); *id.* at 186–87 (Ginsburg, J., dissenting) (criticizing majority for refusing to explicitly reaffirm *Roe*).

[62] See text accompanying notes 91–94, *infra*, for discussion of *Roe*'s implicit conclusions about fetal personhood.

[63] The scenario is unlikely because, even though several members of the Court clearly stand ready to overrule *Roe v. Wade*, the ones who have made their views known would return the issue to the states, not declare embryonic or fetal personhood under the federal Constitution. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. at 979 (Scalia, J., dissenting) ("The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."). At most, the nation would see a patchwork of laws similar to what existed before *Roe*.

[64] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

[65] Nancy Davis refers to these commentators as the "Thomson-Moderates." Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175, 175–77 (1984) (reviewing the arguments).

[66] *See, e.g.*, LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 129–30 (1990); McDonagh, *supra* note 49, at 1183 ("The power of Thomson's argument has always been that even if the fetus is defined to be an unborn human being with the same rights as a born human being, women still have a moral right to use deadly force to defend themselves

claims, however, are unsatisfactory responses to assertions that a fetus is a person. One problem is that none of the creative analogies designed to portray abortion as self-defense are truly apt analogies to pregnancy and thus fail to meet the requirements of public reason. The moral or emotional reality of pregnancy for most women, and for the general public, is not captured by comparing a pregnant woman's developing offspring to a fully grown, famous violinist who somehow becomes attached to the woman without her knowledge or consent, or to a giant baby squeezing the woman out of a tiny house (to name two of Thomson's examples).[67] As Richard Posner puts it, "we can have no settled or reliable intuitions regarding the [violinist] case, because the case is outside our empirical experience; it belongs to science-fiction. So the analogy fails at the start."[68] A closer analogy would at minimum acknowledge the biological tie of fetus to woman and thus, for example, might pose that a woman's own baby were hooked up to her kidneys or trapped in a house with her. Acknowledging the tie, however, tends to weaken the power of the analogies.[69]

Abortion also does not seem sufficiently analogous to more realistic self-defense situations. For example, while it is permissible to use lethal force to defend one's home, the law would not condone using such force

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from nonconsensual intrusion upon their bodily integrity and liberty."); Robin West, *Concurring in the Judgment, in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 137–38 (Jack M. Balkin ed., 2005) [hereinafter WHAT *ROE V. WADE* SHOULD HAVE SAID]; *see also* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT 85 (1996) (Thomson's analogy "should convince even people who perceive the fetus to be a full-fledged person that to permit abortion is not obviously wrong in the case of a woman who becomes pregnant through no fault of her own (for example, by rape)."); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment For Organs*, 120 HARV. L. REV. 1813, 1825–26 (2007) ("Lethal self-defense and abortion-as-self-defense share a moral core: the principle that people should generally be free to defend themselves against that which is threatening their lives.").

[67] *See* Thomson, *supra* note 64, at 48–49, 52–53. In the violinist thought experiment, Thomson asks the reader to imagine "wak[ing] up in the morning [to] find yourself back to back in bed with . . . [a] famous unconscious violinist," who has been "plugged into" the reader's circulatory system in order to save the violinist from a fatal kidney ailment. In nine months, the violinist will have recovered and could be disconnected. *See id.* at 48–49.

[68] Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1675 (1998).

[69] *See* Davis, *supra* note 65, at 181, 184.

against an innocent baby that was deposited inside a person's front door, or even against a baby that somehow happened to threaten one's health. The analogies break down because in real-life self-defense situations, people are defending themselves against an aggressor. Even if the aggressor is not acting with full awareness or intent, self-defense scenarios contemplate affirmative conduct by one party that directly threatens the other's life.[70]

Indeed, abortion does not appear to fit within traditional legal definitions of self-defense. A person is allowed to defend herself against an unlawful force, but her own force must be proportional to the force used against her. Thus, in most jurisdictions (and under the Model Penal Code), a person can only use *lethal* force when it is necessary to defend against an unlawful, lethal force.[71] This means that a non-life-saving abortion is unlawful lethal force if the embryo or fetus is a person, because the embryo or fetus did not exert lethal force against the woman.

Even life-saving abortions may not be justified as self-defense under criminal law. Although in such circumstances the embryo or fetus is arguably imposing "lethal force" on the woman, it is not *unlawful* force—the fetus is innocently there, just as much a victim of circumstance as the woman (in fact, the woman may even be considered morally culpable for helping to create the situation if she had engaged in consensual sex).[72] It does not appear that even a pregnancy caused by rape or incest would make the fetus's force "unlawful," since the force that was unlawful (the intercourse) is not the force against which the woman is now defending herself.[73]

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[70] *See* United States v. Peterson, 483 F.2d 1222, 1233 (D.C. Cir. 1973); Davis, *supra* note 65, at 186; *see also* Kimberly Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 262 (2004); Nancy J. Hirschmann, *Abortion, Self-Defense, and Involuntary Servitude*, 13 TEX. J. WOMEN & L. 41, 47 (2004). *But see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 298 & n. 67 (5th ed. 2009) (characterizing a mountaineer who slips off of a cliff and imperils the life of his companion, to whom he is tethered, as an "aggressor" who might trigger "an expansive version of self-defense").

[71] *See, e.g.*, MODEL PENAL CODE § 3.04 (1962). The Model Penal Code also contains a "defense of others" justification for murder where someone else's life is in danger, such that a person employing self-defense to save her life may enlist others to help her. *See id.* § 3.05. This should protect a doctor who provided an abortion that was justified under the Model Penal Code or a similar provision.

[72] *See infra* Part II.B.

[73] *But cf.* West, *supra* note 66, at 130 (arguing abortion should be legal in cases of rape since "never do states hold a crime victim himself criminally liable . . . for seeking to resist having his physical body used, against his will, so as to sustain the life or well-being of another").

In the abortion context, self-defense arguments are really more about self-preservation, and when seen in this light, their persuasiveness dwindles. They are about self-preservation because the embryo or fetus has not placed itself in its situation by any deliberate or affirmative act. It is simply in the wrong place at the wrong time. The law generally does not condone killing a person who, through no fault of her own, finds herself in a position that would harm another.[74] A fetus can be compared to a child caught with its family, hiding in a closet from intruders in their home. If the child begins to cry, threatening to give away the family's location, it would not be considered self-defense if the family were to smother the child.[75] Likewise, if a father were trapped in a lifeboat with his child, but the lifeboat could hold only one, it would not be considered self-defense if the father pushed the child overboard in order to save his own life.[76]

Conjoined twins offer perhaps the most compelling analogy to pregnancy both because such twins are physically attached to one another and because they are biologically related (unlike the subjects of Thomson's violinist example). Assume a set of adult, competent conjoined twins, and assume further that one twin (the "independent twin") would survive if the pair were surgically separated and the other (the "dependent twin") would not. It would not constitute self-defense if the independent twin were unilaterally to obtain surgery to remove the dependent twin, leading to the latter's death.[77]

Self-preservation arguments for abortion are especially problematic when it comes to so-called "elective" abortions, by which most people

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[74] *See* TRIBE, *supra* note 66, at 122.

[75] Whether a prosecutor would actually choose to prosecute such a horrific case is not relevant. The question is whether such conduct would be prohibited by our criminal laws.

[76] *See, e.g.*, Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (holding shipwrecked sailors guilty of murder after they killed and consumed an ailing companion to permit their continued survival); *see also* United States v. Holmes, 26 F. Cas. 360 (E.D. Pa. 1842) (jury convicted crewman of murder for throwing numerous passengers overboard to ensure crowded lifeboat did not sink).

[77] *See* TRIBE, *supra* note 66, at 121. Where (i) infants are conjoined and (ii) a third-party neutral is presiding, decisions have been made to separate conjoined twins in order to save one twin's life. *See, e.g.*, Re A, 4 All ER 961 (2000) (British court authorized hospital to separate conjoined twin infants in an effort to save one of the twins); Charles I. Lugosi, *Playing God: Mary Must Die So Jodie May Live Longer*, ISSUES IN L. & MEDICINE, Oct. 1, 2001(discussing case). But it is difficult to imagine that we would allow a mature, independent twin to order the death of her dependent twin, especially if the independent twin's life were not at risk. *See* TRIBE, *supra* note 66, at 121.

mean abortions of pregnancies that pose no physical threat to the life or health of the woman. It is hard to imagine a situation where we would consider it morally acceptable for a person to kill a baby—especially her own—because the baby is inconveniencing her, or even because the baby is threatening her emotional well-being.[78] When desperate teenage girls leave their newborn babies in the trash or the toilet, the public is quick to condemn their conduct as morally unspeakable.[79]

Although self-defense does not appear to justify abortions, a woman might invoke a necessity defense.[80] However, a necessity defense typically requires that the harm that the defendant caused by violating the law be less serious than the harm she sought to avoid. Where a woman's life is not at risk, nine months of pregnancy (and perhaps non-life-threatening health consequences) must be weighed against a person's life. This does not seem to meet the requirements for a necessity defense.[81]

On the other hand, if the woman's life is at risk and the fetus is not viable, the woman could argue that a greater harm (the death of both the embryo or fetus and the woman) is averted if the abortion is allowed and the woman lives.[82] However, many state statutes (and the common law) also require that the woman have clean hands. Unless the woman could prove that the sex that caused her pregnancy was nonconsensual, a court might

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[78] *See* Davis, *supra* note 65, at 10; *see also* Chemerinsky, *supra* note 17, at 124. ("Society does not allow parents to kill infants even though infants are a burden and an infringement of privacy. Thus, only by assuming that the fetus is not a human person until viability can the Court justify allowing abortions prior to viability based on a privacy rationale.") (internal citations omitted).

[79] *See, e.g.*, Robert Hanley, *Teen-Agers Get Terms in Prison In Baby's Death*, N.Y. TIMES, July 10, 1998, at A1; *see also* Steven Pinker, *Why They Kill Their Newborns*, N.Y. TIMES, Nov. 2, 1997, at SM52.

[80] There is a choice-of-evils defense (or necessity defense) in the Model Penal Code. *See* MODEL PENAL CODE § 3.02(1) (1962). Necessity is also a common law defense in the United States. *See* MODEL PENAL CODE § 3.02(1) cmt. at 10 (1962).

[81] Some states preclude the defense altogether in cases of homicide, *see, e.g.*, People v. Trippet, 66 Cal. Rptr. 2d 559 (Cal. Ct. App. 1997), and some allow the defense only when the danger is caused by natural forces, *see, e.g.*, Cleveland v. Municipality of Anchorage, 631 P.2d 1072 (Alaska 1981).

[82] If the woman's pregnancy is sufficiently advanced, however, it may be possible to save the fetus at the woman's expense. *Cf. In re* A.C., 573 A.2d 1235 (D.C. App. 1990) (overturning lower court ruling that had permitted hospital to perform a cesarean section on a terminally ill woman against her will, in an unsuccessful attempt to save her fetus).

find unclean hands.[83] Moreover, some states that have not adopted the Model Penal Code version of the necessity defense require that the person invoking the defense be faced with a "clear and imminent danger."[84] A woman who obtained an abortion in order to avoid a potential risk to her life might fail this test if a court did not deem her fear of death reasonable. Similarly, depending on how a court construed the requirement of "imminence," a court might not allow the defense where a woman obtained an early abortion in order to avoid an anticipated risk to her life later in pregnancy.

C. Liberals' Unsuccessful Attempts to Bracket the Question of Embryonic or Fetal Personhood

In the end, though, self-defense and self-preservation arguments are a sideshow for liberals arguing in favor of the right to abortion, because liberals do not in fact believe that the law should recognize the fetus as a person. Instead, liberals typically take the position that the morality of abortion (or whether the fetus is a person) is a deeply personal, and often religious, matter that each person should decide for herself. Although "[t]he fact that a moral belief may be rooted in religious conviction neither exempts it from challenge nor renders it incapable of rational defense,"[85] the Court and most liberal commentators have shrunk from either challenging the belief that an embryo or fetus is a person or from demanding a rational defense of that claim.[86]

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[83] *See, e.g.*, People v. Pepper, 48 Cal. Rptr. 2d 877, 880 (Cal. Ct. App 1996). The Model Penal Code (which includes a broader necessity defense than under common law or many non-Code-based statutes) does not require that the woman have "clean hands," so her "fault" in becoming pregnant would not be at issue in a state that had adopted it. *See* MODEL PENAL CODE § 3.02(1) (1962).

[84] *See, e.g.*, Commonwealth v. Schuchardt, 557 N.E.2d 1380, 1381 (Mass. 1990).

[85] MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 104 (2007) [hereinafter SANDEL, ETHICS & GENETIC ENGINEERING].

[86] *See, e.g.*, Chemerinsky, *supra* note 17, at 142–44; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 927 (1973); *see also* DWORKIN, *supra* note 10, at 102 (noting that many of *Roe*'s "most sophisticated critics" argue "not that the Court's opinion on these great philosophical issues was wrong but that it had no business ruling on the matter at all, because the Constitution gives democratically elected state legislatures . . . the power to decide"). Even the most conservative members of the Court have bracketed the question of when personhood begins, by asserting that the question should be decided by the majoritarian process. *See infra* Part II.A.

Justice Blackmun's opinion in *Roe v. Wade* exemplified liberal avoidance by declaring that the Court could not answer the question of when life begins.[87] Texas, however, had asserted that "life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception."[88] Interestingly, in the oral arguments in *Roe*, the Justices seemed keenly aware of the need to decide the question of embryonic or fetal personhood.[89] In the second round of oral arguments, several Justices pressed the issue with counsel for both sides. For example, Justice Stewart questioned Robert C. Flowers, counsel for Texas:

> JUSTICE STEWART: Well, if you're right that an unborn fetus is a person, then you can't leave it to the legislature to play fast and loose dealing with that person. In other words, if you're correct, in your basic submission that an unborn fetus is a person, then abortion laws such as that which New York has are grossly unconstitutional, isn't it?
>
> MR. FLOWERS: That's right, yes.
>
> JUSTICE STEWART: Allowing the killing of people.
>
> MR. FLOWERS: Yes, sir.
>
> JUSTICE STEWART: A person.
>
> MR. FLOWERS: Your Honor, in Massachusetts, I might point out—
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> JUSTICE STEWART: You can't leave it up to the legislature. It's a constitutional problem, isn't it?
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> MR. FLOWERS: Well, if there would be any exceptions within this—

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[87] Roe v. Wade, 410 U.S. 113, 159 (1973).

[88] *Id.*

[89] Oral argument was heard in the case first on December 13, 1971 (before seven Justices, Justices Black and Harlan having suddenly retired), and again on October 11, 1972 (before a full Court). *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 80–93 (2005).

> JUSTICE STEWART: The basic constitutional question, initially, is whether or not an unborn fetus is a person, isn't it?
>
> MR. FLOWERS: Yes, sir, and entitled to the constitutional protection.
>
> JUSTICE STEWART: And that's critical to this case, is it not?[90]

Yet when it came time to write the opinion, the Justices preferred to dodge the personhood question. The *Roe* majority at first seemed to acknowledge the morally fraught nature of the abortion decision:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one established and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion.[91]

The Court went on to say, however, that it would resolve the issue "free of emotion and of predilection."[92] It flirted with rejecting outright the notion of fetal personhood, pointing out, for example, that the "unborn have never been recognized in the law as persons in the whole sense."[93] It also asserted that Texas was wrong in "adopting one theory of life . . . [which would] override the rights of the pregnant woman that are at stake."[94] The Court recognized that "[i]f this suggestion of fetal personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[95] Thus, by

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[90] Transcript of Oral Reargument, Roe v. Wade, 410 U.S. 113 (1973) (No. 70–18), http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument/. *See also* text accompanying note 173, *infra*.

[91] *Roe*, 410 U.S. at 116.

[92] *Id.*

[93] *Id.* at 162.

[94] *Id.*

[95] *Id.* at 156–57.

upholding the right to abortion, the Court did in fact resolve the debate to this extent: it implicitly denied that an embryo or fetus is a constitutional person.

Yet, the Court ultimately purported to deflect the question of embryonic or fetal personhood, noting "the wide divergence of thinking on this most sensitive and difficult question."[96] It quoted approvingly Justice Holmes's famous dissent in *Lochner v. New York*, which stated that the Constitution is "made for people of fundamentally differing views."[97] The Court thus suggested that it was not its place to impose one moral view of abortion upon the nation. Blackmun's opinion suggested that there were multiple "theories" about when life begins and implied that these theories could coexist without the Court directly denying or endorsing any of them.[98] Thus, the Court concluded, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."[99]

Ironically, while it declared itself unable to decide when an embryo becomes a person, the Court in *Roe* assumed away the answer to the equally if not more vexing question of when "meaningful life" begins.[100] Blackmun's opinion identified fetal viability as the point at which the government's interest in the fetus becomes sufficiently compelling to deny women abortions unless their lives or health are threatened. The opinion asserted that, at viability, "the fetus then presumably has the capability of meaningful life outside the mother's womb."[101] This casual remark left an enormously complex and uncertain medical inquiry wholly untouched. Whether and when a fetus is sufficiently mature to survive outside the uterus in any condition is inevitably an educated guess, measured in

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[96] *Id.* at 160.

[97] *Id.* at 117 (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

[98] *See Roe*, 410 U.S. at 162 ("In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

[99] *Id.* at 159.

[100] *See* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS 5 (2008) ("[I]n *Roe* the Court rejected a state's definition of life but assumed the task of constitutionally defining what constituted 'meaningful life.'").

[101] *Roe*, 410 U.S. at 163.

percentages rather than absolutes, and affected by numerous factors, including the technology and medical expertise available. And the bare question of survival does not even begin to answer whether a fetus's prematurity could at some point mean impairments so severe that its life could not fairly be called "meaningful." Moreover, assuming we know what a "meaningful life" is, of what relevance is it that a fetus could have a meaningful life *outside* the woman's body when the fetus is still *in* the woman's body? As David Faigman notes, "nobody at the time [of *Roe*] or since has suggested that women can remove twenty-four-week-old fetuses so that they might fend for themselves."[102]

Liberals who "bracket" (or deflect) the moral question of embryonic or fetal personhood often avow a profound respect for the views of those who see the fetus as a person. Thus, in a 2004 presidential debate, for example, John Kerry claimed to "deeply respect" the view that the fetus is a person, while also saying that this view should not be imposed on everyone.[103] The Supreme Court took a similar stance in *Planned Parenthood v. Casey*, even as it upheld (albeit in limited fashion) the right to abortion declared in *Roe*. Thus, the controlling opinion ringingly affirmed the right of the individual to decide when personhood begins: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, *and of the mystery of human life*. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."[104]

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[102] FAIGMAN, *supra* note 100, at 5; *see also* William Saletan, *Fetal Separation*, SLATE, July 21, 2008, http://www.slate.com/blogs/blogs/humannature/archive/2008/07/21/fetal-separation.aspx. ("I have to say, it's a relief to learn that the embryo is so complete and independent. I mean, it solves the whole problem. Here's this woman who just wants to be separated from her embryo. And lo and behold, it's already separate! No need to agonize. Just detach it and let it grow.").

[103] In the second presidential debate in 2004, Kerry was asked what he would say to a voter who believed abortion is murder. Kerry said that he would give this response:

> I cannot tell you how deeply I respect the belief about life and when it begins. I'm a Catholic, raised a Catholic. I was an altar boy. Religion has been a huge part of my life. It helped lead me through a war, leads me today. But, I can't take what is an article of faith for me and legislate it for someone who doesn't share that article of faith, whether they be agnostic, atheist, Jew, Protestant, whatever. I can't do that.

John Kerry, The Second Bush-Kerry Presidential Debate (Oct. 8, 2004), http://www.debates.org/pages/trans2004c.html.

[104] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

Perhaps when liberals (or the Court) profess to respect individuals' right to define personhood, they simply mean that they assume the good faith of those who hold such a view. If so, then these statements make a minimal point that is not necessarily inconsistent with rejecting legal personhood for embryos or fetuses. This minimal level of "respect" would presumably seem woefully inadequate to those who hold the opposing view. However, if instead liberals (or the Court) mean to suggest that they grant the validity or potential validity of these views, then the statements are disingenuous, if well-intentioned. Many moral questions may be left to individual interpretation and belief, but personhood in the abortion debate is too weighty an ethical concern to leave publicly unanswered. If we contemplate the killing of any other class of potential persons—slaves, for example—it is obvious that this moral question cannot be left to personal choice, and that declining to answer the question is just another way of answering it (by rejecting the belief). As Sandel points out, the Court's desire "to bracket the intractable controversy over abortion" is akin to Stephen Douglas's proposal "to bracket the intractable controversy over slavery—by refusing to impose a single answer on the country as a whole."[105] To argue for a right to abortion is effectively to reject claims of embryonic or fetal personhood.[106] Even Thomas Nagel, who argues (against Sandel) that liberals can successfully bracket questions about the morality of much conduct, including abortion,[107] seems to agree that one cannot bracket the ultimate question of fetal personhood and abortion without implicitly answering it, and that only lesser disagreements about the embryo or fetus's moral status can be bracketed.[108]

Liberals' asserted respect for claims of fetal personhood therefore does not withstand rigorous scrutiny. Moreover, in professing such respect,

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[105] Sandel, *Moral Argument*, *supra* note 28, at 532.

[106] It is akin to someone saying, "I respect your belief that taking blood into the body through the mouth or veins violates God's laws." *See* Watchtower.org, Blood—Vital for Life, http://www.watchtower.org/e/hb/article_01.htm (last visited Oct. 1, 2009). If a person then argues in favor of the availability of blood transfusions, she reveals that she in fact officially rejects that belief. She is saying, in effect, "It's fine with me if you hold that view, but please keep it to yourself."

[107] *See* Thomas Nagel, *Progressive but Not Liberal*, THE N.Y. REV. OF BOOKS, May 25, 2006, at 46–47 (reviewing MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS (2005)).

[108] *See* Nagel, *supra* note 9, at 57 (for one who holds the religious view that "abortion is as bad as killing a child," requirement of equal respect among citizens will likely be insufficient to persuade her that abortion must remain available).

liberals miss the opportunity to affirm the woman's moral agency and the fact that abortion is often a morally defensible and even laudable decision for a woman who finds herself with an unintended pregnancy.[109] Rather than seeing the legal right to abortion as accommodating and enabling moral agency on the part of women, and recognizing that women often choose abortion for morally good reasons, the liberal position simply claims that the law has no role to play in influencing women's moral choices. However, this has led to a perception of abortion as a selfish, morally bankrupt choice.

The same phenomenon has occurred in the context of same-sex intimacy and same-sex relationships. So long as those who claim to support such rights assert respect for the moral misgivings of those who do not, as many democratic legislators have,[110] their arguments appear weak and lack credibility.[111] An argument in support of same-sex relationships that is premised on a separation of law and morality asserts that—whatever one thinks of the morality of such relationship—the law has no place in governing them. But this view allows a perception of same-sex relationships as morally questionable, or even wrong, to persist. Ultimately, to argue for full equality for lesbians and gay men will require a direct challenge to the factual and moral validity of arguments against same-sex

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[109] *See* Caitlin Borgmann & Catherine Weiss, *Beyond Apocalypse and Apology: A Moral Defense of Abortion*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 40 (2003).

[110] For example, many liberal politicians express support for same-sex equality and yet make exceptions for marriage based on moral arguments against marriage equality. *See, e.g.*, OntheIssues.org, Hillary Clinton on Gay Rights, http://www.ontheissues.org/Domestic/Hillary_Clinton_Civil_Rights.htm#Gay_Rights (last visited Oct. 1, 2009) ("Marriage has historic, religious, and moral content that goes back to the beginning of time, and I think a marriage is as a marriage has always been, between a man and a woman."); OntheIssues.org, John Kerry on Gay Rights, http://www.ontheissues.org/2008/John_Kerry_Civil_Rights.htm#Gay_Rights (last visited Oct. 1, 2009) (When asked, "You also said that you believe the Defense of Marriage Act was fundamentally unconstitutional[?]" Kerry responded, "I was incorrect in that statement. I think, in fact, that no state has to recognize something that is against their public policy.").

[111] *See* Sandel, *Moral Argument*, *supra* note 28, at 532.

relationships[112] and a forthright defense of the moral worth of these associations and the appropriateness of affording them legal protection.[113]

On the other hand, if liberals genuinely respect the possibility that the embryo or fetus is a person, then their position to allow abortions is untenable. As scholars have pointed out, if one is personally unsure whether an embryo or fetus is a person—that is, if one thinks it is *possible* that it may be a person—then one cannot risk allowing abortion.[114] Imagine that a person is hunting in the woods. Suddenly she makes out an indistinct shape moving through the trees. She is unsure whether it is a deer or a person. Nearly everyone would agree that, given her uncertainty, she ought not to shoot at the object. If someone urged her not to shoot, it would not be reasonable for her to respond, "You may be right that it is a person. But it's just as likely to be a deer. Since I'm not sure either way, I'm going to shoot."[115] Frances J. Beckwith gives a different example to illustrate the same point:

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[112] *See* Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 33–37, 51–60 (2009); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1307–10 (2004).

[113] *See, e.g.*, Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371 (2002); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996).

[114] *See* Judith Jarvis Thomson, *Abortion*, BOSTON REV., Summer 1995, at 11–16, *available at* http://bostonreview.net/BR20.3/thomson.html (arguing that positions for and against fetal personhood are equally reasonable); *see also* Chemerinsky, *supra* note 17 (arguing same). This view has rightly been criticized by both supporters (e.g., Michael Sandel) and opponents (e.g., Frances Beckwith) of abortion rights. *See* Sandel, *Moral Argument*, *supra* note 28; Frances J. Beckwith, *Thomson's "Equal Reasonableness" Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185, 197 (2004). *But see* Michael Stokes Paulsen, *Dissenting*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 66, at 211. Oddly, Paulsen seems to assume that uncertainty about the embryo or fetus's status merely makes it *permissible* for the state to ban it (while if it is *clear* that it is human life, state *cannot* refuse to protect it.). Thus, Paulsen asserts that if there is "even a good basis for *believing* that the human fetus is a human life, then surely the state *may* protect that life," and its interest is compelling and trumps the woman's privacy and autonomy claims. Paulsen is inconsistent on this point, however. He argues that, even if the fetus is not a constitutional person, "surely there is a 'compelling' or 'subordinating' state interest in protecting human life, at all stages, from being killed by other human beings." *Id.* at 208. Paulsen also says that no conceivable liberty interest on the part of the woman could trump the state interest in protecting "human life from being killed." *Id.*

[115] Of course, this example poses no countervailing risk in the hunter's refraining from shooting. A person unsure of the embryo or fetus's moral status must weigh that uncertainty against the certainty of imposing pregnancy upon women against their will,

> Imagine the police are able to identify someone as a murderer with only one piece of evidence: his DNA matches the DNA of the genetic material found on the victim. The police subsequently arrest him, and he is convicted and sentenced to death. Suppose, however, that it is discovered several months later that the murderer has an identical twin brother who was also at the scene of the crime and obviously has the same DNA as his brother on death row. This means that there is a 50/50 chance that the man on death row is the murderer. Would the state be justified in executing this man? Surely not, for there is a 50/50 chance of executing an innocent person. Consequently, if it is wrong to kill the man on death row, it is then wrong to kill the fetus when the arguments for its full humanity are just as reasonable as the arguments against it.[116]

Like liberals, the Supreme Court cannot uphold the constitutional right to abortion without at least implicitly rejecting embryonic or fetal personhood.[117] The Constitution guarantees certain protections, including equal protection of the laws, to *all* persons. While the Court can bracket some—in fact most—moral questions under the Constitution, personhood is not one of them.[118] As Faigman points out:

> When life begins and when it ends must necessarily be decided as a matter of constitutional interpretation, because basic guarantees depend on it. . . . However much the Court might want to avoid

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making some women suffer health consequences, and so on. A closer analogy in the hunting context might posit that the hunter had been lost in the woods for days without food. However, a closer examination of countervailing concerns in the abortion context (as well as the hunting analogy) shows that solicitude for those concerns still does not justify the risk of taking a person's life. *See supra* Part I.B.

[116] *See, e.g.*, Beckwith, *supra* note 114, at 197.

[117] *See, e.g.*, FAIGMAN, *supra* note 100, at 14; STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 252–53 (1993); Sandel, *Moral Argument*, *supra* note 28, at 532; McConnell, *supra* note 35, at 1185–87; Chemerinsky, *supra* note 17, at 124.

[118] The Court could bracket the more limited question whether a state might recognize a particular group as "persons" for *state* law purposes even though the Court had rejected personhood for this group for federal constitutional purposes. For example, a state could define a cow as a "person" under state law. In such a case, the Court would still have to answer whether this recognition violated the constitutional rights of anyone recognized as a person under the federal Constitution. And in refusing to grant constitutional protection to cows, the Court itself would effectively reject bovine personhood.

> the question, or appear not to have to answer it, the definition of life, at least at the margins, is a subject necessarily inherent in the meaning of certain constitutional guarantees.[119]

If the Supreme Court were to consider a state law that permitted parents to kill their infants up to one year of age, the Court could not simply decline to answer whether such infants are "persons" protected by the Constitution. If the Court purported to bracket the question of infants' personhood, and at the same time declared a constitutional right of parents to kill their infant children, it would be clear to all that the Court had in fact decided, and rejected, the question of infants' personhood. Thus, when the Supreme Court confronted, first in *Roe v. Wade* and later in *Webster v. Reproductive Health Services*,[120] government assertions that the embryo or fetus is a person, it was forced to respond and implicitly did so (notwithstanding its protestations otherwise). As John T. Noonan claims, the Court's "professed agnosticism [in *Roe v. Wade*] as to when life begins is not a morally neutral position; it is a rejection of a fundamental postulate of the law the decision holds unconstitutional."[121]

Stephen L. Carter likewise argues that the liberal position on abortion amounts to denying that the fetus is a person. Carter contends that liberals' reliance on a modern version of John Stuart Mill's harm principle, which holds that one cannot impose moral judgments on others through the law except to prevent harm to others,[122] unfairly assumes what is to be proved—that the fetus is not a person that can be harmed.[123] Carter, who opposes abortion, claims that any fair argument in favor of the right to abortion must assume that the fetus is a person. "[T]he right to choose abortion, if indeed it survives, must be based on an approach that allows abortion *even if the fetus is human*—instead of an approach that denies that humanity under cover of the pretense that the definition is none of the state's business."[124] While Carter is right that a defense of the right to

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[119] FAIGMAN, *supra* note 100, at 14.

[120] 492 U.S. 490, 505 (1989) (interpreting statutory preamble, which provided that "[t]he life of each human being begins at conception," to have no effect on the provision of abortions in Missouri).

[121] John T. Noonan, *Posner's Problematics*, 111 HARV. L. REV. 1768, 1772 n.24 (1998) (footnote omitted).

[122] *See* JOHN STUART MILL, ON LIBERTY 13 (Gateway 1955).

[123] CARTER, *supra* note 117, at 255–56.

[124] *Id.* at 257.

abortion must address directly the question of personhood, his position is untenable. It cannot be that the government must assume the validity of every religious belief and can justify regulations only on grounds consistent with those beliefs. In a pluralistic society, the government must be able to reject some beliefs as unreasonable or implausible.[125]

II. DEBUNKING EMBRYONIC AND FETAL PERSONHOOD

A. Reevaluating Conservative Claims of Embryonic and Fetal Personhood

Opposing abortion on the grounds that it is murder is a fairly recent approach in the United States. Before the nineteenth century, the abortion debate in this country was not rooted in claims that the embryo or fetus is a person.[126] Abortion was not illegal in any state until 1821.[127] Early abortion laws were motivated, not by concern for the embryo or fetus, but by the medical profession's desire to protect its turf, as well as by nativist concerns that Catholic immigrants were procreating at higher rates than white Protestants.[128]

Interestingly, the shift toward viewing the embryo or fetus as a person marked an attempt to move *away* from rather than *toward* framing the debate in purely moral terms. As Kristin Luker explains, when nineteenth century physicians mobilized against abortion, they "shifted the focus of the debate from moral *values* to empirical *facts*," by asserting that they were newly in possession about facts regarding the development of the embryo and fetus.[129] Luker claims that nineteenth century anti-abortion-rights physicians, in order to differentiate themselves from the lay public,

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[125] *See supra* note 21 and accompanying text.

[126] *See, e.g.*, Jed Rubenfeld, *Concurring in the Judgment Except as to* Doe, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 66, at 113 ("The idea that a fertilized ovum is an independent human being fro/m the moment of conception is a relatively new one—medically, morally, and legally." (citing legal authorities)).

[127] RISEN & THOMAS, *supra* note 15, at 7.

[128] *See id.* at 8–9.

[129] KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 26 (Univ. Cal. Press. 1985). Luker claims that, in fact, there had long been basic medical knowledge that pregnancy was a continuous process that the late nineteenth-century physicians' "discoveries" were more "in the nature of technical additions to a generally accepted principle and were in any event made many years after American physicians mobilized against abortion." *Id.* at 25.

had to be the exclusive ones to see the embryo as a person. But this, she claims:

> [C]reated an unresolvable paradox for physicians, a paradox that would haunt the abortion debate until the present day. If the embryo is a full human life, as these physicians claimed, then abortion can never be morally right, even when undertaken to save the life of the mother; the Western tradition does not permit even physicians to "set aside one life for another." . . . But if abortion is never morally right, then nineteenth-century physicians had no grounds for claiming it as a medical issue that required their *professional* regulation.[130]

To acknowledge abortion as murder would require physicians to turn the issue over to their "competition," the clergy (regarding the moral implications) and lawyers (regarding the legal implications). In order to keep control over the issue, doctors "could not give up either half of the paradox."[131]

This conundrum continues today for conservatives arguing against abortion. Conservatives appeal to the public by suggesting that the embryo or fetus is a person, but their rhetoric is ultimately empty, as they are unwilling to accept the full moral consequences of equating embryos and fetuses with persons. The rhetoric of "life," "human being," and "motherhood," so frequently employed by opponents of abortion rights, is highly misleading. Yet, public discourse about abortion rarely demands clarification of these terms. For most listeners, a description of abortion as the taking of "human life" instinctively conjures up personhood. In keeping with the liberal approach, most listeners therefore simply assume that conservatives mean personhood when they talk about life, rather than engaging conservatives in a discussion about the ambiguity. But saying that the fetus is a "life" or even a "human being," or that the pregnant woman is a "mother" is not the same as saying that the fetus is a full, rights-holding person. Indeed, as this Article demonstrates, many conservatives approach the abortion debate in a way that suggests that this is not in fact how they view the embryo or fetus (or, at best, suggests that they are inconsistent in sometimes viewing the fetus a person and sometimes not).[132]

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[130] *Id.* at 31–32.

[131] *Id.* at 32.

[132] *See infra* Part I.B.

It is significant that even many adamant opponents of abortion rights, including Justice Scalia, "bracket" the question of personhood.[133] These conservatives do not argue that an embryo or fetus should be considered a person under the Constitution. Rather, they argue that each state should be permitted to decide the legal status of an embryo or fetus.[134] In *Carhart I*, Justice Scalia urged in dissent, "[F]or the sake of its own preservation, the Court should return [the abortion] matter to the people . . . and let *them* decide, State by State, whether this practice should be allowed."[135] Conservative Justices would leave the moral question of abortion for legislatures to decide, and liberal Justices would let women decide, but both are ways of attempting to bracket the question.[136] Noonan criticizes Judge Richard Posner for engaging in this kind of bracketing on abortion:

> Posner appears to take refuge in the controversial character of modern morals. . . . For him "[d]ifficult moral questions" must be "indeterminate." We have two cultures on abortion. Who can say which is right? That is Posner's question. But as far as present law goes, the Supreme Court has adopted the morals of the pro-abortion cause: legally, abortion is a liberty, a human good that can be limited only in peripheral fashion.[137]

Noonan is right to argue that the question of personhood cannot be left "indeterminate." Conservative Justices, no less than liberal Justices, are necessarily called upon to answer the question of embryonic and fetal personhood. Although the Court may choose to tread lightly in imposing moral judgments on society as a whole, personhood is fundamental not only to questions of morality but to the meaning of the Constitution and the

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[133] *See* DWORKIN, *supra* note 10, at 102 (noting that many of *Roe*'s "most sophisticated critics" argue "not that the Court's opinion on these great philosophical issues was wrong but that it had no business ruling on the matter at all, because the Constitution gives democratically elected state legislatures . . . the power to decide").

[134] In upholding the federal Partial Birth Abortion Ban Act, the conservative Justices also seemed to accept that Congress may assert interests in the fetus, although Justice Thomas concurred separately to note that the question of Congress's power to enact the ban was not before the Court. *See* Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 169 (2007) (Thomas, J., concurring).

[135] *Carhart I*, 530 U.S. at 956 (Scalia, J., dissenting).

[136] *See* Sandel, *Moral Argument*, *supra* note 28, at 532–33.

[137] Noonan, *supra* note 121, at 1172.

scope of its guarantees. Once this country was finally morally compelled to acknowledge the personhood of slaves, it would have been unacceptable for the Court (or the country) to dodge the question whether the Constitution protected them equally as persons.[138] In leaving unresolved the question of embryonic or fetal personhood, conservative Justices, like their liberal colleagues, implicitly deny that embryos and fetuses are persons.

The implicit denial of personhood among conservative Justices coincides with the policy positions of even the most conservative politicians. Conservatives who appear to hold restrictive views of abortion typically do not consistently treat the embryo or fetus as the moral equivalent of a constitutional person. They often profess a belief that personhood begins the moment a human egg is fertilized. Yet an examination of their policy positions suggests that few would grant an embryo all of the rights of a constitutionally recognized person. Instead, conservative politicians commonly adopt a contextual view of when abortion should be banned. Senator John McCain, for example, remarked at a news conference in 2000:

> After a lot of study, a lot of consultation and a lot of prayer, I came up with a position that I believe there *should be an exception for rape, incest or the life of a mother.* . . . [The abortion issue] is one of the most difficult and agonizing issues that I think all of us face, because of our belief—yours and mine—that *life begins at conception.*[139]

President George W. Bush likewise favored rape and incest exceptions—although McCain took him to task for refusing to advocate for formal changes to the Republican Party platform abortion plank, which does not mention rape, incest, or life-of-the-woman exceptions.[140] Rape and incest exceptions cannot be justified if the embryo or fetus is a person.[141]

The 2008 Republican Vice Presidential nominee, Governor Sarah Palin, apparently held a more restrictive position on abortion than her

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[138] *See supra* note 105 and accompanying text.

[139] Alison Mitchell, *The 2000 Campaign: The Infighting: McCain Faults Landmark Abortion Decision*, N.Y. TIMES, Jan. 22, 2000, at A10 (emphases added).

[140] *See* Teddy Davis, *McCain Poised to Flip on GOP Abortion Platform*, ABCNEWS.COM, May 9, 2008, http://abcnews.go.com/Politics/Vote2008/story?id=4824779.

[141] *See* DWORKIN, *supra* note 10, at 97; TRIBE, *supra* note 66, at 132; Borgmann & Weiss, *supra* note 109, at 42; *supra* Part I.B.; *infra* note 170 and accompanying text.

running mate, rejecting any exceptions for rape and incest.[142] Yet, when her teenage daughter faced an unplanned pregnancy and decided against abortion, Palin's press release emphasized her daughter's autonomy in the matter, remarking that Palin and her husband were "proud of Bristol's decision."[143] In a later interview, Palin described her own position on abortion as her "personal opinion,"[144] again implying that a person's views on the subject are properly a matter of individual choice.

The Republican Party's 2004 platform began with an extreme-sounding statement on abortion that appeared consistent with fetal personhood:

> [W]e say the unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make it clear that the Fourteenth Amendment's protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions.[145]

It is telling, however, that the party singled out "those who perform abortions." The platform's elaboration of the abortion plank made clear that only abortion providers should be punished:

> Our goal is to ensure that women with problem pregnancies have the kind of support, material and otherwise, they need for themselves and for their babies, not to be punitive towards those for whose difficult situation we have only compassion. We

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[142] Dawson Bell, *Views of VP Picks Examined; Palin, Biden in Spotlight for Stances on Abortion, Gun Rights*, DETROIT FREE PRESS, Sept. 14, 2008, at 15; *see also* Matt Volz, *All Three Candidates Support Gas Line Lawsuit*, ANCHORAGE DAILY NEWS, Nov. 3, 2006, *available at* http://www.adn.com/news/politics/elections/story/44943.html (quoting Palin that she would "choose life" over abortion if her daughter were raped).

[143] Dana Bash, *Palin's Teen Daughter Is Pregnant*, CNN.COM, Sept. 2, 2008, http://www.cnn.com/2008/POLITICS/09/01/palin.daughter. Defenders of the Governor similarly described the pregnancy as "a very private matter." *See id.* But if Palin's daughter were deciding whether or not to kill her newborn baby, the public would surely feel that it had a legitimate interest in how the incident was resolved.

[144] Michael Luo, *Working Mother Questions 'Irrelevant,' Palin Says*, N.Y. TIMES, Sept. 13, 2008, at A12.

[145] GEORGE W. BUSH, 2004 REPUBLICAN PARTY PLATFORM: A SAFER WORLD AND A MORE HOPEFUL AMERICA 84 (2004), *available at* http://www.gop.com/images/2004platform.pdf.

> oppose abortion, but our pro-life agenda does not include punitive action against women who have an abortion.[146]

Republicans' professed compassion for women who obtain abortions belies any claim that abortion is murder or that an embryo or fetus is a person. Surely, Republicans would not absolve a woman who solicited a person to murder her newborn baby, even if she did it out of desperation. In Texas, a woman who suffered from mental illness and drowned her five children narrowly escaped execution and is serving a life sentence.[147]

The Republican Party's confusion over the embryo's moral status and whether to punish women for abortion is shared by anti-abortion-rights protestors. A journalist interviewed protestors picketing outside an abortion clinic in Libertyville, Illinois, in the summer of 2007. He first asked individual protestors whether abortion should be illegal. Invariably, they averred that it should be, since it involves the taking of a human life. He then asked whether women should be punished for obtaining abortions. All of the protestors appeared surprised by the question and had no ready answer. When pressed, however, only one protestor thought women should do prison time for abortions (and even she hesitated, saying that many factors would first have to be "taken into consideration"). The others responded that the issue of punishment was between "the woman and her God," or that her "conscience" should guide her, or that the woman should be treated with love, compassion, and prayer.[148]

Like conservative politicians and abortion protestors, legal scholars who argue that embryos or fetuses are constitutional persons appear unwilling to accept the full import of this claim. Stephen L. Carter, for example, argues that to recognize a fetus as a person under the Fourteenth Amendment would not necessarily mean that abortion should be banned.

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[146] *Id.* The 2008 platform does not address as explicitly whether women should be punished for abortion, but it does declare, "We all have a moral obligation to assist, not to penalize, women struggling with the challenges of an unplanned pregnancy." GOP.com, 2008 Republican Party Platform: Values, http://www.gop.com/2008Platform/Values.htm (last visited Oct. 1, 2009).

[147] Timothy Roche, *Andrea Yates: More to the Story*, TIME, Mar. 18, 2002, *available at* http://www.time.com/time/nation/article/0,8599,218445,00.html. Similarly, Peter Singer's suggestion that it is morally permissible in some circumstances to euthanize humans, including infants and disabled adults, PETER SINGER, PRACTICAL ETHICS 175–217 (2d ed. 1993), has prompted stormy objections, *see, e.g.*, Neil MacFarquhar, *Protest Over Princeton's New Ethics Professor*, N.Y. TIMES, Sept. 22, 1999, at B7.

[148] *See* ATCenterNetwork.com, *Libertyville Abortion Demonstration* (July 30, 2007), http://www.youtube.com/watch?v=Uk6t_tdOkwo (last visited Oct. 1, 2009).

Carter points out that Robert Bork in his testimony opposing the Human Life Bill contended that the state could permit some abortions even if the fetus were deemed a person.[149] Carter himself disagrees with Blackmun's assertion in *Roe* that, "If this suggestion of personhood is established, the [pregnant woman's] case . . . collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[150] Carter points out that the amendment only forbids the *state* to deprive a person of life without due process of law and that the state may decline to prohibit murder if it chooses.[151]

This argument seems flawed. Since every state *does* prohibit murder, if embryos were recognized as persons, states that wanted to permit some abortions would have to rewrite their murder laws to make clear that abortion was exempted. But if embryos are persons, the Equal Protection Clause should protect them from this kind of a law. Surely, a state cannot prohibit murder for some persons but not others without running afoul of the Equal Protection Clause.[152] While it is true, as Carter points out, that states can punish the murder of peace officers more severely than the murder of other people, no state excludes an entire category of persons from its prohibition on murder. A law that punished murder but exempted the killing of the elderly, for example, would rightfully be struck down as unconstitutional.

Michael Stokes Paulsen, another scholar opposed to abortion, also hints that there may be some circumstances in which abortion should be permitted even if the embryo or fetus is a person under the Fourteenth Amendment. Paulsen argues that if a fetus is a Fourteenth Amendment person, then "this would defeat the asserted constitutional liberty of a woman and her doctor to choose to kill it (outside of some *extreme justification of tragic necessity*)."[153] Paulsen does not elaborate on the kinds of "tragic" facts that would justify an abortion. Yet the National Right to Life Committee has rejected the argument that any abortion could be justified as "necessary." Its Executive Director, David N. O'Steen, has declared, "A candidate who argues that legal abortion is 'necessary' is not a

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[149] CARTER, *supra* note 117, 252–53.

[150] *Id.* at 252 (quoting Roe v. Wade, 410 U.S. 113, 156–57 (1973)).

[151] *Id.* at 252–53.

[152] *See* Chemerinsky, *supra* note 17, at 112–13.

[153] Paulsen, *supra* note 114, at 208 (emphasis added).

pro-life candidate."[154] As discussed above, if a fetus is a person, virtually no abortion, even in tragic circumstances such as those involving rape or incest, qualifies as justifiable homicide.[155]

Acknowledging that the fetus is not the moral equivalent of a person does not necessarily entail viewing the embryo or fetus as a morally insignificant "lump of tissue," as abortion rights opponents frequently charge. For example, Ronald Dworkin, in *Life's Dominion*, argues that developing human life is sacred even before it attains the status of personhood.[156] Whether or not one finds this characterization of embryonic or fetal life convincing, there is room for a wide range of views about the moral value of a fetus. The importance of denying personhood, however, is that there is no longer an automatic, morally ironclad reason to deny a woman a right to abortion. If an embryo or fetus is a person, abortion is murder and must be banned.[157] If it is something morally significant, but short of a person, the answer is much less certain.[158]

Instead, one must now argue why the state's interest in something that is not a person must override a woman's own moral agency in the abortion decision. More specifically, abortion rights opponents must explain why abortion should be allowed in some contexts (for example, where the life of the woman is at stake) and not in others (for example, where the physical health, but not the life, of the woman is at risk, assuming these two circumstances can be neatly distinguished by a medical professional). Once fetal personhood is no longer the centerpiece of the moral discourse about abortion, a very different discussion can begin. This discussion gives more room for the complex moral dimensions of a woman's decision to enter the debate, in contrast to the liberal "bracketing" approach, which tends to avoid these issues.[159]

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[154] Steven Ertlet, *John McCain Says He Didn't Flip-Flop on Wanting Abortion Case Reversed*, LIFENEWS.COM, Feb. 20. 2007, http://www.lifenews.com/nat2941.html.

[155] *See supra* Part I.B.

[156] DWORKIN, *supra* note 10, at 68–70, 108–110.

[157] *See supra* Part I.B.

[158] DWORKIN, *supra* note 10, at 12–13 (arguing that an abortion opponent who concedes the fetus is not a person may still oppose abortion, but the discussion will be fundamentally different); *see infra* Part III.

[159] *See infra* Part III.

B. Conservatives' Misleading Rhetoric of "Life" and "Motherhood"

The term "life," and its variants "human life" or "human being," are slippery terms, and conservatives have skillfully exploited their ambiguities to suggest that the embryo or fetus is a person without committing fully to this view. Justice Kennedy used this kind of rhetoric to bolster his ruling upholding the federal abortion ban in *Carhart II*.[160] In a particularly controversial part of the opinion, Justice Kennedy wrote:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. . . . [I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[161]

The Court upheld the federal ban in part because it claimed that the Act prohibited a single procedure and could be safely circumvented by doctors providing abortions after the first trimester of pregnancy.[162] Thus, Justice Kennedy clearly did not intend to say that a woman was committing murder in having an abortion. In fact, he seemed to suggest that an embryo's moral status grows as it develops physically. But the words "infant life," "human life," "child," and "unborn child" call to mind not embryos or fetuses but babies. Kennedy's persistent references to the pregnant woman as a "mother" reinforce this perception. By invoking terms that suggest that abortion is murder, Kennedy appealed to a moral position that his own decision undermined: according to Kennedy, the Court's decision to uphold the ban would only steer physicians to other methods and would not prevent a single abortion from occurring.[163]

Like Justice Kennedy, President Bush discussed the federal ban in terms that evoked fetal personhood. In signing the ban, Bush asserted that

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[160] Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 158–59 (2007).

[161] *Id.*

[162] *Id.* at 150, 164–66.

[163] *See id.* at 186–87 (Ginsburg, J., dissenting).

"the most basic duty of government is to *defend the life* of the innocent. Every person, however frail or vulnerable, has *a place and a purpose in this world.*"[164] His language was jarringly misplaced given the legislation's stated purpose and instead seemed more appropriately directed at a total ban on abortions.

President Bush's use of the phrase "innocent human life" to describe embryos in other contexts has confused his own staff. Michael Sandel recounts an incident in which, upon vetoing a bill to fund embryonic stem cell research in 2006, President Bush said that the federal government should not sanction "the taking of innocent human life."[165] Tony Snow, the President's press secretary at the time, publicly interpreted this statement to mean that President Bush regarded destroying embryos as "murder." But the White House observed the public's negative response and later asserted that Snow had "overstated" the President's position. Sandel asks how it is that Snow could have overstated the case if an embryo is a person.[166] This highlights the difficulties posed by ambiguous language about "human life." To most listeners, the language means "person," but when pressed the speaker may disavow intending to invoke personhood.[167]

President Bush's use of the adjective "innocent" only adds to the confusion. Although "innocent" may mean "harmless," its more common meaning (and the one seemingly relevant here) is "free from sin or guilt" or "morally pure."[168] "Innocence" in this sense is an attribute of personhood, since only persons are capable of being morally wrong.[169] Bush's use of the

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[164] Press Release, The White House, President Bush Signs Partial Birth Abortion Ban Act of 2003 (Nov. 5, 2003).

[165] SANDEL, ETHICS & GENETIC ENGINEERING, *supra* note 85, at 103.

[166] *See id.*

[167] On rare occasions, a politician will more clearly indicate that she means "person" when referring to "human life." Senator Sam Brownback, for example, has said, "[A] human embryo . . . is a human being *just like you and me*; and it deserves the same respect that our laws give to us all." Michael J. Sandel, Op-Ed, *Embryo Ethics*, BOSTON GLOBE, Apr. 8, 2007, at E1 (quoting Senator Sam Brownback, Republican of Kansas) (internal quotation marks omitted) (emphasis added).

[168] THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1373 (1993).

[169] In fact, George Lakoff claims that, while conservatives view fetuses as "the most innocent people of all," GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T 169 (2003), they believe that all humans are born immoral, and it is the job of parents (especially fathers) to set standards of behavior and punish transgressions. *Id.* at 76.

term thus reinforces the impression that by "innocent human life" he means a person. But the use of "innocence" to describe the fetus is incongruous with the positions of many conservative politicians like Bush, who call for rape or incest exceptions to any ban on abortion. If embryos are "innocent," those that are the product of rape or incest are no less so. By insisting upon exceptions for rape or incest, conservatives instead seem more interested in the woman's perceived innocence (or guilt). A woman who is the victim of rape or incest is "innocent," in contrast with a woman who engages in consensual sex and who is considered morally culpable.[170] In oral arguments in *Roe v. Wade*, Justice White openly identified pregnant women as morally guilty. He asked counsel for Texas, Robert Flowers, "Well, if you're correct that the fetus is a person, then . . . the State would have great trouble permitting an abortion, would it?"[171] Flowers answered that it would, unless the woman's life was at stake, in which case "there would be the balancing of the two lives."[172] Justice White rejoined, "Well, what would you choose? Would you choose to kill the innocent one, or what?"[173]

The impression that conservatives view most women who seek abortions as guilty and worthy of punishment is reinforced by a comprehensive study of the abortion and child welfare policies in the fifty states.[174] One would expect that if abortion restrictions were really motivated by a belief in fetal or embryonic personhood, state laws restricting abortion would generally be accompanied by other child-protective laws. The study, however, showed the reverse. The states with the most restrictive abortion laws also spent the least to educate children, facilitate adoption, and provide assistance to poor children.[175] The study's author found that this apparent contradiction was largely explained by

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[170] *See* TRIBE, *supra* note 66, at 132; Borgmann & Weiss, *supra* note 109, at 42; *see also* DWORKIN, *supra* note 10, at 96–97 (discussing this and other possible bases for conservative support of abortion in cases of rape).

[171] Transcript of Oral Reargument, Roe v. Wade, 410 U.S. 113 (1973) (No. 70–18), http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument/.

[172] *Id.*

[173] *Id.* Flowers acknowledged that, by including a life exception, "in our statute the State did choose that way . . . [for t]he protection of the mother." *Id.*

[174] JEAN REITH SCHROEDEL, IS THE FETUS A PERSON?: A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 18–20 (2000).

[175] *Id.* at 153, 157.

hostility to women.[176] The more hostile statewide public opinion was toward women's equality, and the lower women's income was relative to men's, the more likely a state was to restrict abortion.[177]

These inconsistencies in conservatives' position on embryonic personhood have remained largely unexamined in the public debate. Politicians who dare to expose the logical consequence of treating an embryo or fetus as a person have faced vitriol from conservative commentators. Robert Novak chastised 2008 Republican presidential candidate Fred Thompson when Thompson rejected the Republican Party's abortion plank on the grounds that he opposed punishing women for abortions. Novak fumed:

> Fred Thompson was well into a prolonged dialogue about abortion on NBC's "Meet the Press" on Sunday when he said something that stunned social conservatives: "I do not think it is a wise thing to criminalize young girls and perhaps their parents as aiders and abettors." He then went further: "You can't have a [federal] law" that "would take young, young girls . . . and say, basically, we're going to put them in jail."[178]

Knowing that the Republican platform endorses a complete ban on abortions, one might at first believe Novak was outraged at Thompson's unwillingness to criminalize women's own conduct in seeking abortions. But Novak continued:

> Those comments sent e-mails flying across the country, reflecting astonishment and rage from pro-life Republicans who had turned to Thompson as their best presidential bet for 2008. No serious antiabortion legislation ever has included criminal penalties against women who have abortions, much less their parents. *Jailing women is a spurious issue* raised by abortion rights activists. Interviewer Tim Russert did not bring it up in his questioning. What Thompson said could be expected from NARAL Pro-Choice America.
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> Thompson's comments revealed an *astounding lack of sensitivity about abortion*. . . . Whether the candidate just blurted out his

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[176] *Id.* at 161–62.

[177] *Id.* at 159–62, 164.

[178] Robert D. Novak, *A Major Abortion Blunder*, WASH. POST, Nov. 8, 2007, at A27.

> statement or had planned it, it suggested a failure to realize how much his chances for the Republican nomination depend on social conservatives.[179]

Novak repeatedly berated Thompson in the column for his failure to support, as the Republican Party's plank does, "a 'human life' constitutional amendment banning all abortions."[180] But it was not clear what angered Novak more: that Thompson declined to endorse the amendment, or that Thompson had flagged the inconsistency in Republican support for a total ban (on the grounds that abortion is tantamount to murder) while refusing to criminalize the woman's conduct. Novak referred derisively to the issue of punishing women as "the criminalization chimera,"[181] an issue, he claimed, that interests only pro-choice advocates and politicians. Yet if a fetus is a person, then why should the woman be exempt from punishment? Novak offered no explanation.

The apparent accepted wisdom (fervently endorsed by Novak) that Thompson should have sidestepped the issue of punishing women for abortion reveals conservatives' discomfort in squarely addressing the proposition that an embryo is a person. When Novak referred to Thompson's "astounding lack of sensitivity" regarding the abortion issue,[182] he did not appear to mean that Thompson failed to appreciate the embryo's personhood (and thus the moral gravity of abortion). Rather, Thompson failed to appreciate the landmine that the issue presents for conservatives. That is, by piercing through the ambiguous terminology of "life" and challenging conservatives to live up to their rhetoric, Thompson was insensitive to the awkward position in which he placed social conservatives. Novak knew that conservatives cannot reconcile their support for an abortion ban with their demand that women's conduct be exempt.[183]

While it is perhaps not surprising that politicians and pundits should employ vague and misleading verbal tactics in arguing against abortion rights, scholars opposed to abortion rights have also traded on the rhetoric

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[179] *Id.* (emphases added).

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Novak's reaction is consistent with George Lakoff's observation that conservatives use "Orwellian language—language that means the opposite of what it says"—when their positions are vulnerable and "they cannot just come out and say what they mean." LAKOFF, *supra* note 35, at 22.

of "life." Michael Stokes Paulsen's dissenting opinion in Jack Balkin's book, *What* Roe v. Wade *Should Have Said*, is replete with ambiguous, yet emotionally laden, rhetoric that gestures at embryonic personhood. For example, Paulsen writes:

> Recognition of the *humanity of the fetus* would appear sufficient to trump the claimed right to abortion in all but the most limited circumstances of true medical necessity. . . . [I]f the human embryo or human fetus is a *living human being*, it becomes virtually impossible to justify a constitutional right of certain individuals to kill that human being whenever they so choose. . . . The essential question . . . is whether the fetus is a *living human being*.[184]

Similarly, he writes, "[T]he question on which every other aspect of *any* legal analysis necessarily depends—is whether the unborn human fetus or embryo is a *member of the human family*, to whom the state *may*, or perhaps *must*, provide basic protection of the laws, including protection of his or her right to life. . . ."[185]

Paulsen never clarifies whether by "human life" he means "person." He does not seem consistently to view an embryo as a person, since he appears unsure whether a state "may or must" protect fetuses as fully as it protects persons.[186] He claims it is not necessary to equate "human life" with "person" in order to for the state's interest in the fetus to trump any right held by the woman.[187] However, Paulsen does not justify why abortion must be prohibited if "human life" does not mean "person." If an embryo or fetus is not a person, then abortion is not as extreme as murder. The embryo may have moral significance, but the state allows people to make decisions about countless morally weighty issues, even where the lives of persons

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[184] Paulsen, *supra* note 114, at 207 (emphasis added).

[185] *Id.*

[186] In an earlier article, Paulsen seems more clearly to identify embryos as persons, calling abortion a moral evil equivalent to the Holocaust and "at least as" significant as slavery. *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 49, 76–77 (1989). But, even in this article, he does not clearly condemn potential "justifications" for abortion, including "rape, incest, health of the mother, [and] emotional distress," that are inconsistent with viewing an embryo or fetus as a person. *Id.* at 48; *see also supra* Part I.B.

[187] *Id.* at 210–11.

hang in the balance.[188] Paulsen could argue that the law does sometimes prohibit immoral conduct, such as animal abuse, not directed at persons. But, in the abortion context, there is a heavy countervailing weight—namely the woman's interest in liberty and bodily integrity—that Paulsen does not account for.

As becomes clear when one attempts to grapple with Paulsen's argument, it is virtually impossible to engage in a coherent discussion with someone relying upon ambiguous terms like "life" without first clarifying what these terms mean. If one simply concedes that an embryo or fetus is a "living human being," Paulsen appears to think he has won the argument, but his terminology begs the question what it means that the person is a "living human being." The *biological* fact that an embryo or fetus is human simply does not answer the *moral* (or legal) question of whether and when it is to be accorded some or all of the rights of a person.

Because conservative politicians, political commentators, advocates, and scholars alike tend to use terms that evoke personhood in a confusing and often deceptive way, the discourse deserves careful examination. "Life" as employed by abortion rights opponents is a "thin" use of the word. To the extent it is rooted in fact, it refers to the fact that a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person. Because abortion opponents want their view to be accepted as not necessarily tied to religious doctrine, they typically do not elaborate on the religious significance of this life, for example, that at a certain point it is ensouled.[189] Their claim that the fetus is a "life" is thus a minimal assertion that does nothing to clarify the debate over abortion. There is no moral agency involved, nor even any awareness, at most stages of fetal development. Even doctors who provide abortions would not deny that a growing fetus is "living."[190] And all would agree that the living fetus is of the human species.[191]

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[188] *See infra* Part III.

[189] *See, e.g.*, SCHROEDEL, *supra* note 174, at 18–20 (summarizing historical, philosophical, and theological theories about moral status of the fetus, including the concept of ensoulment).

[190] *See, e.g.*, R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 295 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001); Planned Parenthood, Inc. v. Miller, 30 F. Supp. 2d 1157, 1165 (D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1033 (W.D. Ky. 1998), *aff'd*, 224 F.3d 576 (6th Cir. 2000).

[191] As Paulsen points out, since "a human embryo . . . is clearly *life*, and it is clearly *human* life," the term "potential life" is nonsensical when used to describe a living human fetus. Paulsen, *supra* note 114, at 207.

This use of "life" stands in stark contrast to the life of a woman seeking an abortion, a woman whose own life is almost wholly disregarded in conservative rhetoric against abortion. Conservatives tend to ignore the "thick" conception of life that captures each particular pregnant woman's life in all its multi-layered complexity.

> Those who oppose abortion often use a process of visualization to stir people's emotions. Yet what they ask us to visualize is an isolated picture of a fetus. Where is the person who develops, nurtures, and sustains the fetus we are looking at? Where is the woman? In this vision, she is insignificant, devalued. When a woman does somehow momentarily enter our view, she is rendered translucent, a ghost of a real person.[192]

A pregnant woman is situated in a time and place that is shaped by the narrative of her life and that is infused with moral obligations and aspirations, relationships, practical commitments, and religious and moral beliefs. She has experienced pleasure and pain, joy and sorrow, triumph and defeat. Along the way, events out of her control have shaped her life, but she has also helped to shape it. She may be a college student who is determined to pursue a particular career before or instead of becoming a mother. She may be a teenage victim of forcible incest who nonetheless managed to find her way to an abortion clinic. She may already be a mother of several children who knows that she cannot continue to provide a good life for her family if she bears another child. The conservative rhetoric wholly ignores—or, worse, trades upon—these deeper aspects of the term "life."[193]

When conservatives concede the permissibility of a "life exception" for the woman in abortion regulations, they again ignore the complexity of real women's lives. What does it mean to save a woman's "life," in the context of an untenable pregnancy? In the nineteenth century, nearly all abortion prohibitions included a "therapeutic exception" allowing abortion when a physician determined it was necessary to preserve a woman's life. Most laws gave doctors unlimited discretion in deciding whether the exception was met. As Kristin Luker explains, no laws defined precisely when a woman's "life" was at stake: "For example, must the threat be

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[192] TRIBE, *supra* note 66, at 136.

[193] *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 163, 236–37 (1980) (explaining that the ways we categorize things highlight certain properties while downplaying or hiding others, and asserting that in politics these categories "matter more, because they constrain our lives").

immediate or can it be long term? Similarly, they did not specify the confidence level needed. Must the pregnancy be an unquestionable threat to maternal life, or could the threat be only probable?"[194]

Luker suggests that the ambiguity in the term "life" was deliberate. Life could mean "physical life in the narrow sense of the word (life or death)," or it could mean "the social, emotional, and intellectual life of a woman in the broad sense (style of life)."[195] "Thus," Luker explains, "'saving the life' of the mother may mean saving her only from imminent death, or it may mean protecting the process and quality of her daily life."[196] Luker claims that even anti-abortion-rights physicians performed abortions for both of these reasons,[197] and that many such physicians—as evidenced by articles on abortion in the Index Medicus—in the period 1900-1960 performed abortions under "life" exceptions for reasons including rape, maternal health or fetal indications, and even economic or "social" reasons.[198] This suggests both that nineteenth-century anti-abortion-rights physicians had a broader conception of "life" as it pertains to the woman than social conservatives do today, and that they "never believed that embryos had an absolute right to life."[199]

However, the contemporary conservative view of what it means to include a "life exception" for the woman has clearly narrowed. It no longer encompasses the kinds of social circumstances Luker describes. It does not include whether a pregnancy was caused by rape or incest. Nor does it include physical health risks to the woman that are short of life-endangering. Conservatives' diminished view of what a "life" exception means is evidenced by their adamant opposition to health exceptions in

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[194] LUKER, *supra* note 129, at 33.

[195] *Id.* at 34. *See also* Doe v. Bolton, 410 U.S. 179, 192 (1973) (finding that doctor's medical judgment that abortion is "necessary" "may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient") (internal quotation marks omitted).

[196] LUKER, *supra* note 129, at 33.

[197] *Id.* at 33–34.

[198] *Id.* at 46–47.

[199] *Id.* at 33–35. Thus, Luker claims, while these physicians were making the "unprecedented claim" of an absolute right to life for an embryo or fetus, in practice they treated the embryo's right to life as conditional. The core of their movement was really about assigning to doctors the "social responsibility for assessing the conditional rights of the embryo against the woman's right to life." *Id.* at 35.

abortion legislation.[200] In South Dakota, for example, a debate has raged over whether an abortion ban must include not only a life exception but one for rape, incest, and the woman's health.[201]

Conservatives' use of the term "mother" is as thin as their references to "life." To the extent conservatives do look at the woman's life, they see her only as either embracing or rejecting motherhood.[202] They view it as women's natural calling to be mothers.[203] An anti-abortion-rights strategy memo proclaims that "abortion destroys the most important liberty interests women have in life."[204] Of course, for women who do not feel a maternal impulse to the embryo or fetus or who have no desire to be mothers, now or ever, this label is falsely applied. Even for women to whom the concept of motherhood is applicable in some way, the conservative conception of "motherhood" is an impoverished one, for it looks only at the narrow snapshot of a pregnant woman and her fetus up to the point of birth. Abortion is portrayed as posing a binary set of choices: either the woman ends the pregnancy and rejects motherhood or she carries to term and embraces it.

Justice Kennedy, for example, suggested in *Carhart II* that the question for all women facing unintended pregnancy is whether to heed the ultimate calling to be mothers or whether to do violence to that calling (at

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[200] *See* Jim Kuhnhenn, *Obama: Mental Distress Can't Justify Late Abortion*, ASSOCIATED PRESS, July 3, 2008, *available at* http://www.huffingtonpost.com/huff-wires/20080703/obama-abortion/ (stating that health exceptions are "considered a legal loophole by abortion opponents").

[201] When the South Dakota legislature enacted an abortion ban in 2006 that lacked these exceptions, the public rejected the ban as too extreme. *See* Davey, *supra* note 48. In November 2008, voters rejected a newly drafted ban that included these exceptions. *See* Sharples, *supra* note 48; *see also infra* Part III (discussing South Dakota voter ambivalence over narrowly defining circumstances under which abortions should be permitted).

[202] In support of an ultimate goal to ban all abortions, an anti-abortion-rights strategy memo declared, "We must now debate . . . the destruction of the rights, interests and health of the children's mothers." Casey & Cassidy, *supra* note 23, at 14.

[203] *See, e.g.*, Siegel, *New Politics*, *supra* note 35, at 992, 999–1000 (describing the sex stereotypes that underlie abortion regulations, such as the belief that restrictions protect "the mother's fundamental natural intrinsic right to a relationship with her child"); *see also* Gonzales v. Carhart (*Carhart II*), 550 U.S. 124, 184–85 (2007) (Ginsburg, J., dissenting) ("This way of thinking reflects ancient notions about women's place in the family and under the Constitution . . . that have long since been discredited.").

[204] Casey & Cassidy, *supra* note 23, at 10.

great risk to their mental stability).[205] However, far from giving regard to a pregnant woman's life, such a romantic, idealized characterization of pregnant women as mothers snatches away the full picture of each particular woman's life and replaces it with an artificial and one-dimensional construct. The real complexities of motherhood are obviously not captured by this binary approach. It ignores the lifelong, irrevocable effect that motherhood has on a woman's future. It ignores the fact that the woman may already be a mother to existing children. It ignores the young woman who plans to be a mother in the future and knows that she must complete her education and grow more mature before she can be the kind of mother she aspires to be. It ignores the woman who cannot bear the thought of carrying and giving birth to her own child if she is unable to parent it.

Just how thin the conservative concept of motherhood is becomes apparent when one remembers that—if a pregnant woman or girl determines she is not fit or prepared to be a mother—conservatives blithely suggest that she should give birth anyway and give up her baby for adoption.[206] What happens to the "bond of love" a woman supposedly has to the "infant life she once created and sustained"[207] when she must relinquish her child? Why does it not seem "unexceptionable to conclude [that] some women come to regret their choice" to bear a child they cannot raise?[208] Indeed, conservatives' disingenuous, thin invocation of

[205] *See Carhart II*, 550 U.S. at 158–59.

[206] *See* Siegel, *The Right's Reasons*, *supra* note 51, at 1678–79 & n.122; *see also* Katherine C. Sheehan, *Toward a Jurisprudence of Doubt*, 7 UCLA WOMEN'S L.J. 201, 209 (1997).

[207] *Carhart II*, 550 U.S. at 159 (discussing pregnant woman's "bond of love" with her embryo and her assumed regret over choosing abortion).

[208] *Id.*; *see* DWORKIN, *supra* note 10, at 103–04. *The Girls Who Went Away*, a book which presents the oral histories of dozens of women who surrendered their babies for adoption at a time when abortion was illegal, poignantly conveys the anguish, guilt, and emotional loss these mothers experienced. *See generally* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006); *and* Sheehan, *supra* note 206, who notes:

> A woman who gives up her baby for adoption is nonetheless a mother of that child. . . . To give her baby up, a mother must either prevent herself from coming to know the person she is so intimately creating, or establish and then attempt to sever the bond between them. . . . Adoption can appear to be a solution to the problem of coerced motherhood only by trivializing the impact of involuntary pregnancy on the physical integrity and psychological well-being of the mother.

motherhood sets women up for a lifetime of guilt when, having surrendered their babies for adoption, they later realize they have violated our culture's entrenched "ideal form of motherhood in which maternal presence has become the essence of good mothering."[209] These women must face a fierce cultural condemnation of maternal separation, which is seen as justified only by the most desperate circumstances:

> The notion of separation as maternal sacrifice and as a decision of last resort remains vigorous today. Mothers who fail to separate when conditions call for it—or, the more common occurrence in present times, mothers who separate when conditions do not—are regarded as misguided, selfish, unnatural. . . . Separating from one's child—even temporarily, even for sensible reasons—is now often viewed as the worst thing a mother can do. It is often taken as proof that she is not a good mother at all and should not be allowed to resume the status she has abandoned. Thus mothers who voluntarily place children in foster care often find it difficult to retrieve them and mothers who put children in day care while they work or study may lose custody of them in a subsequent divorce.[210]

"So," one might respond to all this, "there are thick and thin conceptions of the terms 'life' and 'motherhood.' Why is it so objectionable for conservatives to use the thin conceptions of these terms?" The answer is that conservatives exploit the widely held *thick* conceptions of these terms in order to claim the moral high ground and gain sympathy in the abortion debate, even as they can only commit to the *thin* versions. They thus employ a kind of bait and switch: they know that when they invoke the words "life" and "mother," they instinctively conjure up for people the richer conceptions of these terms. To promote life in its thick sense carries a moral urgency and legitimacy. To be for motherhood in its thick sense is

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Id. at 209 n.20.

[209] Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 378 (1996).

[210] *Id.* at 377 (internal citations omitted); *see also* Sheehan, *supra* note 206, at 209 n.20 ("[T]he same social conditioning that produces unwanted pregnancy stigmatizes women who give up their children[.]") (citing ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993)). Social condemnation of maternal separation is not consistently applied across race and class lines, however. As Sanger points out, far from being reviled for decisions to separate from their children, poor women are often expected to do so. Sanger, *supra* note 209, at 385.

morally praiseworthy. When conservatives misleadingly use the term "life" in this way, they betray our trust.[211]

Two ads run by conservative and liberal groups respectively on the abortion issue are revealing in how they employ the term "life." The conservative ads were commissioned by the DeMoss Foundation in the early 1990s and bore the tag line, "Life. What a Beautiful Choice."[212] As one reporter described them:

> The commercial spots themselves were deliberately uncontroversial, going for gorgeous Reagan-era images of happy kids and unharried parents rather than the more familiar anti-choice portrait of gored nine-month "fetuses." They associated joy, family and fulfillment with the antiabortion position. The word "abortion" was never uttered; the American "value" of life was.[213]

The videos thus traded on a thick conception of life, rooted in human interactions and loving relationships, and avoided the more accurate thin conception of life the conservative position implicates, namely that of an embryo or fetus growing within the uterus. It did not escape liberals that the ads were trading insincerely on thick conceptions of "life." One advocacy organization tried to reclaim the term with a commercial spot that invoked similar imagery and spoke of women's autonomy to make moral choices, closing with the question, "What's life without choice?"[214]

Conservatives would like to have us believe that to forbid abortions will lead to a greater appreciation of babies, children, and family relationships. But their political positions do nothing to further the thick conceptions of life that they invoke. As Reva Siegel points out, we have reason to be concerned about many of the "life constraints" that shape not only women's decisions about abortion but also other important decisions

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[211] *See* LAKOFF, *supra* note 35, at 77 (explaining how disingenuous framing of political issues amounts to betrayal of public trust).

[212] David Van Biema, *Who Are Those Guys?*, TIME, Aug. 1, 1999, *available at* http://www.time.com/time/magazine/article/0,9171,991686,00.html.

[213] Jennifer Baumgardner, *The Pro-Choice PR Problem*, NATION, Mar. 5, 2001, at 19.

[214] Press Release, The Henry J. Kaiser Family Foundation, NARAL Launches New Abortion Rights TV Ad Campaign (Jan. 5, 2001), http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=2054.

such as whether to accept a particular job or to get married. But, she contends:

> Blanket restrictions on abortion are not designed to address these concerns. They violate the dignity of women who are fully competent to make decisions, and do absolutely nothing to help women who are subject to coercion or mental confusion, or to alter the pressures on women who have decided ending a pregnancy is the best choice under the life circumstances and institutional arrangements in which they find themselves.[215]

The term "life" is sufficiently vague to lull the public, however, so that the discrepancies between conservatives' rhetoric and their positions go largely unnoticed. It allows conservative politicians to court voters on both sides of the abortion issue. For conservative voters, "life" is a code word; the presidential candidate who says he wants to promote a "culture of life" signals to conservative voters that he opposes abortion.[216] At the same time, to promote a "culture of life" sounds appealing even to liberals. Who can be against promoting a "culture of life," especially if one has in mind the thick sense of the word? It is only by engaging in a direct dialog over the meanings of these terms that their misleading nature is revealed and a more forthright and fruitful debate about abortion can be had.

III. ADVANCING A SERIOUS MORAL CONVERSATION ABOUT ABORTION

Exposing the insincerities and confusions in the rhetoric of "life" and "motherhood" in the abortion debate frees up the debate from a vague, yet often unquestioned, tie to embryonic or fetal personhood. It helps to clear up what is—and is not—at stake when the state outlaws or regulates abortion. A conservative who does not in fact consistently view the embryo or fetus as a rights-holding person must justify why particular exceptions and not others are permissible, for example. This is not to say that a conservative might not still strongly believe abortion should be banned. But, if that conservative also asserts that there should be rape and incest exceptions, she will have to justify the inclusion of these particular

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[215] Siegel, *Dignity*, *supra* note 35, at 1796.

[216] *See* LAKOFF, *supra* note 35, at 85.

exceptions without a generalized appeal to the need to protect "human life."[217]

Perhaps the conservative will claim that pregnancies caused by rape and incest are particularly traumatic for the woman, and that in such cases the state's interest in developing human life does not outweigh the woman's interest in ridding herself of the traumatic pregnancy.[218] This claim must then be measured against the many other traumatic circumstances in which women seeking abortions may find themselves. For example, are exceptions solely for life, rape, and incest fair if they exclude a woman carrying a much-wanted pregnancy who suddenly discovers that her fetus has a fatal anomaly, such as Tay-Sachs disease? What if a single mother of two learns that carrying her pregnancy to term will render her blind?[219] What of a woman who suffers from schizophrenia or severe depression? The conservative view of abortion aims to have the law embody a particular moral view about abortion. But, because the conservative position lies on one extreme of the spectrum, and because the law must draw clear lines, the conservative approach cannot take account of the moral complexities of women's lives and the realities of the public's perception of the fetus's moral status.[220]

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[217] Judge Michael McConnell, for example, has argued that abortion rights opponents might support exceptions for rape and other circumstances and that such support would depend, "in part, on questions of excuse, justification, compassion (most pro-lifers view the aborted woman as co-victim), degrees of moral culpability (often, in this context, ambiguous), appropriateness of the criminal sanction, and prudence." McConnell, *supra* note 35, at 1194.

[218] Such a scenario recently played out in Brazil, where doctors provided an abortion to a nine-year-old rape victim who was fifteen weeks pregnant with twins. Alexei Barrionuevo, *Amid Abuse in Brazil, Abortion Debate Flares*, N.Y. TIMES, Mar. 27, 2009, at A1. The abortion set off a fiery controversy within the Catholic Church. A Brazilian Archbishop excommunicated the doctors and others involved in the abortion, declaring that "while rape was bad, abortion was even worse." *Id.* The Vatican at first appeared to support the Archbishop's response. *Id.* A public uproar ensued, and a conference of Brazilian Bishops later overruled the excommunications. The Vatican also revised its position, with its top ethics official conceding that the "credibility of our teaching took a blow as it appeared, in the eyes of many, to be insensitive, incomprehensible and lacking mercy." *Id.*

[219] *See, e.g.*, Tysiąc v. Poland, 219 Eur. Ct. H.R. (2007) (A woman sued the Polish government for damages after being denied a "therapeutic" abortion where she already had two children, was on public assistance, and where the pregnancy threatened her eyesight and ultimately left her legally blind. The Court found that the government had violated Article 8 of the European Convention on Human Rights and awarded the woman €25,000 for pain and suffering and €14,000 in legal fees.).

[220] When pressed in the 2000 campaign on the inconsistency between his assertions that "life begins at conception" and his support for abortion in cases of rape and

Although conservative voters often profess support for laws limiting the availability of non-life-saving abortions to cases of rape and incest, one state's experience casts doubt on the likelihood that voters would ultimately accept such laws. In 2006, the South Dakota legislature enacted a ban on abortions that included only a narrowly drawn exception for women who would die if denied an abortion.[221] When this ban was presented to voters through a ballot initiative, the measure was defeated. Opinion polls suggested that voters found the ban too extreme because it lacked exceptions for rape, incest, and the woman's health.[222] Such exceptions were added in a second attempt to pass a ban in 2008,[223] but voters again decisively rejected the measure.[224] It seemed that once the exceptions were codified, voters lost their stomach for the ban altogether. The South Dakota experience demonstrates the difficulty of settling upon certain limited situations that merit abortions, defining those contexts with particularity, and determining the appropriate penalty. The public may seem comfortable in the abstract with laws that dictate the circumstances under which women may have abortions, but when it comes to drafting actual legislative intervention, the endeavor becomes unacceptably difficult and distasteful.[225]

The liberal view of abortion, on the other hand, carries its own difficulties. In contrast with the conservative view, the liberal approach

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incest, Senator John McCain seemed to acknowledge the impossible complexity of adjudicating the individual circumstances that might justify abortion. McCain commented, "'I can tell you that this is a Talmudic discussion and one that goes on for hours and hours and hours and hours. . . . We have to make decisions in life, and we have to balance one thing against the other." Mitchell, *supra* note 139, at A10.

[221] H.B. 1215, 81st Sess., Leg. Assem. §§ 2 & 4 (S.D. 2006).

[222] Nicholas Riccardi, *Revamped Abortion Ban May Have a Chance: South Dakota Measure is a Version of a 2006 One but Has Exceptions for Rape and Incest*, L.A. TIMES, Oct. 27, 2008, at A6.

[223] *Id.*

[224] Nicholas Riccardi, *Initiatives to Curb Abortions Defeated: South Dakota Measure Aimed at Causing High Court Review of* Roe vs. Wade *Loses. Gay Marriage Bans Win*, L.A. TIMES, Nov. 5, 2008, at A18.

[225] Polling on abortion corroborates that rape and incest exceptions alone do not sufficiently capture the scenarios in which the public finds abortion justified. In a 2007 poll by Fox News and Opinion Dynamics, a majority responded that abortion should be legal when needed to protect a woman's mental health or when the fetus has a "fatal birth defect." FOX News/Opinion Dynamics Poll. Oct. 23–24, 2007, http://www.pollingreport.com/abortion.htm (last visited Oct. 1, 2009).

tends to treat the moral complexities of the abortion issue as operating in a sphere wholly separate from the law regulating abortion. Consequently, its defense of the right is unnecessarily weak. It gives a free pass to conservatives who speak ringingly of life and motherhood, but whose positions do not live up to their rhetoric. Moreover, it invites criticisms of the right to abortion as a right borne of selfishness and moral bankruptcy. While the conservative position simplifies discussions of abortion into ultimately untenable, black-and-white platitudes about "life" and "motherhood," liberals' unwillingness to engage in a discussion of the moral dimensions of the embryo or fetus strikes many abortion opponents as dismissive. As Judge Michael McConnell has argued, "Rawls's own dismissal of the pro-life position as 'unreasonable' and not requiring further discussion is a sobering example of a secular 'close out'—not different, in principle, from those who say, 'The Bible says it, I believe it, and that resolves it.'"[226] Laurence Tribe completely missed this point when he criticized *Roe* for "needlessly insult[ing] and alienat[ing] those for whom the view that the fetus is a person represents a fundamental article of faith or a bedrock personal commitment."[227] Tribe suggested that the Court should have declared abortion to be constitutional "even if the fetus *is* a person."[228] But Tribe's suggested approach is more insulting (to conservatives and to liberals) than direct engagement on the question of fetal personhood. It suggests that abortion rights rest upon a bankrupt moral view that would allow a woman to kill her own child.

Liberals, like conservatives, need to appeal to public reason on abortion. This means acknowledging the moral significance of the abortion decision, rather than professing agnosticism. The view that seems most consistent with other considered ethical norms is a gradualist view of human life.[229] At its earliest stages, human life is morally significant, but not sufficiently so to outweigh other important moral interests. This explains our wariness over embryonic stem cell research, yet accommodates the common view that such research is permissible when aimed at alleviating human suffering and curing disease. It also explains our

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[226] Michael W. McConnell, *Religion and the Search for a Principled Middle Ground on Abortion*, 92 MICH. L. REV. 1893, 1896 (1994) (book review).

[227] TRIBE, *supra* note 66, at 135.

[228] *Id. See also supra* Part I.B (citing other scholars who argue same point).

[229] *See generally* DWORKIN, *supra* note 10; Sandel, *Moral Argument*, *supra* note 28, at 532; Margaret Olivia Little, *Abortion and the Margins of Personhood*, 39 RUTGERS L.J. 331, 333 (2008).

acceptance of the creation of embryos, most of which will never be used, in order to allow couples to reproduce when it would otherwise not be possible. And it explains why early miscarriages, while no doubt often traumatic, are not viewed as the equivalent of losing a child (no funeral is held, for example). Fetuses late in pregnancy are viewed with far greater moral regard than embryos, but even in these circumstances the most ardent abortion opponents believe the woman's life takes precedence.[230]

To view human life as intrinsically valuable does not mean abortion must be prohibited, however. The question remains how to weigh human life that has not yet reached the moral status of a person against a woman's interest in ending an unwanted or untenable pregnancy. Abortion is one of many morally significant decisions that adults make throughout their lives. These decisions may implicate the wellbeing, and even the life or death, of others. Parents leave children out of their wills. Children neglect to care for aging parents. A sister refuses to donate blood to her brother, although both share a rare blood type. While some of these decisions may seem selfish and morally indefensible, we do not presume that the state is in a better position to make them. We understand that these kinds of moral decisions are too complex and nuanced for the law to address. We accept that moral autonomy comes at the cost of occasional moral missteps.

Abortion is no different. Unintended pregnancy poses a nuanced moral question that the law is simply too crude and clumsy to answer.[231] A woman's interest in ending an unwanted pregnancy weighs heavily on the other side of the balance. Her interest may well be influenced by moral concerns that most would agree justify ending her pregnancy, such as regard for her existing children, the desire to preserve her own health, or the hope of finishing school in order to escape a life of poverty. Her bodily integrity is also at stake. Some say that to force unwanted pregnancy upon any woman, regardless of her circumstances, is a moral harm far worse than the destruction of an embryo or fetus, while others vigorously disagree.

Abortion is far from unusual in posing these kinds of nuanced choices. We make similar moral choices in deciding to undergo fertility treatments, knowing that a multiple pregnancy is likely and puts each fetus at greater medical risk. We decide to bear more than one child, knowing

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[230] *See supra* Part II.A.

[231] The Canadian experience is illustrative. Canada formerly permitted abortion only for therapeutic reasons. But the law became so difficult to apply that the criminal ban was eventually declared unconstitutional. *See* Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1093 (2007) (citing R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.)).

that the planet is already overcrowded. We decide to enlist in the armed forces, knowing that we may use weapons to kill others. As is often pointed out, the law does not require a person to be a "good Samaritan," that is, to sacrifice herself to save others, even if they are closely related to her. The law does not punish the parent who refuses to donate her kidney to save her child.[232] Abortion should be discussed and considered in the context of the broader array of ethical decisions we entrust to individuals.

Conservatives' rhetoric of life and motherhood, on the other hand, tries to pluck abortion from the messy world of our recurring moral decisions. It paints abortion as exceptional, a pure and easily answered moral question. But, the absolute and fervent nature of the rhetoric of "life," far from reflecting deep commitments and personal experiences, evidences its superficiality. Its consequence

> has been the contraction of complexity into a narrow all-or-nothing conception. If an egg and a sperm have united, there is a human being; if not, not . . . . The simplicity of the issue, the obvious identities of the opponents, and the sanction of revered spiritual leaders give the zealot an energizing and feverish purpose . . . . But when so compressed, a moral value, no matter how heated, takes little space in one's life. It fails to inform what we do daily, and it makes little difference to the life of a true believer whether that narrow value prevails or not.[233]

Only a fraction of those who oppose abortion rights will ever personally confront the issue. The male members of the movement will never face unintended pregnancy, nor will the female members who have surpassed their childbearing years. Those who are sexually active but manage to avoid pregnancy one way or another will never have their own lives touched by the abortion question.[234] As Kate Michelman, former executive director of NARAL, said about obtaining a pre-*Roe* abortion, "I had to go before a panel of four strange men, whose decision was going to impact on the rest of my life, but who would not have to bear the burden of raising four children. Everyone else had control except me, and I had to bear the consequences."[235] Not surprisingly, many ardent abortion

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[232] *See* TRIBE, *supra* note 66, at 130–35; Borgmann & Weiss, *supra* note 106.

[233] ALBERT BORGMANN, REAL AMERICAN ETHICS: TAKING RESPONSIBILITY FOR OUR COUNTRY 23–24 (2006) (footnote omitted).

[234] *Id.*

[235] TRIBE, *supra* note 66, at 135 (internal quotation marks omitted).

opponents who do personally confront unplanned pregnancy will see black and white quickly dissolve into gray and will judge their own circumstances sufficiently compelling to procure an abortion secretly.[236]

It is likely that the law can never sufficiently capture the thick conceptions of life and motherhood in order to dictate whether a particular abortion is morally permissible. Even if it could, it is not clear that we should use the law in this way.[237] While the law may set a floor for minimally moral conduct, to transform every moral aspiration into a legal command takes moral decisions out of individuals' hands in a way that denies them their moral agency.[238] As Tribe says, "to impose virtue on *any* person demeans that person's individual worth."[239] If a woman declines an abortion only because the law tells her to do so, there is nothing to admire or condemn. We trust men and women to make profoundly moral decisions every day. Abortion should be no exception.[240]

To view abortion as a morally weighty decision that women are empowered to make and that should be constitutionally protected is as consistent with the modern notion of "privacy," which speaks to individual autonomy, as it is with an alternative view of abortion rights as grounded in women's equality.[241] But, rather than continuing to sidestep the moral

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[236] *See, e.g.*, Janie Har & Steve Mayes, *Erikson Relationship Detailed by Woman*, THE OREGONIAN (Portland, OR), June 23, 2008, at A1 ("pro-life" Republican congressional candidate allegedly paid for girlfriend's abortion); *see also* Joyce Arthur, "The Only Moral Abortion Is My Abortion": When the Anti-Choice Choose (Sept. 2000), http://www.prochoiceactionnetwork-canada.org/articles/anti-tales.shtml (citing sources).

[237] Rhonheimer, *supra* note 35, at 143 ("It is insufficient simply to underline the immoral character of procured abortion . . . in order to establish the need for a corresponding legislative, even penal, rule.").

[238] *Id.* at 138 ("If civil law were to prohibit and even punish an action such as abortion, it would do so not simply to impede an immoral act with the aim of leading men through state authority to practice virtue, to become good, and to attain happiness. It does so merely to protect the life of the one who, through such an act, would be threatened by death and deprived of his or her right to live.").

[239] TRIBE, *supra* note 66, at 135.

[240] *See id.* ("There should be no 'woman's exception' to our traditional regard for individualism and autonomy.").

[241] This view holds that women cannot participate equally in society if they are not viewed as moral agents who can shape their own futures and destinies by deciding whether and when to become mothers. *See generally* Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995);

discussion about abortion as though it has nothing to add to the constitutional discussion, evolving conceptions of the right to abortion should incorporate a greater attention to and awareness of the moral dimensions of the right, and should recognize women as moral agents empowered to endeavor to make the best decision for themselves and their families.

Contrary to popular perception, abortion providers tend to understand the moral significance of abortion and the need for sensitivity to the woman's particular experience as she confronts the abortion decision. Carole Joffe, a sociologist who has studied abortion practice for many years, notes that abortion providers

> are not "coarsened toward fetal life" and that there exist[] countless examples of . . . "respect for fetal life" . . . . [T]he worldview that prevails in the world of reproductive health facilities that include abortion is one that is steeped in sensitivity and nuance. Above all, there is a recognition of the inappropriateness of a "one size fits all" approach to pregnant patients. Some pregnancies are desperately wanted, and the clinician shares in the exhilaration of the patient. Some pregnancies are not at all wanted, and the clinician accepts that no one is better entitled than the woman herself to decide what to do about this pregnancy.[242]

Joffe recounts an instance in which an abortion provider, understanding a patient's desire to see her embryo, rinsed off the amniotic sac containing the embryo and brought it to the patient in a jar.[243] In another example, a clinic administrator spoke of "meeting the woman where she is" by referring to the embryo or fetus with whatever terminology the patient herself used.[244]

Of course, even an abortion opponent who concedes that embryos and fetuses are not rights-holding persons might oppose abortion for other

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Erdman, *supra* note 231; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

[242] Carole Joffe & Wayne C. Shields, Editorial, *Morality and the Abortion Provider*, 74 CONTRACEPTION 1 (2006), *available at* http://www.longviewinstitute.org/research/joffe/abortionprovider (responding to an article by Frances Kissling, founder of Catholics for a Free Choice).

[243] *Id.*

[244] *Id.*

reasons. Thus, once it is revealed that virtually no one consistently relies upon embryonic or fetal personhood as grounds for banning abortion, the question remains whether abortion should be banned for other reasons, or restricted in some lesser way (and if so, what sorts of restrictions are permissible). As Ronald Dworkin points out, "[s]omeone who does not regard a fetus as a person with rights and interests may . . . object to abortion just as strenuously as someone who insists it is. But he will object for a different reason and . . . with very different implications for the political question of whether and when the state ought to prohibit or permit abortion."[245]

The problem with abortion restrictions is that they will almost invariably be both underinclusive and overinclusive relative to their proponents' goals. Wherever the bright lines of the law are drawn, they will allow for different moral responses to unintended pregnancy, some good, some regrettable, within the boundaries of what is permissible. Inevitably, the laws will prevent some abortions that most would consider morally permissible or even compelling.[246] At the same time, the laws will not ensure morally commendable responses to unwanted pregnancy, much less ensure moral conduct in a host of other, equally weighty circumstances.[247] The law cannot force an immoral person to be a moral one. "If we have genuine concern for the lives others lead, we will also accept that no life is a good one lived against the grain of conviction, that it does not help someone else's life but spoils it to force values upon him he cannot accept but can only bow before out of fear or prudence."[248]

The primary aim of this Article, however, is not to resolve completely the moral question of abortion. It is, rather, to point out that we will never have a national conversation worthy of the real moral choices inherent in the abortion decision if we remain mired in an artificial disagreement over embryonic or fetal personhood. Our current national debate about abortion is constantly derailed by impulsive, undeveloped, and confused assertions about protecting "life." Liberal defenses of abortion allow these assertions to flourish unimpeded, infecting but not informing the debate.

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[245] DWORKIN, *supra* note 10, at 12–13.

[246] *See id.* at 173–74.

[247] *Id.*

[248] *Id.* at 167–68.

IV. CONCLUSION

The abortion debate has stagnated. Conservatives and liberals have each, in different ways, contributed to the impasse. Conservatives have based their opposition to abortion on an asserted belief that life begins at conception. But, they have not opened this belief up to reflection and revision. The confusing and duplicitous nature of their rhetoric suggests a belief in embryonic and fetal personhood. But such a position is inconsistent with conservatives' other considered judgments and therefore fails the test of reason. Meanwhile, liberals have assumed that conservatives' beliefs cannot be questioned and have therefore failed to expose the superficiality of conservative claims about "life." Since liberals refuse to assign any particular moral significance to the embryo or fetus, their defense of abortion appears morally impoverished and squanders the opportunity to affirm the importance of women's equal autonomy to make weighty moral decisions. The way out of the doldrums is for both sides to seek reflective equilibrium and to appeal to public reason on abortion. Once the distracting and misleading question of embryonic and fetal personhood is taken off the table, a more robust and fruitful debate is possible, one that could actually reveal common ground in this age-old controversy.