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Gerard V. Bradley

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ESSAY

Life's Dominion: A Review Essay

Gerard V. Bradley*

There will be no arraignment of Ronald Dworkin for intellectual timidity. *Life's Dominion*¹ is not only (per its subtitle) an "argument about abortion, euthanasia, and individual freedom." It is a breathtakingly audacious one. Dworkin thinks that abortion and euthanasia are prerogatives of the sovereign individual. He advocates a practical program indistinguishable from those of, say, the ACLU, Justice Blackmun, and the New York Times editorial board. Dworkin argues that, despite overheated appearances to the contrary, we all do, too.

To his great credit Dworkin does not jumpstart his argument with euphemistic re-description. Abortion is not (just) "terminating a pregnancy." Euthanasia is not (just) letting nature take its course. The book's first sentence brings us face to face with the truth. Euthanasia "deliberately kill[s] a person out of kindness." Abortion "deliberately kill[s] . . . a developing embryo."² Both are "choices for death," carried out with precisely that intention.³ Dworkin soon forsakes "embryo" talk, and concedes that the fetus is a human life. He allows—at times, insists—that the lives snuffed out are "sacred" and "inviolable." He forsakes labelling the unborn or those mercy killed as "aggressors." *Life's Dominion* is therefore an argument for individual moral and legal liberty to intentionally destroy innocent human life. A more apt title might be "The Individual's Dominion Over Life."

Dworkin aims higher—much higher than Laurence Tribe and Roger Rosenblatt aimed in recent defenses of similar settlements of the abortion controversy. They offered Blackmunesque terms as

* Professor of Law, University of Notre Dame; B.A. 1976, J.D., 1980, Cornell University. John Finnis and Robert George provided invaluable suggestions during the course of drafting this essay. Patrick Lee graciously supplied a copy of his excellent manuscript, *Abortion and Human Life*, in time for drafting Part III.

1 RONALD DWORKIN, *LIFE'S DOMINION* (1993).

2 *Id.* at 3.

3 *Id.*

a *modus vivendi*, an armistice. But armistices are like the Nazi-Soviet Pact. No one expects the truce to hold a moment longer than the prevailing political balance of power. So long as convictions are not transformed, Dworkin says, "the most we can expect is the kind of pale civility one might show an incomprehensible but dangerous Martian."⁴

Dworkin calls for pacification. The abortion war is "America's new version of the terrible seventeenth-century European civil wars of religion. Opposing armies march down streets . . . screaming at and spitting on and loathing one another. Abortion is tearing America apart."⁵

Given what these folks say about each other, Dworkin holds, they should loath, scream, and spit at each other. As the foot soldiers see it, the slaveholders are lined up against the murderers. "Self-respecting people who give opposite answers to the question of whether a fetus is a person can no more compromise, or agree to live together allowing others to make their own decisions, than people can compromise about slavery and rape."⁶ The lion will not—and should not—lie down with the lamb.

Life's Dominion aims to show that the prevailing account of what the dispute is about is "based on a widespread intellectual confusion we [*i.e.*, Dworkin] can identify and dispel."⁷ We accept—and cherish—principles which make "a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect . . ."⁸ The concept "that binds us all together" is that "our lives have intrinsic, inviolable value." Each one of us has a "conception of what that idea means" that "radiates throughout his entire life."⁹ This radiating conception is essentially a religious commitment. Abortion and euthanasia are essentially religious issues. Only Dworkin's liberationist position avoids a "collective imposition of ethical and spiritual values" upon individuals. These laws are a "terrible form of tyranny."¹⁰ Our Constitution does not license tyranny. See particularly the religion clauses.

4 *Id.* at 10.

5 *Id.* at 4.

6 *Id.* at 10.

7 *Id.*

8 *Id.* at 10-11.

9 *Id.* at 28.

10 *Id.* at 15.

Dworkin allows that religious belief does not justify murder.¹¹ People say that abortion is just like murder. Yes, but Dworkin reports that none of us *really* thinks the unborn are persons, or creatures of any kind with a right not to be killed. People who support restrictive abortion laws on this “derivative” ground—that abortion is a grave injustice because it kills a person—do not fully understand what they think. Their rhetoric exceeds their convictions.

In reality people oppose abortion on the “detached” ground that abortion disrespects the basic value, the intrinsic good of human life. This is a “perfectionist” ground for what are really morals laws. Our Constitution rules out morals laws, especially so because abortion and euthanasia are religious questions.

How does the argument unfold? Though the subtitle might suggest equal time for abortion and euthanasia, abortion occupies three-quarters of the book. About half of the abortion discussion is within Dworkin’s primary area of expertise—constitutional interpretation. This third of the book is a long argument for the soundness of *Roe* and *Casey* as interpretations of the United States Constitution. Dworkin holds that they are consonant with sound, free-standing principles of political morality, and that they correspond to our convictions about abortion.

Dworkin offers in the rest of *Life’s Dominion* hard detective work in the underworld of popular convictions. It is not “that people do not know what they think, but rather that we cannot discover what they think simply by fixing on the high rhetoric of the public debate.”¹² Dworkin mines public opinion polls and identifies a basic inconsistency in the pro-life viewpoint. If, as the polls indicate, most of us think that killing the unborn is pretty much like murder, how come most of us favor legal abortion for hard cases: rape, incest, fetal deformity, life of the mother? This is the riddle to which *Life’s Dominion* is the solution. Dworkin examines relations of entailment and incompatibility to uncover what we really think about the unborn, expressed in a highly complex set of attitudes which constitute a sacred space of individual commitments. Dworkin discovers that we are in heated agreement. There are really two sets of lions—or lambs—here.

11 *Id.* at 162.

12 *Id.* at 21.

Life's Dominion is Dworkin's first published encounter with religion. The book's central chapter is titled "What is Sacred." The book's decisive moment is an engagement with the anti-abortion teaching of the Roman Catholic Church. Why decisive? Dworkin admits that Roman Catholics say, and seem to believe, that the unborn are persons with a right to life. If that *is* also what they really hold (even if not true) Dworkin's argument fails. We do not agree on abortion if just a significant minority fraction of the nation's sixty million Catholics *really* do think the unborn are persons.

* * *

Before getting down to business, Dworkin takes the reader on a methodological aside. He proclaims his project a "practical political" one. "Whether the law should ever permit abortion and euthanasia, and if so, in which circumstances . . ." ¹³ Dworkin allows that moral philosophy, theology, social and political thought and (most of all) constitutional law intrude upon the argument. But he eschews "outside in" reasoning where the practical problem-solver must shop from among "ready-made racks" of theories like the modules careening about the Seventh Avenue garment district. ¹⁴ Even "innovative and sometimes compelling" recent theories of law and politics must be rhetorically housebroken. They characteristically identify some set of "first principles" of, say, justice, and then "try to apply the general theories to concrete problems." ¹⁵ (He mentions no names, but Rawls and Finnis are obvious nominees.) What is wrong with them? "[T]hese theories have not yet improved the quality of public political argument, and that is partly because . . . they were not constructed for or in response to" discrete political controversies. ¹⁶

Dworkin intends to do philosophy, theology, and so on, from "inside out." His theories are tailor made for the occasion. They are Savile Row, not Seventh Avenue. "The difference is not in the level of abstraction or theoretical depth The difference is in how the abstract issues are chosen, combined, formulated." ¹⁷ These "homemade" theories "may be more likely to succeed in the political forum." ¹⁸

13 *Id.* at 29.

14 *Id.*

15 *Id.*

16 *Id.* at 28-29.

17 *Id.* at 29.

18 *Id.*

This is one disquieting caveat lector. When Dworkin claims to relate Roman Catholic teaching on abortion (as he does) or the genesis of restrictive nineteenth century abortion laws (as he does), is he telling the truth? Is he trying to? Does Dworkin recognize an obligation to make his "argument about abortion, euthanasia, and individual freedom" coherent?

Homemade theories' suitability to the academy is, Dworkin says, another story. But if academicians search for what is true, what is the (different) criterion of "success" in the political forum? Or, if there is no truth in the sense contemplated by academicians, what is it *all* about? Ideology? Rationalized prejudices? If so, *Life's Dominion* is incoherent. For if so, public political argument does not connect with persons' real reasons for actions (which are material interests, noncognitive prejudices, etc.). *Life's Dominion* is a public political argument which would change belligerents into comrades. If so, then, *Life's Dominion* cannot achieve its stated aim. Does it have unstated aims?

I. CONSTITUTIONAL LAW

A. *Roe v. Wade: The Holding*

Dworkin's answer to an important but simple question—what did *Roe v. Wade*¹⁹ hold—suggests why he offers just a limited warranty.

Dworkin cautions that "few people understand the constitutional issues raised in *Roe*." But "[p]eople know" roughly what the case held.²⁰ In a single paragraph, Dworkin identifies three leading features of the decision:

1. "States may not prohibit abortion at all before the second trimester."
2. States may not prohibit abortion "before the third trimester except in those rare cases when it would jeopardize the mother's health."
3. *Roe* held unconstitutional "the anti-abortion laws of most states."²¹

Dworkin adds a fourth leading feature:

19 410 U.S. 113 (1973).

20 DWORKIN, *supra* note 1, at 103.

21 *Id.*

4. States "may outlaw abortion altogether when the fetus has become viable, that is, in the third trimester of pregnancy."²²

Claim (1) is sound. A completely straightforward expression of it appears later on: no prohibition for any reason in the "first trimester."²³

Claims (2), (3) and (4) are flatly wrong. Claim (2) contemplates a mid-pregnancy crisis in which bringing the child to term is less threatening to maternal health than abortion and that states may, for that reason, override the woman's choice to abort. As far as I know, there is no such medical situation. The concept is surely foreign to *Roe* and to Dworkin's defense of it. *Roe's*—and Dworkin's—central claim is that a choice of such gravity is wholly for the woman, not public authority, to make. Inexplicably, Dworkin elsewhere²⁴ reliably relates the similar sounding but quite different proposition that *Roe* established: states may regulate (not prohibit) second trimester abortions as a medical procedure in the interests of protecting maternal health.²⁵

Roe effectively invalidated the abortion laws of every state. That it likely did so was suggested by Justice White's dissent.²⁶ That effect has been documented in various publications.²⁷ Leaving aside simple incompetence as an explanation, it is hard to account for Dworkin's mistaken claim (3), save that he really believes his mistaken claims (2) and (4). If *Roe* *did* allow states to limit second trimester and outlaw all subsequent abortions,

22 *Id.* at 168. *See also id.* at 115, 169.

23 *Id.* at 168.

24 *See id.* at 168, 243 n.8.

25

Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe v. Wade, 410 U.S. 113, 163 (1973).

26 *Id.* at 221-22 (White, J., dissenting). White did not squarely claim such an effect. He attempted no state-by-state specification of *Roe's* probable effect.

27 *See, e.g.*, Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-By-State Analysis*, 67 U. DET. L. REV. 157 (1990).

Dworkin might reasonably mistake *Roe* for the most liberal laws extant on January 22, 1973.²⁸

But there is no evidence that Dworkin is familiar with those laws. Dworkin cannot believe claim (4) unless he has never read *Roe*. A glance at *Roe* reveals that states may not "outlaw"—not only "altogether" but in any important sense—abortion in the third trimester. *Roe* held that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."²⁹

*Doe v. Bolton*³⁰ established that "health" comprises "all factors—physical, emotional, psychological, familial, and the patient's age—relevant to the well-being of the patient."³¹ This part of *Roe/Doe* has been repeatedly affirmed by the Court, most recently in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³² The truth of the matter about *Roe* is that something very much like the abortion-on-demand mandated for the first two trimesters persists until birth.³³ The Oxford Professor of Jurisprudence cannot have read these passages and honestly concluded that they authorize states to "outlaw all abortions." We have these two unattractive explanatory possibilities. Dworkin wrote a book about *Roe* without rereading *Roe*. Or Dworkin is not being candid with the reader, perhaps because Dworkin's *Roe* (D-*Roe*) is more defensible than *Roe*.³⁴ D-*Roe* stands for a "fair chance" to abort. A woman gets six months to decide whether to bear the child within her womb.

B. *Roe v. Wade: The Rationale*

Let us shift our attention to where Dworkin concentrates his: why Blackmun's "legal argument" in *Roe* was a "strong one."³⁵ Dworkin mentions widespread criticism of *Roe* among "very right wing lawyers like Robert Bork." They say that *Roe* was a "political

28 See *id.* at 158-60.

29 *Roe*, 410 U.S. at 163-64.

30 410 U.S. 179 (1973).

31 *Id.* at 192.

32 112 S.Ct. 2791, 2821 (1992).

33 Without elaboration, Dworkin at one point says that there are "certain exceptions" to the "outlaw altogether" prong of the *Roe* holding. DWORKIN, *supra* note 1, at 170.

34 Dworkin rightly says that third trimester abortions account for a small fraction of abortions annually performed, *id.* at 169, but that owes to accidental matters of (chiefly medical) fact, not to the law.

35 *Id.* at 107.

decision the Court had no right to make."³⁶ This is truly the basic criticism of *Roe*, but it is hardly the province of right wingers. A fairer expression of it is that of the eminently mainstream John Hart Ely (who favors legal abortion): "*Roe* is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."³⁷ As Justice White wrote in dissent, *Roe* was an exercise of "raw judicial power."³⁸

That *Roe v. Wade* was not *law* presupposes some stable, important distinction between law (including constitutional law) and unrestricted reasoning about the common good characteristic of legislation. The pro-choice legal realist defends *Roe* by denying the presupposition. Dworkin is no legal realist. He embraces the presupposition. He holds that law is not good just because it gets the matter right. A "strong legal argument" like Blackmun's is not strong because it is sound unrestricted reasoning about the common good. There is more to law than justice.

Dworkin argues that *Roe* was a sound interpretation of the Constitution. The two dimensions by which he tests an interpretation of the Constitution are "fit" with legal practice and history, and "justice," the unrestricted truth of the matter.³⁹ Being a "court of law," the Supreme Court is "obliged to make its decisions consistent, so far as this is possible, with the broad constitutional traditions established and rejected in its past decisions."⁴⁰ Readers familiar with Dworkin's work will recognize the incorporation of *Law's Empire*⁴¹ in *Life's Dominion*. Dworkin explicitly effects the merger.⁴²

In *Law's Empire*, Dworkin allows that, somehow, fit and "soundness" (here called justice) interact with each other. They are analytically distinguishable, and if fit is (even almost) transpar-

36 *Id.* at 103.

37 John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 957 (1973).

38 *Roe v. Wade*, 410 U.S. 113, 222 (1973) (White, J., dissenting).

39 DWORKIN, *supra* note 1, at 111.

40 *Id.* at 106.

41 RONALD DWORKIN, *LAW'S EMPIRE* (1986). That book has been subjected to cogent criticism by, among many others, Dworkin's Oxford colleagues Joseph Raz and John Finnis. See Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 315-21 (1992); John Finnis, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357-80 (1987). Dworkin does not acknowledge these criticisms in *Life's Dominion*. He has yet to respond to them in published form.

42 DWORKIN, *supra* note 1, at 249 n.6.

ent for justice, Dworkin's defense of *Roe* against Bork (and Ely and Justice White) collapses. Since "fit" has to do with prior authoritative judicial determinations—precedents—Dworkin must, to avoid his response's collapse, handle them more carefully than he handled *Roe*. Dworkin rather sends disturbing signals that he will not mend his ways. He promises to discuss "the United States Constitution" but adds that "the underlying question is a more universal one of political morality. *Should* any political community determine "intrinsic" values for everyone?"⁴³ Will a "decent society" choose coercion or responsibility?⁴⁴

This "fit" is worked over pretty well by justice before it is weighed with "justice" to determine what the law is. Dworkin adds a third element to the "fit" mix. It is some kind of town meeting on what we want the law to be in light of our political needs. "[M]y argument depends . . . on a much more general political issue. What kind of constitution should America have?"⁴⁵ "We must now choose between two very different conceptions of what kind of a constitution the United States really has."⁴⁶

Does Dworkin's "fit" borrow so liberally from his, and our, convictions about what the law should be that Blackmun's strong legal argument disappears into "justice"? If so, the "right wing lawyers," on Dworkin's own terms of engagement, prevail.

I propose to resolve the issue via a somewhat complex exposition and argument. I shall examine Dworkin's brief on Blackmun's behalf on three important points. I take up, first, the personhood of the unborn. Second, I examine claims about the history of abortion law which are premises (for Dworkin and Blackmun) in the first argument. Finally, I explore the derivation of a right of reproductive autonomy, specified to include abortion-on-demand. Dworkin, along with probably most defenders of *Roe*, reduces this to the meaning and soundness of *Griswold v. Connecticut*.⁴⁷

Throughout this part of the essay I shall identify where Dworkin, though professing to support Blackmun's argument, defends different claims. These Dworkinian interpolations indicate either simple carelessness or implicit conclusions that Blackmun's

43 *Id.* at 26 (emphasis added).

44 *Id.* at 216.

45 *Id.* at 118.

46 *Id.* at 117.

47 381 U.S. 479 (1965).

argument is not so strong after all. Finally, I offer my view of the truth of the disputed matters.

Here goes.

1. The Unborn as Persons

Recall precisely what Blackmun said in *Roe*: "If this suggestion of [fetal] personhood is established, the appellant's [abortion rights] case, of course, collapses, for the fetus' right to life would then be guaranteed by the [Fourteenth] Amendment. The appellant conceded as much at reargument."⁴⁸ Blackmun had in mind the guarantee against deprivation of life without due process. He thought that fetal personhood would make all abortions illegal, opining that even a life of the mother exception "appear[ed] to be out of line with the Amendment's command."⁴⁹

Fetal personhood "collapsed"—vitiating, destroyed—plaintiff's claim to abortion rights. Blackmun did not contemplate a fundamental constitutional right to abort that was, as a separate, contingent matter, impossible to exercise due to the unborn's right to life. What kind of "right" has *no* practical existence? The unborn's status was analytically part of the woman's claim to reproductive autonomy, a necessary but insufficient premise in her argument. There could not be a *prima facie* right to abort if the unborn were persons. There might be if the unborn were not. There might be a negative answer to both questions. This is pretty much the *Roe* dissenter's view. States may prohibit or permit abortion as they see fit. Finally, Blackmun treated abortion (and therefore *Roe*) as "inherently" different from contraception (and therefore *Griswold*).⁵⁰

Dworkin attributes to Blackmun an equal protection examination of fetal personhood. He also deviates from Blackmun's view of practical effects. Dworkin, sounding like Blackmun, says fetal personhood "would have been the end of the case."⁵¹ On the next page, he says something quite different. "If a fetus is a constitutional person, then States not only *may* forbid abortion but in some circumstances *must* do so."⁵² "Some" circumstances? "The Constitution," Dworkin continues, "would insist that states need a

48 *Roe v. Wade*, 410 U.S. 113, 156-57 (1973).

49 *Id.* at 157-58 n.54.

50 *Id.* at 159.

51 DWORKIN, *supra* note 1, at 109.

52 *Id.* at 110.

compelling justification for not outlawing abortion"⁵³ Actually, Dworkin has a "compelling interest" at hand. He has already declared that unwanted pregnancies "impose a kind of slavery" on women, that a woman's life might well be destroyed.⁵⁴ Avoiding slavery and self-destruction would seem to be compelling interests.

How does Dworkin establish a right to abort? If the state cannot impose the harm of unwanted pregnancy upon women—see *Griswold*—it follows that the state cannot impose the greater harm of carrying, bearing, and caring for that unwanted child.⁵⁵ Would not adoption alleviate this burden? Dworkin brushes it aside in a short paragraph. Many women "could suffer great emotional pain for many years if they turned a child over to others to raise and love," even if the only alternative was abortion.⁵⁶ Dworkin cites, however, one snippet of testimony by one sufferer. "Psychologically there was no way that I could hack another adoption. It took me about four and a half years to get my head on straight."⁵⁷ Dworkin links, as did Blackmun, fetal and female claims but reverses their priority. He establishes a *prima facie* right to abort, and uses it to defeat state authority to treat the unborn as persons.

Dworkin and Blackmun agree that the unborn are not persons. How do they argue for that conclusion?

Blackmun resisted the "suggestion" so devastating to appellant's case for several articulated reasons: (1) *no* case could be cited holding the fetus a person within the meaning of the Fourteenth Amendment; (2) none of the many uses of the term "person" in the Constitution indicated, "with any assurance, that it ha[d] any possible pre-natal application"; (3) abortion restrictions were "far freer" (Blackmun's phrase) when the Amendment was adopted "than they are today," suggesting that the unborn were not persons.⁵⁸ Blackmun noted inconsistencies between Texas' very restrictive law and the constitutional requirements entailed by fetal personhood.⁵⁹ Abortion was not "murder" in Texas, but a considerably lesser form of criminally punishable homicide. Women procuring abortions were not, as general principles of accessory

53 *Id.*

54 *Id.* at 103.

55 *Id.* at 106-07.

56 *Id.* at 103-04.

57 *Id.* at 104.

58 *Roe v. Wade*, 410 U.S. 113, 158 (1973).

59 *Id.* at 157 n.54.

liability would have them be, liable for their actions. Abortions were permitted to save the life of the mother.

Blackmun cleaved closely to constitutional text, history contemporaneous with its enactment, and decided cases. He examined the "coherence" of controversial propositions asserted by the parties with principles of law. This is a good general approach to constitutional construction. And he scores some points against fetal personhood. The lack of judicial precedent squarely on point is legitimate evidence against the view that the Constitution recognizes the unborn as persons. His point about the Texas law's constitutional infirmity if the Constitution does recognize fetal personhood is far from trivial.

Though Dworkin and Blackmun differ on the precise locus of the "personhood" question, both treat it as a question of restricted legal reasoning. Dworkin asks whether the fetus is a "constitutional person." He concludes that assertions in its favor are "dramatically contradicted by American history and practice."⁶⁰ He traverses an originalist route to that conclusion. He says that when the Equal Protection Clause was passed, (what Dworkin calls) "liberal" abortion laws—they were in truth about the same as those in place in 1973—were not then considered unconstitutional.⁶¹ Dworkin does offer an opinion about the truth of the matter. His opinion is that the unborn are truly not persons. But, like Blackmun, Dworkin does not regard the constitutional question as transparent for the truth or justice of the matter.

Here is a joint venture in "fit," but it is close to the Borkian originalism that both Blackmun and Dworkin ordinarily regard as an unfunny joke. The crucial point is, had they applied these same criteria to the woman's assertion of right under the Fourteenth Amendment, *Roe* would have come out differently. Were constitutional text, precedent, and nineteenth century legislative practice, as well as anomalies forced into contemporary legislative practice, the measure of *her* claim, an attorney who claimed that the Constitution required abortion-on-demand would face Rule 11 sanctions.

Blackmun was not nearly so critical of what he admitted was a novel interpretation of due process. Blackmun applied no similar criteria of "fit" to the woman's claim. He marshalled some cases—*Skinner*, *Pierce*, *Griswold*, *Eisenstadt*⁶²—but admitted that the

60 DWORKIN, *supra* note 1, at 111.

61 *Id.* at 112.

62 *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S.

abortion situation was "inherently different" from all of them.⁶³ Blackmun noted the distress caused by an unwanted pregnancy *after* asserting that "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁶⁴

Dworkin says that abortion may be an important constitutional right even if those who debated the Fourteenth Amendment did not consciously think or say so. That is because they, or judges acting on their authority, articulated a principle—some right of procreative autonomy—but failed to detect all its implications, or failed to recognize certain prevalent practices (*i.e.*, laws against abortion) as unconstitutional. He cites *Brown v. Board of Education*⁶⁵ as support for this judicial *modus operandi*.⁶⁶

The unborn have the better case under Dworkin's methodology. Dworkin wants to establish that an action which was increasingly made criminal by the ratifiers is now (surprisingly) a fundamental constitutional right. The unborn claim a right to life that the ratifiers increasingly protected because they recognized the unborn's right not to be killed from the moment of conception. What do you think the verdict of text and history is upon Dworkin's assumption that childbearing "enslaves" and "destroys" women?

A deep prejudice against the unborn, obscured but still visible behind a methodological double standard, underwrites *Roe*.

Blackmun's and Dworkin's legal arguments against fetal personhood are plausible but not persuasive. The intuitively likely interpretation of "person" for Equal Protection purposes is that all beings who truly are persons are "constitutional persons." This part of the positive law is transparent for the truth of the matter. And the truth is the unborn *are* persons.⁶⁷ I do not here presuppose some riotous "living Constitution" methodology. I assume instead an originalist approach to constitutional interpretation. Occasionally, it does seem that the earmark of originalism is the impermeability of positive law to unrestricted reasoning about, for example, the meaning and definition of personhood. The earmark

510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

63 *Roe*, 410 U.S. at 159.

64 *Id.* at 253.

65 347 U.S. 483 (1954).

66 DWORKIN, *supra* note 1, at 112.

67 See *infra* text accompanying note 192.

sometimes seems to be, in other words, a Hugo Black-like notion that natural law has *no* role in constitutional interpretation, and that constitutional law is entirely a matter of drawing conclusions from conventional legal materials. But a sound originalism insists only that whether or not judges should engage in unrestricted reasoning depends upon the positive law. Does the positive law direct judges to go outside conventional sources—authorities—to determine the truth of the matter? If so, a good “positivist” judge will engage in natural law reasoning. If not—if the positive law stipulates that “person” is a legal term of art including only human individuals born and still living, together with some fictional “persons” like corporations—then the judge has no jurisdiction to make law according to the truth of the matter. Of course, such a stipulation may be unjust, and fail to bind in conscience. It is still the positive law.

Here is my originalist argument for fetal personhood.

What the Constitution usually means by “person” is not dispositive of what it means by each particular usage. Corporations are “persons” for some purposes but not for others. Context—especially the particular action, status, or adverse treatment which is the subject matter of a clause—is central to understanding what each clause means by “persons.” Blackmun identified thirteen or so references to “person” in the Constitution. “None indicates, with any assurance, that it has any possible prenatal application.”⁶⁸ But many of these references, including the Fugitive Slave, Grand Jury Indictment, and Extradition clauses, have no application to many post-natal human beings who are surely persons with a constitutional right to the equal protection of state homicide laws. Person needs to be defined retail, not wholesale.

The relevant question is whether for equal protection purposes the fetus is a person. I have no case at hand which explicitly says “the unborn are persons for equal protection purposes,” but there are many precedents which, in my view, stand for that proposition.

A glance at congressional discussion of the Fourteenth Amendment shows that “person” was not intended as a term of limitation, nor as a legal term of art. “Persons” included “all natural persons” or all “human beings.” John Marshall posthumously testified for that general proposition. The legal phrase “any person

68 *Roe*, 410 U.S. at 157.

or persons" comprehends, Marshall opined, "every human being."⁶⁹

This drives our originalist argument toward the truth of the matter. Now we must consider the import of the increasingly restrictive abortion laws of the Reconstruction period. Those laws and accompanying judicial applications do not, as far as I know, proclaim the unborn, flatly, to be "persons." They certainly establish that, contrary to the common law's view that "quickening" marked the beginning of new life, a new human being with a right not to be killed came into being at conception. I argue that this is equivalent to recognizing the unborn as persons.

Blackmun avoids this implication of restrictive laws by implicit comparison of the unborn to you and me. In Blackmun's phrase, the unborn have never been recognized as "persons in the whole sense."⁷⁰ (Dworkin makes similar appeals to common sense.) The comparison misleads tragically. The unborn are not very much like you and me. Besides obvious physical dissimilarities, the goods that constitute human flourishing—play, knowledge, friendship, aesthetic experience among others—are generally available for your choice and mine. More important, you and I can be harmed by attack upon any one of the goods, as instantiated in us, in any number of ways.

The unborn are persons from the moment of conception, and possess from that moment the capacity to flourish as persons. But during gestation the unborn's flourishing is pretty well limited to uninterrupted biological development. Due to its lack of independence and volition, very limited consciousness, and so on, there are few ways to harm the unborn apart from physical assault. It makes little sense to say that the goods of knowledge or play are instantiated in the unborn, less to think that others might destroy or impede those goods. While intentionally inflicted nonfatal injuries to the unborn are common enough, the practically feasible way to harm the unborn at all is to abort them—interrupt their organic existence (terminate the pregnancy) when they cannot survive outside the womb.

Once the unborn's right not to be assaulted is secured, the cash value to establishing above and beyond that they are "persons" is minimal. Put the other way, prohibiting abortion is *how*

69 *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818).

70 *Roe*, 410 U.S. at 162.

we recognize the personhood of the unborn. By prohibiting abortion we insure the full flourishing of the unborn, insofar as nature permits them to flourish.

Someone might object that the debates about the abortion laws *and* the Equal Protection Clause seem to have occurred simultaneously but without reference to each other. Maybe. But this means (at most) that the ratifiers either failed to articulate an inference they did recognize, or failed to draw an inference that was obvious (probably because their overwhelming concern was to protect the recently freed slaves and their descendants from discriminatory state laws at a time when state laws were being enacted to *protect* the unborn). So long as there is no persuasive evidence of a conscious stipulation by the ratifiers to the contrary, judges should recognize the unborn as persons, if that is truly the case. Would the ratifiers have ratified if told that ratification entailed personhood for the unborn? I think so.

There is significant precedent for such an approach to construing the Equal Protection Clause. It is well known that the Fourteenth Amendment was designed to establish racial equality but was widely not thought to affect, without more, the constitutionality of segregated schools. Not until 1954 was this error corrected. Very few people today question the legitimacy of the Supreme Court's unanimous opinion in *Brown v. Board of Education*.⁷¹

What would the legal world look like if the unborn are "persons"? Would all abortions be prohibited, as Blackmun thought Due Process, and which Dworkin suggests Equal Protection, would? If the unborn are "persons" within the Due Process Clause, it is unlikely that many abortions would be thereby prohibited. The harm which that clause proscribes—extralegal or arbitrary state deprivation of life—does not describe very many abortions because few abortions are performed by the state. Most abortions thus do not meet the threshold "state action" requirement for due process protection. Besides, the clause only conditionally protects life against state deprivation "without due process of law." Thus, all of its protections may be defeated so long as procedural prerequisites are respected.

The important effect of personhood under equal protection would be inclusion of the unborn within the protection of state homicide statutes, that proscribe various ways of "causing the

71 347 U.S. 483 (1954).

death of another person." Failure of state officials to enforce these laws on behalf of the unborn would be a constitutional violation.

Not *all* abortions are culpable homicides, even though the fetus is a "person." Some (perhaps most) "abortions" for the sake of the mother's life do not intend fetal death as either an end or a chosen means. These procedures may be distinguished from abortion, even though the prospect of harm to the fetus *may* justifiably be accepted as a side effect (It is worth noting that Dworkin, in all his writings, is indifferent to the distinction between intention and side effect.) They are certainly not murders (intentionally causing the death of another person). They are unlikely even to fall within other, lesser homicide proscriptions (like manslaughter or negligent homicide). Even if they did, discriminating enforcement personnel may well distinguish, and justifiably decline to prosecute, such cases and would do so without fear of offending the federal Constitution.

These procedures as well as other "hard cases" (impregnation by rape, serious risk to maternal health) raise issues of justification and excuse. Both these concepts presuppose technical criminal liability; that is, *all* the elements of a criminal statute are present in the actor's conduct. A justified "action" is morally appropriate and implies no reason for blame. Others in the same situations may act similarly. An "excusable" action is morally inappropriate, and others in similar circumstances ought to be discouraged from so acting. An excusable action is one for which the actor is not fully responsible, one for which blameworthiness is alleviated.

States enjoy considerable freedom (consistent with the Fourteenth Amendment) to specify conditions under which use of deadly force and acts which create foreseeable risks to the lives and health of others may be performed without criminal liability. They would continue to do so after fetal personhood was recognized. Even though the fetus is not an "aggressor" (because "aggression" is action and the fetus is incapable of acting), the law of justifiable self-defense may permit the use of force—even deadly force—to preserve the mother's life. Other jurisdictions might treat abortions to preserve maternal health as excusable. General principles of excuse might also warrant exemption from punishment for women (and abortion providers) where pregnancy results from rape.

Whether across-the-board immunity for pregnant women from accessory liability for abortions is consistent with equal protection

is problematic. Blackmun⁷² suggests it is not. The fundamental right to life of the unborn may well be effectively secured by prosecution of abortionists. The unborn are thus not bereft of equal protection. The difficult question is whether such an exemption from ordinary rules of accomplice liability is a prohibited discrimination against a class of persons (the unborn). Are they singled out for exposure to risks of harm greater than those imposed upon other persons? Would such exposure undermine the most efficient (necessary?) means of detection—cooperating female victims of abortionists? Would female liability so clash with popular sensibilities that jurors would not convict? If so, is that a good enough reason to except women from liability? Would an exception for these reasons violate the equality of the unborn?

None of these legal qualifications should say, suggest, or imply that killing the innocent is a permissible means to an end, or that the life of the mother is more (or less) valuable than the life of her unborn child.

When all is said and done, some unjust discrimination against the unborn permeated our laws up to and including *Roe*. Even the blanket exception for the mother is an arbitrary preference which, precisely as such, cannot be rationally defended if the unborn are persons with an equal right not to be killed. A fully just regime would, it seems to me, have no special law for abortion at all. Our legal tradition has had special laws for abortion. This fact demands some explanation, if only as a dialectical defense of my legal argument for the personhood of the unborn.

Our early nineteenth century ancestors operated with deficient knowledge of human reproduction. The law operated under additional disabilities, including problems of evidence and proof as well as the need to take serious account of common sense that the unborn were not really alive. James Mohr's scholarly work contains abundant evidence, for example, that many women aborting in the late nineteenth century thought they were simply bringing on menses.⁷³ They were opposed to abortion, which they defined as the killing of an unborn child.

This claim is hardly farfetched. "Contraceptives" commonly used by women today, like the pill and IUD, work sometimes by aborting the fertilized ovum. I am quite sure that any survey of

72 *Roe*, 420 U.S. at 157-58 n.54.

73 JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978).

pill users (perhaps less so of IUD users) would show a significant percentage who sincerely claim that they are conscientiously opposed to abortion and would never have one.

Our ancestors may be forgiven, all things considered, for discrimination that did not substantially abridge the unborn person's right to life. They were not contending with a massive assault on the unborn, blessed by the Supreme Court as a fundamental right.

2. The History of Abortion Law in the United States

Further evidence of bias against the unborn is provided by a closer look at the history of abortion laws related by Dworkin and Blackmun. Both assert that abortion laws were (in Blackmun's phrase) "far freer" throughout most of the nineteenth century than in 1973.⁷⁴ This claim is entirely misleading, and largely false, as several scholarly treatments, all unmentioned by Dworkin, have shown.⁷⁵

The second historical claim I shall examine in detail. This is Dworkin's statement of it: "The best historical evidence shows that these new [restrictive] laws were adopted not out of concern for fetuses, however, but in large part to protect the health of the mother and the privilege of the medical profession."⁷⁶ Blackmun makes a similar claim, relying chiefly upon the deeply flawed research of the late Cyril Means.⁷⁷ Dworkin's "best historical evidence" is one document—the Historians' Brief in *Webster v. Reproductive Health Services*.⁷⁸ Dworkin finds it "worth noticing that James Mohr, the historian cited in the government's brief in that case to support the claim that anti-abortion laws are traditional in America, is one of the signatories to the Historians' brief."⁷⁹

Solitary citation for such a sweeping claim is hardly the mark of careful scholarship, especially when the solitary source bears the outward appearance of partisanship. The historians, after all, were not called as experts by the Court. Pro-abortion lawyers recruited

⁷⁴ *Id.* at 158.

⁷⁵ See, e.g., Joseph Dellapenna, *The History of Abortion: Technology, Morality and Law*, 40 U. PITT. L. REV. 359 (1979); Robert Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1273-78 (1975).

⁷⁶ DWORKIN, *supra* note 1, at 112.

⁷⁷ See, e.g., *Roe*, 410 U.S. at 151.

⁷⁸ Brief for 281 American Historians, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

⁷⁹ DWORKIN, *supra* note 1, at 249 n.8.

them to buttress their argument against the Reagan Administration in *Webster*. Even so, there is no excusing Dworkin, who rests his entire argument ultimately on *Casey's* spiritual freedom defense of abortion rights, for not knowing (or failing to tell his readers) that virtually the same brief was filed in *Casey*. One especially prominent historian who signed the brief in *Webster* did not sign the *Casey* brief. The prominent historian is James Mohr.

Dworkin must also have not read Mohr's book.⁸⁰ Mohr's scholarly findings, with which Dworkin boosts the brief's credentials, actually *contradict* key claims in the *Webster/Casey* briefs!⁸¹

Let us now consider the truth of the claim that concern for the life of the fetus became a motivation for opposition to abortion only in the late twentieth century.⁸² John Keown adduces a mountain of evidence from legislative records, judicial opinions, speeches, medical and jurisprudential textbooks, and other sources to show that a concern for the fetus was central both to the common law prohibitions and to the nineteenth century British statutes.⁸³ I do not think that anyone really doubts that American legislators acted under the same influences. To be sure, Mohr argues in his book that self-interested professional motives and other concerns fuelled the regular medical practitioners' campaign for statutory prohibitions of abortion. Still, far from denying that their case was based on the need to protect prenatal life, Mohr freely admits in his book that one of the main reasons for their campaign was a sincere belief that abortion was immoral.⁸⁴ Indeed, he points out that they defended the value of human life

80 MOHR, *supra* note 73.

81 I must take some responsibility for Mohr's decision not to sign the *Casey* brief. I called Mohr after reading the *Webster* brief, having previously read his book. Mohr admitted to me that some of what the brief said and implied about the common law and the purpose of the nineteenth century statutes was inconsistent with what he had maintained in his book. He said that where inconsistencies exist he stood by the book rather than the brief. He confessed that he was uncomfortable with the way his work was cited for some of the brief's claims. But he took the view that the brief was a "political document," the work of a "citizen" not a "scholar." Dworkin evidently missed my 1990 publication of not only the shortcomings in the Historians' Brief, but my conversation with Mohr as well. See Gerard V. Bradley, *Academic Integrity Betrayed*, FIRST THINGS, Aug.-Sept. 1990, at 10-12. A Harvard Law Review article drew attention to my publication. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

82 Note a deep insult to pro-lifers. This claim is tantamount to saying that concern for the fetus is the last resort of persons whose real concerns are elsewhere.

83 JOHN KEOWN, *ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982* (1988).

84 MOHR, *supra* note 73, at 164-65.

from fertilization as a near absolute and were "fierce opponents" of any attack on it.⁸⁵

Dworkin has made no independent investigation of the tradition which he so confidently judges to be indifferent to the unborn. Documentary evidence aside, one need do no more than advert to the centrality of quickening even in the most permissive anti-abortion laws, whether in Britain or the United States, to infer that the law was concerned to protect the life of the fetus as well as the mother. Had the law been concerned only, or even primarily, to protect the mother, we could give no account of those courts or jurisdictions which prohibited, or at least prosecuted, only post-quickening abortions. If the prohibitions were intended to protect the health of the mother, without regard to the life of the fetus, it would be illogical not to punish actions meant to induce abortion before quickening when the same action would be punished if performed immediately after quickening. Quickening would not affect the impact of abortion techniques on maternal health.

The historical evidence clearly shows that progress in the scientific investigation of reproduction and fetal development wrought changes in abortion law. Quickening was long thought to mark the onset of life in "contemplation of law," as several nineteenth century courts, following Blackstone, emphasized even as they recognized its fictional character.⁸⁶ The reality of when life began was, courts recognized, quite a different matter. The reality of the matter was the controlling force behind the development of nineteenth century law.

These are external criticisms: Dworkin's historical claims do not match or correspond to the evidence. But Dworkin's account is also internally incoherent. His evidence against "personhood" is chiefly state laws which discriminate[d] between the unborn's right not to be killed and the right of other persons not to be killed. He says that "constitutional person" is a question of that legal practice and history. But from these considerations, it would seem that Bork is right: the drafters of the Equal Protection Clause (for better or for worse) left the precise legal status of the unborn to state decision. According to the Constitution, abortion was a mat-

85 *Id.* at 36.

86 See 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; *Roe v. Wade*, 410 U.S. 113, 132-33 (1973).

ter left to the states. The *Roe* court had no business constitutionalizing it.

That may count (a little bit) against my argument that the Equal Protection Clause requires states to prohibit abortion because the unborn are persons. But Dworkin summarily rejects the different possibility that states might decide the issue. Here he capitalizes on his reversal of Blackmun's prioritizing of female and fetal claims. No "state can curtail constitutional rights [*i.e.*, abortion rights] by adding new persons to the constitutional population."⁸⁷ "States have no power to overrule the *national* constitutional arrangement, and if the fetus is not part of the constitutional population under that arrangement, states cannot make it one."⁸⁸

Dworkin's denials beg the question. If states may treat the unborn as persons, then there is no constitutional right (to abort) to be articulated. In any event Dworkin offers no argument against *national* addition to the constitutional population via a Human Life Act. That is, by *national* legislative action. Dworkin does not notice that by text and original understanding, congressional enforcement under section 5—and not judicial action under section 1—was the primary means of enforcing the Amendment's restriction.

3. *Griswold*: Antecedents and Progeny

Dworkin aims to locate *Roe* securely in the tradition of judicial interpretation of the Constitution. He identifies by name one pre-*Roe* case.⁸⁹ Blackmun's legal argument was a "strong one if we assume that the *Griswold* decision was right."⁹⁰

There are at least three major flaws in his argument. One, Dworkin's (D-*Griswold*) looks even less like (the real) *Griswold* than D-*Roe* looks like *Roe*. Two, D-*Griswold* repudiates the constitutional tradition. (Even *Griswold* struggled mightily to find moor-

⁸⁷ DWORKIN, *supra* note 1, at 113.

⁸⁸ *Id.* at 114.

⁸⁹ He refers to Blackmun's references to "several earlier Supreme Court decisions [which] had established that a person has a specific constitutional right to make decisions about procreation for himself or herself." *Id.* at 106. He has in mind such pre-*Griswold* cases as *Pierce*, *Meyer*, *Skinner*, none of which provides support for abortion rights. Dworkin does *not* relate that Blackmun said that the situation in *Roe* was "inherently different" from all prior cases. Nor does Dworkin relate the nakedness of Blackmun's "argument" for abortion rights: "If the right of privacy means anything . . ." Dworkin quotes from *Eisenstadt* as well, identifying it, however, only in the notes. *See id.* at 106.

⁹⁰ *Id.* at 107.

ings). Three, D-Griswold does not justify *Roe*, much less does *Griswold*. Dworkin's more general claim that the right to contracept preceded and justified *Roe* is completely mistaken. The truth is nearly the opposite: *Roe* established a right to contracept as a lesser included element of the right to abort. With the collapse of the Griswoldian foundation, Dworkin's case for *Roe* disintegrates.

a. *In Search of Griswold*.—Dworkin gets the narrow holding of *Griswold* wrong. He claims that *Griswold* “decided that a state may not prohibit the sale of contraceptives to married persons.”⁹¹ Though the multi-opinion *Griswold* decision is hard to pin down on some points, this is not one of them. *Griswold* established some immunity from state interference for “marital privacy” broad enough to protect a couple's use of contraceptives. But the court expressly distinguished, and (in dictum) tacitly approved, a state ban on the manufacture and sale of contraceptives.

Dworkin fares little better in his broader account of *Griswold's* holding. He says that *Griswold* and other privacy decisions “can be justified only on the grounds that decisions affecting marriage and childbirth are so intimate and personal that people must in principle be allowed to make these decisions for themselves, consulting their own preferences and convictions, rather than having society impose its collective decisions on them.”⁹² *Griswold*, in this reading, forbids perfectionist state policies regarding sexual morality. But that is not what *Griswold* said or implied, much less is it the “only” interpretation available.

The question of perfectionist meddling in marital contraceptive use was not even raised in *Griswold*. As Justice White observed in his concurrence, there was no serious effort by Connecticut to justify its laws by virtue of the intrinsic immorality of contraception.⁹³ The state defended restriction of contraceptive use on the entirely different ground that it furthered laws against fornication and adultery. The Justices did not question the constitutional validity of those perfectionist policies governing sexual morality. They just denied that they were usefully advanced by the challenged statutes. The simplest interpretation of *Griswold* is that the Connecticut law, so defended, failed the rational basis test.

91 *Id.* at 106.

92 *Id.*

93 *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965) (White, J., concurring).

One may reasonably suppose that several members of the *Griswold* court silently agreed with dissenting Justice Stewart's characterization of the law as "uncommonly silly."⁹⁴ More remarkable, then, that no right to use contraceptives within marriage was articulated. Justices White and Goldberg came close to saying as much, but the center of gravity of the opinion is something quite distinct. Marital privacy, comprised of the confidentiality which marital friendship requires for its enjoyment, joined to spatial privacy in one's home, is at the core of *Griswold*. The opinion of the Court refers to the "intimate relation of husband and wife";⁹⁵ "privacy surrounding the marriage relationship";⁹⁶ and, finally, this understanding of marriage: "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."⁹⁷ What does all this mean? How should we interpret it? Is it true, as Dworkin alleges, that these passages (and *Griswold* as a whole) can *only* be interpreted as prohibiting perfectionist policies regarding sexual morality?

I propose this interpretation of *Griswold*. Assume that a majority of the Court believed there was no right to use contraceptives, even for married couples, because contraception is intrinsically immoral and there cannot be a right to do a moral wrong. The *Griswold* decision could still be written in about the same terms. That is, not only did the court expressly decline to find a right to contracept, such a finding is not necessary to explain their opinion. This interpretation of *Griswold* supposes, as the Justices repeatedly indicated, that there are many goods of marital intimacy (including noncontraceptive sexual intimacy) which are damaged by exposure to others. These goods are damaged particularly by involuntary exposures to public authority. Suppose further, as the Justices seem to have, that a criminal prohibition upon contraceptive use would damage those genuine goods of marriage as well as, perhaps, marginally discourage contraception (which we suppose to be, considered just in itself, something we want to discourage). A responsible but firmly anti-contraceptive public official might well conclude that, all things considered, a ban would do more harm than good.

94 *Id.* at 527 (Stewart, J., dissenting).

95 *Id.* at 482.

96 *Id.* at 486.

97 *Id.*

This kind of prudential decision is not obviously committed in our constitutional system to judges, particularly to federal judges.⁹⁸ But that is a matter of jurisdiction, not the meaning of an opinion which presupposes jurisdiction. Rightly or wrongly, the *Griswold* court is in a legislative mood. My suggested interpretation makes more sense of the rhetoric of "marital privacy," of repeated concern for the ill effects of enforcement, the intense focus of some *Griswold* Justices upon the sanctity of home and bedroom, of the explicit distinction of bans on sale and manufacture, enforcement of which would not much affect marital privacy as I suggest we understand it. My interpretation locates *Griswold* much closer to the tradition than does Dworkin's "only" possible interpretation. And the *Griswold* Justices were clearly trying to hew closely to the tradition.

b. The Constitutional Tradition.—One need only glance back at the 1961 *Poe v. Ullman*⁹⁹ opinion of Justice Harlan, who voted with the majority in *Griswold*, to see what the constitutional tradition had to say about perfectionism and sexual morality:

[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis.¹⁰⁰

I propose to fill out that tradition anecdotally, relying upon one earlier Supreme Court decision for illustration.¹⁰¹

Realizing the need of those who, having made a misstep, find it necessary to leave home at this critical period, we have estab-

98 This was the ground of the Stewart and Black dissents.

99 367 U.S. 497 (1961).

100 *Id.* at 545-46.

101 I am fully prepared to defend the appropriateness of my illustration as typical of the tradition, though I leave that argument for another occasion. Besides, Dworkin can hardly object. He cited just one opinion, too.

lished our home for their protection and care until the time when they may return to their homes and friends, free from the burden of their mistake, to become useful members of society. We find homes for infants by adoption when desired, or provide board for them at reasonable rates.¹⁰²

So read a notice for The Queen Anne Home. Its picture bore the caption, "a private retreat for unmarried pregnant women who prefer to be away from home during pregnancy and confinement, to preserve individual character or family reputation."¹⁰³ Additional assurances of respectability followed. Accepting only those recommended by "reputable physicians," Queen Anne patients ran no "risk of having to meet or associate with objectionable characters."¹⁰⁴ Directions to the home were included.

One Dysart, evidently the proprietor, mailed eleven such notices from the El Paso, Texas post office. The addressees were specific but, to history at least, nameless "unmarried females". Dysart was promptly indicted, not for suspicion of class snobbery, but for mailing "obscene, lewd, or lascivious printed material," a federal crime. Dysart, himself, an "objectionable character"?

The circuit court of appeals affirmed the trial jury's verdict that the notices were indeed "obscene."¹⁰⁵ Adhering to an earlier Supreme Court exposition, the court held that if matter "is offensive to the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard," an obscenity indictment may stand.¹⁰⁶

The appellate judges conceded that some notice of Dysart's enterprise was available. But lawful notice had to avoid "innuendo or suggestion" capable of raising "illicit sexual desires or thought."¹⁰⁷ The court thought that a jury could reasonably find Dysart's were "[c]apable of giving rise to sexual thoughts or desires in the minds of unmarried females"¹⁰⁸ How so? "Commendation of existing facilities for avoiding possible unpleasant social consequences of conduct in pursuant of illicit sexual desires

102 *Dysart v. United States*, 4 F.2d 765, 766 (5th Cir. Tex. 1925), *rev'd*, 272 U.S. 655 (1926).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 767.

108 *Id.*

may be the means of covertly suggesting such desires to those whose actions are largely the result of social inferences and restraints."¹⁰⁹

No need to lament the fate of Mr. Dysart, who does seem to have been a well-intentioned fellow. The Supreme Court ultimately reversed his conviction, though scolding him for "inexcusabl(y)" sending the notices to "refined women."¹¹⁰

Dysart's conviction was reversed in 1927, but the Supreme Court might still be expected to have found that his free speech rights, or his right to freely contract, were violated. The 1920's, after all, were the heyday of economic due process ("the *Lochner* era") as well as the seedtime of modern free speech doctrine. We might also expect Dysart's "right of privacy" to make an analytical appearance. The "right to be let alone," from which recent Justices have derived things like abortion on demand, was coined by Justice Brandeis in 1928 in *Olmstead v. United States*.¹¹¹

Dysart's lawyers made no constitutional claim. The Supreme Court raised none of its own. The Justices did not even question their prior test for "obscenity." They simply declared that Dysart remained on its safe side, that as a matter of law the notices were not obscene.

Sustained across nearly two centuries, countless Americans of diverse religious faiths, ethnic backgrounds, political parties, and economic classes have recognized a model of the morally upright person. Sexual temptation was a profound threat to the integrated personality. *Dysart's* attention to purity of *thought* and *tendency* to excite sexual desires belie any suggestion that this concern was ultimately with anti-social behavior. Good persons were not, in the tradition, the means to a safe, sane, peaceful environment. Quite the other way around. The upright person subordinated, and thereby integrated, sexual desires by the light that reason, informed by authoritative sources of moral instruction (Scripture, the Church) shed. Reason showed the proper locus for full bodily expression of these feelings: marriage.

Plainly, the morally strong were expected to conform their conduct to assist the morally weak. No one imagined that most—or very many—persons receiving the *Dysart* mailing would disintegrate. Some might. (Thus a "tendency" to activate

109 *Id.*

110 *Dysart*, 272 U.S. at 658.

111 277 U.S. 438 (1928).

unintegrated sexual feelings and desires.) Public authority determined that, in the interest of the common good, the virtuous should forgo an otherwise licit means of expression for the benefit of the few especially prone to temptation.

It is true that morals laws were indifferently enforced beginning shortly after World War II. But nonenforcement supplies no new premises for legal reasoning. It is also true that there were some doctrinal modifications between approximately 1930 and 1960, the practical effect of which was relaxation of *Dysart's* rigor. The same federal law which caught *Dysart* in its web also banned literature about contraception and contraceptive devices themselves from the mails.¹¹² Some judges, including the venerable Augustus Hand, greatly expanded an implicit exception for disease-preventing "contraception."¹¹³ As to condoms, the exception soon consumed the rule.

None of these doctrinal modifications, which one may presume were partly driven by extralegal convictions edging closer to Stewart's view than to the *Dysart* opinion, added new premises to the constitutional argument. In light of this tradition, we can better appreciate that *D-Griswold* is likely an anachronism, not the "only" justification for *Griswold*.

C. *Contraception and Roe*

My interpretation of *Griswold* also makes sense of subsequent developments in the constitutional law of sexual and reproductive freedom. Dworkin's does not. It makes sense of the fact that the 1972 case which bears great resemblance to *D-Griswold*—*Eisenstadt*—also declined to articulate a right to use contraceptives:

[May] the Massachusetts statute . . . be sustained simply as a prohibition on contraception? . . . We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.¹¹⁴

Eisenstadt has anti-contraceptive laws surrounded by *Griswold* and the Equal Protection Clause. If the premise of the Massachu-

112 The Comstock Act was passed in 1873. At the time of the *Dysart* decision, it was at 17 Stat. 598.

113 *United States v. One Package*, 45 F.2d 103 (2d Cir. 1930).

114 *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972).

sets law is the immorality per se of contraception, married and unmarried contraceptive use present the same evil. Equal Protection would seem to require identical statutory treatment. But the Massachusetts law discriminated between persons similarly situated. Probably to accommodate *Griswold*, the statute banned only distribution to unmarried persons. This underinclusiveness, the *Eisenstadt* court concluded,¹¹⁵ is invidious, citing *Railway Express Agency v. New York*.¹¹⁶ The simple interpretation of *Eisenstadt* is the simple interpretation of *Griswold*. The statute lacked a rational basis. That test presupposes no fundamental right at all.

One is tempted to say that what has been lost here is the true ground of *Griswold*, the one suggested by my interpretation. On that ground *Griswold* constructed an immunity around a true good—marital privacy—which foreseeably but still incidentally encompassed contraceptive use. The temptation should be resisted. This ground is not *lost* in *Eisenstadt*; it is repudiated in the following passage:

If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹¹⁷

No doubt the *Eisenstadt* Court wanted to articulate a right of contraceptive use. But it did not. On the eve of *Roe*, then, we have one case—*Griswold*—which never considered the perfectionist case for anti-contraceptive laws, and another—*Eisenstadt*—which expressly puts the question aside. Two cases apparently decided on “rational basis” grounds, which means that talk of any fundamental right at all is dictum.

Eisenstadt is no authority for *Roe*. Blackmun rightly recognized the “intrinsic difference” between abortion and contraception. More important, *Griswold* spoke not only of marital privacy but, in Goldberg’s words, rights to “marry and raise a family,” and “to establish a home and bring up children.”¹¹⁸ *Eisenstadt* refers to “the decision whether to bear or beget a child.”¹¹⁹ Where did the “bear or” come from? *Eisenstadt* was argued just a few weeks before *Roe* was argued. It was decided several months after *Roe* was

115 *Id.* at 454.

116 336 U.S. 106 (1949).

117 *Eisenstadt*, 405 U.S. at 453.

118 *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965).

119 *Eisenstadt*, 405 U.S. at 453.

argued. *Eisenstadt*, including its "bear or beget" language, was drafted well into deliberations about *Roe*. These circumstances suggest that *Eisenstadt* is a dress rehearsal for *Roe*.

My interpretation of *Griswold* also allows us to make sense of the 1977 decision in *Carey v. Population Services International*.¹²⁰ Dworkin's does not. There plaintiffs challenged New York's ban on distribution of contraceptives to minors. The statute's defenders saw *Griswold* and *Eisenstadt* more clearly than Dworkin does. The *Carey* Court finally recognizes a right to contraceptive use. Again, lengthy quotation seems justified.

[A]ppellants argue that neither [*Griswold* nor *Eisenstadt*] should be treated as reflecting upon the State's power to limit or prohibit distribution of contraceptives to any persons, married or unmarried The fatal fallacy in this argument is that it overlooks the underlying premise of those decisions that the Constitution protects "the right of the individual to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child" *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.¹²¹

It is easy to see now why *Griswold* does not justify *Roe*. Dworkin says that abortion is a waste of a human life. He says that abortion is not like killing a regular person (you or me). He also says that the unfertilized ovum and sperm do not embody the intrinsic value of human life the way that the fetus does. So, abortion is a contralife act somewhere between the moral gravity of contraception and homicide. Before *Roe* there was not even a clear right to contracept. *Roe* established it, as it established a right to abort.

Dworkin may be right that *Griswold*—even D-*Griswold*—has been "accepted" by the American people. He suggests Bork's defeat evinces as much. Maybe. But that justifies neither *Griswold* nor *Roe*. What the people accept in 1987 hardly establishes the soundness of decisions reached in 1965 and 1973. Retrospective "fit" just will not do. Dworkin does not, on the whole, claim that it does.

120 431 U.S. 678 (1977).

121 *Id.* at 686-88 (quoting *Eisenstadt*, 405 U.S. at 453).

Dworkin is hardly done distorting the privacy cases. His account of the most prominent setback of his liberationist ethic since *Roe—Bowers v. Hardwick*¹²²—is all eisegesis. Dworkin presents *Hardwick* as a rejection of an equal protection argument that sexual orientation is no ground for legal discrimination.¹²³ For that reason *Hardwick* bears a Lochnerian “stench.”¹²⁴ Nondiscrimination may now be the homosexual rights argument of choice. But it was not the homosexual’s argument in *Bowers v. Hardwick*. Laurence Tribe argued the case for Michael Hardwick. Tribe argued it as a privacy case smack in the *Griswold* tradition.¹²⁵ The dissenters, Blackmun especially, supported the homosexual’s claim. But they too downplayed the sexual orientation aspect of the case. They wanted to efface it entirely, and to view it as a simple (*i.e.*, sexually neutral) claim to be let alone.¹²⁶ *Pace* Dworkin, *Hardwick* can only be understood as (at least) two cheers for old-fashioned morals laws. The tradition may be in extremis, but Dworkin dates the funeral about three decades too early.

* * *

There is now ample evidence that Dworkin is innocent of the constitutional tradition to the extent he does not simply invent it. There is a big mistake in virtually every claim he makes about the privacy cases. If *this* is “fit,” then it is a facade covering a one dimensional test for the validity of constitutional interpretation—“justice.”

II. RELIGION

Life's Dominion marks Dworkin’s initial published encounter with religion. He discusses it under three separate headings. “What is Sacred” is a chapter long explanation of how we might share a commitment to the inviolability of life even if the unborn have no interests or rights we are bound to respect. How a life continuing to be might be important, in and of itself, is according to Dworkin mysterious. We should see it (along with art and nature) as a category of the sacred.

122 478 U.S. 186 (1986).

123 DWORKIN, *supra* note 1, at 138.

124 *Id.* at 146.

125 Tribe’s argument is summarized in Gerard V. Bradley, *Remaking the Constitution: A Critical Examination of the Bowers v. Hardwick Dissent*, 25 WAKE FOREST L. REV. 501, 510-511 (1990).

126 *See generally, id.*

The second engagement is an interpretation of religiously-grounded moral teaching against abortion. After a token display of ecumenism (quoting Paul Ramsey out of context and cannibalizing a fifteen-year-old court opinion relating testimony by religious leaders), Dworkin turns to his only real concern, the Roman Catholic Church's "present official position," as set out in the 1987 *Instruction on Respect for Human Life*.¹²⁷ It, Dworkin confesses, is an important counter example to his thesis. He works hard to transform the Church's "derivative" objection (abortion is an injustice) into a "detached" (perfectionist) argument against abortion.

Finally Dworkin argues that decisions to kill the fetus and to kill persons out of kindness are "essentially religious issues."¹²⁸ The First Amendment religion clauses commit them to the consciences and convictions of individuals, free of a collectively imposed orthodoxy. Abortion and euthanasia may not be "stamp[ed] . . . out with the jack boots of the criminal law."¹²⁹

A. *The Sacred*

Dworkin does not vouch for any of his claims about the sacred. "Perhaps," he says, they are all "inconsistent superstitions."¹³⁰ They are, he insists, our convictions, and they might clarify our beliefs about abortion and euthanasia. This part of *Life's Dominion* purports to be an anthropological field study. The most arresting feature of it is therefore that it is bereft of evidence for what, Dworkin concludes, we believe.

There are eleven footnotes to this thirty-four-page chapter full of our convictions. (Just try counting the number of sentences that begin with "we" or "our.") Four of these notes, (1), (2), (5), and (9), are simple textual additions. They expand upon unsupported textual assertions. They cite no sources. Notes (4) and (8) perform the same function through third parties. The references are to Walt Whitman and Leo Tolstoy. Dworkin deploys their phrases to enlarge his unsupported textual account of what we believe. Note (6) illustrates "in hyperbolic form" what we believe. This one is from "an obscure nineteenth century Austrian philosopher."¹³¹ Note (7) leads the reader to a philosophical explana-

127 DWORKIN, *supra* note 1, at 39.

128 *Id.* at 165.

129 *Id.* at 15.

130 *Id.* at 81.

131 *Id.*

tion of an important distinction Dworkin attributes to us. He distinguishes "zoe"—physical or biological existence—and "bios"—life as lived, a biography filled with action, decisions, events.¹³² Dworkin does not cite further evidence that we, as opposed to the Greeks, speak of "life" so equivocally.

Just three citations remain to evidence that we actually believe anything Dworkin attributes to us. These include note (3), an unelaborated citation to the source of this textual proposition: "An anthropologist recently pleaded that we should treat the threatened death of a primitive language with as much concern and sympathy as we show snail dart and horned owls and other near extinct species of animal life."¹³³

And then there were two. Notes (10) and (11) come near the chapter's end. Note (10) identifies the New York Times report of Louisiana Governor Buddy Roemer's 1991 veto of an anti-abortion statute. That law excepted rape victims from its generally restrictive treatment of abortion. Governor Roemer vetoed it because the exception worked in a way that "dishonors women and . . . unduly traumatizes victims of rape."¹³⁴ Note (11) returns to the Federal Supplement and Judge Dooling's opinion in the '1980 abortion funding case. The textual proposition supported is Dooling's account of Rabbi Feldman's view that Jewish law allows abortion for rape victims.¹³⁵ Thus, we have *two* citations for *one* point: "Moderate conservatives believe that abortion is normally permissible to end a pregnancy that began in rape."¹³⁶ But this proposition was amply demonstrated in Chapter 1 through public opinion poll data. Chapter 3 ("What is Sacred") was supposed to explain that data. The evidential cupboard is completely bare.

Dworkin offers literally *no* evidence for his findings. If this is anthropology, it is critical cultural anthropology from the top down. It is not, in other words, anthropology. Move this part of *Life's Dominion* over to the fiction shelf. "What is Sacred" is an imaginative thought experiment. But that does not prove it is, in fact, foreign to our thoughts. Has Dworkin somehow happened onto our convictions?

132 *Id.* at 82-83.

133 *Id.* at 76.

134 *Id.* at 95.

135 *Id.* at 96.

136 *Id.* at 95.

No. I list below some leading features of Dworkin's sacred space that are deeply uncharacteristic of the religious American, particularly religious Americans serving in the anti-abortion army.

1. Dworkin's "sacred" space has no reserved seat for God, a Supreme Being, or any greater-than-human source of meaning and value. "Sacred" is one category where we put things valuable in themselves. There are other categories. Dworkin says that "sacred" is interchangeable with its secular counterpart "inviolable."¹³⁷ The "sacred" sense of religious Americans connects with God. They are skeptical of any "sacred" which treats God as an option.

2. Dworkin nowhere engages a conspicuously common feature of the religious American's anti-abortionism—arguments from religious authority. Many anti-abortion Mormons, Orthodox Jews, Muslims, and Christians understand themselves to be following straightforward moral truths recorded in sacred writings or taught by recognized human religious authority. Dworkin never mentions, for instance, the evangelical Christian who regards the story of Mary's visit to Elizabeth (when the baby "leapt" in Elizabeth's womb) as proof of the unborn's humanity. Some of these claims may well be naive in the specific sense that background assumptions not traceable to sacred texts (and likely absorbed from present day culture) are suppressed or ignored. No matter. Dworkin wants neither to defend nor refute "our" convictions. He just wants to know what they really are.

3. Most believing (and some nonbelieving, depending on how you categorize Shirley MacLaine) Americans believe in the hereafter. Dworkin does not. That he does not emerges in his discussion of euthanasia. When "zoe" finally succumbs, it is lights out for good. He writes that "[death's] central horror is oblivion—the terrifying dying of the light Death has dominion because not only is it the start of nothing but the end of everything."¹³⁸

4. Is there any "inherent" difference between a good and bad life?¹³⁹ Dworkin seems to think so. He meets the challenge by distinguishing two species of skepticism. "External" skepticism doubts metaphysical claims about the nature of reality. Mentioning John Mackie by name, Dworkin correctly says that this skepticism attacks realist claims about what it means to say something is true.

137 *Id.* at 83.

138 *Id.* at 199.

139 *Id.* at 206.

To take a leading example, believers typically hold that there really is a God, and that bringing oneself into harmony with His plan for human beings puts us in touch with reality. Believers typically do not consider God a projection of their minds. Mackie's argument is that we have no firm ground for such affirmations.

Dworkin thinks "external" skepticism is self-refuting. What is the status of the claim that there really is no there, there? Is that a metaphysical claim? Is it not affirmed as true?

Dworkin's fall-back position interests us more. "[I]n any case external skepticism is unthreatening, because we can embrace it, if we wish, and continue to live and feel as we have before."¹⁴⁰ It does not (or should not) matter to believers, in other words, whether there is (or is not) a God. What matters is that they believe there is.

Hold on. The divine promise, whatever exactly we understand it to be, is not some comforting fable. It is the Word of the Living God about things we now barely perceive—as through a glass darkly—but someday will be ours to hold and to enjoy, forever. We Americans, it seems to me, take our stand with St. Paul: if there is a body in that tomb, then we are all fools. Dworkin seems to think Paul is the fool.

Dworkin's response to "external skepticism" suggests a breach between him and his research subjects—us. His response to "internal skepticism" widens it to a chasm.

The second kind of skepticism . . . is the disabling substantive skepticism of the person who is suddenly gripped by the implications, as he thinks, of discovering that there is no God; or of someone like Goncharov's gray hero, Oblomov, who suddenly sees no point in anything, no reason to leave his bed This skepticism is dangerous exactly because it plays the same structuring role for people in its grip, except in a draining, negative way, that positive convictions play for those who embrace them.¹⁴¹

What is the person so gripped to do? What reason does he have to jump to his feet?

The philosophical standing of internal skepticism is no different from that of the positive convictions it challenges If it

140 *Id.* at 207.

141 *Id.* at 207-08.

is true, it is true in exactly the same way, and with no more independent foundation in an objective world, than the positive opinions it mocks There is no answer to internal skepticism once it has taken hold except to test it again by measuring the conviction it finally brings. Most people then find that it has loosened its grip.¹⁴²

Evidently, believers "cold-boot" themselves into believing and stay there by force of inertia. There is just as much—or just as little—reason to stay in bed (or to deny God), as there is reason to get up and go (or to affirm God). (Maybe there is none in either event.) Do you have a solid argument that you *ought* to stay in bed? Hardly. That being the case, one might as well do that which just seems more appealing. Who wants to stay in bed all day anyway?

Dworkin's secularized "sacred" makes a shambles of the complex doctrines about the relationship among divine initiative, reason, human choice, and will (or roughly cognate notions) that are at the heart of Western monotheism. I see the face of Jean Paul Sartre, unmistakable and vivid, in Dworkin's imaginative construction, but no trace of John Paul II.

B. *Roman Catholicism*

Dworkin admits that Catholic teaching is an important counterexample. He warms to the task of creatively reinterpreting the convictions of pope, saint, moral theologian. But Dworkin is no gambler. His insurance policy pays off in dissent in the pews. "Most American Catholics do not seem to accept the Church's teaching."¹⁴³ "Catholic women are as likely to obtain abortions as women generally"¹⁴⁴ though Catholics are "less likely to approve of abortion than some other religious groups."¹⁴⁵ That is hardly grounds for the special attention Dworkin gives Catholicism. He says that Baptists are significantly more likely than Catholics to think that abortion should never be permitted.¹⁴⁶ He says almost nothing about Baptists. Dworkin agrees (and I think it is the case) that the important correlation in popular attitudes about abortion is between regular church attendance—regardless of one's

142 *Id.*

143 *Id.* at 39.

144 *Id.* at 245 n.6.

145 *Id.*

146 *Id.* at 35.

faith—and irregular attendance or nonattendance.¹⁴⁷ He does not pursue that provocative matter. For some obscure reason this book has a rendezvous with Roman Catholicism.

Dworkin presents the substance of Church teaching accurately enough. “[E]very human being” has a “right to life and physical integrity from the moment of conception until death.”¹⁴⁸ He claims, nevertheless, almost no one really believes it, including the Popes and Bishops who teach it.

Dworkin's problem is not that the Church has said for over a century that all abortions are injustices. Lots of people say that. Dworkin is committed only to the proposition that no one—even people who say it—really believes it. Dworkin disposes of common folks in the pews as basically confused. Transit from conviction to rhetoric has derailed due to innocent mistake. Does Dworkin argue that Popes and Bishops are similarly confused?

No. Like their flocks, these shepherds say the unborn are persons but do not really believe it. For them, transit from conviction to rhetoric is consciously disrupted. Popes and Bishops are insincere. They offer a teaching as true which they believe to be false. They are liars.

What resources does Dworkin bring to the formidable forensic task of justifying the charge? With characteristic equivalence between “some” and “all,” he thanks John Finnis for “sav[ing]” him “from mistakes about the history of Catholicism and abortion.”¹⁴⁹ All his mistakes? Unlikely. He mentions none of Finnis' many writings examining the morality of abortion and other intentional killings, including Finnis' recent review of the Church's teaching and the history of its development.¹⁵⁰ Dworkin makes no references to, and appears ignorant of, the two foundational works on abortion by orthodox Catholics, Germain Grisez and John Connery.¹⁵¹

Dworkin heavily relies instead upon the writings of Catholics who dissent from the Church teaching he sets out to clarify. He

147 *Id.* at 35-36.

148 *Id.* at 39.

149 *Id.* at 261.

150 See John Finnis, *The Rights and Wrongs of Abortion*, 2 PHIL. & PUB. AFF. 117 (1973); John Finnis, *The Legal Status of the Unborn Baby*, CATH. MED. Q., Aug. 1992, at 5 [hereinafter Finnis, *The Legal Status*].

151 GERMAINE GRISEZ, *ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS* (1970); JOHN CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* (1977).

features two articles by Joseph Donceel, S.J., on delayed hominization.¹⁵² Delayed hominization is the view, rooted in a prescientific understanding of reproduction, that a new human individual comes into being some time during the pregnancy, as late perhaps as the third month. Thomas Aquinas held this view. Compelling arguments demonstrate, however, that Thomas's view depended upon an Aristotelian biology that we know now is false.¹⁵³ Donceel argues (unsuccessfully, in my opinion) against this view. He holds that Thomas would, even in light of modern biology, adhere to delayed hominization.

Dworkin notices the lively intellectual debate within the Church on this and the related question of when the soul is infused. He notes, correctly, that this debate swings free of the Church's teaching on abortion.¹⁵⁴ Dworkin concedes that when the spiritual soul is infused is independent of the moral assertion that the unborn have a right to life from the moment of conception. He suggests that this proves *his* point. His point is that the Church's condemnation of abortion has no logical dependence upon personhood. This is a simple mistake, based partly upon a suppressed equivocation. True, if the unborn are not persons, the Church would still condemn evacuating the uterus of a pregnant woman. But it would condemn that act as either contraceptive or something less than "abortion" defined as destroying a human person. Which is to say, if my aunt were a man she would still be related to me, but she would no longer be my aunt. What the independent affirmation shows instead is that the injustice of abortion does not depend upon identifying when the soul is infused.

Dworkin capitalizes generally upon his reader's probable ignorance of how sin (offense against God) and immorality (ascertainable by reason) are related in Catholic thought. He offers assertions like "abortion insults and frustrates God's creative plan" for the transmission of life¹⁵⁵ as examples of a perfectionist condemnation of abortion, suggestive of no injustice. But expressions like "offend and insult" are not sorters of what I here call strictly for argumentative purposes mere immoralities (contraception) from

152 DWORKIN, *supra* note 1, at 44-46.

153 See, e.g., Benedict M. Ashley, *A Critique of the Theory of Delayed Hominization*, in AN ETHICAL EVALUATION OF FETAL EXPERIMENTATION: AN INTERDISCIPLINARY STUDY (1976); Stephen J. Heaney, *Aquinas and the Presence of the Human Rational Soul in the Early Embryo*, 56 THE THOMIST 19 (1992). Dworkin mentions the latter article.

154 DWORKIN, *supra* note 1, at 44.

155 *Id.* at 45.

immoralities which are also injustices (abortion). One might well describe contraception, abortion, and the killing of other human persons as "insults to God's creative plan." All are contralife acts, all offend God. Not all are per se injustices. For that matter, "offend and insult" do not distinguish actions (nonmoral or immoral *and* unjust) cognizable by public authority from those that are not. For Catholics, sin is basically immorality viewed as an aspect of our relationship to God.

Dworkin has one point that deserves careful consideration. For a long time the church distinguished early from late abortion, as it distinguished the preanimate from animate existence of the unborn. By the mid-nineteenth century the Church condemned all abortions as violations of the rights of unborn children not to be killed. What, Dworkin asks, explains this development of doctrine? He brushes aside the intuitively obvious—and certainly correct—answer: Roman Catholic teaching took account of the same physiological truth of the matter that American lawmakers did.¹⁵⁶ A new human being came into being not at quickening but at conception. Aristotelian biology was mistaken.

To fill the explanatory void he has created, Dworkin builds a circumstantial case for a political/rhetorical interpretation of the change.¹⁵⁷ The change in teaching gave the church "a considerable political advantage in its campaign against abortion."¹⁵⁸ Dworkin does not identify the campaign, but context suggests that he means political campaigns to make abortion illegal. Dworkin says that the derivative objection to abortion was necessary to make a political difference in countries like the United States where the Constitution separated church from state. "Since the eighteenth century, Western democracies had begun to resist explicitly theological arguments in politics," citing the First Amendment.¹⁵⁹

This argument is highly improbable. For one thing, Dworkin acknowledges that the churches played no role in the mid-to-late nineteenth century movement for statutory prohibitions of abortion.¹⁶⁰ Besides, how would adoption of the "immediate ensoulment" doctrine, a theological position if ever there was one,

156 *Id.*

157 *Id.* at 45-46.

158 *Id.* at 45.

159 *Id.*

160 *Id.*

evade the separationist stricture? Dworkin's answer is that Catholics could argue the conclusion—abortion kills a person—and keep the reasons to themselves. But the first question likely to be raised about such a conclusion is, *why* is the fetus a person. It is also unlikely that Pius IX, whom Dworkin says officially adopted the immediate ensoulment view in 1869,¹⁶¹ was concerned about political operations in regimes (like ours) whose premises he resisted so strenuously in the Syllabus of Errors.

Some elementary facts about the American constitutional tradition belie Dworkin's speculation. The derivative objection was hardly necessary to political success in the nineteenth century abortion campaign since, in those pre-*Eisenstadt* days, contraception was legally prohibitable, too. If "early abortion" is not abortion, it is at least some kind of contraceptive or contralife act. Nor does it matter what the First Amendment to the Constitution says. The anti-abortion campaign was waged in the states. No part of the First Amendment applied to the states before 1920. The religion clauses were not "incorporated" until 1940 (free exercise) and 1947 (establishment). The states did have (more or less) equivalent restrictions in their constitutions. But the historical fact is that the anti-abortion campaigns did *not* involve, explicitly or implicitly, discussion of theological premises. Besides, Dworkin himself, following the Historians' Brief, claims that the anti-abortion campaigns were not about fetal life at all. If, as he further says, they were about maternal health, then there really is no historical basis for his assertion that the Church changed its position on fetal personhood to gain political advantage. Of course, the truth of the historical matters—politics and the development of Catholic doctrine—is that new scientific knowledge in light of unchanging moral principles wrought legal progress.

Another Dworkinian speculation about the "practical political advantage" of adopting "immediate ensoulment" is, frankly, almost unintelligible.¹⁶² The leading idea seems to be that church leaders feared their disapproval of abortion would be ignored by the faithful, just as their disapproval of masturbation and contraception were (are?) ignored. Since contraception, Dworkin continues, is here to stay, "the church needs a sharp and effective way to distinguish abortion and contraception," especially in the United

161 *Id.* at 44-45.

162 *Id.* at 46.

States after *Griswold*.¹⁶³ “[T]he doctrine of immediate ensoulment makes a more dramatic distinction, because it claims that a conceptus has a divine soul, though a sperm or an ovum does not.”¹⁶⁴

How this explains what Pius IX did in 1869 is not immediately clear. The reality is that, today, American Bishops do not believe the unborn are persons. They really think abortion is just like masturbation. They realize that Catholics think *that* account is ridiculous. So the Bishops, make public statements which they believe to be false. The Bishops, Dworkin implicitly holds, are liars.

C. *The Religion Clauses*

After dispatching the derivative argument, Dworkin opines that it has been decided “in the only way it can be . . . under the American constitutional system.”¹⁶⁵ The detached argument for restrictive abortion laws remains. May “states prohibit abortion” to impose “a controversial view about what respect for the intrinsic value of human life requires.”¹⁶⁶ The religion clauses will not allow it.

Dworkin concedes that this argument “is less easily demonstrated [than a simple due process defense] on grounds of precedent alone.”¹⁶⁷ He dramatically understates the matter. Only Justice Stevens, Dworkin concedes, has made the Establishment Clause into a brief for a freedom of conscience wide enough to include abortion rights. In *Webster*, Stevens said that only theological dogma could support the view that life begins at conception.¹⁶⁸ In *Cruzan v. Director, Missouri Department of Health*,¹⁶⁹ he said that religious dogma necessarily underwrote resistance to the “right to die.”

More remarkable than Stevens’ lonely polemic is the hostile reception it has received on a Court struggling to ground abortion rights. The Court’s 1980 review of Judge Dooling’s decision on abortion funding explicitly refused to steer the abortion controver-

163 *Id.*

164 *Id.*

165 *Id.* at 161.

166 *Id.*

167 *Id.* at 160.

168 *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 566-72 (1989).

169 497 U.S. 261 (1990).

sy into the church-state stream.¹⁷⁰ The landmark free exercise decision in *Oregon v. Smith*,¹⁷¹ affirmed in June, 1993,¹⁷² undermines Dworkin's free exercise case. In a footnote,¹⁷³ Dworkin arbitrarily distinguishes *Smith* out of sight.

Dworkin's precedent for his commodious definition of religion is the twenty-eight-year old decision in *United States v. Seeger*.¹⁷⁴ The *Seeger* Court clarified what Congress meant by the terms "religious training and belief" and "Supreme Being" as they appeared in a statute governing conscientious objection to military service.¹⁷⁵ Dworkin is right¹⁷⁶ that *Seeger's* construction of those terms owed something to felt constitutional constraints. The Court probably thought that a less latitudinarian construction raised doubts about the statute's constitutionality. The Court even flirted with some kind of functional definition of religion as "ultimate concern," citing Paul Tillich's work specifically.¹⁷⁷

Dworkin claims the Court adopted Tillich's notion. He says that *Seeger* tested a conviction for religiosity by asking if it has "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹⁷⁸

Convictions that endorse the objective importance of human life speak to the same issues—about the place of an individual human life in an impersonal and infinite universe—as orthodox religious beliefs do for those who hold them "Men expect from their various religions answers to the riddles of the human condition: What is man? What is the meaning and purpose of our lives?"¹⁷⁹

Dworkin treats the *questions* that religious people ask as the defining feature of religion. Any answer to these questions is essentially religious. But that is not what distinguishes religion. Sartre and Pope John Paul II ask the same questions. Do they both believe in a Supreme Being? Are they both Catholic? The

170 *Harris v. McRae*, 448 U.S. 297, 319-21 (1980).

171 492 U.S. 872 (1990).

172 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S.Ct. 2217 (1993).

173 DWORIN, *supra* note 1, at 253 n.17.

174 380 U.S. 163 (1965).

175 *Id.*

176 *See* DWORIN, *supra* note 1, at 253 n.18.

177 *Seeger*, 380 U.S. at 187.

178 DWORIN, *supra* note 1, at 163.

179 *Id.* (quoting *Seeger*, 380 U.S. at 181-82).

believer's *answer*—characterized by recognition of a greater than human source of meaning and value with whom (which) one may pursue some form of harmony—distinguishes religion.

The *Seeger* court held tight to this defining characteristic of religion. Dworkin omits a *Seeger* caveat, repeated in many cases since, that only religious answers, distinguished precisely by a felt obligation to conform one's actions to an external "higher authority," qualify for Religion Clause protection.¹⁸⁰ Secular equivalents, including a personal moral philosophy, do not. *Seeger's* own problems moved within the orbit of theistic religious belief. Its aspiration was to avoid discrimination *among* religions, not to treat secular and religious answers to central questions as if they were all religious responses.

Dworkin concludes that, by *Seeger's* reckoning, abortion and euthanasia are "essentially religious issues."¹⁸¹ Legislation supporting one side of an argument about an essentially religious issue—as do restrictive laws on abortion and euthanasia—"would violate both of the First Amendment's religion clauses at once."¹⁸²

Seeger does not warrant that conclusion. Is Dworkin's notion of the "essentially religious," regardless of authority, a sound one?

Religions prescribe in some detail what harmony with God requires, depending upon what God is thought to have revealed about His expectations or plan for us. Many of the requirements—diet, dress—would rank as minor matters of taste on Dworkin's view of the essentially religious. But once the path of holiness is made known, a distinctive concept is introduced into the self-understanding of religious believers for which Dworkin's scheme has no place: disobedience to God, rejection of His offer of friendship. In this light, Dworkin's conception of the "essentially religious" is too narrow.

If any response to questions like "what is the meaning of life?" is "essentially religious," then it is virtually impossible for rational beings to be nonreligious. Everyone wonders about such things, and works up some answer, however wooly. But this conception of religion pulls the bottom out of the religion clauses. They disappear into the domain of the autonomous self, free of perfectionist public policies to work up distinctive responses to all

180 *Seeger*, 380 U.S. at 175-76.

181 DWORKIN, *supra* note 1, at 162.

182 *Id.* at 162.

of life's puzzles. It is true, as Dworkin claims, that the religious liberty defense of abortion rights has some basis in *Casey*. But that is precisely because religious liberty is there consumed by the autonomous self.

Here's why. Dworkin fairly states *Casey*'s slender authority: "Much of the rhetoric" of the joint opinion "is at least suggestive of it."¹⁸³ (Is this the practical abandonment of "fit"?) The *Casey* "centrists," Justices Souter, Kennedy, and O'Connor, recognized, as did Blackmun in *Roe*, that abortion is a matter very different from contraception. They realized that the Court had lacked all along a principle embracing abortion and contraception, and marriage, procreation, child rearing, etc., to rationalize, unify, and thereby legitimate twenty years of privacy holdings. *Casey* supplied it. "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."¹⁸⁴

May public authority assist us in making worthwhile decisions about these matters? May the law, in other words, rule out some truly worthless option, like killing one's unborn son or daughter, leaving an almost limitless range of options concerning sex, marriage, procreation, child-rearing available? No. "At the heart of liberty is the right to define one's own concept of existence, of meaning, the universe, and of the mystery of human life. Belief about these matters could not define the attributes of personhood were they formed under the compulsion of the State."¹⁸⁵ All law is, in this view, intrinsically "personicidal." Foreclosing one option via legal restriction—any option, all law—wounds.

Recall that just five days before *Casey*, the Court handed down the middle-school graduation prayer case, *Lee v. Wiseman*.¹⁸⁶ Justice Kennedy's majority opinion conceived religious liberty broadly as "that sphere of inviolable conscience and belief which is the mark of a free people."¹⁸⁷ Kennedy located religious liberty at the center of "our constitutional vision of a free society."¹⁸⁸ Blackmun, concurring in *Lee*: "The Establishment Clause protects religious liberty on a grand scale, it is a social compact that guar-

183 DWORKIN, *supra* note 1, at 160.

184 Planned Parenthood of Southeastern Pa. v. Casey, 112 S.Ct. 2791, 2807 (1992).

185 *Id.*

186 112 S.Ct. 2649 (1992).

187 *Id.* at 2658.

188 *Id.* at 2657.

antees for generations a democracy and a strong religious community."¹⁸⁹

How "grand" is the "scale" upon which the Justices would protect religious liberty? The law of religious liberty has been subsumed—disappeared into, been gobbled up by—a wider civil liberty, the entirety of which is determined by the everyday-becoming-more-familiar autonomous self. The Court began about three decades ago executing an encircling movement, surrounding this sensitive creature with impregnable constitutional defenses. On one flank, the Justices upgraded moral decisions (like contraception, abortion) to the status of religion by stressing, as does Dworkin, their deep, self-defining quality. The boundary between religion and morality, on the other flank, was collapsing. Religion has expanded from, in the 1950's, monotheism to any religious belief, to nearly "ultimate concern," all the way to where belief and disbelief are now, per *Casey*, equally protected self-defining choices.

This self-determining sovereign chooser dominates such cases as *Roe* and *Casey*. The primary domain of the chooser in matters religious is anterior to the religious life, even to religion itself. The new "religious" liberty is not fundamentally that of the believer to live out the committed life with some immunity from civil interference. It is fundamentally to choose *between* religion and (what the cases call but do not define) "irreligion" or "nonreligion." The believer is subordinated to the chooser.

There is one undifferentiated private sphere. There *all* value laden choices are protected, so long as no harm is visited upon nonconsenting third parties. *All* such choices are equally valid in the eyes of the political community. Huddled together in this realm are Cardinal O'Connor, Billy Graham, the Skokie Nazis, Robert Mapplethorpe, and the Kitty Kat lounge's table-top dancers.

Casey finally arranged the adoption of religious liberty by the privacy doctrine. Abortion must be freely available because, while not a solitary performance, "the abortion decision may originate within the zone of conscience and belief . . . [T]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."¹⁹⁰

189 *Id.* at 2665 (Blackmun, J., concurring).

190 *Casey*, 112 S.Ct. at 2807.

All this means that not only the woman aborting and the woman bearing and rearing a child are exercising the same right. They are, as *Casey* explicitly claims in a note of self congratulation. It also means that the woman aborting and the priest baptizing the other woman's child are exercising the very same right.

Is this "our" understanding of religious liberty? Is it a doctrine of "religious liberty" at all? Fortunately, as Dworkin concedes, this marriage is annulable. Only three justices in *Casey* officiated at the ceremony (granted, two more—Blackmun and Stevens—were compliant witnesses). None claimed to actually interpret the religion clauses, and *Casey* unequivocally rested upon the autonomy of the Fourteenth Amendment's guarantee of liberty. The really awkward thing is that we now have competing, irreconcilable constitutional doctrines of religious liberty going. One calls the religion clauses home, the other resides in the Fourteenth Amendment.

One reason they are irreconcilable is that one can barely find in free exercise and establishment cases a forthright account of how free human choice in religious matters is practically possible. Given the prevailing understanding of religion (nonrational, if not noncognitive) and its sociology of knowledge (subliminal but profoundly formative influences all around us), it is hard to imagine a convincing account by the Court of just how individuals freely choose belief over disbelief, or one set of beliefs over another set. If our religious commitments *are* caused more than they are chosen, it makes little sense to speak of them, as Dworkin does, as self-defining choices par excellence.

III. PHILOSOPHY (INSIDE OUT)

So far Dworkin has adduced little evidence to support his claims about constitutional law, religion, and Catholic teaching on abortion. He handles the little evidence he adduces carelessly. Selection criteria seem wholly arbitrary. Dworkin generally fails to take account of relevant contrary evidence and often provides caricaturish accounts of the contrary evidence he does discuss. Dworkin habitually engages in fanciful speculation according to his rhetorical needs. He relies upon inconsistent criteria of truth in arguing for and against the same type of proposition.

What of the philosophical infrastructure of *Life's Dominion*? Its organizing philosophical ideas include a radical metaphysical dualism,¹⁹¹ a conception of rights as protectors of interests and of

191 That is, Dworkin considers the body to be the mere physical carrier and instru-

interests as solely the property of conscious, experiencing subjects; a natural right of equal respect for critical interests; a deep conventionalism in all other matters of ontology and value. Since Dworkin does not make them stick to us, the Supreme Court, or to the Catholic Church, and because they are consistent with his scholarly opus as a whole, they would seem to be Dworkin's philosophical commitments.

Dworkin offers no defense of them in *Life's Dominion*. He does not inform the reader that he (Dworkin) is relying upon controversial assumptions. Neither the term "dualism" nor any equivalent appears in the book. Yet, apart from a radical dualism, Dworkin could hardly avoid concluding that the unborn are persons *once* he concedes that the fetus "embodies the intrinsic value of human life."¹⁹²

How so? It is uncontroversial that a new individual comes into being when sperm and ovum unite to form the zygote. The chromosomal packages of mother and father carried to fertilization differ from that of their new offspring—the zygote. From conception onward this new individual is human. Why? Its sources are human, its genetic structure is that of humans, and it will in due course develop into a human individual like you and me. Dworkin is certainly on board this far. Is this human individual a complete human being? Yes. It is not a part of a human being because parts do not develop into wholes. The embryo, however, has within it all the material and information necessary to develop into a mature human organism.¹⁹³ Dworkin sometimes disputes this. Dworkin's main escape hatch, however, is his denial that the fetus is a person or, he sometimes says, a creature of any sort with a right not to be killed. Dworkin goes back and forth on the humanity of the unborn, consistently denies that the unborn are persons, says sometimes they are just "creatures," claims that whether the unborn are humans or persons or just plain creatures does not matter. Here we see Dworkin doing philosophy "inside out." It is not a pretty sight.

ment of the "person"—the deliberating, choosing, experiencing subject. In this metaphysical perspective, the person is related to his body much as the driver is to his car.

192 DWORKIN, *supra* note 1, at 244 n.18.

193 Here I follow the argument of Patrick Lee, *Abortion and Unborn Human Life* (1993) (unpublished manuscript, on file with the author). An additional persuasive argument for the personhood of the unborn is Germain Grisez, *When Do People Begin?*, 53 PROCEEDINGS OF THE AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION 27-47 (1990).

Dworkin asks why "should fetal viability mark the end of a pregnant woman's right to protection? If a state may not prohibit abortion before that point, then why may it do so after?"¹⁹⁴ Recall that Dworkin invented D-Roe to make *Roe* appear reasonable. To defend D-Roe Dworkin makes noises that sound like fetal personhood. "[A] primitive form of fetal sentence is possible. A fetus might then sensibly be said to have interests of its own."¹⁹⁵ Seeing unborn "persons" straight ahead, Dworkin veers into oncoming traffic. "[A] state may nevertheless act to protect the interests even of creatures—animals, for example—who are not constitutional persons"¹⁹⁶

Dworkin says that a state act of this sort would not be an example of "detached" opposition. After "fetal viability, the state may claim a legitimate interest that is independent of its interest in enforcing its conception of the sanctity of life."¹⁹⁷ Is the human fetus just like a chimp fetus? Like a snail darter? Would a late term abortion ban find its rational basis in animal cruelty concerns?

Dworkin is more erratic when discussing fetal personhood in a strictly moral (nonlegal) setting. He generally concedes the moral component of the detached argument. That is, he agrees that the unborn embody the intrinsic value of human life. Then again, he sometimes denies it.

If we cautiously describe it as Dworkin's predominant tendency, we may say that he identifies "persons" with the presence of complex capacities "to form affections and emotions, to hope and expect, to suffer disappointment and frustration."¹⁹⁸ Although Dworkin offers this as unproblematic, he must know that enormous difficulties afflict his denotation of "capacity" as *actually having* these experiences. Without modification, that imposes a death sentence on infants, the reversibly comatose, even sleeping adults. Dworkin dogmatically rules out the obvious defense of the unborn, that they have the *capacity* for these functions now but only later will actually exercise them. This will not do, Dworkin says, because Frankenstein was on his way to being "a full human being" while on the assembly table, as the fetus is in the womb. And we do not think Frankenstein was then (if ever) a person. One

194 DWORKIN, *supra* note 1, at 169.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 17-18.

might object that Frankenstein was inanimate, just a collection of spare parts, before the switch was pulled. Is the six-month-old fetus inanimate? Not really, Dworkin replies, but like Frankenstein it has no interests.

How do sleeping adults, infants, and the comatose avoid Frankenstein's fate? Dworkin grandfatheres them onto the active roster. One who "has or *has had*" emotional and mental experiences is a person.¹⁹⁹ But if past consciousness suffices to protect one's life, the denizens of the local cemetery are (buried alive?) persons. The grandfather clause is dubious. No one—not even the sovereign self—can decide now that he shall be a person later when all organic functioning has ceased. This still leaves out in the cold newborns and "persons" mentally incompetent since birth. There is no security at all for them in *Life's Dominion*.

What is Dworkin up to in the following passage?

Is a fetus a person? That is an even more treacherous question [than whether the fetus is a human being] because the term "person" has a great many uses and senses that can easily be confused. Suppose it is discovered that pigs are much more intelligent and emotionally complex than zoologists now think they are, and someone then asks whether a pig should therefore be considered a person. We might treat that as a philosophical question, asking us to refine our conception of what a person really is to see whether pigs, on the basis of our new information, qualify for that title. Or we might treat the question as a practical one, asking whether we should now treat pigs as we treat creatures we regard as people, acknowledging that pigs have a right to life so that it is wrong to kill them for food and a right not to be enslaved so that it is wrong to imprison them in pens. Of course, we might think that the two questions are connected: that if pigs are persons in the philosophical sense, they should be treated as other persons are, and that if they are not, they should not. But that does not necessarily follow, in either direction. We might believe philosophically that pigs are persons but that human beings have no reason to treat them as we treat one another; or, on the contrary, we might decide that pigs are not persons according to our best understanding of that complex concept but that nevertheless their capacities entitle them to the treatment persons give one another.²⁰⁰

199 *Id.* at 16.

200 *Id.* at 22-23.

Is that sickly cabin boy over in the corner of the lifeboat a person? Depends on how hungry you are. "[I]t would be wise," Dworkin concludes, "to set aside the question of whether a fetus is a person, not because that question is unanswerable or metaphysical . . . but because it is too ambiguous to be helpful."²⁰¹ Why not keep all our options open?

With such shifting metaphysical ground beneath it, we should not be surprised that Dworkin's ethic of killing is, well, surprising. Here it is. (It is already clear that Dworkin uses the royal "we.")

[W]e treat human life as sacred or inviolable . . . It is inviolable because of *what it represents or embodies*.²⁰²

[T]he nerve of the sacred lies in *the value* we attach to a process or enterprise or project rather than to its results considered independently from how they were produced.²⁰³

Our attitudes toward individual value of art and discrete cultures, then, display a deep respect for the enterprises that give rise to them²⁰⁴

[W]e are selective about which products of which kinds of creative or natural processes we treat as inviolable [O]ur selections are shaped by and reflect our needs and, in a reciprocal way, shape and are shaped by other opinions we have.²⁰⁵

[M]ost people's convictions about abortion and euthanasia can be understood as resting on very similar, though in some important ways different, beliefs about how and why *individual* human life, in any form, is also inviolable.²⁰⁶

We believe, as I said, that a successful human life has a certain natural course. It starts in mere biological development—conception, fetal development, and infancy—but it then extends into childhood, adolescence, and adult life in ways that are determined not just by biological formation but by social and individual training and choice, and that culminate in satisfying relationships and achievements of different kinds. It ends, after a normal life span, in a natural death. It is a waste of the natural and human creative investments that make up the story of a normal life when this normal progression is frustrated by premature death or in other ways. But how bad this is—how great the frustration—depends on the stage of life in which it occurs, because the frustration is greater if it takes places after

201 *Id.* at 23.

202 *Id.* at 73-74 (emphasis added).

203 *Id.* at 78 (emphasis added).

204 *Id.*

205 *Id.* at 80 (emphasis added).

206 *Id.* at 81.

rather than before the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely.²⁰⁷

So the idea that we deplore the frustration of life [understood, then, as referring to zoe—a biological life and bios—a lifetime of choices], not its mere absence, seem adequately to fit our general convictions about life, death and tragedy.²⁰⁸

Life so [equivocally] understood can be frustrated in two main ways. It can be frustrated by *premature death* [evidently, the end of organic functioning], which leaves any previous natural and personal investment unrealized. Or it can be frustrated by other forms of failure: by handicaps or poverty or misconceived projects or irredeemable mistakes or lack of training or even brute bad luck Is premature death always, inevitably, a more serious frustration of life than any of these other forms of failure?²⁰⁹

Dworkin has finally succeeded in rendering his book's opening sentence analytically useless. "Deliberately killing a person" turns out to be too ambiguous to be helpful. The morally relevant description is closer to "deliberately frustrate an investment." We need to know what aspect of "life" (organic functioning, a project) was "frustrated," and what sort of investments in that project were left unrealized. Figuring out the morality of such an action is another obscure matter. As far as I can tell, it rests upon some kind of utilitarian calculus even though Dworkin seems to reject consequentialism. There is no evidence, for example, that he thinks a resulting state of affair is the measure of individual choice. Unlike consequentialists, Dworkin emphasizes the intransitive effects of choice.

Dworkin holds, in other words, that by choosing, one determines oneself around the good(s) chosen. A fatal flaw in consequentialist ethics nevertheless seems central to Dworkin's moral theory. He holds with consequentialists that prior to choice one can compare and weigh and balance premoral goods like "zoe," knowledge, play, friendship. A "metric of disrespect" yields the right choice. As many critics of consequentialist ethics have shown, the basic goods are incommensurable. So consequentialism cannot rationally guide free choice. Indeed, it precludes the possi-

207 *Id.* at 88.

208 *Id.*

209 *Id.* at 89-90 (emphasis added).

bility of rationally-guided free choice. If one could identify one option, all things considered, undeniably superior to all others, then it would be irrational *not* to choose it.²¹⁰ If Dworkin's ethics shares this feature of consequentialism, he succeeds in eliminating the possibility of free choice, too.

Dworkin's equivocal use of "life" and his redefining of killing as frustration shatter common sense and usage. No one considers a failed project a form of killing. If someone stole this manuscript right now, you would be arrested for reporting it as a homicide. Homicide statutes uniformly refer to "causing the death of" or "killing" another "person." No one has ever been indicted for transgressing them without abundant proof that someone ceased all organic functioning due to the accused's acts. Prosecutors call a pathologist, not a psychologist, to establish cause of death. And so on.

IV. THE RIDDLE OF POPULAR OPINION

To what problem or puzzle is this intricate construction the solution? What is the dilemma which calls forth this novella? "[S]ignal inconsistencies in Americans' opinion about abortion as revealed in polls."²¹¹ Dworkin offers data from a few polls, roughly to the same effect. He features a Gallup poll taken for Americans United for Life (AUL).²¹² I shall follow Dworkin and take it as exemplary.

Dworkin accurately relates the main lines of the "puzzle." Thirty-seven percent of respondents said that abortion is "murder," "just as bad as killing a person who has already been born."²¹³ Twelve percent said that abortion is "murder, but it is not as bad as killing someone who has already been born."²¹⁴ Twenty-eight percent said "[a]bortion is not murder, but it does involve the taking of human life."²¹⁵ It seems to Dworkin, not unreasonably, that about three quarters of Americans morally judge abortion in a way that would lead them to favor its legal prohibition, just as they favor the prohibition of murder. Dworkin correctly reports

210 Here I have followed the critique of Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978).

211 DWORKIN, *supra* note 1, at 13.

212 Characteristically, Dworkin gets the data retail from Rosenblatt's book. He also misstates the date of its compilation as 1991. The poll was conducted in 1990.

213 DWORKIN, *supra* note 1, at 13.

214 *Id.*

215 *Id.*

that the constituency for comparable prohibition is considerably smaller than seventy-five percent.²¹⁶

How much smaller? Dworkin offers widely differing data. Taking the AUL survey again as our exemplar, roughly a quarter of the respondents would legally permit abortion only to save the life of the mother. Another quarter regards abortion as sufficiently unproblematic to warrant no special legal restrictions (though this number decreases as the fetus matures in the womb). For these people, abortion is simply a surgical procedure. Half of respondents would legally allow (if they do not think it morally permissible) abortion in the "hard cases": life/physical health of the mother, rape, incest, serious fetal deformity.

This "baffle[s]" Dworkin. "No one can consistently hold that a fetus has a right not to be killed and at the same time hold it wrong for the government to protect that right by the criminal law."²¹⁷ People cannot, in other words, consistently hold that abortion is "murder"—the deliberate taking of human life—and permit abortion for, say, rape and incest. *Life's Dominion* is launched to harmonize the underlying moral conservatism with this manifest legal liberalism.

What is the riddle's exact dimensions? Dworkin does not pause long enough to consider (or chooses not to say) that about half of us are acting quite consistently. The liberationist quarter (or so) thinks abortion is, morally speaking, a self-regarding act and, consistently with that moral view, holds that abortion is none of the government's business. Another quarter or so would legally permit abortion only to save the life of the mother. Are these folks acting inconsistently? I think not. Let me state first what I think a fully just law on abortion would be. A simple "life of the mother" exception creates an unjustifiable blanket preference for one life over another. It is unjustified because it implies that, in some cases, killing may rightly be chosen as a means to an end (which is false). It suggests, if not implies, that maternal life should always be preferred to the unborn's (which is unfair).²¹⁸

216 *Id.* at 14.

217 *Id.*

218 John Finnis suggests the following draft statute, and I would adopt it.

If the life of either the mother or the child can be saved only by some medical procedure which will adversely affect the other, then it is lawful to undertake such a procedure with the intention of saving life, provided that the procedure is the most effective available to increase the overall probability that one or the other (or both) will survive [or: to increase the average probability of their sur-

I still deny Dworkin's claim that these persons act inconsistently. First, he reports that many of them—he cites 7, 10, 16% figures in different polls²¹⁹—really do mean to outlaw *all* abortions. Second, the reasons Dworkin gives for claiming them as inconsistent actors do not wash. He says that it is morally and legally impermissible for a third party (*i.e.*, a doctor) “to murder” one innocent person to save the life of another one.²²⁰ But, quite obviously, the doctor need not intend the death—much less the murder—of anyone in an operation intended to save the mother, even where probable death to the fetus is accepted as an unintended but foreseeable effect. No one thinks that the surgical team which recently separated Siamese twins joined at the chest,²²¹ in circumstances in which the survival of even one of them was unlikely, were engaged in a homicidal act. Third, persons who respond in favor of the life of the mother exception are operating consistently, based upon a consistent but flawed notion of self-defense. They really do think the unborn have the same right to life as everyone else. They also think that *any* person may defend with lethal force his or her life against threats posed by other persons, including unborn persons.

Dworkin contemplates a riddle of rapidly diminishing perplexity. Only half of us move inconsistently from our moral views to the appropriate legal restrictions. But we are talking about hard cases accounting for no more than five percent of all abortions performed annually. So stated, this does not seem to be enough fuel to launch Dworkin's payload about what all of us must really believe about abortion.

The inconsistency sample is actually much smaller than that. We have already seen how a full commitment to fetal personhood is properly refracted not only by justification (life of the mother) but also excuse principles. Persons responding to poll takers might well be speaking of excused—that is culpable, technically ille-

vival].

Finnis, *The Legal Status*, *supra* note 150, at 8.

This formula does not say or imply that killing as a means can be permissible. It does not give an unfair priority to the mother. It excludes any indirect killing which would be unfair. It provides a criterion which, though complex, is framed in ordinary language and so can serve as a commonly intelligible criterion.

219 See DWORKIN, *supra* note 1, at 24, 245 n.2.

220 *Id.* at 94.

221 See David Brown, *Twins Who Shared Heart are Separated*, WASH. POST, Aug. 21, 1993, at A1.

gal—but properly unpunished abortions. Others may incorrectly but reasonably suppose that making abortion criminally punishable homicide would do more harm than good. “Back alley” abortions in which roughly the same number of unborn perish, now joined by many distressed women, might, these persons suppose, be the chief practical effect. Many (perhaps most) other “hard cases” people are driven by no *conviction* at all. They respond out of *feelings* for the rape victim, the seriously deformed infant, etc. They simply need to better integrate their emotions.

Dworkin claims that large percentages of Americans “favor” abortion in hard cases.²²² But persons who are completely committed to the unborn’s right to life may, in good conscience and without inconsistency, “favor”—support, vote for—laws which contain many unjust provisions regarding abortion, including hard case exceptions.

How so? Everyone, including especially those exercising public authority, has a general responsibility, subject to his other serious responsibilities, to support any proposal concerning abortions if all its elements are just, and to oppose any proposal all of whose elements are unjust.

Everyone—including legislators and judges—is under a strict moral duty to avoid all formal and unjust material complicity in abortion. One *formally* cooperates in another’s wrongful act when one participates in the immoral act in such a way that it becomes one’s own. In the case of abortion, one formally cooperates when one performs abortions, or acts to encourage, counsel, facilitate, or make abortions available. One is formally complicit in the injustice of abortion when one votes for a candidate even partially on the basis of his or her pro-abortion positions. The same is true when a legislator votes for legislation even partially for the purpose of making abortion available.

One *materially* cooperates in another’s wrongdoing when one’s acts help to make that wrongdoing possible although one does not *intend* that wrongdoing. Material cooperation in abortion takes place when *one does not will* that an abortion happen, or that the unborn be left unprotected from abortion, but *where one’s actions—although motivated by another purpose—nevertheless help to make an abortion possible.*

222 DWORKIN, *supra* note 1, at 245 nn.3-5.

So, for example, a pro-life legislator who reasonably believes that in the prevailing political circumstances there is little hope of enacting legislation that would fully protect the unborn may in good conscience vote for legislation that would prohibit abortions after twelve weeks gestation in preference to a public policy that would permit abortions to be performed up to the point of fetal viability or all the way until birth. Or again, a legislator who is working for the protection of all unborn children may nevertheless vote for legislation that would leave unborn children conceived in acts of rape or incest unprotected in preference to a public policy that would leave all unborn children vulnerable to abortion.

In other words, one may legitimately vote for ("favor") less than fully protective legislation when (and only when) one's *reason* for voting for the legislation is precisely to win (or maintain) the protections for the unborn contained in the legislation. Where one's reason for action is precisely to protect the unborn, one *intends* only those aspects of the legislation that are protective and merely *accepts as a side effect* those aspects of the legislation that are unfair. Thus, one's intention can be free of injustice towards the unborn: one treats them no differently than one would wish to be treated were one's own life among the lives that the legislation leaves unprotected.

Where, however, one votes for less than fully protective legislation, not (or not merely) for the sake of the protections contained in the legislation, but rather (or also) for, say, increasing the freedom of women, fighting overpopulation, or improving one's own prospects for re-election, one seeks to impose risks on the unborn that one would not be willing to have imposed on oneself and deprives them of rights that one cherishes for oneself and those whom one favors. By *intending* the not-fully-protective aspects of the legislation, albeit not as an end-in-itself but rather as a means to another end (*e.g.*, enhancing women's freedom), one acts unfairly towards the unborn by treating their lives as less worthy of protection than one's own.

I offer no precise account of the remaining "inconsistent" sample, save that it is far smaller than Dworkin says. Let us look at the matter from the other direction. Dworkin proposes to uncover what we really believe. But we certainly do not believe—really—in *Roe's* regime of nine-month abortion-virtually-on-demand. The AUL survey showed that only seven percent of us think a woman's right

to choose outweighed a child's right to be born up to birth.²²³ Only an additional sixteen percent thought a woman's right to choose prevailed until viability.²²⁴ These figures track opinions about when the unborn are persons. Roughly the same percentage of respondents thought that the unborn become persons at birth and viability.²²⁵ It seems that Dworkin has actually taken the convictions of the liberalationalist quarter among us, given those convictions a hallowed rhetorical spin, and pasted them onto the rest of us.

V. EUTHANASIA

Abortion is a waste of the start of human life. Death intervenes before life in earnest has even begun. Now we turn to decisions that people must make about death at the other end of life, after life in earnest has ended. We shall find that the same issues recur, that the mortal questions we ask about the two edges of life have much in common.²²⁶

The "idea that human life is sacred or inviolable is both more complex, and more open to different and competing interpretations" than conservatives who oppose all euthanasia allow.²²⁷

Dworkin maintains that the euthanasia debate is basically controlled by the principles which settled the debate over abortion. He concedes that the furor over the two is not comparable. Abortion politics are "fiercer and politically more important." Abortion, he says, "is tearing America apart" and confounding our constitutional law²²⁸ even though euthanasia, unlike abortion, is the deliberate killing of a *person*.²²⁹

No armies march down Pennsylvania Avenue on the anniversary of the *Cruzan* decision. *Cruzan* is the only high-court treatment of the "right-to-die," and it hardly registers on the Richter Scale of judicial politics. Dworkin cites no puzzle of poll data on euthanasia. I rather suspect that a large majority of Americans agree that

223 See Paige Comstack Cunningham & Clarke D. Forsythe, *Is Abortion the 'First Right' for Women?: Some Consequences of Legal Abortion*, in *ABORTION, MEDICINE, AND THE LAW* 100, 105 (J. Douglas Butler & David F. Walbert eds., 3d ed. 1992).

224 *Id.*

225 *Id.* at 106-7.

226 DWORKIN, *supra* note 1, at 179.

227 *Id.* at 215.

228 *Id.* at 4.

229 *Id.* at 3.

a competent adult, either presently or previously by living will or power of attorney, has a right to decide what kind of medical treatment, including life-saving or life-sustaining measures, he shall undertake. There is little controversy about enacting such provisions into law. Unsurprisingly, Dworkin devotes just a quarter of *Life's Dominion* to life's far end.

Why is there less political and moral polarization on euthanasia? (This is my question, not Dworkin's.) The critical difference is that decisions at the far side of life need not be, and typically are not, killings. Death need not and commonly is not chosen as a means or end. Death is accepted as a side effect of a decision to, for example, forego life sustaining measures in order not to use up financial resources better left to surviving spouse and children.

The principle common to both ends of life (and everywhere in between) is that one may never intentionally destroy innocent human life. One may never adopt and carry into effect a proposal which includes death as a chosen end or means. Life (zoe, for Dworkin) is always a good; death is always an evil. One may, and sometimes should, adopt a proposal which is liable—even practically certain—to result in death. Otherwise there would be no possibility of what is called a "life-of-the-mother" exception to the prohibition on abortion. So long as death is not chosen as end or means, and its acceptance as a side effect works no unfairness, one may forego medical treatment which, we can reliably predict, will result in death.²³⁰ It would be unfair for a young and otherwise healthy father of three to decline temporary use of a respirator when he needs it to survive. It would probably not be unfair for an older person upon whom no one particularly depends to decline the respirator, especially if his underlying condition will kill him soon anyway.

The fundamental point is that abortion invariably either intentionally destroys an innocent human life or unfairly accepts its destruction as a foreseeable side effect. That is why abortion is almost always (apart from some "life-of-the-mother situations) immoral and unjust. What Dworkin capaciously labels euthanasia includes many instances of completely upright, if tragic or sad, choices. He refers to people (like Justices Scalia and Rehnquist) who "think that euthanasia is wrong in *all* circumstances. They think that a person should bear the pain . . . until his life ends

230 In this precise sense one may "choose" death consistently with the exceptionless moral norm precluding the intentional killing of the innocent.

naturally—by which they mean other than through a human decision to end it”²³¹ Dworkin then links this undifferentiated view—he says it “provides the most powerful emotional basis”—to Roman Catholic condemnation of “euthanasia.”²³²

The Church does not condemn all “human decisions” which “end life.” It is hardly imaginable that one could lead the practical life without making some “decisions” which result, foreseeably or unforeseeably, in “end[ing] life.” We certainly accept that risk every time we start up our cars or step off a curb to cross a busy street. Dworkin charges conservatives with a raw biologism or physicalism which no one, to my knowledge, has ever defended. He says that the feeling at the bottom of “conservative revulsion” against euthanasia is this: “[If] nature’s investment in a human life has been frustrated whenever someone dies who could be kept technically alive longer, then any human intervention—injecting a lethal drug into someone dying of a painful cancer or withdrawing life support from a person in a persistent vegetative state—cheats nature”²³³

Neither action is necessarily a choice to kill. Though the first might be a mercy killing—death is desired, chosen, and brought about by a plan to carry that intention into effect—it might well be the choice to relieve excruciating pain through injection of morphine in doses that might kill. This choice may be upright. The latter example is more likely than not (though far from necessarily) a choice to kill either as means or end.

There is room in the conservative side of the “euthanasia” debate for liberal (if you like) policies about autonomous decisions about medical treatment, including life-saving and life-sustaining procedures. There is, however, no room for euthanasia—deliberately killing the innocent “out of kindness” or some other defensible motive. It is a supreme defect of Dworkin’s treatment of “euthanasia” that he effaces all such distinctions. Without them, practical reason cannot grasp what is at stake in these very difficult situations. By Dworkin’s dull measure, we could not tell if Jesus was killed by the Romans or committed suicide.

What is Dworkin’s doctrine on “euthanasia”? No one, he says, wants to die “out of character.” Athletes, for instance, are likely to judge the life of a paraplegic not worth living, while others might

231 *Id.* at 195.

232 *Id.*

233 *Id.* at 214.

tolerate it. "Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny."²³⁴ There is, however, no objective standard by which one might judge an act of self-annihilation right or wrong. One's life—and death—should be a personal masterpiece, each brush stroke one's own. Dworkin concludes:

Decisions about life and death are the most important, the most crucial for forming and expressing personality, that anyone makes; we think it crucial to get these decisions right, but also crucial to make them in character, and for ourselves. Even people who want to impose their convictions on everyone else through the criminal law, when they and like-minded colleagues are politically powerful, would be horrified, perhaps to the point of revolution, if their political fortunes were reversed and they faced losing the freedom they are now ready to deny others.²³⁵

Dworkin defends an extreme liberationist approach to suicide, its assistance, and mercy killing. He evinces no squeamishness about doctors who kill. We may legitimately wonder why Dworkin assumes the burden of justifying more killing than his question requires. Why, for that matter, force us to choose between an airtight prohibitionist abortion policy (no life-of-the-mother exceptions) and abortion on demand.

Dworkin's problem is how to contain, or at least rationalize, the killing. *Life's Dominion* is not so much about the ethics of killing—no such ethic can be recovered from the book—as it is about unfairly claiming more than one's share of dominion over life. Lethal choices are the stuff of distributive justice. Precisely to prevent the situation from turning into society-wide rush to devour the sickly cabin boy, Dworkin steps outside our convictions and conventions and states unequivocally that some natural right of equal respect for autonomy exists.

VI. CONCLUSION

You do not need to open Ronald Dworkin's *Life's Dominion* to sense that he is up to something strange. Dworkin's three previous books were works of legal philosophy published by Harvard University Press. *Law's Empire*, his most recent book, won the ABA's

234 *Id.* at 217.

235 *Id.* at 239.

Silver Gavel Award. Its "jacket blurbs" were from the London Review of Books, the Washington Post Book World, The Journal of Philosophy, and the Georgetown Law Journal.

Alfred A. Knopf, a commercial publisher of diverse titles, brought out *Life's Dominion*. On its jacket is a blurb by one legal figure—ACLU President Nadine Strossen—and three novelists: Susan Sontag, Jessica Mitford, and Joan Didion. Their praise knows no academic stodginess. *Life's Dominion* is "fresh" and "agile"; [e]veryone should read it" (Sontag); "stunningly insightful" (Strossen); this "complex and fascinating" book (Mitford) is, in Joan Didion's view, a "miracle". Revelation, indeed. This "path-breaking work promises to illuminate your understanding" (Strossen); it is so "rich" a reformulation of how we think . . . that it illuminates the very nature of how we live our lives." No wonder that during President Clinton's stay on Martha's Vineyard, Dworkin was feted at a book signing party.

This is very strange because the book's stated aim is to dispel confusion about abortion in, for all important practical purposes, the anti-abortion camp. Has Susan Sontag converted to the pro-life cause? The ACLU? For whom is the book *really* written? After our long march through the pages of *Life's Dominion*, we may now conclude that Dworkin does not write for whom he says he writes. Take first the case of the moderately informed pro-lifer. In addition to all the reasons heretofore adduced for doubting that he is the intended audience, consider this one. There is simply nothing new in *Life's Dominion*. All its leading ideas and strategic innovations are familiar—quite familiar—to anyone conversant with the intellectual debate about abortion. Some of the yeoman ideas—notably "critical interests" and the natural right to equal dignity—are uniquely Dworkinian. But they have been worked out in public before. The latter has been the mainstay of Dworkin for almost twenty years. Recall other key evidence—Donceel's twenty-year-old article, the *Webster* Historians' brief, the tired criticisms of originalism—and how familiar it all is. Many of Dworkin's notions—notably including rights as protecting certain interests of the conscious, choosing subject against frustration—can be found in the well-known work of Michael Tooley on abortion and infanticide.²³⁶ Throw into the mix three essays (unmentioned by Dworkin) in a collection from which he cites essays by Noonan

236 Dworkin cites Tooley's writings. See *id.* at 23 n.31.

and Donceel, and one can account for virtually Dworkin's entire stock of ideas.²³⁷

Life's Dominion has simply cobbled together elements of familiar pro-choice writings. Moderately sophisticated anti-abortion people know these arguments, have thought about them, and rejected them. They know why they reject them. They are not confused. We cannot believe Dworkin is trying to reach the pro-life sophisticate.

It is just as hard to believe he is addressing the unsophisticated pro-lifer, the foot soldier in the army on Pennsylvania Avenue. I do not suggest these folks are less intelligent than the sophisticates. But they are unlikely to pick up any book by Ronald Dworkin. They know enough to figure out that, even if they have not heard of Dworkin, "an argument about abortion" blurbed by the ACLU and three feminist literati is not for them.

Dworkin is not, we are obliged to conclude, talking to pro-lifers at all. To whom is he talking? He writes for the moderately sophisticated pro-choice crowd, people who know the difference between Seventh Avenue and Savile Row (and not just because one is in Manhattan and the other is not). Virtually all of the rhetorical flourishes, examples and allusions—Tolstoy, Bellini, save-the-snail darter, concern for ancient culture and language, rhino-protection—are liberal highbrow. This book was not written for Rush Limbaugh listeners.

Elizabeth Fox-Genovese saw this clearly enough in her *Washington Post* review of *Life's Dominion*.²³⁸ "For all Dworkin's intellectual elegance and flashes of humanity, he ultimately offers the 'autonomous' members of the middle class a comforting rationale for serving our own interests while continuing to feel that we are good people."²³⁹ Dworkin certainly pitches the book to new class sensibilities. He rings all the chimes of their prejudices: the "very right wing" Bork; the "conservative" opponents of liberation, Scalia and Rehnquist; the depiction of Roman Catholic hierarchs as cynical pols hung up on sex; an unwanted baby "enslaves" and "destroys" a woman; the implicit identification of pro-life leaders (like Pennsylvania Governor Robert Casey) as "odious tyrants"; the inescapable conclusion that before 1973, the United States was a

237 See Stanley I. Benn, *Abortion, Infanticide, and Respect for Persons*, in *THE PROBLEM OF ABORTION* (Joel Feinberg ed., 1st ed. 1973).

238 Elizabeth Fox-Genovese, *LIFE'S DOMINION: An Argument About Abortion, Euthanasia, and Individual Freedom*, WASH. POST, June 6, 1993, at X1.

239 *Id.*

tyrannical regime. Dworkin never canvassed our convictions to verify *these* claims. He does not convincingly argue for them.

Why outline "a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect" if the addressee is not expected to read them? Liberationists give not an inch of territory. They must only suffer some shared rhetoric about "all human life being inviolable," interpreted as each of them sees fit! They do not need to be talked into signing on the dotted line. Is *Life's Dominion* just, as Fox-Genovese says, a sop to troubled pro-abortion consciences?

I doubt it. Look again at the terms of settlement. It offers pro-lifers a way to surrender honorably, to give up the fight without loss of self-respect. Is Dworkin asking people who are driven by the truth of the humanity of the unborn to throw all that aside? As if the pro-lifer was just trying to feel good about himself, rather than trying to save babies?

One party to the abortion war does treat "self-respect" as the central criterion of upright action, the mother lode of practical reason. *Life's Dominion* is written for them. But, finally, why? Why sketch in great detail why one's adversaries cannot reasonably decline your terms of surrender? We can only piece together the evidence of Dworkin's aim here since his stated aims are wide of the mark. The unstated genuine aim of *Life's Dominion* must have something to do with bracing the liberationists' conviction that, indeed, their adversaries are would-be slavemasters and tyrants. To what end Dworkin braces their convictions is anyone's guess.

