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THE CONSTITUTIONAL MORALITY OF ABORTION

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INTRODUCTION

For the last two decades, the Supreme Court's decision in *Roe v. Wade* has dominated and controlled any discussion of the legality of abortion in the United States. Today, given the changes in the Court's composition, the protection provided abortion rights by the *Roe* holding is clearly in jeopardy. That does not mean, however, that the issue of a woman's right to an abortion no longer remains one of vital constitutional significance. The question of abortion rights will not simply or easily go away.

Even if the Supreme Court sharply distinguishes or overrules the *Roe* opinion, questions would remain, for example, as to whether an alternative foundation for protecting abortion rights exists in the Federal Constitution. As long as the Court recognizes *some* right of privacy and personal autonomy relating to sexual autonomy, bodily integrity and procreational decisions, it cannot easily isolate the decision to have an abortion.¹ For certain Supreme Court Justices who reject the *Roe* trimester framework, the problem is not whether women have some constitutional right to procreational choice, it is whether and to what extent the state's interest in protecting potential life may override the woman's right to an abortion.²

¹ This issue is itself open to debate. See *infra* note 131 and accompanying text.

² In her dissents in *Akron v. Akron Center For Reproductive Health*, 462 U.S. 416 (1982), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), Justice O'Connor suggested that strict scrutiny should be used to review laws that "unduly burden" the right to an abortion. *Thornburgh*, 476 U.S. at 814-33; *Akron*, 462 U.S. at 452-75. Given the state's compelling interest "in protecting potential human life" during the entire pregnancy, however, Justice O'Connor explicitly recognized that such burdensome regulations may "withstand" even heightened review. *Thornburgh*, 476 U.S. at 828.

Moreover, several state constitutions explicitly or implicitly protect a right of privacy that is interpreted to include the right to an abortion.³ Thus, the resolution of the abortion issue at the federal constitutional level would still leave complex constitutional issues open for state resolution.

This article is grounded on the continued existence of a constitutional right on the part of women to make procreational choices, including, to at least some extent, abortion. Given that foundation, the purpose of the article is to examine the issue of abortion from a perspective that is typically ignored or misapplied in constitutional analysis, the morality of abortion. Indeed, in the debate over the legality of abortion, both proponents and opponents of abortion rights often seem to struggle unsuccessfully to fit their arguments concerning the morality of abortion into an appropriate constitutional context.

Thus, the anti-abortion (or "pro-life") side condemns its opponents for avoiding the issue of right and wrong. Abortion opponents argue that all that proponents of abortion rights talk about is the right of a woman to choose to terminate her pregnancy without even discussing the morality of that choice.⁴ The implica-

³ For examples of state constitutions that explicitly protect a right of privacy, see ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); ARIZ. CONST. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into his private life, except as otherwise provided herein."); HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest."); MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). These state constitutional provisions may be interpreted to protect the right to an abortion. See, e.g., Committee to Defend Reprod. Rights v. Myers, 172 Cal. Rptr. 866, 870-71 (Cal. 1981).

⁴ See Jason DeParle, *Beyond the Legal Right*, WASH. MONTHLY, Apr. 1989, at 28 ("The problem with much prochoice thinking is suggested by the movement's chief slogan, 'a woman's right to control her body,' which fails to acknowledge that the great moral and biological conundrum is precisely that another body is involved."); John Leo, *The Moral Complexity of Choice*, U.S. NEWS & WORLD REP., Dec. 11, 1989, at 64 ("The problem is not feminists' pro-choice stance but that the stance has no moral context. All the emphasis is on rights. None is on the morality of using those rights."). Even some feminist writers raise this criticism of proponents of abortion rights. Thus, Kathleen McDonnell argues:

Some pro-choice advocates deny that abortion is a moral issue at all. A favorite slogan for a time in the pro-choice movement was 'Abortion is a health issue,

tion, of course, is that any such discussion of the morality of abortion would inevitably conclude that abortions should be prohibited.

Advocates of legal abortion respond to this contention by dismissing it as an irrelevant half-truth. "Pro-choice" supporters contend that even if having an abortion is immoral in certain circumstances, it should not be illegal.⁵ The fundamental right of privacy protected by the Constitution guarantees women the freedom to make procreative decisions.⁶ Women may not always exercise the right to determine whether or not to have children in a moral or responsible fashion,⁷ but that is the nature of constitutional rights.⁸ The speech of American Nazis may be cruel, insensitive, bigoted and wrong, but it nevertheless remains protected speech.⁹ The Federal Constitution reserves the decision to have an abortion, like the decision to preach intolerance rather than brotherhood, for the individual, not the state.

not a moral issue.' [Under this view] abortion should be treated in the same way as any other medical procedure and should not be controlled by criminal law.

Kathleen McDonnell, *Pro-Choice Feminists Must Open up the Abortion Debate*, *UTNE READER*, Mar.-Apr. 1987, at 109, 111.

⁵ See, e.g., L.W. SUMNER, *ABORTION AND MORAL THEORY* 13-14 (1981) (noting the often imperfect fit between law and morality and concluding that demonstrations of the wrongfulness or evil of abortion do not necessarily justify strict abortion regulations); see also HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 16 (1979) (describing acts that are not crimes although they "have the status of moral atrocity"); Daniel Callahan, *An Ethical Challenge to Prochoice Advocates—Abortion & the Pluralistic Proposition*, *COMMONWEAL*, Nov. 23, 1990, at 681 ("Those who call themselves 'pro choice' argue that the abortion choice is private and personal to women and should thus be left to them without the interference of the law.").

⁶ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

⁷ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 781 (1986) (Stevens, J., concurring) ("In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny.").

⁸ Indeed, it is intrinsic to the nature of rights from a philosophical perspective. As Sumner explains:

[I]n deciding whether to permit women access to abortion we do not want to know whether, or when, having an abortion would be for the best; instead, we want to know whether, or when, having an abortion is within a woman's rights. Since having a right entails having the prerogative not to do what is for the best, this is a different question. Nothing could prevent an abortion from being within a woman's rights except the competing right to life of the fetus. Thus, if a fetus has no right to life before [a] threshold stage, and some such right thereafter, a prethreshold abortion might well be within a woman's rights whereas a postthreshold abortion would not.

L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 208 (1987).

⁹ *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978) (expressing court's "repugnance" for Nazi doctrines, but recognizing duty under the First Amendment to protect ideas it "justifiably rejects and despises").

Both the anti-abortion critique and its rejoinder are inaccurate and incomplete. Neither contention adequately addresses the role of moral interests and argument in constitutional analysis. If, as current case law holds, there exists a constitutional right of privacy and personal autonomy that encompasses procreational decisions,¹⁰ the alleged immorality of certain abortion decisions cannot be dispositive of the constitutionality of anti-abortion laws. Certainly, fundamental rights would be of little value if their exercise could be abridged whenever society collectively viewed the exercise of the right as morally "bad." Although moral considerations alone may be a sufficient justification for the regulation of unprotected behavior, the mere assertion of "wrongfulness" cannot be the basis for restricting the exercise of constitutional rights.¹¹

This pro-abortion analysis, however, also begs the question. No constitutional right is absolute. At some point the state's interests will justifiably outweigh any constitutionally protected interest of individuals. Under currently accepted doctrine, the state may override a woman's right of privacy, or any other fundamental right, if such action is necessary to further a sufficiently compelling state interest.¹² Unless one believes that a historical examination of the intentions of those who drafted and ratified the Constitution provides a complete description of all such interests, it is difficult to imagine how a court could possibly distinguish between a compelling state interest and a trivial one without performing some kind of moral evaluation of the harm that the exercise of a right may cause.¹³ Thus, even those persons who most aggressively argue that

¹⁰ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (rejecting the total suppression of advertising concerning contraceptives); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (recognizing constitutional right of access to contraceptives for unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); see also *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (distinguishing prior cases "as construing the due process clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child").

¹¹ See, e.g., *Bowers*, 478 U.S. at 210-11 (Blackmun, J., dissenting) (rejecting argument that acts condemned as immoral may be banned); see also *infra* note 15.

¹² See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (freedom of speech); *Roe*, 410 U.S. at 155 (right of privacy); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (free exercise of religion).

¹³ The point should be self-evident. There is no language in the text of the Constitution that describes when a state interest will outweigh the exercise of a constitutional right. Further, because what constitutes a compelling state interest must of necessity vary as conditions in society change, historical analysis cannot provide a dispositive answer either. Thus, a resort to contemporary values is unavoidable. Even for noncontroversial compelling state interests, such as obvious health and safety objectives, determining that a particular interest is even important, much less compelling, presumes some hierarchy of moral values.

the decision to have an abortion is a fundamental right cannot entirely avoid evaluating the morality of abortion decisions. If abortion is a sufficiently immoral act, such that preventing its occurrence constitutes a compelling state interest, then prohibiting abortion may well withstand constitutional scrutiny. As a constitutional matter, therefore, it is necessary to examine the morality of abortion as a justification for abridging women's rights to privacy and personal autonomy.

Obvious problems immediately confront a legal writer attempting to discuss the morality of abortion. The primary hurdle is basic; how does one discuss and evaluate moral principles in legal terms? Clearly, the state has the political power to promote moral results.¹⁴ What is problematic is the method by which the moral principles of the state are to be evaluated. One potential measure of the importance of state interests might be popular or public morality. Courts could examine contemporary community attitudes and values with regard to an asserted state interest. An inquiry of this kind would be useful and relevant, though it could hardly be conclusive. For example, if most Americans believed that interracial marriages were immoral, those beliefs alone should not require courts to uphold the constitutionality of antimiscegenation laws on moral grounds.¹⁵ Clearly, some more reasoned and dispassionate judicial analysis is necessary.

An alternative source is the philosophical literature on abortion, which is substantial both in its scope and depth. Philosophical scholarship, however, can also play only a partial role in this inquiry.

¹⁴ Indeed, the state apparently has the power to promote morality by acting to improve the personal character of individuals as well as attempting to protect society from harmful behavior. See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (obscene material has no protection under the First Amendment); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 391-92 (1963) (criticizing Supreme Court obscenity jurisprudence). See also Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*:

The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry And much legislation, compulsory public education laws, civil rights laws, even the abolition of capital punishment—is grounded, at least in part, on a concern with the morality of the community.

413 U.S. at 108-109 (Brennan, J., dissenting).

¹⁵ *Bowers*, 478 U.S. at 216-17 (Stevens, J., dissenting) ("The fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

One difficulty is essentially interpretative. "Compelling state interests" are legal constructs, defined and manipulated by lawyers and judges. Philosophers direct their deliberations at a different audience from the readers of legal commentary and cases, and their frame of reference and language of discourse may often strike lawyers and judges as devoid of merit or relevance.

More importantly, the utility of philosophical literature may be limited for other reasons. The nature and structure of the American legal system imposes constraints on legal reasoning that do not apply to the formal theorizing of philosophers. In a constitutional democracy with a legal system that demands respect for precedent while tolerating evolutionary change in the case law, judges and lawyers cannot write moral arguments on an empty slate. They must consider the moral intuitions of political actors past and present. Whatever their analytical merits, philosophical judgments that are unacceptable or unpersuasive to the people who either create the law or elect and appoint those who perform law-making and law-interpreting functions are of dubious legal value or relevance. Moreover, the normative parameters of constitutional doctrine have only limited flexibility. Lawmakers and judges must resolve the issue of abortion within an existing framework of case holdings and analysis.

Thus, constitutional courts will reject, at least eventually, any philosophical discussions that substantially exceed the boundaries of reflective common sense morality, that is, the shared moral intuitions of those who exercise the franchise, even if such discussions are persuasive to philosophers. No philosophical theory, for example, that justifies infanticide or that totally prohibits the killing of animals is likely to influence the direction of constitutional decisions.¹⁶ Similarly, a theory of morality that permits the state to regulate pre-conception reproductive choices creates too much dissonance with accepted authority to be useful to the resolution of the abortion issue.¹⁷

¹⁶ See generally Michael Tooley, *In Defense of Abortion and Infanticide*, in *WHAT IS A PERSON?* 111 (Michael F. Goodman ed., 1988) (suggesting the moral acceptability of infanticide "during a time interval shortly after birth").

¹⁷ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977) (invalidating law restricting the distribution of nonprescription contraceptives to licensed pharmacists because access to contraceptives "is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird* and *Roe v. Wade*"); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

In short, compelling state interests cannot be defined by public opinion, but neither can they significantly deviate from conventionally acceptable values. The task of the legal commentator is to temper contemporary values with philosophical judgment. In doing so, it is necessary to adapt and transform what is valuable in the latter discipline into an analysis that is coherent and persuasive in legal terms.

Against this background, it is possible to stake out the poles of the moral continuum within which the abortion debate must be resolved as a constitutional matter. Two foundational limits can be recognized (or at least assumed). At one pole, the state has a sufficiently compelling interest to outlaw infanticide, the killing of a child after birth, regardless of any "rights" of the perpetrator that the state might infringe by the enforcement of such a law.¹⁸ At the other pole, the state may not require women to become pregnant or prohibit their access to medically accepted contraceptives that prevent conception. No asserted moral interest in promoting potential life or facilitating the birth of new life can justify this intrusion into a woman's privacy and autonomy.¹⁹

These demarcation lines reflect existing doctrine. Moreover, we suggest that these limits are persuasive and accepted because they express settled and stable common sense moral intuitions about both the nature of life and evolving personhood and the personal autonomy of women. Between these two accepted principles, common sense and legally cognizable moral philosophy struggle with competing analogies. Is abortion more correctly understood in moral terms as an act of contraception, as to which the state's interest must be subordinate to the woman's liberty, or is the more appropriate comparison infanticide, the immorality of which justifies direct governmental interference with a woman's decision to be relieved of the burdens of motherhood?

¹⁸ See, e.g., SUMNER, *supra* note 5, at 225-26 (infanticide is wrong because it violates the infant's right to life); see also JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 164 (1979) (arguing that "the side-effects of killing a wanted, normal baby are so entirely awful that they alone would constitute an overwhelming objection" to such a practice); Benn, *Abortion, Infanticide, and Respect for Persons*, in THE PROBLEM OF ABORTION 135, 142-44 (Joel Feinberg ed., 2d ed., 1984); Edward A. Langerak, *Abortion: Listening to the Middle*, in WHAT IS A PERSON?, *supra* note 16, at 251, 258 (noting the "social consequences" of infanticide, including the argument that "infants are so similar to persons that allowing them to be killed would generate a moral climate that would endanger the claim to life of even young persons").

¹⁹ *Carey*, 431 U.S. at 685 (describing right of privacy cases and concluding "the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices"); *Eisenstadt*, 405 U.S. at 453-54.

This conflict was never adequately addressed, much less persuasively resolved, in Justice Blackmun's *Roe v. Wade* opinion. Instead, the Court deliberately avoided issues of morality and attempted to resolve the abortion debate in an ethical vacuum through the use of ostensibly neutral legal principles.²⁰ The inadequacy of that approach is demonstrated in part by the ease with which judicial opponents of abortion rights can challenge the reasoning of *Roe*.²¹ Nor does the widespread popular support for the holding in *Roe* substantiate the analysis of the majority opinion. We suggest that the power of *Roe* is not based on the Court's reasoning, but rather on the fact that the line the Court draws in *Roe* comports with many people's intuitions regarding the morality of abortion as it is balanced against the individual rights of women.²² Similarly, the massive political opposition to *Roe* results from contrary moral intuitions. This article directly confronts that moral conflict in a way that *Roe* did not.²³

We recognize that the audience for an article such as this is necessarily limited. For many readers, either religious or political

²⁰ In *Roe*, the Court declined to evaluate the morality of abortion and concluded that: [W]e need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159. Instead, the Court determined that the state has a compelling interest in protecting potential life at the point of fetal viability on the conclusory grounds that "state regulation protective of fetal life after viability . . . has both *logical* and biological justifications." *Id.* at 163 (emphasis added). No description of these justifications was offered, however.

²¹ Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) raises two simple but powerful challenges to the *Roe* framework. First, the *Roe* model is dependent on medical technology that has the effect of both increasing the safety of abortion procedures in the second trimester and moving the point in time at which a fetus becomes viable to an earlier and earlier date in the gestation period. *See id.* at 453-59. Second, the choice of viability as the point at which the state's interest in protecting potential life becomes compelling is completely arbitrary. *See id.* at 461. "Potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Id.* Nothing in the *Roe* opinion explains why only post-viability potential life should be of importance to the state.

²² *See generally* Mark Tushnet, *The Supreme Court on Abortion: A Survey*, in *ABORTION, MEDICINE AND THE LAW* 161, 169 (J. Douglas Butler & David F. Walbert eds., 3d ed., 1986) (describing general congruence between conventional morality and of the result of *Roe v. Wade*).

²³ If the constitutional protection provided for women's procreational rights is ultimately eliminated, many of the arguments presented here also may be appropriate in legislative deliberations that determine how to regulate abortions. Because the authors of this article are committed to an interpretation of the Constitution that recognizes and protects the right to make procreational decisions after conception, at least to some extent, we have not directed our analysis toward legislative issues. This article is primarily a constitutional inquiry into the conflict between women's rights and the state's interests in promoting its moral goals.

convictions preclude a secular reconsideration of the abortion question. We also recognize that no article of tolerable length can address every issue that might arise with regard to the constitutionality of abortion regulations. Thus, our goals are relatively modest. We write for those readers for whom the abortion issue remains a difficult moral and legal question. In addition, we propose a beginning inquiry, an initial elaboration of a constructive way to discuss the legality of abortion in a post-*Roe* era, that answers some questions and offers criteria for examining the many issues that remain unresolved.

Section I of the article considers the ethical legitimacy of abortion by first determining the moral standing of the conceptus.²⁴ We argue that the actual characteristics of the newly formed conceptus do not permit an accurate analogy between early abortions and infanticide. Indeed, the primary moral status of the conceptus is predicated not on its actual condition, but on its developmental potential. In focusing on the potential of what the conceptus may become, and not on its immediate attributes, we suggest that early abortion and contraception are similar interventions in a developmental continuum that might ultimately result in birth. Although early abortions and the use of contraceptives are *not* entirely morally commensurate, they are also not sufficiently distinct to justify state intrusions into a woman's personal autonomy to prohibit the former while permitting the latter.²⁵

²⁴ See *infra* notes 30–122 and accompanying text. We use "conceptus" to refer to the developing zygote through all its stages. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 470 (1986). The zygote is properly termed a "morula" during the first week, a "blastocyst" during the second week, an "embryo" from then until the eighth week, and a "fetus" from that point until birth. See MARTIN H. JOHNSON & BARRY J. EVERETT, ESSENTIAL REPRODUCTION 224–229 (1988). Using "conceptus" allows us to set aside the fine distinctions marked by these terms until and unless they become relevant.

²⁵ See *infra* notes 80–122 and accompanying text. We use the term "contraception" and its cognates strictly, to refer to devices or practices that prevent conception. Obviously, in its colloquial use "contraception" includes devices that operate post-conception and prevent implantation. Many authors argue that early abortion and contraception are morally equivalent. Sumner, for example, explains that "the moral issues raised by early abortion are precisely those raised by contraception." See SUMNER, *supra* note 5, at 152. He argues that the fetus has not yet acquired sentience (Sumner's criterion for moral standing) at the time of an "early" abortion, so the early abortion is like contraception in that it merely "prevents the emergence of a new being with moral standing." *Id.* at 151–52; see also GLOVER, *supra* note 18, at 65. Glover suggests that under a utilitarian view that values total lives worth living or total worthwhile lives lived, killing is no different from contraception because both acts reduce the number of worthwhile lives. Glover's own view is that abortion, contraception and infanticide "are all on the same level of direct wrong" because they all similarly reduce the amount of worthwhile life. *Id.* at 139. Glover does distinguish abortion, nonconception

Although this analysis rejects the primacy of conception, it recognizes that conception and developmental changes in the condition of the conceptus matter in moral terms, as does the increasing actualization in the conceptus of those attributes that constitute personhood. Indeed, we suggest that at some point during the gestation period, the moral status of the conceptus may become fully analogous to that of a newborn baby. That point is not determined precisely in this article, although we consider criteria to be used in making the determination.²⁶ For the vast majority of abortions, which are performed during the first trimester of pregnancy,²⁷ however, we contend that the moral status of the conceptus will not justify interference with the woman's autonomy choices under the framework proposed.

Section II provides an alternative framework for identifying that period during a woman's pregnancy in which the state's moral interests may outweigh her privacy and autonomy right to terminate the pregnancy. While recognizing that development matters, and, therefore, that the state's interest increases during the gestation period, we suggest that exclusive attention in the abortion debate to the status of the conceptus is unwarranted. Considering the development of the conceptus in isolation directs the analysis down two problematic roads. Initially, it may lead one to search for the dispositive moment when the development of the conceptus triggers the state's compelling moral interest in its preservation (or, stated differently, the moment when the conceptus achieves the moral standing of an infant or person). Alternatively, after conceding the futility and arbitrariness of determining a critical point in time that is morally distinct from the previous moment, one may be led to insist that abortion must be either criminalized or tolerated throughout the gestation period.

We argue that an adequate analysis must examine both the changing nature of the woman's interests during pregnancy and

and infanticide on the basis of side effects—abortion and infanticide typically cause the mother grief, use medical resources and damage society in general. *See id.* at 143. Yet he also notes that for early abortions, unlike infanticide, these side effects are minimal. *Id.*

²⁶ *See infra* notes 115–22 and accompanying text.

²⁷ *See* Alan F. Guttmacher & Irwin H. Kaiser, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, in *ABORTION, MEDICINE AND THE LAW*, *supra* note 22, at 238 (in 1980 over 90% of abortions in the United States were performed during the first trimester, over half at eight weeks of gestation or less); Christopher Tietze, *Demographic and Public Health Experience with Legal Abortion: 1973–80*, in *ABORTION, MEDICINE AND THE LAW*, *supra* note 22, at 289, 298 (percentage of abortions in U.S. occurring in second trimester between 1973 and 1980 ranged from a high of 14.6% in 1973 to a low of 8.7% in 1980).

the changing status of the conceptus. Unlike the *Roe* framework, in which the woman's privacy and autonomy interests remain uniform during the entire pregnancy while the state's interest in preserving potential life increases by trimester,²⁸ we suggest that the woman's interest in terminating a pregnancy may decline significantly as the pregnancy progresses.²⁹ This complex change in the woman's interest provides additional information, and a useful shift in discourse, that may assist courts in balancing the competing concerns at issue in the constitutional evaluation of abortion restrictions.

I. THE MORAL DEBATE

A. *The Extreme Positions*

For many people, abortion is a morally serious act, justified in some circumstances and not in others. Although it is difficult to describe the range of positions that exist with regard to the morality of abortion, we can posit an artificial symmetry that establishes the

²⁸ See *Roe*, 410 U.S. at 162-63 (state interest in preserving the health of the pregnant woman and in protecting potentiality of human life "grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling'").

²⁹ See *infra* notes 123-77 and accompanying text. The importance of evaluating the woman's interest over time as well as that of the developing conceptus cannot be overstated. Looking at an act such as abortion in the abstract and in isolation ignores the basic reality that we determine the morality of behavior by considering both its effects and its justification. Thus, the legal prohibition against maternal infanticide is explained in significant part by recognizing the moral value of the life of the infant. But surely another foundation for our legal certainty that infanticide may be prohibited is our conviction that the mother has no reasonable justification for destroying a baby living independently outside of her body. Even if the burdens of motherhood are experienced as overwhelming and intolerable, obvious alternatives exist for reducing those burdens while maintaining the life of the child. Because such alternatives are unavailable under current technology during the gestation period, abortion involves a more complex moral analysis.

From a purely constitutional perspective, the issue can be described this way. In order to outweigh a woman's privacy and autonomy rights, the state must assert a compelling state interest that requires the sacrifice of those rights. For most courts, protecting the life of an infant would easily satisfy this rigorous standard of review. It is highly doubtful, however, that strict scrutiny is appropriate or necessary to review the prohibition of infanticide. The personal interests the mother of an infant can assert as the basis for destroying it involve very different concerns from those that exist while the conceptus is developing within her body. Nor do we typically understand a parent's interest in familial autonomy to include the physical destruction of family members since that obliterates the very social institution the right of family autonomy is attempting to maintain. Thus it seems likely that whatever interests a woman may assert to avoid the burdens of motherhood by killing a child can be outweighed by any legitimate state interest. Even if the value of an infant's life did not constitute a compelling state interest, the state could act to protect the child's life because there is no countervailing interest of constitutional significance to limit the exercise of its police powers in this circumstance.

parameters of debate. On one side, "pro-life" or "conservative" factions advocate a rigorous regulatory approach to abortion. From this perspective, abortion is always, or almost always, a grievously immoral act. In the vast majority of cases, abortion is culpable homicide, usually murder.³⁰ On the other side, "pro-choice" or "liberal" factions advocate an unqualified "deregulatory" position on abortion. From this perspective, abortion is a matter of purely private concern for the woman involved. It is morally comparable to an appendectomy or to plastic surgery.³¹

Both views in this model endorse a uniform evaluation of abortion that relies on sharp lines to divide morally acceptable from morally unacceptable conduct. Both views also identify particular events as crucial moral thresholds. To the conservative, conception is critical. Contraception is either not immoral or it is of a qualitatively distinct and reduced level of immorality than abortion. To the liberal, birth is critical. Abortion is either not immoral or it is of a qualitatively distinct and reduced level of immorality than infanticide. Finally, both of these views are entirely one-dimensional in their moral evaluations. The conservative does not identify any substantial change in the woman's interests pre- and post-conception. Only the change in the status of the conceptus is relevant.³²

³⁰ "In the simplest characterization, a pro-choicer would hold that the decision to abort a pregnancy is to be made only by the woman; the state has no right to interfere. And a pro-lifer would hold that, from the moment of conception, the embryo or fetus is alive; that this life imposes on us a moral obligation to preserve it; and that abortion is tantamount to murder." Carl Sagan & Ann Druyan, *Is It Possible to Be Pro-Life and Pro-Choice?*, SACRAMENTO BEE, Apr. 22, 1990 (Parade Magazine), at 4; see also Ernest Van den Haag, *Is There a Middle Ground?*, NAT'L REV., Dec. 22, 1989, at 29, 31 ("A principled and intense minority of Americans think of abortion as murder."); Ross Laver & Randy Fisher, *The Debate About Life*, MACLEAN'S, July 31, 1989, at 20 (noting that "[s]ome anti-abortion groups insist that it is wrong to destroy an embryo or fetus at any stage of development. . . [and] some feminists oppose any limits on abortion, arguing that the rights of the fetus at any stage of its development must be subservient to the rights of the mother"). But see Michael Kinsley, *TRB From Washington*, NEW REPUBLIC, July 15 & 22, 1991, at 4 (arguing that pro-life groups do not really think that abortion is the equivalent of murder since they advocate punishing the physician who performs an abortion but not the woman who procures an abortion).

³¹ Sagan & Druyan, *supra* note 30, at 4.

³² Vincent Genovesi has written:

[A]bortion ought to be seen for what it really is: a matter of human life and death. As such, the facts regarding abortion must be kept distinct from any romanticizing over the rights of sexual freedom or the liberties of a sexual revolution. Abortion is not a matter simply of sexuality, and it is not a form of contraception. Moreover, any clear exposition of abortion ought quickly to disentangle itself from the issues of women's rights and the right to privacy.

Vincent J. Genovesi, *Challenging the Legal Status of Abortion: A Matter of Moral Obligation*, AMERICA, Dec. 14, 1985, at 417, 421.

Similarly, the liberal does not identify significant differences in a conceptus immediately pre- and post-delivery.³³ Only the removal and separation of the conceptus from the mother's body is important.

Under common sense morality, the abrupt discontinuities proposed by the liberal and the conservative are difficult to accept. Intervention in the development of a conceptus one minute after conception does not seem to be the moral equivalent of killing a three-year-old.³⁴ Similarly, most of us feel strongly that the decision to have an abortion late in the third trimester has considerable moral significance.³⁵ It may well be justifiable in some special cases, but it is clearly something that requires substantial justification. Very late abortion is not purely a matter of subjective preferences, bereft of moral overtones. Unlike either extreme view, which does not vary the moral status of abortions depending on the length of pregnancy, common sense morality views the decision to have an abortion as progressively more problematic in moral terms as gestation continues. Unlike the polar views, which use a particular event—fertilization or delivery—to mark a crucial moral threshold, common sense morality is far less confident that sharp moral boundaries exist.

Although the two sides of the abortion debate described above are presented as artificial constructs for analytical purposes, it should be clear that the conservative position more closely approximates actual advocacy in the American political spectrum.³⁶ With-

³³ Thus, the liberal position ignores the fact that "birth apparently does not constitute a major breakpoint in the development of neural function from prenatal to postnatal life." G.H.A. Visser & H.F.R. Prechtl, *Movements and Behavioral States in the Human Fetus*, in *FETAL AND NEONATAL DEVELOPMENT* 581, 586 (Colin T. Jones ed., 1988).

³⁴ See, e.g., LAURENCE H. TRIBE, *ABORTION, THE CLASH OF ABSOLUTES* 121 (1990) (describing human intuition "that abortion particularly early in pregnancy is not really the equivalent of killing an already born person").

³⁵ See, e.g., Callahan, *supra* note 5, at 686-87 (noting widespread support for restricting late term abortions on moral grounds); Langerak, *supra* note 18, at 252 (describing belief that "late abortions are significantly more morally problematic than early ones" as widely shared).

³⁶ See, e.g., B.J. George, Jr., *State Legislatures versus the Supreme Court: Abortion Legislation in the 1980s*, in *ABORTION, MEDICINE AND THE LAW*, *supra* note 22, at 23, 25 (noting that "in most American jurisdictions prior to 1967, abortions were allowed only to save the lives of pregnant women; to activists within the self-proclaimed right-to-life-movement, the United States Constitution should be amended today to prohibit all abortion, or at a minimum all that are unnecessary to save maternal life"); see also Albert M. Pearson and Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, in *ABORTION, MEDICINE AND THE LAW*, *supra* note 22, at 119-21 (describing proposed constitutional amendments to protect fetal life from the moment of conception).

out constitutional limitations, laws to criminalize abortions from the moment of conception throughout the gestation period are realistic possibilities.³⁷ There seems much less commitment to establishing a woman's absolute discretion to terminate a pregnancy immediately before delivery.³⁸ Thus, we will begin our analysis by considering the merits of the conservative position.

B. *Abortion as Murder*

According to the conservative view, abortion is morally wrong because it kills the conceptus. But just why is killing the conceptus morally wrong? One response is that it is wrong simply because the conceptus is alive.³⁹ This response is at variance with common sense morality, which attaches limited moral import to the taking of life as such. Killing bacteria or pulling up weeds, for example, has little moral significance. Consequently, if killing the conceptus is morally wrong, there must be certain distinctive features of this event that differentiate it from other acts of killing that we do not condemn on moral grounds.⁴⁰

In evaluating the wrongfulness of abortion, philosophers often approach the problem by examining characteristics that the conceptus must have to give it, in contrast to bacteria or weeds, "moral standing."⁴¹ If it possesses moral standing, the conceptus has rights and interests that others must take into account in their deliberations and actions. Among the rights of an individual with moral

³⁷ In response to *Roe v. Wade*, "Illinois and Kentucky declared their intent to prohibit abortions should the Supreme Court reverse its constitutional stance or should the Constitution be amended to permit them to do so. Idaho . . . has standby provisions to come into force through gubernatorial proclamation should the constitutional picture change." George, *supra* note 36, at 31. Illinois law also proclaims, "The unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State." ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1991).

Most recently, Louisiana House Bill 112, enacted into law June 18, 1991, states in its preamble, "it is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth." See *New Measure Limiting Louisiana Abortion*, N.Y. TIMES, June 21, 1991, at A11.

³⁸ Indeed, very few abortions occur in the third trimester. See Tietze, *supra* note 27, at 298 (between 1973 and 1980 the percentage of abortions in the U.S. occurring after 21 weeks of gestation changed from a high of 1.4% in 1973 to a low of .08% in 1980).

³⁹ See generally GLOVER, *supra* note 18, at 41-42.

⁴⁰ *Id.* at 48.

⁴¹ The term is taken from Sumner and connotes an entity that has moral rights; that is, the entity "ought to be protected in some specified activity, or ought to be treated in some specified manner." SUMNER, *supra* note 5, at 30.

standing is the right to life. So if the conceptus has moral standing, other things being equal, killing it is morally wrong.⁴²

1. Moral Standing

We can distinguish two arguments for giving the conceptus moral standing. The first is that the conceptus has moral standing because of its actual characteristics. Alternatively, one could argue that the conceptus has moral standing because of its potential abilities or capacities.⁴³ We will characterize these two positions as the actuality argument and the potentiality argument.

a. *The Actuality Argument*

The central thesis of the actuality argument is that the conceptus has moral standing from the moment of conception on, not because of what it may eventually become, but on the basis of its

⁴² In the abortion context, "to ask whether fetuses have moral standing is . . . to ask whether they have a moral right to life If fetuses have a right to life, then (some or all) other persons have a moral duty to extend to the fetus some specified protection of life." *Id.*

⁴³ Considerable confusion surrounds the issue of potentiality in the abortion debate. To some scholars, the question is whether the conceptus is the kind of organism that in the normal course of events will develop into a being with moral standing. Philip Devine, for example, describes a "potentiality principle" under which the right to life of the fetus can be protected:

According to this principle, there is a property, [however defined] such that (i) it is possessed by adult humans, (ii) it endows any organism possessing it with a serious right to life, and (iii) it is such that any organism potentially possessing it has a serious right to life even now—where an organism possesses a property potentially if it will come to have that property under normal conditions for development.

PHILIP DEVINE, *THE ETHICS OF HOMICIDE* 94 (1978); see also ROSALIND HURSTHOUSE, *BEGINNING LIVES* 72 (1987) (defining the potentiality view as the belief that "the foetus, from the moment of conception, is morally unique, unlike anything else in being not an actual but a potential human being or person"). Langerak explicitly distinguishes a potential person (for example, a human fetus) from a possible person (for example, a human sperm or egg). See Langerak, *supra* note 18, at 253. A possible person will not "become an actual person in the normal course of its development," but it could, "under certain causally possible conditions, become an actual person." *Id.*

We use the term "potential" differently. On the one hand, we do not limit the meaning of the term as narrowly as do these scholars. We are not at all certain that a human egg does not also have the potential to become a person even though its place in the developmental continuum precedes that of the conceptus. See *infra* notes 61–62 and accompanying text. On the other hand, our focus is on the individual potential of particular organisms, not the generic potential of organisms of a particular kind. Thus, we would argue that a conceptus with an incurable condition that will inevitably result in its death early in the gestation period is not a potential person, even though it is the *kind* of thing that typically does develop into a person. Potentiality in our sense involves individual possibility. See *infra* notes 44–45, 61–62, 85–91 and accompanying text.

current characteristics and qualities. The conceptus is thus no different morally from a child or an adult, whom we value because of who they are today, without regard to their future development.⁴⁴ This thesis is a common part of the political rhetoric of the abortion debate, although it appears much less regularly in the legal literature. It is subject to several critical challenges.

Initially, critics can confront proponents of the actuality argument with a direct hypothetical. Assume a pregnant woman learns five weeks after conception that there is no possibility that the conceptus will be born alive. The conceptus will die during the first five months of the gestation period. In that circumstance, would it be morally permissible for the woman to have an abortion? Clearly, no one would defend killing a six-year-old child with only four months to live; for many individuals, however, the decision to terminate a pregnancy that could not result in birth would represent a morally acceptable choice.

Not everyone will agree with this conclusion. Some opponents of abortion would condemn this decision to terminate a pregnancy, as well as all other abortions. If one acknowledges that abortion in this situation is morally permissible, however, it is difficult to defend the actuality argument with rigor. Unlike the way it regards children and adults, common sense morality seems to ground the moral status of the conceptus in its potential. Where no potential exists, the question of moral standing changes substantially.

The second problem with the actuality argument relates to the difficulty of finding a justification for conferring moral standing on the conceptus on the strength of its actual characteristics. Conservatives sometimes argue that the conceptus has a right to life either because of its biological properties, that is, because it is a member of the species *Homo sapiens* (the species argument), or, more ambiguously, because it possesses those qualities that characterize a person for moral and legal purposes (the personhood argument). The species and the personhood arguments demonstrate common weaknesses.

⁴⁴ See Daniel J. Callahan, *Counseling Abortion Alternatives: Can It Be Value-Free?*, AMERICA, Aug. 31–Sept. 7, 1991, at 110, 112 ("Pro-life counselors, by and large, view the fetus as a human life that is morally equal in value with all other human lives."); Edd Doerr, *Abortion: Right or Wrong?*, USA TODAY, Jan. 1989, at 51, 53 (noting that the National Right to Life Educational Trust Fund argues, "we are compelled to recognize that there is no essential difference between the fertilized ovum we all once were, and the embryo, the fetus, the infant, adolescent and adult we all grew or are growing to be").

i. The Species Argument

The species argument relies on two premises. The first premise, that the conceptus is human, is relatively uncontroversial; the genetic composition of the conceptus is indeed that of the species *Homo sapiens*. The second premise is considerably more problematic: that all beings with this genetic structure from the time of conception⁴⁵ have moral standing precisely and solely because of these physical properties.⁴⁶ This premise invites the rejoinder that

⁴⁵ The language in the text oversimplifies the fertilization process. It is doubtful that, in technical terms, there is a single moment of conception. See, e.g., ROBERT EDWARDS, *LIFE BEFORE BIRTH* 53 (1989); TRIBE, *supra* note 34, at 122-24. At some point, however, the fertilization process may properly be deemed complete.

⁴⁶ May makes the argument simply, but in general terms: "membership in the human species . . . is a morally significant fact simply because human animals are a different kind of animal from other animals." William E. May, *What Makes a Human Being to be a Being of Moral Worth?*, 40 *THOMIST* 416, 442 (1976). Thus, humans are moral beings because they are "minded" beings, capable of thinking, understanding, choosing and loving. *Id.* at 424. Accordingly, "the reason why a human being is a being of moral worth is rooted in his membership in the human species. What makes an entity to be a human being simultaneously makes it to be a being of moral worth." *Id.* at 421; see also ALAN DONAGAN, *THE THEORY OF MORALITY* 171 (1977) (supporting the natural kind argument that "if respect is owed to beings because they are in a certain state, it is owed to whatever, by its very nature, develops into that state").

More often this same claim is made more specific by focusing on the genetic code of the conceptus. According to Judge Noonan, for example:

The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A being with a human genetic code is man.

John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 57 (John T. Noonan, Jr. ed., 1970).

Grisez also argues that the conceptus at conception has an immediate right to life, upon receiving its complete genetic code. The zygote is "human" at this time because the human species has a unique DNA Code. The zygote is also an individual from conception onward because it has "derived half of its genetic make-up from each parent [and, therefore,] is unlike any cell that belongs to either of them." GERMAIN G. GRISEZ, *ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS* 14 (1970).

Similarly, Tribe describes the argument of Dr. John Willke of the National Right to Life Committee as insisting that the "embryo must be a separate human person, not simply living tissue, from the moment of conception since the crucial forty-six chromosomes that determine a person's separate and distinct genetic identity are all present in the fertilized egg." TRIBE, *supra* note 34, at 117.

One response to these arguments challenges their technical accuracy in describing the singleness, individuality or completeness of the conceptus after fertilization:

We know scientifically that at the moment of fertilization a new individual in the sense of singleness does not arise; . . . twinning can occur at stages well beyond the time of fertilization. Also fusion of early stage embryos can be performed yielding a single individual. Therefore, in the early stages of devel-

it is unjustified "speciesism."⁴⁷ Even more problematic, it simply assumes what is in debate without providing any criteria or explanations to support its conclusions.⁴⁸

Clearly, not all biological characteristics are relevant to moral standing. Most of us would reject as obviously unjustified and underinclusive the claim that only men or the white race have moral standing. The claim that all beings with legs have moral standing is equally as unjustified and overinclusive. Just as having a certain skin color, gender or extremities seems unrelated to determining

opment beyond fertilization an individual has not yet been firmly and stably established. The early embryo is in fact an aggregate of cells which have not yet formed a distinct collective in the sense of an individual organism.

The Human Life Bill: Hearings on S.158 Before the Subcommittee on Separation of Powers (1981), reprinted in *ABORTION, MEDICINE AND THE LAW*, *supra* note 22, app. 2 at 456-57 [hereinafter *Human Life Bill*] (statement of Dr. Clifford Grobstein); see also *TRIBE*, *supra* note 34, at 122-24. In addition, many of the above arguments, while cast in terms of the actual condition of the conceptus, seem to emphasize the potential development encoded in its genetic structure as the key to its acquiring human qualities. Most problematically, however, what is lacking in these arguments is any explanatory link that justifies equating human DNA with moral worth.

⁴⁷ See, e.g., *DEVINE*, *supra* note 43, at 51 (explaining that under a "species principle," "those creatures protected by the moral risk against homicide are the members of the human species, and only the members of the human species"); *GLOVER*, *supra* note 18, at 50 (1977) (defining speciesism as the belief that human life should be "treated as having a special priority over animal life simply because it is human").

⁴⁸ This criticism cannot be avoided by generalizing the species argument. Instead of the first premise, which gives moral standing only to human beings, we can adopt one that gives it to all members of all species of a certain kind. But what kind of species should count? The basic idea is to look for species whose paradigm members unquestionably have moral standing. *Homo sapiens* counts because normal, adult human beings have moral standing. This contention becomes uselessly circular, however, unless an independent reason is provided to explain why adult human beings have moral standing. They cannot have it simply because they are members of the species, *Homo sapiens*. Instead, they must have it because of some general qualities, perhaps on account of their mental capacities and abilities, that *Homo sapiens* and other species may possess. Moreover, in order to defend this claim, the conservative must explain how having such properties establishes moral standing. That is, she needs to explain why killing an entity with those properties would be morally wrong. Why, for example, is killing entities with higher intelligence morally distinct from killing entities with other attributes shared with *Homo sapiens*, such as having two legs?

Sumner sets out yet another criticism of the species argument. According to the species argument, moral standing "extends to the edges of a natural kind [species] whose mature members are normally rational." *SUMNER*, *supra* note 5, at 97. There is no consistent basis, however, Sumner argues, for valuing rationality when comparing kinds of creatures, while treating rationality as irrelevant to moral worth when comparing individuals of the same species. *Id.* at 98.

Devine views the species argument much more sympathetically. *DEVINE*, *supra* note 43, at 51-57. Although he aggressively defends the species argument against particular criticisms, he says very little about why members of the human species deserve elevated moral status, other than to note that this principle is "founded on kinship or solidarity that obtains among members of the same species." *Id.* at 50.

whether a being has a right to life, we need to be told why having the genetic structure of the species *Homo sapiens* should matter morally.⁴⁹ The bald assertion that it is just wrong to kill humans, without more, is ad hoc and question-begging.⁵⁰

ii. The Personhood Argument

The personhood argument also rests on two premises: first, that the conceptus is a person from the moment of conception and, second, that all persons have moral standing. It is subject to criticisms similar to those directed at the species argument. The proponent of this position must connect having the right to life with certain non-question-begging characteristics or properties connoting personhood. Further, she must establish that, from conception on, the conceptus has those properties.⁵¹ There are few obvious options for meeting these criteria.

We have already considered biological properties while discussing the species argument. As we saw, the connection between such properties, including genetic structure, and moral standing is unsupported.⁵² The connection between biological properties and

⁴⁹ See GLOVER, *supra* note 18, at 50-51 ("It is not in itself sufficient argument for treating a creature less well to say simply that it is not a member of our species. An adequate justification must cite relevant differences between the species."); Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective in DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS* 19 (Margery W. Shaw & A. Edouard Doudera eds., 1983) (arguing that aside from religious adherents who believe that humans have a unique moral status because their special relationship with God is not shared by other species, "the thesis that humans should be ascribed rights simply for being human has received practically no support from philosophers"); see also SUMNER, *supra* note 5, at 92 ("[A]n individual's gender, race or species does not in itself have any implications for his/her moral status, and so fastening upon any of these divisions as significant in itself is mere bigotry.").

⁵⁰ The species argument is complicated further by the variation in developmental outcomes that are determined between conception and the implantation of the fertilized ovum on the wall of the uterus. "[U]ntil implantation, one cannot know whether the conceptus will be a hydatidiform mole, a chorionic tumor, or an individual." Rebecca J. Cook, *Legal Abortion and Human Life*, in *ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS* 211, 223 (Maeve O'Connor & Ruth Porter eds., 1985). In literal terms, if genetic structure establishes human life, one must argue at best that the nonimplanted fertilized ovum was human for a very short period and then ceased to be.

⁵¹ See, e.g., SUMNER, *supra* note 5, at 32. Sumner argues that a criterion for moral standing must point to properties that have "some plausible connection with the possession of certain moral rights." *Id.* Accordingly, he concludes, "[t]here must, therefore, be some reason for thinking that it is in virtue of an entity's possessing just *these* properties that it has such rights, that *these* properties mark the crucial watershed between entities with those rights and entities without them." *Id.*

⁵² Indeed, correlating any biological condition of the conceptus or fetus with moral standing is difficult during the first part of the gestation period. Most "developmental

personhood is equally unsupported. A theory that personhood consists of having a soul is formally adequate but deficient because of the axiomatic assumptions on which it is based.⁵³ Defining personhood in terms of mental abilities may be a promising possibility,⁵⁴ but the conceptus, early in the gestation period, has extremely limited mental abilities. On the basis of its actual mental condition, without regard to its potential, it would be impossible to distinguish the human conceptus from other organisms to which common sense morality does not accord a right to life.⁵⁵ Thus, if personhood is

milestones" during gestation do not involve "uniquely human characteristics." For example, "[a]ll animals respond to stimuli and move of their own volition. Large numbers are able to breathe. But that doesn't stop us from slaughtering them. Reflexes and motion and respiration are not what makes us human." Sagan & Druyan, *supra* note 30, at 7. Nor are there other biological developments that intrinsically constitute the achievement of human personhood. See *Human Life Bill*, *supra* note 46, at 459 (statement of Dr. James Neal) ("At some point as the amazing chain of events that results in a fertilized egg becoming a human being unfolds, we acquire the basis for those attributes that make us humans, but . . . I can find no biological basis for saying at exactly what stage in development human personhood begins.").

⁵³ The "traditional Catholic" view of ensoulment, for example, holds that what makes an organism a human being is the spiritual soul, the existence of which begins "at the moment of its 'infusion' into the body." See Joseph F. Donceel, S.J., *A Liberal Catholic's View*, in *THE PROBLEM OF ABORTION*, *supra* note 18, at 15. Most Catholics adhere to the "theory of immediate animation," believing that the soul is infused at the time of conception. *Id.*

Commentators have frequently recognized the problematic nature of arguments predicated on the conceptus having a soul and the injustice of applying laws based on such an assumption to individuals who challenge this religious doctrine. See, e.g., ROBERT N. WENNBERG, *LIFE IN THE BALANCE* 43-46, 52 (1985); Tooley, *supra* note 16, at 83-114.

While moral principles should not be excised from constitutional debate simply because they derive from a religious source, it must be clear that exclusively religious assumptions about the nature of life cannot constitute the kind of compelling state interests that outweigh the exercise of fundamental rights. For example, courts should not permit legislatures to force parents to convert their children to a faith not their own on the grounds that this is the only way to provide them entry into heaven and everlasting life. The state's interest in protecting the children's life after death would not be a sufficiently compelling state interest to justify overriding the parents' and children's free exercise rights. Similarly, courts should not allow the sacrifice of a woman's autonomy rights to further a state's interest in protecting potential life before birth on the theory that the conceptus has a soul.

⁵⁴ See, e.g., SUMNER, *supra* note 5, at 142-46. Sumner uses sentience, the "capacity for feeling or affect," as the criterion for moral standing. *Id.* at 142. He favors this criterion because a being can acquire it gradually, and because it admits of degrees, assigns no moral status to plants or inanimate objects, and allows moral standing to be assigned to people with limited intellectual capabilities, such as the retarded. *Id.* at 145-46.

Brody argues that a fetus is a human being from the time brain activity begins (at about six weeks of age). Brain function is the "essence of humanity" under this analysis because its loss entails that a living human being no longer exists. Baruch Brody, *On the Humanity of the Fetus*, in *WHAT IS A PERSON?*, *supra* note 16, at 248.

⁵⁵ Professor Hare puts it bluntly:

I am not saying that physiological research on the fetus has no bearing on moral questions about abortion. If it [is] brought to light, for example, that fetuses

determined by mental development, the conceptus is excluded from this status for a significant part of the gestation period.⁵⁶ In short, without extensive revision and supplementation, the personhood argument does not support the conservative position.

b. *The Potentiality Argument*

The potentiality argument rests on premises that parallel those of the two arguments discussed above. These premises are that potential persons have moral standing and that the conceptus is a potential person from the moment of conception. Both of these premises are susceptible to challenge.

The philosopher Joel Feinberg has argued against the first premise.⁵⁷ Although acknowledging that persons have moral standing, Feinberg argues that it does not follow from this that *potential* persons also have moral standing. To reason otherwise is a logical

really do suffer on the same scale as adults do, then that would be a good moral reason for not causing them to suffer. It would not do to show that they wriggle when pricked, for so do earthworms; and I do not think that the upholders of the rights of unborn children wish to extend these rights to earthworms. Encephalograms are better; but there are enormous theoretical and practical difficulties in the argument from encephalograms to conscious experiences. In default of these latter, which would have to be of such a sort as to distinguish fetuses radically from other creatures which the antiabortionists would not lift a finger to protect, the main weight of the antiabortionist argument is likely to rest, not on the sufferings of the fetus, but on harms done to the interests of the person into whom the fetus would normally develop.

R.M. Hare, *Abortion and the Golden Rule*, 4 PHIL. & PUB. AFF. 201, 205-06 (1975); see also Sagan & Druyan, *supra* note 30, at 6-7 (noting that all animals have the mental ability of the early fetus to respond to stimuli and move on their own volition, but by the middle of the seventh month of the gestation period, recognizably human brain activity begins).

⁵⁶ Dr. Grobstein has stated:

[W]ith respect to such characteristics as sentience or selfness or consciousness, correlation with the development of the central nervous system is very close. We know that it is not until 4 weeks that the first recognizable rudiment of a nervous system appears, and that at that time there are no identifiable nerve cells, no identifiable synaptic connections among them, and no identifiable neurotransmitters.

Through the gradual maturation of the spinal cord, and particularly of the brain, the underpinnings for properties such as sentience presumably appear. It is not until 8-10 weeks that there are spontaneous movements in the human fetus, quickening, of course, not occurring until about 18 weeks. It is not known whether these early movements represent something that should be interpreted as sentience or selfness, or whether they are more in the nature of what would be called unconscious reflex activity.

Human Life Bill, *supra* note 46, at 457 (statement of Dr. Grobstein).

⁵⁷ See Joel Feinberg, *Potentiality, Development, and Rights*, in *THE PROBLEM OF ABORTION* *supra* note 18, at 145-50 (raising "the logical point about potentiality" in order to challenge the idea that potential persons have a right to life).

fallacy. "It is a logical error . . . to deduce actual rights from merely potential (but not yet actual) qualification for those rights."⁵⁸ Certainly, this argument comports with our understanding of legal rights.⁵⁹ A thirty-year-old adult has individual constitutional rights of speech, religion and autonomy; a three-year-old is a potential adult but does not have this same panoply of rights.⁶⁰ This analogy seems persuasive, unless one can demonstrate that moral status and legal rights are not the same in this respect. All else being equal, the potential to qualify for a certain right or status does not, itself, qualify for that right or status.

Feinberg's thesis is correct. It does not follow from the fact that persons have moral standing that potential persons do as well. His thesis, however, is also irrelevant. The conservative need not claim that the conceptus has moral standing because persons have moral standing. Instead, she can claim that potential personhood itself is an adequate basis for moral standing. Although the conservative must defend this claim, it is important to understand that the potentiality argument does not necessarily rest on a non sequitur.

The second premise—that the conceptus is a potential person from the moment of conception—can also be questioned. One common objection is that the unfertilized egg and the sperm are also potential persons, so that by parity of reason they too must have moral standing. A theory that gives spermatozoa the same moral status as adult humans seems to prove too much.⁶¹

⁵⁸ *Id.* at 145.

⁵⁹ Feinberg explains, for example, that as children Jimmy Carter and Franklin Delano Roosevelt were both potential presidents, yet neither had any claim or right to assume command of the U.S. military until actually elected to office. *Id.* at 147–48.

⁶⁰ While "minors, as well as adults, are protected by the Constitution and possess constitutional rights," *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977).

More specifically, the constitutional rights of children are more restricted than those of adults because of the "inability [of minors] to make critical decisions in an informed, mature manner." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). Thus, the right of a minor to terminate a pregnancy may be limited by requirements of parental consultation, or, alternatively, a judicial hearing to determine if the minor is sufficiently mature and informed to make the decision independently of her parents. *Id.* at 643–644. Similarly, children do not have the same First Amendment rights as adults to determine for themselves what they will read. Minors are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring).

⁶¹ Sagan and Druyvan state:

Every human sperm and egg is, beyond the shadow of a doubt, alive. They are not human beings, of course. However, it could be argued that neither is a fertilized egg A sperm and an unfertilized egg jointly comprise the full

The conservative has a rejoinder to this criticism. By claiming that the conceptus is potentially a person, she means that the conceptus is an actually existing single individual with the active potentiality to become a person. Neither the sperm nor the egg are potentially persons in this sense. A sperm has an active potentiality to fertilize, an egg to be fertilized; neither has the active potentiality to become a person.⁶²

genetic blueprint for a human being. Under certain circumstances, after fertilization, they can develop into a baby. But most fertilized eggs are spontaneously miscarried. Development into a baby is by no means guaranteed. Neither a sperm and egg separately, nor a fertilized egg, is more than a *potential* baby or a *potential* adult. So if a sperm and an egg are as human as the fertilized egg produced by their union, and if it is murder to destroy a fertilized egg—despite the fact that it's only *potentially* a baby—why isn't it murder to destroy a sperm or an egg.

Sagan & Druyan, *supra* note 30, at 5. Grobstein makes the same biological point. "Eggs and sperm are alive and human, and so, too, is the cell that results from their fusion and all of its products. Fertilization is not when life begins; it is an important stage in the continuity of life from generation to generation." *Human Life Bill*, *supra* note 46, at 456 (statement of Dr. Grobstein). Similarly, Sumner argues that if the protection of life is to extend back to fetuses, embryos or zygotes by virtue of their potential, it must also be extended back by parity of reasoning to ova and spermatozoa. SUMNER, *supra* note 5, at 104-05. Moreover:

From the point of view of potentiality, conception . . . is simply another step in the actualization of the potential for creating a rational being that is contained in male and female gametes. From the point of view of potentiality, the fact that conception for the first time assembles the complete genetic material for a new individual is also of no significance; it is entirely arbitrary to protect a creature who is potentially rational and to not protect the potential for a rational creature.

Id. at 105; see also R.G. Edwards, *Fertilization of Human Eggs in Vitro: Morals, Ethics and the Law*, 49 Q. REV. BIOLOGY 3, 13 (1974) (arguing that unfertilized eggs have the potential for life because parthenogenesis (the development of an organism from an unfertilized egg) can occur in mammals). *But cf.* HURSTHOUSE, *supra* note 43, at 82 (arguing that parthenogenesis is not proven to occur in humans, and, even if it were, there are no grounds for asserting that sperm are potential human beings).

⁶² Hursthouse claims that, under the potentiality view, sperm and unfertilized eggs are not potential human beings. See HURSTHOUSE, *supra* note 43, at 81-82. Her argument is complex, but seems to be predicated on two premises. First, in saying that the fetus is a potential human being or person, Hursthouse does not mean that any specific fetus has the opportunity to become a human being, an opportunity that may or may not actualize. Rather, the fetus is a member of a class of potential human beings, regardless of the fate of that particular fetus. *Id.* at 80-81. Thus, an ill fetus with no chance to be born alive is as much a potential human being as a healthy, normal fetus unless "it were, from the start, *genetically* so abnormal as to make it impossible that it would even develop to term and survive." *Id.* at 81 (emphasis added). Thus, the fetus is a potential human being in the sense that its generic, natural and normal development is to become a human being.

Second, Hursthouse explains that a sperm and ovum are not generic potential human beings because each needs "to combine with the other in order for the [developmental] process to be got going." *Id.* at 81. A fetus, unlike the ovum and sperm, can develop of its own accord. *Id.* at 80. Hursthouse anticipates the objection that this distinction is not crucial

This response, however, only highlights the need for additional explanation. Why is it that only actually existing single individuals constitute potential persons with moral standing while earlier essential stages of development do not? The egg in a woman's womb cannot fulfill its potential without additional intervention (fertilization) and substantial change in its condition. But that is clearly true for a fertilized egg as well.⁶³ The woman's role in the development and change of the fertilized egg into a delivered baby is an outside, instrumental necessity.⁶⁴ Exactly how do we connect the event of conception with the reasons why potential persons deserve moral standing in the first place?

in that the fertilized ovum also must receive substantial external support from its maternal environment in order for it to develop. Her response to this argument, however, is unclear. To refute the objection, she argues that the possibility of one thing fortuitously combining with another to form some new entity does not mean that the constituent parts were potentially the new entity. *Id.* If an ovum or fetus dies, is buried, decays, and ultimately combines with a sapling, it would still be incorrect to say that the ovum was a potential tree. *Id.* The fertilization of the egg by the sperm, however, involves a natural, normal, and predictable sequence that is hardly as inconsistent with the idea of normal and natural development as is the sapling example.

Hursthouse goes on to claim that her theoretical opponent must be arguing either that sperm and ovum are human beings or that parthenogenesis may occur in humans. *Id.* at 82. Her argument here is also difficult to follow, however, and does not seem to counter directly the point she is challenging. Hursthouse clearly believes that the unfertilized ovum lacks sufficient characteristics to qualify as a potential human being, but she does not fully explain why this should be so. Certainly, the ovum is an essential foundation for the development of human life and its fertilization is part of the natural sequence of events leading to birth. Although the ovum is, of course, incomplete, that is not inconsistent with a status defined in terms of potential. The fertilized egg is further developed and significantly more particularized than the ovum, but its nature still is not conclusively fixed. Much depends on the receptivity and type of support provided by the mother's body.

Perhaps to Hursthouse, the unfertilized ovum is in some sense a potential, potential human being. What remains unclear, however, is why that status should be of significantly lower moral value than that of the conceptus. Given that the development process may be blocked, and the birth of a baby prevented, by external intervention both pre-conception as well as post-conception, the case remains to be made why only post-conception decisions produce morally significant results.

⁶³ See *supra* note 62.

⁶⁴ Dr. Rosenberg has stated:

To fulfill [its] potential, the fertilized egg must travel to the uterus, be implanted in the uterine wall, and undergo millions and millions of cell divisions leading to the development of its head, skeletal system, limbs, and vital organs. To be sure, this sequence of events depends on the genetic program present in each cell of the developing embryo and fetus. As surely, however, the sequence depends on the environment offered by the mother. Without the genetic blueprint of the fetal cells, human development cannot be initiated; without the protection and nutrition provided by the mother's tissues, the genetic blueprint cannot be followed to completion.

Human Life Bill, *supra* note 46, at 443-44 (statement of Dr. Leon Rosenberg).

c. *Common Problems*

In a superficial sense, the weaknesses of the above arguments seem to make an excellent case for the liberal position. If all and only persons have a right to life, for instance, and if the conceptus is not a person, then it does not have a right to life. Unfortunately for the liberal, however, under this analysis the same conclusion may hold for infants. For example, if we adopt strict criteria for personhood based on mental ability, infants also may not be persons, and thus would have no right to life. Up to the point when the child begins to qualify as a person under this analysis, infanticide should be morally unproblematic.⁶⁵

Both the conservative and the liberal at this point may protest that our definitions of their positions are too rigid and absolute. The conservative may argue that she does not necessarily contend that a three-week-old conceptus has the same moral status as an eight-and-one-half-month-old fetus or a six-year-old child. Her opposition to legal abortion is justified as long as the moral status of the conceptus is of sufficient value at each point in time to outweigh the woman's interest in terminating the pregnancy. That contention is consistent with the argument that the moral status of the conceptus increases throughout the gestation period and, perhaps, thereafter.⁶⁶

⁶⁵ Michael Tooley is probably the best known proponent of this position. Tooley argues that a being must be capable of having a desire for something in order to have a right to it. Therefore, to have a right to life, one must have an interest in continued existence, and, to have an interest in one's own continued existence, one must possess a concept of self. Tooley, *supra* note 16, at 83-114. Carrying this analysis to its logical conclusion, he adds that behavioral and neurophysiological studies indicate that infants do not have the mental capacity to engage in this kind of conceptual thinking. Accordingly, they do not have a right to life and "infanticide during a time interval shortly after birth must be viewed as morally acceptable". *Id.* at 111; see also Harry G. Frankfurt, *Freedom of the Will and Concept of a Person*, in *WHAT IS A PERSON?*, *supra* note 16, at 127-44 (drawing a distinction between ordinary desires and desires about which desires to have, and arguing that the existence of the latter are essential to personhood).

Sumner concludes that "[i]f being rational is the criterion for moral standing then it seems to follow that many members of the [human] species have no such standing—and among these members will be fetuses." SUMNER, *supra* note 5, at 94. He rejects this criterion, however, recognizing that under this standard infants and other human beings would lack a right to life. *Id.* at 138.

⁶⁶ See GLOVER, *supra* note 18, at 127-28. Glover states:

It seems more defensible to abandon the view that there is an abrupt transition to the status of a person and to replace it by the view that being a person is a matter of degree. A one-year-old is much more of a person than a newborn baby or foetus just before birth, but each of these is more of a person than the embryo.

The conservative's protest is consistent, but her burden of justification, not yet adequately satisfied, is now even more onerous. For an individual with clear moral standing, such as a two-year-old child, further development and maturation have no impact on her right to life. Common sense morality does not accord a stronger right to life to a twenty-year-old than to a two-year-old. Thus, a more flexible conservative must posit at least a two-tier standard.⁶⁷ At conception, the conceptus instantly achieves moral standing sufficient to outweigh the woman's exercise of her right to privacy and autonomy. That moral status, however, changes during the gestation period until it culminates at an even higher level of value, which remains fixed throughout the rest of life. Again, the conservative needs to present a justification for this more complex moral analysis. If the moral standing of an eight-month-old conceptus or a five-year-old child differs from the moral standing of a three-week conceptus, the conservative must justify these distinctions as well as the absolute priority of the conceptus's over the woman's interests from the moment of conception through birth.

Similarly, the liberal will reject even the insinuation that she supports infanticide. Her protest is consistent with her claim that birth is the critical moral threshold.⁶⁸ What the liberal must justify

Id.; see also SUMNER, *supra* note 5, at 125–26 (arguing that moral standing is acquired gradually and criticizing viewpoints focusing on the moral importance of conception or birth since “neither can attach any significance to the development of the fetus during gestation”). Similarly, under what Hursthouse calls the “mixed strategy view,” a conceptus’ moral status progresses with development. The conceptus starts out morally akin to a piece of tissue. Then its moral status increases to that of a lower animal, a higher animal, a baby, and finally it reaches the status of an adult human being. See HURSTHOUSE, *supra* note 43, at 65.

⁶⁷ For example, Langerak recognizes that there is a basic tension between the belief that the fetus has inherent claims to life and the belief that late term abortions are more morally problematic than early abortions. Langerak, *supra* note 18, at 252–53, 258–59. To resolve the dissonance between those two views, Langerak poses a weaker claim to life for the early fetus supplemented by a conferred claim to life based on avoiding the secondary effects of late abortions on third parties (that is, society should confer a claim to life on the fetus to supplement the fetus’s inherent claim to life). *Id.* See generally DEVINE, *supra* note 43, at 79–80. Devine warns that those who believe that personhood is acquired gradually must also determine when “full-fledged humanity” is reached. Otherwise, if the gradualist theory is extended beyond birth, killing a ten-year-old would be less bad than killing an adult. *Id.*

⁶⁸ See Lucinda Cisler, *Unfinished Business: Birth Control and Women’s Liberation*, in *SISTERHOOD IS POWERFUL* 274–81 (Robin Morgan ed., 1970) (defending the proposition that birth is the crucial moral threshold). Cisler’s analysis suggests that quickening (the time at which the mother first perceives fetal movement) and viability (the time at which the fetus can survive outside the mother) are too indefinite to be criteria for moral standing. Therefore, “[w]e are left with the inescapable conclusion that the only event in the sequence of pregnancy that can be assigned a specific time is birth itself, at the time that it occurs. All else is mystique and conjecture.” *Id.* at 274.

is her contention that the woman's interest outweighs the right to life of the about-to-be-delivered conceptus. Further, she must explain why the woman's interest changes so dramatically from immediately before to immediately after birth.⁶⁹

The liberal may also seek additional flexibility and concede that late term abortions indeed may be sufficiently immoral to justify state-imposed restrictions.⁷⁰ This concession, however, requires the liberal to explain her basis for determining the changing moral standing of the conceptus, because the separation of the baby from the mother at birth would no longer be dispositive. In short, the flexible liberal faces the same difficulty as the flexible conservative: each must tie the changing condition of the conceptus to an increase in its moral standing. This difficulty can only be resolved by probing more deeply into the question of why it is wrong to kill anything with either the potential for or the actual attributes of personhood.

2. The Wrongfulness of Killing

In conventional moral terms, there are three things wrong with killing. First, it deprives the individual killed of something that is usually valuable, the continuation of his or her life. Second, it deprives the individual of autonomy or self-determination. Finally, it causes harm to others—for instance, the individual's friends and family, or the entire community of which he or she is a member.

From the perspective of the conservative, and to the extent that current law reflects common sense moral intuitions, we can quickly dispense with the third criterion as reflecting a qualitatively different and lesser kind of harm than the first two. As a general matter, killing a recluse with neither family nor friends remains a morally

⁶⁹ The immediate superficial response to this inquiry is that the woman's interest declines at birth because the fetus no longer resides within her body. At a short time interval prior to birth, however, a woman's interest in terminating her pregnancy (special medical complications aside) rests on two factors: the burden of continuing to carry the fetus for that limited time period, and the difference between the delivery of a live baby as opposed to a very late trimester abortion. It is unclear how much weight should be assigned to either factor. See *infra* notes 154–61 and accompanying text.

⁷⁰ Hursthouse maintains that under the strict "mixed view" (the view that moral status is acquired gradually on the basis of development), third trimester abortions are morally equivalent to infanticide. She adds, however, that many of those who hold the mixed view try to distinguish late abortions from infanticide on the basis of the fetus's parasitic relation to the mother prior to birth. See HURSTHOUSE, *supra* note 43, at 66–67; see also SUMNER, *supra* note 5, at 151. Using a sentience-based criterion for moral standing, Sumner argues that "late abortion belongs in the same moral category as infanticide" because, at the time of the "late" abortion, the fetus has already acquired moral standing. *Id.*

reprehensible act of great seriousness.⁷¹ Certainly, it is a much greater moral wrong than maliciously and falsely informing a person's family that he is dead. Thus, the harm resulting from the knowledge that someone is dead pales in comparison with the harm done to the person who is actually killed. Similarly, for the conservative, an abortion performed without the knowledge of any third party is as morally reprehensible as one that is publicly known to have occurred. Both actions would constitute murder. Indeed, to the extreme conservative, devices or methods that prevent implantation are abortifacients and their use is a serious moral wrong, even though it is highly unlikely that the woman using such methods will know if and when this event actually occurs.⁷² Thus, we may focus our analysis on the harm suffered by the individual who dies: what is bad about death for the individual who is killed?⁷³

⁷¹ See GLOVER, *supra* note 18, at 40–41.

⁷² Although "[s]ome abortion opponents . . . oppose forms of contraception that they believe can work after conception," other pro-life groups reject this contention. Gina Kolata, *Opponents of Louisiana's New Law Say It Could Limit Use of Some Contraceptives*, N.Y. TIMES, June 21, 1991, at A11. The Louisiana Attorney General, however, in discussing that state's new law criminalizing abortion, "refused to rule out the possibility that doctors could be prosecuted for prescribing such contraceptives." *Id.*

Similarly, RU 486, the so-called "French abortion pill," is condemned by anti-abortionists because it is a "contra-gestive" rather than a contraceptive, in that it prevents early gestation rather than conception. In theory, at least, RU 486, if perfected, might allow abortions to be implemented in private. That possibility has not reduced the moral condemnation the pill has received from critics. See Dorothy Wickenden, *Drug of Choice*, NEW REPUBLIC, Nov. 26, 1990, at 24–26.

⁷³ An important digression must take place at this point in the analysis. Any account of the sort described in the text relies on one of two kinds of moral theory. *Consequentialist* theories determine the rightness or wrongness of an act by evaluating the consequences of that act. No act is intrinsically good or bad, that is, good or bad regardless of its consequences. When the consequences are sufficiently good, the means to achieve them are not merely permissible, but are morally required. Thus, for example, in defining consequentialist moral theory, Sumner begins by noting that "a theory is consequentialist just [if] it appraises actions solely in terms of the value of their consequences"; that is, if it evaluates actions in terms of their outcomes, not intrinsically, in terms of their nature. SUMNER, *supra* note 8, at 165. Sumner adds that consequentialist moral theories utilize principles of "the good rather than of the right." *Id.* at 167. That is, the goals of the moral framework are understood to be "valuable or worthwhile, but not obligatory or a matter of right." *Id.* at 106. Utilitarianism is the seminal example of a consequentialist moral theory.

By contrast, *deontological* theories rely on the nature of the act itself, independent of its consequences. According to such theories, some acts are intrinsically bad, even if they turn out to have good consequences.

A deontological theory of ethics is one which holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe [If] considerations based on concern for one's own well-being or the well-being of others indicate a course of action at odds with that dictated by respect for the moral law, respect for the moral law should prevail.

a. *A Life Worth Living*

We noted that one of the things wrong with killing is that it deprives the individual killed of something valuable. But common sense morality holds that life itself is not so intrinsically valuable that its destruction is always immoral. The life of a daisy, for example, has little intrinsic value. Certainly killing a daisy is not mor-

Robert G. Olson, *Deontological Ethics*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 343 (Paul Edwards ed., 1967).

Thus for the deontologist, the end never justifies the means. That is, moral rules cannot be broken to accomplish good results. The fact that, on balance, the world would be better if some action were taken makes it consequentially proper but not deontologically so. For example, the fact that the organs of an irreversibly comatose patient could be used to benefit many others may be sufficient to make killing him consequentially right, but it remains deontologically wrong to kill him under normative rules prohibiting the taking of life, even if those who could benefit from his organs die as a result.

Pure consequentialism or pure deontology makes for a harsh morality. Anyone with a knowledge of history can recognize the potential cruelty of utilitarian excesses. Broadly stated deontological requirements raise different, but equally difficult problems. The deontological imperative needed to proscribe abortion may be one that completely prohibits killing. If this imperative is absolute, then it is morally impermissible to kill, even in self-defense, no matter the consequences. It would be morally impermissible to kill, even when killing is the only way to avoid a moral horror of the greatest magnitude. Similarly, an absolute deontological imperative against lying would prohibit lying even when the death of innocent persons would otherwise result. According to Immanuel Kant, for example, "it is wrong to tell a lie even to save another man's life." *Id.*

Considerations of this kind caution against adopting a pure deontological or a pure consequentialist perspective. They strongly recommend a hybrid view, in which various rules compete in the moral arena so that we may achieve the best results possible. This hybrid model tempers the extreme and unacceptable results of pure deontology and avoids the ad hoc situational uncertainty of consequentialism. Under this framework we can try to identify general rules that tell us when particular acts of killing are wrong and how wrongful they are, in terms of the effect of such actions. "Rule utilitarianism" or "rule consequentialism" is one such hybrid ethical theory that provides that "although any moral rule must be justified by showing that its adoption has humanly desirable consequences, an act violating a moral rule cannot itself be morally justified in the same manner." *Id.*

Sumner proposes a form of rule consequentialism in order to establish a regime of rights out of a consequentialist moral framework. See SUMNER, *supra* note 5, at 175-98. His argument "is essentially an argument [based on] fallibility":

If you simply set out on each occasion to do the best you can from the limited information available to you, your imperfect ability to process this information, your natural bias in favor of yourself and those closely connected with you, the various pressures to which you are subject in the heat of deliberation—all of these factors and more will lead you to make costly errors. You are therefore likely to do better if you precommit yourself to observe some relatively simple rules even when doing so seems, on the best evidence available to you, to disserve your basic goal. When looking for such rules our obvious candidate will be the requirement that you respect those rights whose conventional recognition is the best social policy for promoting that very goal.

Id. at 195-96.

ally on a par with killing a person. The two are not morally on a par because killing the person ends a life that is valuable in a way that a daisy's life is not. We shall call this valuable form of life a "life worth living."⁷⁴ Unlike life itself, then, a life worth living is intrinsically valuable: it is valuable in itself and for its own sake, and not just as a means to, or for the sake of, other things.⁷⁵

In discussing the criteria of a life worth living, several points are crucial. First, whatever the precise components of a life worth living may be, a life that has not been worth living may become so, and one that has been worth living may cease to be so. Second, other things being equal, a longer life worth living is better than a shorter life worth living. Even the example of the heroic individual who loses her life in an effort to save others dramatizes this point. We applaud the self-sacrifice of the heroine, not because of any belief that her voluntary exposure to death has benefited her own existence, but because she has given up something of extraordinary value. Thus, ending or shortening a life worth living harms the individual who dies, and the more the life is shortened, the greater the harm to the individual.

Third, for our immediate purposes, it is not necessary to spell out in detail what makes a life worth living. An adequate account is undoubtedly variegated and complex, but there will surely be consensus on some points. We refer to some of these below.⁷⁶ What is critical for our argument, however, is to draw a clear distinction between the conditions that actually make a life worth living and the conditions that establish the possibility that a life worth living might eventually arise.

The analysis we propose rests on a single observation, namely that there is a certain minimal threshold of physical and mental

⁷⁴ The concept and discussion of a "life worth living" rely heavily on GLOVER, *supra* note 18, at 50-57.

⁷⁵ It should be clear that any criterion of a life worth living requires an evaluation from the perspective of humans. Even if a cat, in some attenuated sense, experiences its own life as valuable and worth living, it is by no means clear that *people* would regard an existence with the consciousness and capabilities of a cat as a life worth living. The issue becomes even more blatantly problematic if one considers the condition of life of a zygote. See *infra* notes 81-82, 88. The assumption here is that

human beings—or nearly all of them—are capable of a much richer kind of life than nonhuman animals on this planet enjoy, including the very moral agency presupposed in the asking of a moral question. To be deprived of this kind of life (or to have it impaired) is a much greater harm than to be deprived of a merely animal existence.

DEVINE, *supra* note 43, at 49.

⁷⁶ See *infra* notes 116-22 and accompanying text.

capability necessary to establish a life worth living. Below this threshold, there is no life worth living in our special, morally-laden sense. Although a daisy falls below this threshold, essentially no child or adult does. Thus, from this perspective, the argument that an unwanted child of limited economic means, or a child born with Down's syndrome, does not enjoy a life worth living is not simply erroneous, it is absurd.

Even this minimum threshold, however, poses a critical problem for the conservative position. The conservative must assert the unsupportable contention that a four-week conceptus, an embryo less than an inch long, without even rudimentary consciousness, actually has a life worth living.⁷⁷ If she does not, she must concede that the conceptus lacks moral standing at the moment of conception. Alternatively, she must attempt to justify the moral standing of the conceptus not in terms of its current condition but through its potentiality, through the likelihood that it may develop into a child with an unmistakable life worth living. We address this latter argument following the next subsection.

b. *Autonomy*

Apart from being wrong when it deprives an individual of a life worth living, killing is wrong if it subverts the individual's autonomy. In most killings, the individual is harmed in two ways: her autonomy is violated, and she loses a life worth living. In some cases, however, the only harm suffered is loss of self-determination. For example, imagine that someone has frequently and unequivocally declared that she wishes to remain alive for as long as possible, even if she is permanently unconscious. She then becomes permanently unconscious. Even those who agree that a life under such conditions is not worth living nonetheless may acknowledge a sense in which killing her would be wrong.⁷⁸

⁷⁷ According to the testimony of Dr. James Neal:

Approximately 30 days after conception, the developing embryo has a series of parallel ridges and grooves in its neck that are interpreted as corresponding to the gill slits and gill arches of fish. At that same time, it has a caudal appendage that is quite simply labeled "tail" in many textbooks of human embryology The early embryo appears to pass through some of the stages in the evolutionary history of our species . . . [This means that] during embryological development we repeat in abbreviated form many aspects of our evolutionary past. [Thus] the potentiality for becoming a human being is clearly present from the moment of conception, but to judge by external appearance, that potentiality is not immediately realized.

Human Life Bill, *supra* note 46, at 458 (statement of Dr. James Neal).

⁷⁸ Glover explains that the principle requiring respect for the individual's autonomy with

This is an especially difficult example. For a less difficult case, imagine an individual whose life some third person would not consider worth living, but who continues to want to live. It is always possible to be unsure about a third person's judgments concerning another's life. That other may be disfigured, abandoned, unemployed and unemployable, paralyzed, in constant pain, and with no prospects for a better future. But his life may still have purpose and his days may include moments of bliss. This sort of uncertainty plays a large role in our deference to his judgment. But a deeper reason underlies our reluctance to supersede his evaluation. It is his life we are judging. What matters ultimately are his priorities and values, priorities and values of which we may approve or disapprove, but which we have no right to dismiss.

The intuitive moral value we place on an individual's self-determination extends beyond the question of continued existence. It is reflected in the legal arena in the constitutional doctrine that protects a woman's procreational decisions from state intervention. The right of personal autonomy recognized in the Supreme Court's privacy cases is grounded on the moral indignity of ignoring an individual's fundamental decisions about his or her own life.⁷⁹

3. The Morality of Killing and Abortion

As discussed above, killing is a moral wrong when it destroys a life worth living or when it violates the personal autonomy of the individual. To what extent is abortion a wrong of this kind? The

regard to life and death decisions can be defended under both a deontological and a utilitarian moral framework. The utilitarian analysis is based "partly on the bad side-effects of 'paternalistic killing,' partly on the fallibility of predictions about people's future happiness or misery and partly on the central role that a person's own view of his life must play in any decision whether his life is worth living." GLOVER, *supra* note 18, at 78. Accordingly, to Glover, "[e]xcept in the most extreme circumstances, it is directly wrong to kill someone who wants to go on living, even if there is reason to think this desire [is] not in his own interests." *Id.* at 83.

Hursthouse criticizes this autonomy principle in part because it does not preclude the utilitarian sacrifice of one person to save a larger group. In other words, autonomy may be too easily outweighed. HURSTHOUSE, *supra* note 43, at 158-65. She also challenges Glover's assumption that autonomy rights only accrue to an entity that wants to go on living, which requires a state of mental awareness that the fetus and infant will lack. *Id.* at 163-64. Nonetheless, at a minimum, a serious commitment to an autonomy principle provides some measure of protection against the abuses of utilitarianism in many important circumstances, even if it does not temper utilitarianism sufficiently to meet Hursthouse's objections.

⁷⁹ See *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2883-85 (1990) (Stevens, J., dissenting) (locating a dying person's constitutional right to be free from unwanted medical treatment within a more generalized right of bodily integrity, self-determination and privacy, which includes procreational choices).

autonomy argument does not directly support the wrongfulness of abortion. It makes little sense to ascribe autonomy rights to something that is not autonomous. Autonomy rights are properly ascribed only to those who are capable of having, rejecting or endorsing preferences and values, choosing among alternatives, and planning and making decisions. Such rights are not properly ascribed to those who lack these capacities. Thus, they are not ascribed to the conceptus, or arguably, even to the newborn child. Even if some very limited right of autonomy is attributable to the conceptus, surely it is analytically distinct from and of a substantially lesser value than that which we assign to a more developed human being.⁸⁰

The issue of a life worth living is more difficult to address. The status of the conceptus at any point during gestation is difficult to evaluate. In particular, it is not a simple matter to determine exactly what kind of sentience or consciousness exists at any given stage of development. Even when consciousness of some sort exists, what are its characteristics? To defend abortion rights by focusing on a life worth living, we must establish that for some significant part of the gestation period, the actual condition of the conceptus, without regard to its potential for development, is qualitatively different from that of a child. During the early weeks of pregnancy, we can be certain that the conceptus lacks consciousness of any sort. We can be far less certain of its condition during the last trimester.⁸¹

Despite this uncertainty, the foregoing analysis of the immorality of killing establishes certain things. It shows that there is a qualitative moral difference between early abortion and killing an infant or adult. It also strongly suggests that the moral standing of the conceptus increases during gestation. Its potential aside, however, the life of a zygote is not actually a life worth living. Thus, from the moment of conception, whatever moral status the conceptus has is grounded not in its actual state, but in its potential, at least, that is, until its development progresses to the point at which it experiences a life worth living or becomes autonomous. This view is consistent with, and indeed helps explain, the moral intuition that

⁸⁰ See *supra* note 78.

⁸¹ Although the fetus shows some reflex movements by the end of the eighth week of the gestation period, the linkage of neurons in the cerebral cortex does not begin until the 24th week. Brain waves with patterns similar to those of adult human beings do not begin until the 30th week. Thus, "[t]he beginning of characteristically human thinking becomes barely possible" at the start of the third trimester. Sagan & Druyan, *supra* note 30, at 7. See also *infra* notes 116-22 and accompanying text.

an abortion in the eighth month of pregnancy is a far greater moral wrong than an abortion in the first month of pregnancy.⁸²

a. *The Value of Potential Life*

Distilling the conservative position to one that is predicated on the moral sanctity of potential life does not settle the issue. It does not automatically justify a permissive regulatory environment in which the decision to have an abortion may be made at the woman's discretion, even during early pregnancy. For although the possibility of experiencing a life worth living is not the same thing as having such a life, it is still of moral value. Thus, we cannot determine the moral significance of abortion solely by considering the actual status of the conceptus at the time an abortion occurs. We also must consider what the conceptus may eventually become. Whether one uses the terminology of potential life, potential person or potential baby, there is no doubt that what we are discussing exists on a developmental continuum that itself is of substantial moral value.

The argument that the conceptus is entitled to protection because it can *become* a baby lacks the rhetorical passion of the traditional conservative position. Nonetheless, it is an analytically powerful position. If it is immoral to terminate a pregnancy at that point in the gestation period when the conceptus can be said to enjoy a life worth living, surely it is almost as immoral to terminate a pregnancy one moment before that potential is actualized. This regression can be pursued back to conception itself. Thus, the conceptus has the potential to develop naturally into a newborn. The conservative may argue that it is this capacity to become that gives the conceptus moral standing, and that it is the irrevocable denial of that potential that makes abortion wrong.

This modified conservative argument is correct in an important sense. Abortion of a healthy conceptus with good prospects for a

⁸² As noted, to avoid this conclusion, the strict conservative, because she insists that the conceptus, at conception, is a person with clear moral standing in its own right, must posit the existence of classes of persons based on their maturation and abilities, assigning greater moral value to the more capable group. That contention, however, runs counter to the general moral intuition that the murder of a newborn infant and a one-year-old are comparable moral events, despite the substantially greater relative maturity and abilities of the one-year-old. Without positing such distinct classes, however, the conservative cannot justify the increased wrongfulness of late term abortions. Indeed, if personhood and full moral standing are achieved at conception, in a purely logical sense, apart from its side effects, the *late* abortion would have to be the morally *preferable* course, because all things being equal, more life is better than less.

life worth living is *prima facie* wrong. But it is important to understand precisely in what sense it is wrong. The death of the conceptus preempts the possibility of a worthwhile life. It denies life opportunities. It does not nullify the current and ongoing experience of a life worth living. Early in the pregnancy, at least, the conceptus is not yet capable of that experience. An abortion is not *prima facie* wrong because it frustrates or overrules the conceptus's ambitions, objectives or aspirations. It is wrong because it makes such things impossible. Abortion is wrong to the extent that it eliminates the possibility of a new, full-fledged life with its own projects, experiences and plans.

But this is precisely the effect of contraception, or, for that matter, of celibacy. The decision not to conceive, whether by abstaining from intercourse or by preventing fertilization in some other way, also denies life opportunities. Where conception would produce a conceptus that ultimately would have a life worth living, contraception is morally comparable to abortion. Each prevents a life worth living from coming into being and from developing.

The potentiality argument does not begin to apply at conception. If one traces the developmental continuum that leads to the birth of a child, it is apparent that significant events occur prior to conception. An obvious example is the decision of the mother and father to have a child.⁸³ Moreover, whatever moral status we assign to pre-conception potential life on this developmental continuum, it is clearly outweighed by the autonomy rights of the prospective parents to determine whether or not they wish to have children. Using the same moment-by-moment analysis employed by the conservative to establish the value of potential life, the liberal may argue that because pre-conception potential life is subordinate to the parents' autonomy choices one minute prior to conception, the same balance of personal freedom and the state's interests should apply minutes later when fertilization of the egg occurs.⁸⁴

The conservative will insist that there is nonetheless a fundamental moral difference between contraception and abortion. Strictly speaking, only abortion kills. Contraception merely prevents

⁸³ In romantic terms, of course, the developmental continuum can be said to begin with even earlier decisions. In the words of Lennart Nilsson, whose sensational microphotography of the fertilization and gestation process was published in *Life Magazine*, "[m]aybe the first moment of human life, it starts with a kiss." David Van Biema, *Master of an 'Unbelievable Invisible World'*, LIFE MAGAZINE, Aug. 1990, at 46.

⁸⁴ See, e.g., Langerak, *supra* note 18, at 252 (discussing the difficulties inherent in identifying one "magic moment" in which the conceptus immediately develops a claim to life).

a new life from forming. As the foregoing analysis helps make clear, however, early abortions are not morally objectionable because they kill. They are morally objectionable because they prevent lives worth living from developing.⁸⁵

We can reaffirm this judgment by returning to the hypothetical, previously discussed, involving the pregnant woman carrying a conceptus of five weeks that will never mature to birth. A miscarriage will occur between the fourth and fifth month of the gestation period. Assume further that if nature is allowed to take its course without medical intervention, the woman will never be able to bear children. If the nondeveloping conceptus is aborted early in the gestation period, however, the woman will be able to conceive again and bear a normal healthy child. Is abortion morally justified in this situation? If it is, the key element of the moral standing of the conceptus through a significant part of the gestation period is not the life the conceptus *experiences* but rather its developmental *potential* to become a newborn baby. When that potential is eliminated from one side of the moral equation, the potential life of children *not yet conceived* has moral value at least equal to that of the conceptus without developmental potential.⁸⁶

The point is not that potential life before conception is always equivalent to potential life after conception. While many conceptions terminate in spontaneous miscarriages,⁸⁷ development into a newborn becomes increasingly probable as the pregnancy progresses. Hypotheticals involving predictable and certain miscar-

⁸⁵ See *supra* notes 82-83 and accompanying text.

⁸⁶ Although the conceptus in our example is alive, the fact that it has no development possibilities makes killing it a morally distinct event from the killing of a child. This basic distinction holds true even if we assume similar tragic conditions involving the child. If a three-year-old boy has only six months to live, our moral intuitions do not justify ending the child's life immediately, even if doing so would provide vital organs that could be used to save the life of another child. The moral status of the three-year-old is grounded on its actual condition in a way that the moral status of the conceptus is not. This moral judgment, that a person's bodily integrity and life cannot be sacrificed to aid others even if the individual is terminally ill and has virtually no future prospects, is reflected in the case law. For example, the District of Columbia Court of Appeals decided *en banc* that it was error for a trial court to order a terminally ill pregnant woman to submit to a caesarean section that would hasten her death in order to increase the likelihood that the fetus that she was carrying would survive. See *In re A.C.*, 573 A.2d 1235, 1252-53 (D.C. 1990). "[I]t matters not what the quality of a patient's life may be; the right of bodily integrity is not extinguished simply because someone is ill, or even at death's door." *Id.* at 1247.

⁸⁷ For example, "[e]mbryologists estimate that as many as two-thirds of all fertilized ova fail to implant and are carried out in the woman's next menstrual flow." HYMAN RODMAN ET AL., *THE ABORTION QUESTION* 50 (1987). Spontaneous abortions or miscarriages terminate about one-third of all pregnancies. *Id.* at 33.

riages describe extraordinary, not routine, circumstances. The purpose of the hypothetical is not to describe what will ordinarily occur but to confirm that the moral value of developing life, pre- and post-conception, is in its potential, not its actual condition.⁸⁸ In terms of potential life, conception is simply one point on a continuum without any more significance than other essential developmental events.⁸⁹

This analysis is also consistent with common sense morality. Consider a married couple trying to decide whether or not to have children. They agree not to have children. Their next choice is the means of contraception they will employ. They consider abstinence, condoms and a device that prevents the implantation of the zygote in the uterine wall after conception occurs. In terms of the effect on potential life that this couple controls, can it really be that the decision not to conceive is devoid of moral significance while the choice among the three methods is equivalent to deciding whether or not to commit premeditated murder?⁹⁰ In real terms, is the latter decision the more critical one for the life to be, or is it at best incidental to the crucial judgment of the couple that they do not want to have a baby?

Recognition of the moral proximity of contraception and early abortion does not mean that abortion is morally inconsequential. Under the analysis we propose, it means that contraception is a morally serious act. The decision to conceive is an act of transcen-

⁸⁸ Consider another hypothetical. Assume that a pregnant woman takes a drug whose effect is to freeze the conceptus permanently at a very early stage of development. Once the drug is administered, its effect on the conceptus is absolutely irreversible. It is difficult to see what harm could be done to the conceptus by abortion that is not done by such a drug. It is even more difficult to see what harm could be done by administering this drug that is not done by contraception. The net moral effect of all three is the same: a life worth living is prevented. Preventing the new life by contraception is not materially different from preventing it by arresting development at an early stage; this is not materially different from preventing it by aborting. Thus, from the moral point of view, early abortion and contraception, although not equivalent, are at least sufficiently close that any distinction between the two cannot justify abridging fundamental rights in one circumstance and not the other.

⁸⁹ See, e.g., *Human Life Bill*, *supra* note 46, at 457 (statement of Dr. Grobstein) ("At still later stages [of development] our knowledge indicates that there is continuing transition and emergence of properties normally associated with self or personhood over a considerable period of time."); RODMAN ET AL., *supra* note 87, at 35 (noting various points of development during the gestation period including "conception, implantation, quickening, viability, or some degree of brain function deemed uniquely human" as possible determinants of personhood).

⁹⁰ See, e.g., TRIBE, *supra* note 34, at 122. ("Both the IUD and some birth control pills may work to prevent pregnancy not by preventing conception but by preventing a newly fertilized ovum from implanting in the wall of the uterus.").

dent moral value. For the same reasons and in the same manner, the decision not to conceive is, profoundly, a morally significant decision. When conception would lead to a new life worth living, the decision to conceive is *prima facie* a morally commendable decision. When conception would lead to a new life worth living, the decision never to conceive is *prima facie* morally problematic.⁹¹

In the majority of cases, other factors will radically change the moral tone of either abortion or contraception: the interests and needs of the woman, her spouse, her family and circle of intimates are factors that may change the moral balance substantially. The effects of pregnancy on her health and of child-rearing on the conduct of her life are factors as well. We do not say that the decision not to conceive is always immoral. We claim only that it is always morally significant, and morally significant in essentially the same way as the decision to abort early in one's pregnancy.

Put simply, conception benefits someone and contraception harms someone. When a child conceived would have a life worth living, conception benefits it, and contraception harms it. This is exactly the effect of abortion. When the conceptus would have a life worth living, not having an abortion benefits it. Under the same circumstances, an abortion harms it. Moreover, an abortion harms it in precisely the same way as contraception does. An unconceived and an aborted conceptus are denied the same life opportunities. From the perspective of the conceptus, it suffers no greater wrong in being aborted than in not being conceived.

A final example further demonstrates the importance of attributing moral significance to pre-conception decisions. It is well documented that women over the age of forty run an increased risk of having children severely impaired by genetic defects.⁹² Suppose one hundred women in that age group consider becoming pregnant. Assume further that the risk of having an impaired child is one in one hundred for women in this age group. Moreover, none of these particular women is willing to incur that risk unless abortion is an available alternative.⁹³ Accordingly, if abortion is an

⁹¹ Some abortion opponents recognize the moral parallels between contraception and abortion, although not necessarily for the reasons argued in the text. To some Catholic theologians, for example, contraception is "analogous to homicide." See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1025 n.248 (1984).

⁹² See Doug Podolsky, *Having Babies Past 40*, U.S. NEWS & WORLD REPORT, Oct. 29, 1990, at 105 ("The risk of Down[s] Syndrome soars . . . from 1 in 378 births at age 35 to 1 in 106 at age 40."). See generally CAROLE McCauley, *PREGNANCY AFTER 35*, at 45-46 (1976).

⁹³ We do not suggest that this is a common attitude of women of this age, merely that it

available option, many, perhaps all, of the one hundred women will conceive, but there is a strong probability that one woman will have an abortion. If abortion is not available, none of these women will elect to become pregnant. As this example makes clear, the potential lives prevented from coming into being by prohibiting abortion also belong in our moral evaluation of whether abortion should be permitted.

One must be careful here to distinguish this hypothetical from the more common ethical dilemma of sacrificing the one to save the many. In our hypothetical, it is true that if abortions are permitted, one conceptus is likely to be destroyed. In the alternative state where abortion is prohibited, however, none of the conceptuses, including that one, would have come into being. From the perspective of that conceptus, is that a morally superior outcome? Is total nonexistence, in the sense of not being conceived, so preferable morally in comparison to the short-term existence that occurs in a terminated pregnancy that it outweighs the loss of the ninety-nine children who would otherwise be born, but never are? Is determined nonexistence a better condition than deliberately determined short-term existence?

All of these arguments and hypotheticals support the same general conclusion: the state's moral interest in protecting potential life is not a sufficiently compelling interest to justify interference with the woman's privacy and autonomy rights through a significant part of the gestation period. There is a basic moral equivalence between the decision not to conceive and the decision to have an early abortion. Because the woman's privacy and autonomy rights clearly prevent the state from controlling her choice as to whether or not she will become pregnant, these same rights also prohibit the state from restricting, on moral grounds, her decision to have an early abortion.

b. *The Conservative Rejoinder*

Conservatives can challenge the thesis that abortion and contraception have a comparable moral status, at least through the beginning of the gestation period, on several fronts. One charge we must face is that the thesis commits us to an absurd ontology, or concept of being. There is no life prior to conception that can

is a plausible hypothesis for at least some women. This issue arises in a more agonizing form for women carriers of Tay Sachs and similar hereditary conditions.

be harmed by a decision not to conceive. It makes no sense to talk about harm to a possible but unreal being. Only after conception can one meaningfully discuss harm to a developing entity that eventually will become a person.⁹⁴

⁹⁴ See, e.g., Michael D. Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 293 (1976). Bayles argues that the two necessary conditions for private harm to exist are first, an existing individual person, and second, conduct that "unreasonably risks adversely affecting or does adversely affect another person's net interests." *Id.* at 293. With regard to the unconceived, he claims:

the two standard conditions for the application of the harm principle are not obviously met with respect to those people to be protected who do not now exist. Since they do not exist, how can one identify individual persons who may be harmed? Moreover, how can one harm nonexistent persons, make them worse off? Nonexistent persons do not have any interests which may be adversely affected.

Id. at 294. Accordingly, he rejects the idea that one can harm individual persons by not conceiving them and bringing about their existence. *Id.* at 298-99.

Bayles's analysis is predicated on two uncertain premises. First, he recognizes that the unconceived can receive benefits (being brought into existence), but distinguishes between the failure to provide a benefit and causing a harm. *Id.* at 298. By analogizing conception to the granting of a nonobligatory gift, he concludes that the failure to conceive at worst involves the deprivation of a benefit. *Id.* The difficulty with this argument, as it relates to the morality of abortion, is that it provides no basis for determining when the benefit or gift of life is completed, so that its withdrawal constitutes a harm. If, before conception, a woman uses a contraceptive device that prevents implantation or otherwise causes a miscarriage, has the conceptus been harmed? Alternatively, did it receive a much more limited benefit from its creator than would otherwise have been the case? Without some way of determining when the "gift of creation" is completed, the distinction between depriving someone of a benefit and inflicting harm upon him is of limited usefulness.

Second, Bayles argues that nonexistent persons, including the unconceived, "cannot be individuated." *Id.* at 299. Therefore, they cannot be the victims of private harm. In response to the contention that the failure to conceive would harm the person who would be born if two particular people engaged in intercourse five minutes from now, Bayles suggests that this description is insufficiently precise to designate anyone in particular. *Id.* This conclusion is also dubious. If Bayles's concern is that conception may not occur at all as a result of any specific sexual interaction, his objection may be mitigated by stipulating the two designated people are fertile and that, given sufficient opportunities, the probability of conception will be extremely high. The same result follows if Bayles were to argue that the exact individual conceived depends on which particular sperm joins with the ovum. The inability to predict or describe which person will suffer the harm does not undermine the legal determination, at least, that an individual being will be harmed by a perpetrator's behavior. Placing a land mine on the sidewalk on Fifth Avenue is attempted murder, regardless of the indeterminate identity of the victim. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 619-20 (2d ed. 1986).

The following hypothetical helps illustrate the point. Assume *A* irrevocably gives a car to a lottery company. The lottery company will pick a single winner out of one billion entrants; just as in Bayles's hypothetical, which individual wins the car depends on which particular number is chosen. If *B* destroys the car five minutes before the lottery is to take place, can it be argued that no one person was harmed by *B*'s action and that only the general public suffered a loss? Would it not be more accurate to contend that the individual who would be picked in the future has been harmed by *B*'s conduct? Certainly, if the lottery takes place

There are several ways to respond to this attack. The least controversial is to note that the thesis that contraception and abortion are morally comparable can be defended without any essential reference to individuals who are real prior to conception. The thesis requires only that when a woman conceives, she conceives someone. The morally central points can be made by looking at life opportunities in general. Contraception does not end a life worth living; neither does early abortion. Contraception precludes life opportunities and preempts a possible life worth living; abortion does the same. One can see the equivalence between the two without thinking that there is, prior to conception, a particular individual whose life opportunities would be precluded by contraception or ended by abortion. The thesis that contraception and abortion are morally similar is ontologically neutral.

This can also be seen by directly examining the morality of an act of abortion. A real conceptus is going to be destroyed. As to this particularized concrete being we may ask whether the woman who does not want to be pregnant is committing a greater moral wrong by conceiving this conceptus and terminating it rather than having prevented its conception in the first place? Is this conceptus worse off in having been given a limited existence as opposed to none at all?⁹⁵

This is not an incoherent metaphysical inquiry. Indeed, this inquiry is strongly suggested not only by common sense moral understanding but by legal intuitions as well. Consider one line of wrongful life cases.⁹⁶ A married couple bears a child with a serious

anyway because the officials had not learned in time that the prize had been destroyed, the winner is clearly harmed by *B*'s actions.

⁹⁵ Obviously, in all cases in which an abortion is performed conception has already occurred. The mother had the right to avoid conception but, for a variety of possible reasons, did not accomplish that result. Accordingly, whenever an abortion is performed, there is always a being in existence that may be wrongfully harmed by the abortion, and there is always a being in existence that would not have been in existence, or at least not in its current state of existence, if it had not been conceived. The inquiry we propose examines whether aborting the fetus harms it in a significantly more egregious way by denying its subsequent existence than by preventing its conception in the first place. Presumably, the individual born to parents who did not want him views his parents' failure to avoid his conception and their unwillingness to abort as entirely commensurate events.

⁹⁶ See, e.g., *Gallagher v. Duke Univ.*, 852 F.2d 773, 775 (4th Cir. 1988); *Turpin v. Sortini*, 643 P.2d 954, 955 (Cal. 1982) ("child born with an hereditary affliction" brought wrongful life action against "a medical care provider who—before the child's conception—negligently failed to advise the child's parents of the possibility of the hereditary condition, depriving them of the opportunity to choose not to conceive the child"); *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1204 (Colo. 1988) (parents conceived second child in reliance on physician's erroneous advice that blindness of first child was nonhereditary); *Moore v. Lucas*,

impairment, and they seek medical counseling to determine the cause of their child's condition. Their physician's diagnosis negligently fails to disclose that the cause of their child's impairment is a genetic defect that will affect any future children the couple may have. Relying on this erroneous information, the parents conceive again and another infirm child is born. The correct genetic diagnosis is now made. The parents indicate that they never would have conceived the second child if they had received accurate information after the first child was born as to the hereditary traits they carried. A wrongful life action is brought by the second child. The child alleges that she would have been better off not being brought into existence, rather than having to live in her present impaired condition.

Although they reflect different perspectives, wrongful life cases of this kind share a common foundation with arguments relating to the morality of abortion and contraception. In the wrongful life case, the parents' decision not to conceive the fetus would have resulted in nonexistence for the child plaintiff, who claims that such a state is preferable to her present impaired condition. Thus, the child argues that the defendant's conduct in influencing her parents to conceive a child caused her harm.⁹⁷ If that argument is intelligible, however, and it is meaningful to claim that a child born with severe birth defects was harmed by being conceived,⁹⁸ then surely it is equally plausible to suggest that a healthy child would have

405 So. 2d 1022, 1024 (Fla. Dist. Ct. App. 1981) (parents with genetic disorder would not have conceived child if properly informed that condition was inheritable); *Bruggeman ex rel. Bruggeman v. Schimke*, 718 P.2d 635, 636-37 (Kan. 1986) (after birth of first child with serious birth defects, parents would not have elected to have additional children but for defendant's inadequate and negligent genetic counseling); *Dorlin v. Providence Hosp.*, 325 N.W.2d 600, 601 (Mich. Ct. App. 1982) (child born with sickle cell anemia would not have been conceived if mother had been adequately informed of consequences of genetic disorder); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 486 (Wash. 1983) (en banc) (parents would not have conceived additional children if adequately informed of risks of birth defects caused by drug administered to mother).

⁹⁷ "[M]ost courts and commentators have recognized that the basic claim of 'injury' in wrongful life cases is '[i]n essence . . . that [defendants], through their negligence, [have] forced upon [the child] the worst of . . . two alternatives[.] . . . that nonexistence—never being born—would have been preferable to existence in [the] diseased state.'" *Turpin*, 643 P.2d at 961 (quoting *Speck v. Finegold*, 408 A.2d 496, 511-512 (Pa. Super. Ct. 1979) (Spaeth, J., concurring and dissenting), *aff'd in part*, 439 A.2d 110 (Pa. 1981)).

⁹⁸ See *Procanik ex rel. Procanik v. Cillo*, 478 A.2d 755, 770 (N.J. 1984) (Handler, J., concurring in part and dissenting in part) ("The proposition that nonexistence can be chosen over existence, though philosophically remarkable, is not judicially indefensible or unprecedented.").

been harmed by preventing its conception.⁹⁹ In both circumstances, the inquiry requires a comparison between the nonexistence that results from avoided conception and the current condition of the child who argues that preventing conception would have either harmed or benefited it.¹⁰⁰

Wrongful life cases suggest that, in theory, we can evaluate both conception and contraception as to their beneficial or harmful consequences for children-to-be. They also support the intuition that preventing conception denies life opportunities in much the

⁹⁹ Hare recognizes the "perplexing" nature of this claim but nonetheless seeks to cast doubt on the assumption . . . that one cannot harm a person by preventing him coming into existence. True, he does not exist to be harmed; and he is not *deprived* of existence, in the sense of having it taken away from him, though he is *denied* it. But if it would have been a good for him to exist (because this made possible the goods that, once he existed, he was able to enjoy), surely it was a harm to him not to exist, and so not to be able to enjoy these goods. He did not suffer; but there were enjoyments he could have had and did not.

Hare, *supra* note 55, at 221. For Bayles's criticism of this position, see *supra* note 93.

¹⁰⁰ Indeed, some courts explicitly refer to potential persons being harmed by the defendant's negligence prior to conception. See, e.g., *Turpin*, 643 P.2d at 962 ("When a defendant negligently fails to diagnose an hereditary ailment, he harms the potential child as well as the parents by depriving the parents of information which may be necessary to determine whether it is in the child's own interest to be born with defects or not to be born at all."); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495-96 (Wash. 1983) (en banc) (physician's duty to inform mother of risks associated with prescribed drug during future pregnancies extends to "unconceived children" who may bring wrongful life action after birth); see also *Cowe ex rel. Cowe v. Forum Group, Inc.* 541 N.E.2d 962, 968 (Ind. Ct. App. 1989) (Conover, J., concurring). The *Cowe* concurrence stated:

[A]ny person who is the direct result of a sexual union which occurs without the knowing and intelligent consent of both parents, whether that union was due to violence (i.e., rape, incest, child molesting, etc.) or otherwise, has an unqualified right not to be born under such circumstances which pre-exist conception.

Cowe ex rel. Cowe, 541 N.E.2d at 968; see also *Speck v. Finegold*, 408 A.2d 496, 512 (Pa. Super. Ct. 1979) (Spaeth, J., concurring and dissenting) ("If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be."), *aff'd in part*, 439 A.2d 110 (Pa. 1981).

Other courts criticize such ideas as hopelessly metaphysical or simply meaningless. See *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988) (courts "cannot appraise the value of [plaintiff's] nonexistence for purposes of comparing it with his impaired existence" because "the relevant question—of what value to [plaintiff] would his nonexistence have been?—is entirely too metaphysical to be understood within the confines of law, if indeed, the question has any meaning at all"); *Viccaro v. Milunsky*, 551 N.E.2d 8, 13 (Mass. 1990) (denying wrongful life claim based on negligent pre-conception genetic counseling on grounds that "[o]n a theoretical basis, it is difficult to conclude that the defendant physician was in breach of any duty to [plaintiff]"); *Speck*, 408 A.2d at 508 ("Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve.").

same way that abortion does. Courts confronted with a wrongful life action, based on allegations that the child plaintiff would not have been conceived but for the defendant's negligence, do not distinguish it in theory from a wrongful life action in which the parents claim they would have had an abortion rather than give birth to a severely impaired baby.¹⁰¹ In both contexts, courts struggle with the same question of whether a wrongful life action should be allowed.

The cases are difficult to resolve, but their difficulty arises out of two specific concerns. First, courts are unsure how to value nonexistence—the allegedly preferred status of which the child has been deprived—in comparison to the child's impaired existence. There is an intractable problem of measuring the loss the child allegedly suffers as a result of being born.¹⁰² Second, judges are

¹⁰¹ Opinions in wrongful life cases, whether they recognize the cause of action or not, routinely and interchangeably cite as precedent cases involving allegations that parents would not have conceived additional children but for the defendant's negligence and cases in which the parents would have had an abortion rather than give birth to a child with birth defects. The exact same arguments are used in both cases without any judicial suggestion that one fact pattern is a more, or less, intelligible or reasonable basis for the cause of action than the other. *See, e.g.,* *Dorlin v. Providence Hosp.*, 325 N.W.2d 600, 601–02 (Mich. Ct. App. 1982) (decision in wrongful life case involving mother who would not have conceived child but for defendant's negligence decided on basis of prior authority involving mother who would have aborted fetus). *Compare Turpin*, 643 P.2d at 955 (parents would not have conceived the plaintiff child but for the defendant's negligence) and *Lininger*, 764 P.2d at 1204 (same) and *Bruggeman ex rel. Bruggeman v. Schimke*, 718 P.2d 635, 636–37 (Kan. 1986) (same) with *Wilson v. Kuenzi*, 751 S.W.2d 741, 742 (Mo. 1988) (en banc) (parents claimed they would have aborted the fetus if they had received accurate medical information) and *Procanik ex rel. Procanik v. Cillo*, 478 A.2d 755, 758 (N.J. 1984) (same) and *Nelson v. Krusen*, 678 S.W.2d 918, 919 (Tex. 1984) (same).

In some cases, plaintiffs claimed both that they would not have been conceived, and, alternatively, that they would have been aborted, but for the negligence of defendants. *See, e.g., Speck*, 408 A.2d at 500; *Rubin ex rel. Rubin v. Hamot Medical Ctr.*, 478 A.2d 869, 870 (Pa. Super. Ct. 1984); *see also Becker v. Schwartz*, 386 N.E.2d 807, 808–09 (N.Y. 1978) (single opinion resolving two cases, one involving the conception of a child after negligent genetic counseling, the other involving a child with Down's syndrome who would have been aborted). In these cases the courts also drew no distinction between these two grounds for wrongful life claims.

At least one state, Indiana, has enacted legislation declaring, "No person shall maintain a cause of action or receive an award of damages on his behalf based on the claim that but for the negligent conduct of another he would have been aborted." IND. CODE ANN. § 34–1–1–11 (West Supp. 1991). In a case applying that statement to a wrongful life action alleging that the plaintiff would not have been conceived but for the defendant's negligence, the majority sustained the plaintiff's claim on the grounds that it was not technically covered by the terms of the statute. *Cowe*, 541 N.E.2d at 965. The majority's conclusion was challenged in dissent on the grounds that the thrust of plaintiff's claim was that he would have been better off not being born, a view that "is contrary to the public policy of this state as declared . . . in Indiana Code section 34–1–1–11." *Id.* at 971 (Ratliff, C.J., dissenting).

¹⁰² *See, e.g., Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984) (noting "impossibility of

understandably reluctant to undermine the principle that life has value and is always preferable to nonexistence.¹⁰³ In answering these questions, however, courts do not suggest that the assertion that "I would have been better off if I had not been conceived" is any more problematic than the assertion that "I would have been better off if I had been aborted."¹⁰⁴ With regard to their hypothetical impact on the existing child, these events are interchangeable.¹⁰⁵

measuring damages" in wrongful life action); *Goldberg ex rel. Goldberg v. Ruskin*, 471 N.E.2d 530, 534-35 (Ill. Ct. App. 1984); *Eisbrenner v. Stanley*, 308 N.W.2d 209, 213 (Mich. Ct. App. 1981) ("[T]he comparison between nonexistence and deformed life is necessary but impossible to make and juries should not be allowed to speculate on the child's damages."); *Wilson v. Kuenzi*, 751 S.W.2d 741, 744 (Mo. 1988) (en banc); *Procanik*, 478 A.2d at 763 ("The crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of . . . impaired existence."); *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979) (measuring "the difference in value between life in an impaired condition and the 'utter void of nonexistence' . . . is literally impossible"); *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967) ("[I]nfant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination."); *Becker*, 386 N.E.2d at 812 (wrongful life action "demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence"); *Williams v. State*, 269 N.Y.S.2d 786, 787 (App. Div. 1966); *Nelson v. Krusen*, 678 S.W.2d 918, 924 (Tex. 1984) (wrongful life "cause of action involves a weighing of life against non-life, a calculation that cannot rationally be made").

¹⁰³ See, e.g., *Phillips v. United States*, 508 F. Supp. 537, 543 (D.S.C. 1980) (wrongful life suit inconsistent with "preciousness and sanctity of human life"); *Blake*, 698 P.2d at 321 (judicial reluctance to recognize wrongful life action "stems partially from the fact that the theory amounts to a repudiation of the value of human life"); *Bruggeman* 718 P.2d at 642 (rejecting wrongful life cause of action because "a legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law"); *Proffitt v. Bartolo*, 412 N.W.2d 232, 240 (Mich. Ct. App. 1987) (wrongful life tort often rejected "as contradictory to the belief that life is precious and that life, even with a major handicap, is preferable to nonlife"); *Berman*, 404 A.2d at 12-13 (wrongful life action requires court to disavow the basic assumption on which our society is based, "that life—whether experienced with or without a major physical handicap—is more precious than non-life"); *Azzolino v. Dingfelder*, 337 S.E.2d 528, 532 (N.C. 1985) (denying wrongful life claim on grounds that "life, even life with severe defects, cannot be an injury in the legal sense"). But see *Turpin v. Sortini*, 643 P.2d 954, 961-62 (Cal. 1982) (rejecting decisions that conclude that allowing wrongful life suits "would 'disavow' the sanctity and value of less-than-perfect human life").

¹⁰⁴ Some courts, however, do adopt alternative rationales for rejecting a wrongful life cause of action. See, e.g., *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 740 (Ariz. 1990) (en banc) (because child born with birth defects had no right or ability to control whether she would be born, physician's negligence in failing to inform parents of condition of fetus caused legally cognizable injury to parents alone, not to child); *James G. v. Caserta*, 332 S.E.2d 872, 881 (W. Va. 1985) (the "duty to inform does not extend to the unborn child as it is the parents' decision to risk conception or to terminate a pregnancy").

¹⁰⁵ Indirectly supporting the conclusion in the text, Hare suggests a modification of the "Golden Rule." Hare posits the moral principle that "we should do to others what we are

Indeed, even the rhetoric of the abortion debate implicitly recognizes this conclusion. Women usually do have a choice, as anti-abortion advocates commonly assert. If they do not want to have a baby, they can practice abstinence or use contraceptives. Once we recognize the freedom to make that decision, however, the result of that choice, nonexistence for potential life, is the condition to which an abortion must be compared when we evaluate its morality. The question of whether a woman commits a significantly greater moral wrong by electing to have an abortion rather than preventing conception requires a comparison of the consequences of these two events from the perspective of the child-to-be.¹⁰⁶ As noted, contraception and early abortion result in a similar denial of life opportunities.

The conservative critic may also argue that our analysis trivializes in moral terms the decision to have an abortion. Any such contention simply ignores our discussion of the morality of pre-conception procreative choices. We believe that the decision not to have children is a serious moral choice.¹⁰⁷ By recognizing the moral comparability of abortion and contraception, we challenge the contention that the power of men and women to control the creation and development of new life is devoid of moral implications. We

glad was done to us." Hare, *supra* note 55, at 208. Applying this principle to abortion, Hare posits:

[W]hen I am glad that I was born . . . I do not confine this gladness to gladness that [my parents] did not abort me. I am glad, also, that my parents copulated in the first place, without contraception. So from my gladness, in conjunction with the extended Golden Rule, I derive not only a duty not to abort, but also a duty not to abstain from procreation.

Id. at 212.

¹⁰⁶ Although Hare thinks that the morality of contraception and that of abortion are much "closer together" than is often believed, he believes they nonetheless remain distinct in important respects. First, there is a much stronger probability that a fetus will develop into a normal adult than that a single act of intercourse will eventually produce the same result. *Id.* at 214. Second, abortion precludes the mother from subsequent reproductive activity for a significantly longer period of time than does the use of contraception or abstinence. *Id.* Third, parents are more adversely affected psychologically by abortion than they are by contraception or abstinence. *Id.*

Not all these distinctions are plausible, and only the first distinction seems significant. Even in this case, it remains unclear how much moral weight to assign to increasing probabilities of successful development, particularly in the early months of the gestation period. It also is unclear how Hare's probability analysis applies to drugs or other abortifacients that are used pre-conception and result in miscarriages. In those situations, the fetus never had an actual probability of developing into an adult.

¹⁰⁷ See *supra* notes 92-94 and accompanying text.

do not imply that abortions are morally comparable to cosmetic surgery simply because they are not morally comparable to murder.

The more flexible conservative will criticize our position on different grounds. She might argue that one need not choose between giving potentiality for personhood the same value as personhood or no value at all. The conservative maintains that this is a false dichotomy. The conceptus does have rights and interests that moral deliberation must take into account, even if they are not the full equivalent of the rights and interests of a child or adult. Moreover, she believes these rights and interests increase and become more analogous to those of a child as the gestation period progresses.¹⁰⁸

We agree. Initially, however, the rights and interests of the conceptus are the same as those that must be taken into account in deliberating about whether to have a child. The conservative has not established the moral significance of conception. Moreover, she has not provided any criteria for determining the changing moral status of the conceptus during the gestation period. Clearly, the potentiality of the conceptus, in some important sense, becomes stronger as the pregnancy progresses. What remains indeterminate, unless one posits some moral threshold, such as having a life worth living, is how one distinguishes between any particular moment during the gestation period and any other.

The conservative critic, however, may still remain unsatisfied. Why should the distinction between having the potential to be a person with moral standing and actually being such a person be so critical and so rigid? As the conceptus develops during pregnancy, its moral status surely increases substantially, as does the probability that it will achieve birth and uncontrovertible personhood. The question of when a conceptus begins to lead a life worth living and achieves a status of protected autonomy is indeterminate. If conception is not a crucial event in the developmental continuum, neither is viability, birth or any other particular moment. Thus, the essential fluidity of this progression does not justify viewing the moral status of the conceptus as no greater than that of an unfertilized ovum, until it suddenly jumps to the full moral status of a

¹⁰⁸ This argument, of course, is much more often advanced by proponents of abortion rights. See, e.g., GLOVER, *supra* note 18, at 126 ("[T]he transition from fertilized egg to adult, like many biological developments, can better be represented by a fairly steady upward curve than by a series of obviously discrete stages with abrupt transitions.")

person. It is wrong to kill a potential person that will soon be a person, even if doing so is not quite as wrong as killing a baby.¹⁰⁹

This contention would be much more persuasive if the conceptus developed in an environment independent of the mother's body. In that circumstance, the conceptus's potential could be actualized in a way that did not directly threaten the physical and psychological integrity of another person. But no such independence exists.¹¹⁰ The conceptus's transformation from a potential person to an actual person with moral standing is brought about at the pregnant woman's expense, through the use of her body and the sacrifice of her interests.¹¹¹ The conceptus cannot insist on the right to fulfill its natural potential without interference because from the very beginning the conceptus can be characterized as an interfering agent whose actions and transformation fundamentally alter the woman's condition.¹¹²

¹⁰⁹ For the absolute conservative, this indeterminacy could justify protecting the conceptus from the moment of conception throughout the gestation period. Thus, Callahan argues:

As embryology and fetology advance, it becomes clear that human development is a continuum. Within such a continuous growth process, it is hard to defend logically any demarcation point after conception as the point at which an immature form of human life is so different from the day before or the day after, that it can be morally or legally discounted as a person.

Sidney Callahan, *A Pro-life Feminist Makes Her Case*, *UTNE READER*, Mar.-Apr., 1987, at 104, 105.

Conversely, the critical question for the flexible conservative is identifying criteria that justify attributing a substantial claim to life to the conceptus at the earliest possible time in the gestation period. Langerak, for example, argues that two factors, the increased probability that the conceptus will survive to become a baby and the extent to which allowing abortion undermines the protection provided to other vulnerable persons such as infants, control the increasing claim to life of the fetus through the gestation period. Langerak, *supra* note 18, at 259-61.

¹¹⁰ As Sylvia Law states:

Fetal life is starkly different from all other forms of human life in that the fetus is completely dependent upon the body of the woman who conceived it. It cannot survive without her. Although all human infants, and many adults, are dependent upon others for survival, that support can be provided by many people. The fetus by contrast is dependent upon a particular woman.

Law, *supra* note 91, at 1023.

¹¹¹ Law goes on to note:

People who are dependent—infants, the poor, the elderly, and the disabled—make a strong moral claim on the resources of a society of abundance But the sustenance the fetus needs is not society's to give. It can only be provided by a particular pregnant woman. Forcing her to support the dependent fetus denies her capacity to decide whether that is a relationship that she can sustain and imposes enormous costs on her life, health and autonomy.

Id. at 1027.

¹¹² Even before implantation occurs, the presence of the fertilized egg in the uterus

The point here is not that either the conceptus or the mother must be identified as the active aggressor during pregnancy. The distinction between actively harming another or failing to assist another in distress is not always useful, particularly in special contexts such as this. It is true that the mother who gets an abortion acts affirmatively to terminate her pregnancy, but the moral status of her conduct would not change if she deliberately withdrew essential support that the conceptus needed to survive. In situations of absolute dependency, there is little difference between acting and failing to act. Certainly a mother who deliberately fails to feed her baby until it dies is fully responsible for its death.¹¹³ Not acting does not make her less blameworthy.

Similarly, the condition of acting does not necessarily increase an individual's culpability. For example, assume an individual unknowingly swims near someone drowning in the ocean. In a last act before losing consciousness the drowning person throws out his hand, catches the other swimmer by the hair and reflexively entangles his hand in her hair. In this situation, detaching the victim's hand is surely no more wrongful than the act of deliberately failing to rescue him before contact takes place. Our moral evaluation of the swimmer's conduct will be based primarily on other factors, such as the swimmer's ability to effectuate a rescue without sacrificing her own life. That a deliberate action instead of an inaction occurs would not be an important aspect of our moral calculus.¹¹⁴

results in significant physical changes in the mother's body. RODMAN ET AL., *supra* note 87, at 32. The conceptus requires a transformation of the mother from her pre-pregnant state in order to create an environment in which it can develop. The conceptus has no generative power in isolation. Thus, even the initial steps toward fulfilling its potential requires immediate dedication of another person's existence toward that objective.

Put simply:

the fetus is an egoist, not merely a helpless dependent. Its purpose is to see that its own needs are served, and this is achieved by causing a substantial upheaval to its mother's physiology. The changes in maternal physiology serve to ensure maternal well-being, and to ensure that the fetal "supply line" works effectively.

ALAN L.R. FINDLAY, *REPRODUCTION AND THE FETUS* 83 (1984).

¹¹³ See, e.g., *De Leon v. State*, 684 S.W.2d 777, 778 (Tex. Ct. App. 1984) ("The omission by a parent to perform his statutory parental duty [to provide food and medical care] which results in the death of the child, if done intentionally and knowingly, is murder.").

¹¹⁴ Tooley postulates a "moral symmetry principle" that holds that there is no moral distinction between acting and not acting. MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* 186-87 (1983). The authors do not endorse this conclusion for the purposes of our argument. It is sufficient to accept Tooley's related point, that in comparing the morality of failing to save an individual from death with the morality of killing a person, the moral analysis often is controlled by other factors, such as the actor's motivation and the cost and risk involved, more than it is by the isolated distinction between acting and not acting. *Id.* at 187-89.

In cases involving pregnancy and other dependencies, the critical issue is not whether either party should be characterized as playing an active or passive role. Rather, there is a conflict between the conceptus's interest in fulfilling its potential through the use of the pregnant woman's body, and the woman's interest in not being forced to sacrifice her bodily integrity to help the conceptus achieve moral standing.¹¹⁵ Again, the question is comparable to that of the

¹¹⁵ Subsequent to implantation, the development of the embryo remains particularly vulnerable to environmental disturbances during the next 45 days. KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 151 (1982). Accordingly, warnings to pregnant women to avoid teratogenic agents—i.e., those tending to cause developmental malformations—are crucial in the first two months of the gestation period. *Id.* at 153.

Indeed, the positive development of the fetus may require substantial changes in the woman's physical and psycho-social environment through much of the pregnancy. A growing literature, for example, confirms that significant stress, anxiety and family discord in the mother's life during pregnancy ultimately results in higher incidents of adverse physical and psychological consequences for the child. See, e.g., Peter R. Dallman, *Iron Deficiency: Does It Matter?*, 226 J. INTERNAL MED. 367 (1989) (iron deficiency in diet of pregnant women associated with low birth weight, prematurity and perinatal mortality); Carl L. Keen & Lucille S. Hurley, *Effects of Zinc Deficiency on Prenatal and Postnatal Development*, 8 NEUROTOXICOLOGY 379 (1987) (zinc deficiency in mothers results in abnormal births); Herbert L. Needleman, *Low Level Lead Exposure in The Fetus and Young Child*, 8 NEUROTOXICOLOGY 389 (1987) (adverse developmental consequence from lead ingested by mothers and passed through to fetus); Alan J. Ward, *A Comparison and Analysis of the Presence of Family Problems During Pregnancy of Mothers of "Autistic" Children and Mothers of Normal Children*, 20 CHILD PSYCHIATRY & HUM. DEV. 279, 286 (1990) (family discord during pregnancy affects psychological development of child); Harold Williamson, Jr., et al., *Association Between Life Stress and Serious Perinatal Complications*, 29 J. FAM. PRAC. 489 (1989) (prenatal stress affects physical development of child); Arthur Wynn & Margaret Wynn, *Nutrition Around Conception and the Prevention of Low Birthweight*, 6 NUTRITION & HEALTH 37 (1988) (connection between low birth weight, condition commonly associated with perinatal death, and maternal consumption of nutrients) See generally ANNALS OF THE N.Y. ACAD. SCI., VOL. 562, *PRENATAL ABUSE OF LICIT AND ILLICIT DRUGS* (Donald E. Hutchings ed., 1989) (discussing effect of prenatal alcohol and drug use on fetal and child development).

The evidence is less certain with regard to the effect of a woman's employment activity on pre- and postnatal health. Compare Richard L. Naaye & Ellen C. Peters, *Working During Pregnancy: Effects on the Fetus*, 69 PEDIATRICS 724, 724-27 (1982) (maternal work, particularly in standing occupations, during third trimester impairs fetal growth); Helen Taskinen, *Effects of Parental Occupational Exposures on Spontaneous Abortion and Congenital Malformation*, 16 SCANDINAVIAN J. WORK ENV'T & HEALTH 297 (1990) with Mark A. Klebanoff et al., *The Effect of Physical Activity During Pregnancy on Preterm Delivery and Birth Weight*, 163 AM. J. OBSTETRICS & GYNECOLOGY 1450 (1990) (heavy work or exercise not associated with preterm delivery or reduced fetal growth); Gunnar Ahlborg Jr. et al., *Heavy Lifting During Pregnancy—A Hazard to The Fetus? A Prospective Study*, 19 INT'L J. EPIDEMIOLOGY 90 (1990).

Overall, it seems clear that it is a gross mischaracterization to describe the conceptus as a passive being whose developmental needs are naturally satisfied. Rather, the conceptus must be developed by the pregnant woman through myriad conscious and unconscious actions. In this context, the creative role of the mother cannot reasonably be viewed as completed at conception or implantation so that from that time on the conceptus has an independent existence and right to continue its development. External assistance and the mother's active participation is as necessary post-conception as pre-conception.

woman fulfilling the potential within her body prior to conception to create a new life. As the essential source of that potential in the first place, the mother may act wrongfully in obtaining an abortion, but only in the sense that she does not complete an act of creation that is within her power.

A final challenge to our thesis contends that it proves far too much to be tenable. If abortion is no greater a wrong than the deliberate decision not to conceive, because limiting the conceptus to some minimal life is roughly comparable to providing it no life at all, why cannot that same argument be used to justify infanticide? A mother who kills her two-week-old child can claim that she at least gave him two weeks of life that he would not have lived to enjoy had she elected her other legitimate choice and not conceived him. The argument that consciousness is the minimum predicate both for having a life worth living and any plausible claim to autonomy in one's choices is an inadequate foundation on which to base one's moral opposition to either late abortion or infanticide.

This criticism involves two related contentions. First, making consciousness a necessary condition for having a life worth living is unacceptably indeterminate. It makes moral standing depend on the question of when consciousness occurs, and even more problematically, on the question of exactly what constitutes consciousness. As development progresses and mental ability increases, we face a new indeterminate and potentially arbitrary issue to resolve. The question now would be when the mental state of the conceptus supports the conclusion that it has a life worth living. Arguably, attempting to resolve this issue would not create any less of a political and legal quagmire than currently exists.¹¹⁶

Second, and even more problematically, some may attempt to define the level of consciousness necessary for having a life worth living at so high a level of mental ability as to exclude the eight-month-old conceptus, and, perhaps, the newborn baby as well. Clearly, it will be possible to achieve some scientific and moral consensus with regard to the beginning of the gestation period. The conceptus lacks meaningful consciousness during the first trimester;

¹¹⁶ There is hardly a clear consensus on what degree of consciousness or mental ability constitutes a life worth living, to which moral standing would accrue. As Tribe put it succinctly, "the question when human life truly begins asks not for a discovery of the point at which the fetus possesses an agreed upon set of characteristics which make it human, but rather for a decision as to what characteristics should be regarded as defining a human being." Laurence H. Tribe, *The Supreme Court 1972 Term, Forward: Toward a Model of Roles in The Due Process of Life and Law*, 87 HARV. L. REV. 1, 21 (1973).

few would argue that life as a ten-week conceptus constitutes a life worth living.¹¹⁷ Thus, the legality of the overwhelming majority of abortions performed in the United States could be constitutionally confirmed.¹¹⁸

The status of the conceptus near the end of the gestation period, however, cannot be described with complete confidence. The level of consciousness that the authors argue is necessary for a life worth living is imprecise and subject to debate.¹¹⁹ If the requisite

¹¹⁷ Professor Clifford Grobstein argues:

It seems clear that there is an early period of fetal development when you don't have to worry about a sentient being, because there is no anatomical or physiological basis for it. From 8 to 20 weeks, the central nervous system is so extremely immature—especially the brain—that there seems no possibility of any awareness.

Elizabeth Hall, *When Does Life Begin?—A Conversation with Clifford Grobstein*, PSYCHOL. TODAY, Sept. 1989, at 44. Grobstein elaborates at length on his understanding of this aspect of prenatal development in CLIFFORD GROBSTEIN, *SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES* (1988). Biologist Michael J. Flower similarly concludes that "it is probably not until after 28 weeks of gestation that the fetal human attains a level of neocortex-mediated complexity sufficient to enable those sentient capacities the presence of which might lead us to predicate personhood of a sort we attribute to full-term newborns." Doerr, *supra* note 44, at 51, 53.

Even some conservative theorists concede this point if the abortion debate is confined to non-religious argument. Ernest Van den Haag explains:

It is the embryo that might be aborted, not what it will, but has not yet, become. If it, as yet, lacks the distinctly human characteristics that might entitle it to social protection on purely secular grounds, one must ask: When does intra-uterine life become human life? What characteristics are distinctively human? One may disagree on the sufficient characteristics. However, there is little disagreement on the necessary ones. Surely these are absent in the first 12 weeks after conception. The embryo has neither a brain nor the neural system which makes sentience possible.

Before sentience the embryo cannot be aware of itself, or of losing a future by not being allowed to develop . . . Only upon acquiring a functioning brain and neural system, after the first trimester, does it become possible, though not yet probable, for the fetus even to feel pain.

Ernest van den Haag, *Is There a Middle Ground?*, NAT'L REV., Dec. 22, 1989, at 29, 30. Despite this general consensus, there is considerable dispute as to when actual sentience begins. Some antiabortion groups argue that brain activity exists prior to six weeks and that the fetus experiences and reacts to pain as early as 12 weeks. The statements of Dr. Grobstein, among others, dispute these contentions. See *Human Life Bill*, *supra* note 46.

¹¹⁸ Approximately ten percent of the abortions performed in the United States occur in the second and third trimester. RODMAN ET AL., *supra* note 87, at 57.

¹¹⁹ Brain development increases rapidly from the third to sixth month of the gestation period. By the end of the second trimester the fetus demonstrates reflex movements that are "evidence of central nervous system activity." *Id.* at 34. According to Grobstein:

From 20 to 30 weeks is an uncertain period and we don't know where to come down [with regard to fetal sentience]. Once past the 20-week mark, the brain is maturing and there are some connections between neurons in the cortex. We can be doubtful but we can't be sure there's no inner experience . . . When

state of consciousness is defined in terms of higher mental ability, such as the capacity to possess "the concept of a continuing self,"¹²⁰ very late abortions, or even infanticide, are potentially justifiable on the grounds that the conceptus has not yet achieved moral standing.¹²¹

This is strong and fair criticism. Although one response to it might rely on scientific evidence regarding the mental abilities of a third trimester conceptus, that evidence is so ambiguous as to preclude a peremptory dismissal of the conservative's concerns. If our model is to defend the widely shared intuition that third trimester abortions are morally suspect unless supported by substantial justification, an additional response is required.¹²² This is precisely what we provide in the next section. We must evaluate the morality of abortion not only in terms of the status of the conceptus, but also with regard to the changing nature of the woman's interest in having an abortion.

this middle period ends, at about 30 weeks, we do have to worry about possible minimal awareness If we arbitrarily set the boundary of sentience, psychic individuality, at 26 weeks (the beginning of the last trimester), we provide a safety margin.

Hall, *supra* note 117, at 44-46. What is less clear, of course, is whether the degree of mental and physical development that occurs between 20 and 30 weeks is sufficient to support what we would recognize as a life worth living. From the perspective of the authors, a conclusion establishing the end of the second trimester as the point in time in fetal development at which discretionary abortions might be generally restricted would be acceptable, although not required. This is in accord with Grobstein's analysis; he describes a "predecessor to . . . self-awareness," "a rudimentary form of self," and a "diffuse sentience" that is extremely unlikely to occur prior to twenty-six weeks of gestation. GROBSTEIN, *supra* note 117, at 123-24, 130. For a lengthy and sophisticated analysis of psychological and neurophysiological data suggesting that newborn infants lack sufficient mental development to achieve personhood for moral purposes, see TOOLEY, *supra* note 114, at 359-412. We believe this question need not be answered dispositively in most cases, however, because of the changed status of the pregnant woman at the latter part of the gestation period. See *infra* notes 137-77 and accompanying text.

¹²⁰ Tooley, *supra* note 16, at 94-95. Tooley posits that "[a]n individual cannot have a right to continued existence unless there is at least one time at which it possesses the concept of a continuing self or mental substance."

¹²¹ *Id.* at 95-96 (arguing that since behavioral and neurophysiological studies indicate that human fetuses do not possess any concept of a continuing self they do not possess a right to life).

¹²² It is not sufficient to argue, without more, that the substantial probability that a fetus in the third trimester will soon lead a life worth living justifies restrictions on late term abortion. That analysis suggests a completely arbitrary determination of when the potential life of the soon-to-be-born baby attains sufficient moral value that it outweighs the mother's rights, without even considering what the mother's interests are or how they should be valued.

II. THE CONSTITUTIONAL BASIS FOR PROTECTING A WOMAN'S DECISION TO HAVE AN ABORTION

Thus far, we have been discussing the morality of abortion from the position of the conservative. Accordingly, our attention has been directed exclusively toward the moral status of the conceptus. From the conservative's perspective, the woman's interest does not even seem to exist, or at least it is not worthy of serious consideration in light of the magnitude of the interests on the other side of the moral equation.

Many writers have challenged and condemned the failure of the conservative to rigorously examine the interests of women. They base their criticism on the grounds that the morality of an act must always be evaluated in context.¹²³ This is true even of an act of extreme moral significance, such as the killing of a person. From this perspective, even the wrongfulness of infanticide, which common sense morality indisputably recognizes, is not predicated on the evolving status of the newborn alone. Rather, the issue is an ethically simple one because of the total lack of justification for committing such an act once the baby is physically separate from the mother. Thus, several critics challenge the conservative position on its own turf, so to speak, by conceding personhood to the conceptus. Judith Thomson,¹²⁴ Donald Regan¹²⁵ and others argue that accepting this premise of personhood does not entail the conclusion that all abortions are immoral. When one examines the interests of the woman, abortion may be justified even if it results in the death of a person.

These kinds of criticisms of the conservative position generally are based on the same considerations that in the common law excuse or justify conduct that would otherwise subject the actor to tort or criminal liability. Thus, one may describe the woman's interest in having an abortion as an act of self-defense or as a failure to sacrifice one's own interests to assist another.¹²⁶ Such arguments have much to commend them. The privilege or excuse of self-defense has been interpreted to encompass acts that are done in the mistaken but

¹²³ See, e.g., TRIBE, *supra* note 34, at 129-35; LAW, *supra* note 91, at 1021-22.

¹²⁴ Judith Jarvis Thomson, *A Defense of Abortion*, 1 J. PHIL. & PUB. AFF. 47, 48-49 (1971).

¹²⁵ Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

¹²⁶ See Patricia A. Cain & Jean C. Love, *Stories of Rights: Developing Moral Theory and Teaching Law*, 86 MICH. L. REV. 1365, 1379 (1988).

reasonable belief that the actor was seriously threatened.¹²⁷ It also has been successfully asserted to protect the dignity of the individual who forswears a safe opportunity to escape his aggressor and instead resorts to deadly force to avoid the ignominy of being forced to retreat.¹²⁸ From this foundation, obvious analogies to abortion are possible. The failure to act and good Samaritan analysis is also a provocative line of inquiry to consider.¹²⁹

The difficulty with both these approaches, however, is their uncertain relevance to the constitutionality of abortion. The scope of the privilege of self-defense accepted by a state, and the extent to which the state imposes on its citizens a duty to render assistance, are matters of public policy for legislative determination or common law adjudication. They typically do not raise constitutional concerns.¹³⁰ The preceding arguments may be used to undermine the

¹²⁷ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19, at 125 (5th ed. 1984).

¹²⁸ The *Restatement of Torts* notes:

In many parts of the country, the ideal of social manhood has included as one of its prime requisites courage and dignity. The interest of the actor in his personal dignity has been regarded as of greater importance than the social interest in the prevention of deadly affrays, and in the preservation of life and limb of those engaged in them. In many jurisdictions, therefore it is held that one threatened with a deadly attack may stand his ground and protect himself against it by deadly force even though he knows that he can with perfect safety avoid the necessity of doing so by retreat.

RESTATEMENT (SECOND) OF TORTS § 65 (1966); see also *People v. Bush*, 111 N.E.2d 326, 328 (Ill. 1953); KEETON ET AL., *supra* note 127, at 127.

¹²⁹ Both Thomson, *supra* note 124, at 62-64, and Regan, *supra* note 125, at 1571-1610, discuss abortion from the perspective of women being required to act as good Samaritans for the benefit of the fetus while similar duties are seldom imposed on other potential good Samaritans.

¹³⁰ In his well-known article, *Rewriting Roe v. Wade*, *supra* note 125, Regan energetically and unsuccessfully tries to develop constitutional doctrine from his common law analysis of self defense and good Samaritan cases. *Id.* at 1618-39. He initially posits constitutional principles of "non-subordination" and "freedom from physical invasion" that would serve to protect the right to an abortion. *Id.* at 1619. Regan concedes, however, that both principles provide flawed foundations for his constitutional argument. *Id.* at 1619-21. Accordingly, he ultimately contends that an equal protection analysis is necessary. *Id.* at 1621. Anti-abortion laws violate equal protection principles because "[w]omen who want abortions are required to give aid in circumstances where closely analogous potential samaritans are not. And they are required to give aid of a *kind* and an *extent* that is required of no other potential samaritan." *Id.* at 1622.

Regan's equal protection argument, however, is totally divorced from conventional equal protection analysis. Under Regan's model, fundamental rights and suspect classifications are not essential predicates for rigorous review. Nor is strict or intermediate level scrutiny the appropriate standard of review. As an alternative, Regan suggests a "reasonable American legislature test." *Id.* at 1627. Under this approach, inequalities that are "especially costly and specially resented" require "special justification" to be upheld. Anti-abortion laws require

state's claim that its moral concern in protecting potential life constitutes a compelling state interest. They cast doubt on the validity and value of the state's purposes. They do not confront directly, however, the constitutional side of the balance on which the woman's privacy and autonomy rights are weighed.

A. *The Failure of Roe v. Wade*

A fair and persuasive analysis of the right to have an abortion must carefully examine the interests of the woman from a constitutional perspective. The place to start such an analysis is the Supreme Court's majority opinion in *Roe v. Wade*. Justice Blackmun's opinion in *Roe* examined two state interests, protecting the life and health of the mother and protecting potential life, and balanced them against the woman's right to privacy and autonomy.¹³¹ In

such careful balancing because they violate anti-subordination and freedom from physical invasion principles and disproportionately burden women, a group that has been historically subject to discrimination. *Id.* at 1630—31.

The difficulty with Regan's argument is that the anti-subordination and freedom from physical invasion principles he expresses have traditionally been left to the legislature and common law courts to enforce. Failure to act and self defense rules and decisions have never been subjected to constitutional scrutiny. Moreover, generalized burdens such as conscription, which require both subordination and exposure to physical invasion, do not raise serious constitutional concerns under current doctrine. Regan may be correct, of course, that many anti-abortion laws are unfair, but he has to transform radically the Court's equal protection doctrine to make that unfairness a matter of constitutional significance.

¹³¹ *Roe v. Wade*, 410 U.S. 113, 148—52 (1973). The argument over whether the decision to terminate a pregnancy is subsumed within the right of privacy and procreational autonomy that the Supreme Court first recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny is expressed succinctly in the debate between Justices White (dissenting) and Stevens (concurring) in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 776, 792 (1986). Justice White argued:

As the Court appropriately recognized in *Roe v. Wade*, "[t]he pregnant woman cannot be isolated in her privacy"; the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, . . . the continued existence and development—that is to say, the *life*—of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

Id. at 792 (White, J., dissenting) (citations omitted). Justice White then added in a footnote: That the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt*, and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as

implementing that balancing process, Justice Blackmun described

well the characterization of the liberty interest itself. For if the liberty to make certain decisions with respect to contraception without governmental constraint is "fundamental," it is not only because those decisions are "serious" and "important" to the individual, see *ante*, at 776 (Stevens, J., concurring), but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of government's business. The same cannot be said where, as here, the individual is not "isolated in her privacy."

Id. at 792 n.2.

Justice Stevens's response ignored Justice White's argument that rights of privacy and autonomy are grounded on two essential conditions, the importance of the interest to the individual and the judgment that such decisions are none of the government's business. Justice Stevens considered only the seriousness of the woman's decision, and on that basis found White's conclusion incomprehensible. Justice Stevens wrote:

There may, of course, be a significant difference in the strength of the countervailing state interest, but I fail to see how a decision on childbearing becomes less important the day after conception than the day before. Indeed, if one decision is more "fundamental" to the individual's freedom than the other, surely it is the post-conception decision that is the more serious . . .

Id. at 776 (Stevens, J., concurring).

It is not clear, however, that Justice Stevens actually disputed Justice White's assertion that there is a "none of the government's business" dimension to defining the scope of privacy and autonomy rights. As is clear from his analysis distinguishing the state's interest in protecting an embryo from its interest in protecting an infant, Justice Stevens did not believe that the event of conception dramatically changes the state's "business" in regulating procreational decisions. See *id.* at 778-79 (Stevens, J., concurring). Thus, he challenged the premise on which Justice White based his judgment, that abortion inherently involves important state concerns that distinguish it from other exercises of the right to privacy and autonomy. From that perspective, Justice Stevens did not need to address the broader issue of how the Court should define privacy and autonomy rights.

That question is not easily resolved. The parameters of even enumerated rights are difficult to discern and often cannot be clearly identified. For example, in determining whether expressive activity is protected by the First Amendment, courts typically examine both the activity itself (e.g., is it speech or conduct and does it communicate a message?) as well as the consequences of the activity on state interests. Consider speech that is subject to sanction (under *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) because it threatens to incite immediate violence. Under one approach, expression that creates a clear and present danger is unprotected speech. Alternatively, such expression is protected by the First Amendment, but the state has a sufficiently compelling interest in suppressing such speech that it may do so and withstand rigorous constitutional scrutiny. Even if the former description is the accurate one, is the basis for determining that speech is unprotected fundamentally different from the analysis the court uses to evaluate an allegedly compelling state interest that outweighs the exercise of protected rights?

Moreover, it is not clear that the Supreme Court must resolve this problem the same way for all constitutional rights. Unlike freedom of speech, which seems to protect a generic activity with intrinsic parameters, the right of privacy and personal autonomy may be more analogous to freedom of religion. Religious practice, like personal autonomy choices, might include an almost limitless range of behavior. See Alan Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990). There is little in the basic idea of religion or autonomy that suggests the boundaries of the right. Thus, the Court may need to consider some external

how he believed the state's interests change while the woman's interest remains constant during the gestation period.¹³² His analysis

indicia. With regard to privacy and autonomy rights, some decisions may not be sufficiently personal or private to warrant protection despite their importance to the individual asserting the right. Proponents of the right to have an abortion cannot summarily dismiss Justice White's "none of the government's business" limit on the nature of privacy rights.

What Justice White fails to address adequately, however, is the issue of how courts are to determine that a liberty interest, otherwise fundamental to a pregnant woman, is not a *right* because the termination of pregnancies allegedly implicates the state's business. In one sense, everything, including the use of pre-conception contraceptives, is of interest to the state. Thus, there must be some way to evaluate when a procreational interest is sufficiently part of the public's business to prevent it from being protected as a right. Justice White simply declares that the fact of conception satisfies his unstated criteria for answering this question.

This issue arose again in glaring terms during the oral argument of *Planned Parenthood of S.E. Pa. v. Casey* before the United States Supreme Court. Justice Stevens asked Kenneth Starr, the Solicitor General of the United States, to defend his contention that a state has a compelling interest in protecting potential life throughout a women's pregnancy. In particular, Justice Stevens inquired of Starr, "You argue very vigorously there's no textual basis supporting your opponent's position. What is the textual basis for your position that there's a compelling interest in something that is not a person within the meaning of the Fourteenth Amendment?"

Starr ultimately replied, "The state has an interest in its potential citizen, it does not have to be granted, have the basis in the Constitution. Justice Stevens, it is my view that the state can look out and say we, as we have historically, regulate and legislate in the interests of those who will come into being, who will be born. It is an interest that every member of this Court has said in potential life."

After Justice Stevens continued to press him to describe the textual source for his conclusion, Starr added, "I think it's in the nature of our system. And if nothing else, the Tenth Amendment, Justice Stevens, suggests that the state can order its relationships in ways that reflect the morality of the people, within limits." *Abortion and the Law: A Day in Court After Years of Skirmishing*, N.Y. TIMES, Apr. 23, 1992, at A13.

Starr's problem, of course, is not so much the lack of a textual source in the Constitution for his argument that protecting potential life from the moment of conception constitutes a compelling state interest. The weakness of his argument is that it justifies protecting potential life *before* conception as well as after that event. Nothing in Starr's answer explains why the state's interest in "those who will come into being" or in "ordering its relationships in ways that reflect the morality of people" only becomes compelling after conception occurs.

This article assumes that the degree to which the existence of the fetus changes the state's interest in procreation decisions remains to be determined. Given the premise that pre-conception procreational choices are fundamentally private and constitutionally protected, however, substantial justification is necessary to negate totally the existence of that right at the moment of conception. Although we recognize initially the continuation of a right to privacy and procreational choice after conception, and use the terminology of the strict scrutiny standard to determine if the state's interest in protecting potential life is a sufficient basis for abridging the right, the alternative conceptualization of the issue should not alter the fundamental problem requiring resolution. If it is argued that the right of procreational choice ends absolutely at conception, that conclusion must still be defended. We suggest that any such explanation should parallel an analysis that recognizes the existence of the right during pregnancy but also acknowledges compelling state interests that justify abridging the right.

¹³² *Id.* at 162-64.

resulted in the well-known trimester framework, pursuant to which the Court will most rigorously evaluate state regulation of first trimester abortions and least rigorously evaluate state regulation of third trimester abortions.¹³³

The holding of Justice Blackmun's opinion is both aggressively supported and condemned because of its results. Whichever reaction one has to *Roe*, it seems fair to conclude that the Court's reasoning is unpersuasive. In particular, Justice Blackmun spent little time justifying the conclusion that the viability of the fetus is the critical event during the gestation period for determining when the balance of interests shift in favor of the state's interest in protecting potential life.¹³⁴

The weakness of the *Roe* opinion, however, is not simply that the importance it attributes to one aspect of fetal development, viability, is unsubstantiated.¹³⁵ The entire thrust of the opinion is misdirected. As we suggested earlier, an examination of the moral standing of the conceptus alone will necessarily result in conclusions that are subject to challenge. It is difficult to attach very much significance to any one point in time in a developmental continuum. All attempts to do so are vulnerable to the question of why this moment is ethically distinct from one hour earlier or one hour later in the conceptus's evolution.¹³⁶

¹³³ *Id.*

¹³⁴ Justice Blackmun wrote simply:

[W]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

Id. at 163.

¹³⁵ Presumably, one reason for designating viability as the point during the pregnancy at which abortion may be prohibited is that only then can the fetus be separated from the mother without necessitating its destruction. Thus, viability is defended as a valid legal distinction because "[a]t that point where the fetus need no longer depend on the mother for survival, a woman is no longer making a baby but bearing it; that is, she is able to turn it over to another person, presumably without harm." Donald Burrill, *Abortion Moderates on Shaky Ground*, THE CHRISTIAN CENTURY, Apr. 25, 1990, at 420.

Because the fetus remains within the mother, however, it is not clear how or why viability changes the ethical equation. There is no way to separate the viable fetus from the woman that is not as massively intrusive of her bodily integrity as is the alternative of carrying the fetus to term. Indeed, if separation were to be accomplished at viability, the method most protective of the fetus would be delivery by hysterotomy (premature caesarian section), a method that "involves maximal maternal invasion." J.K. MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 158 (1990).

¹³⁶ See *supra* notes 108-09 and accompanying text.

The more fundamental flaw in *Roe* is Justice Blackmun's lack of analytic attention to the woman's interests and rights. *Roe* defends these rights much more effectively than it discusses them. In truth, although they approach the problem from radically different perspectives, both the majority opinion in *Roe* and much of the conservative criticism of *Roe* fail to examine seriously the rights of women.¹³⁷

We propose an alternative analysis that challenges a central orthodoxy of *Roe v. Wade*. In contrast to Justice Blackmun's approach in *Roe*, which focuses on the varying nature of the state's interest in regulating abortion and views the woman's rights as uniform throughout the gestation period, we suggest a more complete analysis. Although we agree that development matters and that the state's interest changes during pregnancy, exclusive attention to this indeterminate variable may result in fruitless inquiry and unpersuasive conclusions. We suggest that the woman's right also varies during pregnancy and that this change in interest shifts the balance of state interests against fundamental rights in many cases. Indeed, if the woman's interest in terminating her pregnancy declines to a sufficient extent, the balancing necessary to justify abortion restrictions may be accomplished without determining exactly when the conceptus experiences a life worth living. In constitutional terms, the state's interest in protecting even potential life may outweigh the woman's interest in terminating a pregnancy late in the gestation period.

B. *The Varying Nature of the Woman's Interest*

Just as the nature of killing can be broken down into component concerns for the purposes of analyzing the morality of abortion, a woman's right to have an abortion can be divided into several divergent interests. These include the right to sexual autonomy, the right to bodily integrity and autonomy, and the right to psychological independence and integrity.¹³⁸ Each of these interests has im-

¹³⁷ In *Roe*, "[t]he story of women was almost nonexistent; the story of the law of abortion, of medical knowledge, and of doctors took its place. The focus was less on women, and more on fetuses, fetal life, and the responsibility of physicians and their 'right' to administer treatment." Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1626 (1987).

¹³⁸ Obviously, an additional interest of the pregnant woman is that of avoiding the long term economic, social and psychological burdens of motherhood—of raising a child to adulthood. We do not consider that interest in this article because it is capable of resolution through a mechanism other than abortion, that is, by having the baby adopted or cared for by the state. We do not suggest that such alternatives are always feasible or meritorious. That

portant ramifications for the right of privacy and autonomy protected in the abortion cases. More importantly, each of these interests varies significantly during the gestation period.

1. The Right to Sexual Autonomy and the Right to Bodily Integrity

Although the Supreme Court is inclined to use narrower and less controversial terminology, such as the rights of marriage and procreation,¹³⁹ it is difficult to avoid the conclusion that the right to have an abortion is grounded, at least in part, on a right to sexual autonomy. The Court has never directly acknowledged that such a right exists.¹⁴⁰ However, there is no other way to intelligibly interpret the case law. The extension of the Court's holding in *Griswold v. Connecticut*¹⁴¹ to a line of authority invalidating virtually any law restricting the distribution of contraceptives clearly undercuts any literal privacy rationale underlying *Griswold*.¹⁴² Judicial aversion to police searches of the marital bedroom to discover tell-tale signs of contraceptive usage¹⁴³ cannot reasonably support, for example, the conclusion in *Carey v. Population Services International*¹⁴⁴ that a law prohibiting the sale of contraceptives by anyone other than a licensed pharmacist is unconstitutional.¹⁴⁵

issue is clearly in dispute. See, e.g., ROBERT D. GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 63-64, 179-91 (1988). Because the mother's obligation to raise her child may be mitigated or avoided through sufficiently supportive state intervention, however, this interest raises a different and less intractable form of moral dilemma than the other interests identified in the text.

¹³⁹ See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (quoting *Roe v. Wade* in support of the conclusion that the right of personal privacy covers personal decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education") (citations omitted)).

¹⁴⁰ In *Carey*, Justice Brennan concluded that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Id.* at 688 n.5. Subsequently, the Court concluded that "any claim that [cases such as *Griswold*, *Eisenstadt*, *Roe* and *Carey*] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1985) (citations omitted).

¹⁴¹ *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

¹⁴² See Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190-200 (arguing that contraception cases subsequent to *Griswold* demonstrate that the Court is protecting "sexual liberty," not privacy).

¹⁴³ *Griswold*, 381 U.S. at 485-86.

¹⁴⁴ 431 U.S. 678 (1977).

¹⁴⁵ *Id.* at 689-90 (challenged law unconstitutionally "renders contraceptive devices considerably less accessible to the public" by restricting sales outlets, "reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition").

Moreover, the contraception cases must be based on a broader principle than the right to procreate. Contraceptive devices, of course, do not directly facilitate having children. Nor can protecting access to and the use of contraceptives be rationalized, as part of a generalized right to procreate, on the grounds that such devices assist people in implementing their decision not to have children. That argument proves too much. Bluntly speaking, doing anything as a substitute for engaging in heterosexual intercourse helps people to avoid having children. The contraception cases must be understood as protecting the right to engage in sexual activity without risking the natural consequences that might otherwise result from such activity.

Given the existence of a right to sexual autonomy, it is not difficult to defend the right to have an abortion as directly derivative of that right. The possibility of becoming pregnant and having a baby is frequently experienced as a burden on a woman's decision to engage in sexual activity.¹⁴⁶ Although the use of contraceptives mitigates that burden by reducing the risk of impregnation, contraceptives are not foolproof. Without the availability of abortion, sexual intercourse always involves a risk. This burden on sexual autonomy is significant, even if the risk of pregnancy is low, because the impact of an unwanted pregnancy is so great. The right to have an abortion instrumentally furthers the right of sexual autonomy by permitting women to reduce that impact substantially.¹⁴⁷

Not only is the right to have an abortion derived in part from the right of sexual autonomy, it is in one important respect depen-

¹⁴⁶ See, e.g., Law, *supra* note 91, at 1019 ("State action restricting access to abortion imposes a crushing restraint on the heterosexual women's [sic] capacity for sexual expression.").

¹⁴⁷ The close relationship between the right of sexual autonomy and the right to have an abortion is reflected to some extent by the social identity of participants in the abortion debate. One (particularly harsh) description of pro-choice and pro-life proponents, for example, examines this division in explicit terms:

Support for abortion comes primarily from men and women who admit to enjoying sexual activity and want safeguards for that pleasure. They have attained new realms of experience, which they have no wish to abandon. Apart from a small minority, they are not swingers or spouse-swappers or even unnecessarily unfaithful. They compose a new class of Americans, for whom intercourse is an important leisure pursuit. But it is also an activity that needs abortion as a backup.

[O]pponents of abortion want to see an end to youthful sexual intimacy Opponents of abortion see the pursuit of pleasure as contaminating our age [O]pponents of abortion do not say they are opposed to sexual activity, only that it must be enjoyed in marriage, and best on the sparing side.

Andrew Hacker, *Of Two Minds About Abortion*, HARPER's, Sept. 1979, at 16, 18, 22.

dent on that right. Other component aspects of the right to have an abortion, such as the woman's interest in bodily integrity, are vulnerable to the following argument. A person's interest in bodily integrity, and a person's interest in personal liberty, are not protected against state intrusion if the individual's prior discretionary conduct places his or her bodily integrity and liberty interests at risk.¹⁴⁸ If you join the Air Force and sign up to fly jets, you cannot protest being ordered to take a physical examination. If you violate the law and become addicted to a controlled substance, such as heroin, you may be incarcerated prior to trial, convicted and forced to undergo withdrawal symptoms.¹⁴⁹ Even outside of the prison context, the state clearly may constitutionally cut off your source of supply.

A similar analogy applies to abortion. If there is no right to sexual autonomy, by prohibiting abortion the state does not force anyone to undergo the burden of pregnancy, birth and mother-

¹⁴⁸ For example, in *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973), defendant (Moore) challenged his conviction for possessing narcotics on the grounds that the compulsion of his addiction forced him to acquire the illegal drugs. In rejecting his claim, Judge Wilkey explained:

[W]e cannot ignore how the defendant became an addict Moore could never put the needle in his arm the first and many succeeding times without an exercise of will. His *illegal acquisition and possession* are thus the direct product of a freely willed illegal act.

According to [Moore's] thesis, an addict only has a choice as to the manner in which he obtains the funds (or the drugs) to support his habit; this neglects the choice that each addict makes *at the start* as to whether or not he is going to take narcotics and run the risk of becoming addicted to them. Although the narcotics user may soon through continued use acquire a compulsion to have the drug, and thus be said to have lost his self-control . . . due to a "disease," it is a disease which he has induced himself through a violation of the law.

Id. at 1151.

In response to the argument that an addict cannot be punished solely on the basis of his status, under *Robinson v. California*, 370 U.S. 660 (1962), Judge Wilkey continued:

[I]t is not inconsistent to say that an addict may not be punished for his craving (his 'addiction') but may be punished when he makes the decision not to subject himself to the admittedly painful process of withdrawal, gives in to his craving and commits acts in violation of law and which continue his addiction.

Moore, 486 F.2d at 1153.

¹⁴⁹ "The government has no constitutional obligation to provide treatment for narcotics addiction" of parolees, pretrial detainees or convicted prisoners. *Butler v. United States Parole Comm'n*, 570 F. Supp. 67, 72 (M.D. Pa. 1983). Similarly, neither prisoners nor pretrial detainees who suffer from drug addiction have any right to receive methadone through a drug maintenance program. *Norris v. Frame*, 585 F.2d 1183, 1188 (3d Cir. 1978); *Holly v. Rapone*, 476 F. Supp. 226, 230 (E.D. Pa. 1979). Prisoners, however, must receive timely medical treatment for withdrawal symptoms. *United States ex rel. Walker v. Fayette Cty., Pa.*, 599 F.2d 573, 576 (3d Cir. 1979). The quality of that treatment will not be reviewed seriously as long as it is reasonable. *Holly*, 476 F. Supp. at 233.

hood. Leaving aside cases of rape, incest and other forms of coercion,¹⁵⁰ the woman can escape any burden on her bodily integrity by never engaging in sexual activity. The availability of this prior choice undercuts the argument that abortion prohibitions violate a woman's bodily integrity by forcing her to carry an unwanted pregnancy to term. As in the case of the addict, withdrawal symptoms and pregnancy are the consequences of earlier private decisions that are not the state's responsibility.

The force of this analogy cannot be avoided by arguing that the use of heroin is illegal, while heterosexual intercourse is not. That is not always the case. Although anti-adultery, anti-fornication and gender-neutral statutory rape laws are seldom enforced with rigor in cases of consensual sexual relationships,¹⁵¹ in technical terms, many abortions terminate pregnancies that resulted from illegal conduct.¹⁵² The state may not use anti-abortion laws to punish people who engage in illegal sex,¹⁵³ but the decision to engage in illegal sexual activity may deprive a woman of the argument that forcing her to continue her pregnancy violates her right to bodily integrity. That consequence was fully avoidable as long as she complied with the relevant law. The state's claim that the way to avoid interference with one's bodily integrity is to practice abstinence can only be conclusively repudiated if the decision to engage in sexual activity is protected as a fundamental right. Indeed, unless one posits some right to engage in heterosexual relationships, the right to an abortion is necessarily tied to the state's discretionary decisions as to the sexual activity it will permit.

Although the right to have an abortion reinforces and protects a woman's right to sexual autonomy, it does not serve that objective uniformly throughout the gestation period. The burden that the risk of pregnancy and childbirth imposes on a woman considering a sexual encounter is largely avoided by providing her with suffi-

¹⁵⁰ The range of what constitutes coercive sexual activity clearly may extend beyond forcible rape. See generally CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987).

¹⁵¹ See Richard Green, *Griswold's Legacy: Fornication and Adultery as Crimes*, 16 OHIO N.U. L. REV. 545, 548 (1989) (adultery and fornication laws seldom enforced); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 418-19 & n.36 (1983).

¹⁵² See generally Green, *supra* note 151, at 546 & nn.7, 8 (twenty-five states penalize adultery and thirteen states penalize fornication).

¹⁵³ See, e.g., the Court's comment in *Eisenstadt* that "[i]t would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child [or the physical and psychological dangers of an abortion] as punishment for fornication." *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972).

cient time to make a deliberate, informed and reflective choice as to whether or not she wants to carry her pregnancy to term.¹⁵⁴ Providing substantially less time than this, thereby forcing the woman to make a precipitate choice, would not achieve the desired result. Less obviously, providing substantially more time is of little utility. In terms of the woman's right to sexual autonomy, unless there is a material change of circumstances during pregnancy, a significantly reduced benefit is derived from permitting her to have an abortion after she has had sufficient time and information to make a deliberate choice.

We do not suggest what period of time would be sufficient. We assert simply that in a legal environment in which abortion was generally illegal, recognizing the right to have an abortion during the first several months of pregnancy would substantially promote the sexual autonomy of women. Conversely, in a legal environment in which abortions were freely available during the first seven months of pregnancy, allowing abortion during the remaining two months would add little to women's sexual autonomy. The knowledge that this additional time to decide to have an abortion is available will not create a significantly greater sense that an unwanted birth can be avoided. Thus, the extent to which the right to have an abortion protects the right of women to sexual autonomy declines as the pregnancy progresses. In many cases, the right to an abortion will be of no significant additional value to the woman, with regard to her interest in sexual autonomy, during the latter part of her pregnancy.

A similar analysis applies with regard to the right of bodily integrity.¹⁵⁵ We see no need to elaborate on the obvious fact that being forced to carry a pregnancy to term constitutes a massive

¹⁵⁴ See generally GOLDSTEIN, *supra* note 138, at 59-62 (arguing that a woman must be provided a reasonable period of time to discover her pregnancy and to determine "whether to enter into a symbiotic relationship with the fetus and newborn and, more generally, into a relationship of parenthood").

¹⁵⁵ Although the Supreme Court has not explicitly recognized a formal right to bodily integrity, *In re A.C.*, 573 A.2d 1235, 1245-46 (D.C. 1990) (en banc), a long line of cases demonstrates that a person's bodily autonomy is constitutionally protected against state-mandated invasion or intrusion. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2851 (1990) ("[A] constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); *Winston v. Lee*, 470 U.S. 753, 766 (1985); *Rochin v. California*, 342 U.S. 165, 174 (1952); *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The right, of course, is not absolute. See *Cruzan*, 110 S. Ct. at 2851-52; *Schmerber v. California*, 384 U.S. 757, 772 (1966). The right to bodily integrity is only a part of the foundation on which the right to have an abortion is grounded. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 789 n.202 (1989).

invasion of a woman's bodily integrity. Other writers have made the point abundantly clear.¹⁵⁶ The fact that many women welcome the experience of pregnancy, childbirth and motherhood is simply irrelevant to this discussion. It is in the nature of personal rights of this kind that the same event can be alternatively viewed as ecstasy and fulfillment or degradation and destruction, depending on whether it is freely chosen. This holds equally true for sexual relationships, pregnancy and childbirth, or less physical, but also highly personal activities, such as the practice of religion. In terms of the impact on the individual, in many ways the appropriate analogy to forcing someone to continue an unwanted pregnancy is rape or coerced religious conversion.¹⁵⁷

The critical point for the purposes of this article, however, is that the woman's interest in the continuing availability of abortion as a means to protect her bodily integrity declines during the gestation period. In one sense, this is a counterintuitive conclusion. Obviously, the last trimester of the pregnancy is in many ways the most physically problematic for a woman. We are not suggesting, however, that a woman has no important interest in her bodily integrity during the last months of her pregnancy. What we suggest is that the right to have an abortion at that time does not protect the right to bodily integrity to the same extent as an early abortion, especially when the delivery of the baby would create no special health risks for the mother.

This is so for two reasons. First, the pregnancy is almost over. The last months of pregnancy simply cannot constitute the same physical burden as nine months of pregnancy which *include*, of course, the last months as well. We do not intend to understate the physical difficulties of the third trimester, but we do not think that we do so by recognizing the substantial physical burdens a woman undergoes during the earlier part of her pregnancy, which cannot be avoided, of course, by a late term abortion.¹⁵⁸

¹⁵⁶ See Regan, *supra* note 125, at 1617 ("[A]nyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion.").

¹⁵⁷ See Law, *supra* note 91, at 1021 ("However gratifying pregnancy may be to a woman who desires it, for the unwilling it is literally an invasion—the closest analogy is the difference between lovemaking and rape." (quoting Ellen Willis, *Abortion: Is a Woman a Person?*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 473 (Ann Snitow et al. eds., 1983))).

¹⁵⁸ See generally ARTHUR D. COLMAN & LIBBY LEE COLMAN, *PREGNANCY: THE PSYCHOLOGICAL EXPERIENCE* 34 (1973) (describing "weakness, nausea, morning sickness, and even severe vomiting . . . that may lead a woman to restrict her usual activities [during the first trimester of pregnancy]").

Second, a late term abortion is a greater physical burden and medical risk than an early abortion.¹⁵⁹ In terms of its physical effect, it may be comparable to childbirth.¹⁶⁰ Because a late term abortion is a serious surgical procedure,¹⁶¹ as the pregnancy progresses the woman loses the opportunity to avoid the medical risk and physical discomfort she may escape through an early abortion. Thus, as the pregnancy progresses the value of an abortion in relieving the woman of physical burdens and risks may be reduced substantially.

2. The Right to Psychological Independence and Integrity

The impact of pregnancy on a woman's psychological condition and sense of self is as powerful as its effect on her physical being. Robin West describes how "the radical feminist argument for reproductive freedom"¹⁶² is grounded on this perception. In blunt terms, unwanted "pregnancy is a dangerous, psychically consuming,

¹⁵⁹ See Mary Anne Wood & Lisa Bolin Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 MO. L. REV. 394, 400 (1980) ("Few risks in obstetrics are more certain than that which occurs to a . . . [woman] undergoing abortion after the 14th week of pregnancy." (quoting Johann Duenhoelter & Norman F. Gant, *Complications Following Prostaglandin F2a-Induced Midtrimester Abortion*, 46 OBSTETRICS & GYNECOLOGY 247, 250 (1975))).

¹⁶⁰ As one author notes:

Regardless of the agent used in amniocentesis, it should be recognized that there is a similarity between the basic process of second trimester abortion and term delivery. Both events depend on the active participation of the uterine musculature in the process of self-evacuation. In cases of malfunction, the greater the uterine size, the more severe are the ensuing complications. This is especially evident in the case of hemorrhage and infection, the two leading obstetrical complications at almost any stage of gestation. Therefore, expectant "labor floor" management should be employed, including the continuous presence of obstetrically trained nursing and physician house staff . . . 'on call' on a 24-hour basis.

Thomas D. Kerenyi, *Intraamniotic Techniques*, in ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS 359, 372-73 (Jane E. Hodgson ed., 1981); see also Wood & Hawkins, *supra* note 159, at 396-401 (describing saline and prostaglandin instillation methods of late abortions as involving the induction of labor and hysterotomy abortions which are similar to caesarean sections).

¹⁶¹ Medical authorities regularly report that the health consequences for the mother in having an abortion become more dangerous and severe the later the abortion occurs in the pregnancy. See, e.g., SECRETARY OF STATE FOR SOCIAL SERVICES ET AL., Report of the Committee on the Working of the Abortion Act 237-41 (Gr. Brit. 1974) [hereinafter ABORTION ACT REPORT] (explaining that the duration of the pregnancy significantly affects the incidence of morbidity and medical complications resulting from abortion in part because the methods of termination used early in the gestation period are unavailable for later abortions); RODMAN ET AL., *supra* note 87, at 65-68 (noting that risk of death or nonfatal complication from abortion increases substantially and progressively after twelve weeks of pregnancy).

¹⁶² Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 30 (1988).

existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming, intrusive, invasive assault on the mother's self-identity."¹⁶³ Women may experience this condition as threatening their ability to control their lives, or as surrendering their lives to another being. In a fundamental way, pregnancy "blurs the physical boundary between self and other, and that blurring of boundaries between self and other constitutes a profound invasion of the self's physical integrity."¹⁶⁴

This blurring of one's individuality, arising from the unique interrelationship and attachment that exists between the pregnant woman and the conceptus, is not a static condition. It changes and increases in intensity throughout the gestation period.¹⁶⁵ Similarly, the bonding between mother and conceptus matures through the pregnancy and birth.¹⁶⁶ Thus, the fact that the great majority of women who elect to have an abortion choose to do so in the first trimester confirms "the sense that most women have, in term pregnancies, of developmental differences that correspond to differences, changes, in their relationship/obligation/bond to the fetus."¹⁶⁷

¹⁶³ *Id.* at 30.

¹⁶⁴ *Id.* at 32. West explains that while radical feminists of the sixties described pregnancy in terms of the language quoted in the text, radical feminists of the eighties would describe heterosexual intercourse in similar terms. *See id.*

¹⁶⁵ Rosalind Petchesky explains:

The pregnant woman, *whether she wants the fetus or not*, is caught up irrevocably in a condition of intimacy with and perhaps longing for it as well. The experience of going through a full-term pregnancy, bearing a child, and giving it up for adoption is punitive and traumatic for a woman because the relationship by then is real; it exists. No woman who has ever borne a child needs to be told that its "personality" and certainly its relationship to her begin to emerge well before its birth.

ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM* 346 (1984).

¹⁶⁶ In Robert Goldstein's words:

The physical evolution of pregnancy points the way toward further intimacy with the infant to be . . . [T]he woman may identify the fetus with herself and her own inner world of thoughts and feelings The woman's experience of pregnancy and anticipation of motherhood in the last trimester, as well as hormonal changes, have typically led to a deep self-absorption that she can make available to her newborn. Through this powerful identification with the fetus within and then with the infant who "at first seems like a part of herself," women in health achieve a very powerful sense "for what the infant needs."

GOLDSTEIN, *supra* note 138, 66-67.

¹⁶⁷ PETCHESKY, *supra* note 165, at 347; *see also* GROBSTEIN, *supra* note 117, at 141 (describing change in attitude that occurs "when a prospective mother who has been ambivalent or negative about her pregnancy undergoes emotional bonding on experiencing the reality of her developing offspring through the technology of ultrasound imaging").

As a result of this deepening sense of attachment, connection and identification, it is not surprising to hear the experience of putting a child up for adoption described as "psychological amputation" or a "loss of self or mutilation."¹⁶⁸ Thus, many women who do not want to be pregnant or to have a child are ultimately confronted with a wrenching fragmentation of their psychological integrity if they carry the conceptus to term. The impact on the mother of putting a baby up for adoption may be long-term and severe.¹⁶⁹

Nothing we say here is intended to undermine the moral significance of giving birth to a baby and putting the baby up for adoption, rather than having an abortion. The moral merit of that decision, however, reflects in part the self-sacrifice of the woman who makes it. More importantly, despite the rectitude of adoption, few women would intentionally elect to become pregnant in order to provide a baby for someone else to raise. Clearly, one of the reasons a woman who does not want to raise a child seeks to avoid pregnancy is her interest in avoiding the emotional experience of bearing a baby only to give it up to adopting parents.¹⁷⁰

Providing women the right to have an abortion permits them to escape this consequence, but its helpfulness in that regard declines as the pregnancy progresses. As the bond between mother and conceptus deepens, the psychological impact of permanent separation becomes an inevitable and unavoidable cost, however it is brought about. For abortion to protect the woman's sense of self and emotional well-being, the abortion must occur before the connection between mother and conceptus intensifies to the point of fusion and bonding.¹⁷¹ As the pregnancy continues into the third

¹⁶⁸ See ARTHUR SOROSKY ET AL., *THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTED, BIRTH PARENTS, AND ADOPTIVE PARENTS* 56 (1978); Leverett Millen & Samuel Roll, *Solomon's Mothers: A Special Case of Pathological Bereavement*, 55 AM. J. ORTHOPSYCHIATRY 411, 413 (1985). Both sources are cited in GOLDSTEIN, *supra* note 138 at 194-95.

¹⁶⁹ See, e.g., PAUL SACHDEV, *UNLOCKING THE ADOPTION FILES* 9-10 (1989) (describing studies that find that the birth mother "never really forgets the child she relinquished" and continues to experience feelings of pain, loss and grief as long as forty years after the adoption); SOROSKY ET AL., *supra* note 168, at 58 (many birth parents continue "to have feelings of loss, pain, and mourning" long after adoption occurs).

¹⁷⁰ For the pregnant woman who must bear an unwanted child if the right to have an abortion is denied, the alternative of adoption may also involve "the misappropriation of her genetic procreative power, her body and its strength during pregnancy, her associational capacity, and her attachments and identity as a mother." GOLDSTEIN, *supra* note 138, at 65-66.

¹⁷¹ Abortions later in the pregnancy produce significantly greater emotional distress for the pregnant woman. See, e.g., *ABORTION ACT REPORT*, *supra* note 161, at 53 ("Emotional

trimester, the importance of abortion as a means of protecting the psychological integrity of the woman becomes particularly doubtful. If there are no special health risks to be considered, the alleged psychological benefit to a woman of destroying a conceptus in order not to experience birth and adoption would seem to be of very uncertain weight.¹⁷²

C. *The Intersection of Moral Interests and Fundamental Rights*

One could imagine a graph where the y-axis measures the importance of the interests at stake and the x-axis measures the nine months of pregnancy. The line representing the privacy and autonomy interests of the woman curves downward during the gestation period. The line representing the moral status of the conceptus curves upward during the same period.¹⁷³ The point at which these lines cross establishes the foundation for the state regulation of abortion in opposition to the discretionary choice of the woman. At that intersection, the woman's interest in having an abortion, grounded on her sexual autonomy and bodily and psychological integrity, is no longer of sufficient force and value to

distress is more likely in late abortions, after fetal movements have been felt and maternal feelings have been aroused."); Nancy E. Adler & Peggy Dolcini, *Psychological Issues in Abortion for Adolescents*, in *ADOLESCENT ABORTION* 74, 86 (Gary B. Melton ed., 1986) (finding that patients who have abortions in second trimester feel a greater sense of loss than do women having abortions earlier in pregnancy); Irene Figà-Talamanca, *Abortion and Mental Health*, in *ABORTION AND STERILIZATION: MEDICAL AND SOCIAL ASPECTS*, *supra* note 160, at 181; Howard J. Osofsky et al., *Psychological Effects of Abortion: With Emphasis upon Immediate Reactions and Followup*, in *THE ABORTION EXPERIENCE*, 188, 201-02 (Howard J. Osofsky & Joy D. Osofsky eds., 1973) (reporting greater post-abortion feelings of guilt and depression in women having second trimester as opposed to first trimester abortions); Nancy B. Kaltreider, *Emotional Patterns Related to Delay in Decision to Seek Legal Abortion—A Pilot Study*, 118(5) *CAL. MED.* 23-27 (1973) (women having second trimester abortions talk more often about their "babies" while women having first trimester abortions discuss their "pregnancy" or "condition"). This reality is also reflected in the philosophical literature. See, e.g., GLOVER, *supra* note 18, at 142.

¹⁷² One physician who performs late second trimester and early third trimester abortions explained that the women seeking to terminate advanced pregnancies "face choices that are agonizing, no matter how their pregnancy ends up." He concluded, "I deal with tragedy, that's all I do." Gina Kolata, *Late Abortions: Tough to Decide, Tough to Get*, *DAVIS ENTERPRISE*, Jan. 5, 1992, at A1, A3. One woman who elected to have a late term abortion after learning of the severe medical problems of the fetus she was carrying described her feelings: "A very big part of me just wanted to have the baby and hold him until he died." *Id.*

¹⁷³ See GLOVER, *supra* note 18, at 126 ("[T]he transition from fertilized egg to adult, like many biological developments, can better be represented by a fairly steady upward curve than by a series of obviously discrete stages with abrupt transitions."). Tooley rejects this incremental, change by degrees model as "unsound," or at least not supported by the evidence. TOOLEY, *supra* note 114, at 409. His conclusion is based in part on his rejection of any moral obligation regarding potential or possible persons. *Id.* at 165-284.

completely outweigh the state's moral concerns in protecting potential life.

Describing the general parameters of this model for the purpose of evaluating the constitutionality of abortion regulations leaves many issues open for debate. These include, for example, the time that a woman requires to make a deliberate, reflective and informed choice as to whether or not she wants to have a baby; a comparison of the medical procedures available for late term abortions with the procedures involved in childbirth to determine the extent to which a woman's bodily integrity continues to be substantially furthered by the decision to have an abortion; an examination of the psychological consequences of late term abortions; and a more vigorous inquiry into the condition and experience of prenatal life.

The resulting constitutional framework based on this model will parallel *Roe v. Wade* in one fundamental respect. Early abortions will be constitutionally protected, and late abortions, except in special circumstances, will not. The duration of these periods and exactly how the balance of rights and interests is to be resolved for mid-term abortions will depend on the careful determination and balancing of the factors described.¹⁷⁴ If the conceptus does not achieve moral standing before the woman's right to an abortion substantially decreases in value, the resulting analysis will be relatively straightforward. That is the likely result with regard to first trimester abortions.¹⁷⁵ If the conceptus achieves moral standing during that part of the pregnancy in which the right to an abortion is of vital significance to the woman, a direct confrontation between morally recognized life and constitutionally protected rights must be resolved for that period.¹⁷⁶ Alternatively, it is also possible that a court would determine that these variables can only be discussed in terms of gradually increasing and decreasing values during the middle of the gestation period. This reasoning would suggest that the range of ascending and declining values will cross at an inde-

¹⁷⁴ See, e.g., GOLDSTEIN, *supra* note 138, at 60-62, for a cogent, but brief, discussion of why women often need more time than the first trimester in order to make an informed, deliberate and reflective choice about whether or not to terminate a pregnancy.

¹⁷⁵ During the first trimester, there is little basis for arguing that the conceptus experiences a life worth living, and the woman's autonomy and integrity interests remain very high.

¹⁷⁶ The likelihood of this conflict arising would depend on how early during the gestation period a life worth living is determined to occur, and how much time women would ordinarily require to make a deliberate, informed and reflective choice as to whether or not to carry the pregnancy to term.

terminate point, a conclusion on which a variety of regulatory responses might be based. Finally, there will be various atypical situations in which general rules will not apply, cases in which changed circumstances or delayed information create or strengthen a woman's interests in an abortion later in the gestation period.¹⁷⁷ All these questions remain to be decided, but the grounds for deciding them are available and amenable to reasoned debate.

In many ways, this process may seem coldly clinical on the one hand and incapable of accurate generalization on the other. Both criticisms are justified, but they are also unavoidable. The conflict over abortion rights can only be resolved with passion and easy generalization if one or the other extreme position is adopted. Those positions, however, are neither persuasive nor justifiable. They may be enforced through the exercise of power, but for many of us, this would be done without conviction. Alternatively, a compromise position may evolve, not out of any meeting of the minds on the merits of the issue, but rather as a political accommodation, achieving as much for each side as their respective resources of political power can provide. That process, however, may produce a result that is substantively indefensible. Its validity would depend on our commitment to the political process that produced it. The Constitution would be largely irrelevant to this approach.

The thesis of this article is that there is a middle ground in the abortion debate that has an intellectually commanding position to assert as a matter of constitutional adjudication. Its passion is the commitment to do justice to conflicting values that are both worthy of some respect. That objective can never be determined or defended with the clarity of arguments that consider only one side in a debate. The approach we propose does, however, shift the debate away from competing world views and unanswerable imponderables to questions that are capable of principled judicial and political resolution.

¹⁷⁷ This would typically be the case, for example, when the physical status of the woman or the fetus changes in an unexpected way late in the gestation period, or when information about the physical condition of the woman or the fetus is discovered late in the gestation period. See Kolata, *supra* note 172, at A3.