LIFE'S DOMINION

AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM

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THE MORALITY OF ABORTION

Sometimes people who disagree passionately with one another have no clear grasp of what they are disagreeing about, even when the dispute is violent and profound. Most people assume that the great, divisive abortion argument is at bottom an argument about a moral and metaphysical issue: whether even a just-fertilized embryo is already a human creature with rights and interests of its own, a person in the sense I defined in chapter 1, an unborn child, helpless against the abortionist's slaughtering knife. The political rhetoric is explicit that this is the issue in controversy. The "human life" amendment that anti-abortion groups have tried to make part of the United States Constitution declares, "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or conditions of dependency." The "pro-choice" world defends abortion by claiming that an embryo is no more a child than an acorn is an oak. Theological, moral, philosophical, and even sociological discussions of abortion almost all presume that people disagree about abortion because they disagree about whether a fetus is a person with a right to life from the moment of its conception, or becomes a person at some point in pregnancy, or does not become one until birth. And about whether, if a fetus is a person, its right to life must yield in the face of some stronger right held by pregnant women.

I have suggested some preliminary reasons for thinking that this

account of the abortion debate, in spite of its great popularity, is fatally misleading. We cannot understand most people's actual moral and political convictions about when abortion is permissible, and what government should do about abortion, in this way. The detailed structure of most conservative opinion about abortion is actually inconsistent with the assumption that a fetus has rights from the moment of conception, and the detailed structure of most liberal opinion cannot be explained only on the supposition that it does not.

Of course, people's opinions about abortion do not come in only two varieties, conservative and liberal. There are degrees of opinion, ranging from extreme to moderate, on both sides, and there are also differences of opinion that cannot be located on a conservative-liberal spectrum at all—neither view about whether a later abortion is worse than an earlier one seems distinctly more liberal or more conservative, for example. Nevertheless, in this part of my argument, I shall suppose that people are spread along a conservative-liberal spectrum because this will make it easier to describe my main points.

We have seen that a great many people who are morally very conservative about abortion—who believe that it is never, or almost never, morally permissible, and who would be appalled if any relative or close friend chose to have one—nevertheless think that the law should leave women free to make decisions about abortion for themselves, that it is wrong for the majority or for the government to impose its view upon them. Even many Catholics take that view: Governor Mario Cuomo of New York among them, as he made explicit in a well-known 1984 speech at Notre Dame University in Indiana.[1]

Some conservatives who take that position base it, as Cuomo did, on the principle that church and state should be separate: they believe that freedom of decision about abortion is part of the freedom people have to make their own religious decisions. Others base their tolerance on a more general notion of privacy and freedom: they believe that the government should not dictate to individuals on any matter of personal morality. But people who really consider a fetus a person with a right to live could not maintain either version. Protecting people from murderous assault—particularly people too weak to protect themselves—is one of government's most central and inescapable duties.

Of course, a great many people who are very conservative about abortion do not take this tolerant view: they believe that governments

should ban abortion, and some of them have devoted their lives to achieving that end. But even those conservatives who believe that the law should prohibit abortion recognize some exceptions. It is a very common view, for example, that abortion should be permitted when necessary to save the mother's life.[2] Yet this exception is also inconsistent with any belief that a fetus is a person with a right to live. Some people say that in this case a mother is justified in aborting a fetus as a matter of self-defense; but any safe abortion is carried out by someone else—a doctor—and very few people believe that it is morally justifiable for a third party, even a doctor, to kill one innocent person to save another.

Abortion conservatives often allow further exceptions. Some of them believe that abortion is morally permissible not only to save the mother's life but also when pregnancy is the result of rape or incest.[3] The more such exceptions are allowed, the clearer it becomes that conservative opposition to abortion does not presume that a fetus is a person with a right to live. It would be contradictory to insist that a fetus has a right to live that is strong enough to justify prohibiting abortion even when childbirth would ruin a mother's or a family's life but that ceases to exist when the pregnancy is the result of a sexual crime of which the fetus is, of course, wholly innocent.

On the other side, a parallel story emerges. Liberal views about abortion do not follow simply from denying that a fetus is a person with a right to live; they presuppose some other important value at stake. I exempt here the views of people who think that abortion is never even morally problematic—Peggy Noonan, a White House speech writer in Ronald Reagan's administration, said that when she was in college she "viewed abortion as no more than a surgical procedure"[4]—and that women who have scruples about abortion, or regret or remorse, are silly. Most people who regard themselves as liberal about abortion hold a more moderate, more complex view. I will construct an example of such a view, though I do not mean to suggest that all moderate liberals accept all parts of it.

A paradigm liberal position on abortion has four parts. First, it rejects the extreme opinion that abortion is morally unproblematic, and insists, on the contrary, that abortion is always a grave moral decision, at least from the moment at which the genetic individuality of the fetus is fixed and it has successfully implanted in the womb, normally after about

fourteen days. From that point on, abortion means the extinction of a human life that has already begun, and for that reason alone involves a serious moral cost. Abortion is never permissible for a trivial or frivolous reason; it is never justifiable except to prevent serious damage of some kind. It would be wrong for a woman to abort her pregnancy because she would otherwise have to forfeit a long-awaited European trip, or because she would find it more comfortable to be pregnant at a different time of year, or because she has discovered that her child would be a girl and she wanted a boy.

Second, abortion is nevertheless morally justified for a variety of serious reasons. It is justified not only to save the life of the mother and in cases of rape or incest but also in cases in which a severe fetal abnormality has been diagnosed—the abnormalities of thalidomide babies, for example, or of Tay-Sachs disease—that makes it likely that the child, if carried to full term, will have only a brief, painful, and frustrating life.[5] Indeed, in some cases, when the abnormality is very severe and the potential life inevitably a cruelly crippled and short one, the paradigm liberal view holds that abortion is not only morally permitted but may be morally required, that it would be wrong knowingly to bring such a child into the world.

Third, a woman's concern for her own interests is considered an adequate justification for abortion if the consequences of childbirth would be permanent and grave for her or her family's life. Depending on the circumstances, it may be permissible for her to abort her pregnancy if she would otherwise have to leave school or give up a chance for a career or a satisfying and independent life. For many women, these are the most difficult cases, and people who take the paradigm liberal view would assume that the expectant mother would suffer some regret if she decided to abort. But they would not condemn the decision as selfish; on the contrary, they might well suppose that the contrary decision would be a serious moral mistake.

The fourth component in the liberal view is the political opinion that I said moral conservatives about abortion sometimes share: that at least until late in pregnancy, when a fetus is sufficiently developed to have interests of its own, the state has no business intervening even to prevent morally impermissible abortions, because the question of whether an abortion is justifiable is, ultimately, for the woman who carries the fetus to decide. Others—mate, family, friends, the public—may disapprove,

and they might be right, morally, to do so. The law might, in some circumstances, oblige her to discuss her decision with others. But the state in the end must let her decide for herself; it must not impose other people's moral convictions upon her.

I believe that these four components in the paradigm liberal view represent the moral convictions of many people—at least a very substantial minority in the United States and other Western countries. The liberal view they compose is obviously inconsistent with any assumption that an early-stage fetus is a person with rights and interests of its own. That assumption would, of course, justify the view that abortion is always morally problematic, but it would plainly be incompatible with the fourth component of the package, that the state has no right to protect a fetus's interests through the criminal law, and even more plainly with the third component: if a fetus does have a right to live, a mother's interests in having a fulfilling life could hardly be thought more important than that right. Even the second component, which insists that abortion may be morally permissible when a fetus is seriously deformed, is hard to justify if one assumes that a fetus has a right to remain alive. In cases when a child's physical deformities are so painful or otherwise crippling that we believe it would be in the best interests of the child to die, we might say that abortion, too, would have been in the child's best interests. But that is not so in every case in which the paradigm liberal view allows abortion; even children with quite terrible deformities may form attachments, give and receive love, struggle, and to some degree conquer their handicaps. If their lives are worth a great deal, then, how could it have been better for *them* to have been killed in the womb?

But though the presumption that a fetus has no rights or interests of its own is *necessary* to explain the paradigm liberal view, it is not sufficient because it cannot, alone, explain why abortion is ever morally wrong. Why should abortion raise any moral issue at all if there is no one whom it harms? Why is abortion then *not* like a tonsillectomy? Why should a woman feel any regret after an abortion? Why should she feel more regret than she does after sex with contraception? The truth is that liberal opinion, like the conservative view, presupposes that human life itself has intrinsic moral significance, so that it is in principle wrong to terminate a life even when no one's interests are at stake. Once we see

this clearly, then we can explain why liberal and conservative opinions differ in the ways they do.

My discussion so far has emphasized individual moral opinion. But people do not respond to great moral or legal issues only as individuals; on the contrary, many people insist that their views on such important issues reflect and flow from larger, more general commitments or loyalties or associations. They have views, they think, not just as individuals, but as Catholics or Baptists or Jews or protectors of family values or feminists or atheists or socialists or social critics or anarchists or subscribers to some other orthodox or radical view about justice or society. We must consider how far the hypothesis I am now defending—that the abortion debate is about intrinsic value, not about a fetus's rights or interests—helps us better to understand the claims, insights, doctrines, and arguments of these large institutions or movements. I shall raise that question with reference to two of the most prominent groups in the controversy: traditional religions and the women's movement.

RELIGION

Throughout the Western world, even where church and state are normally separated, the battle over abortion has often had the character of a conflict between religious sects. In the United States, opinions about abortion correlate dramatically with religious belief. According to the 1984 American National Election Study, 22 percent of Baptists and fundamentalists, 16 percent of Southern Baptists, and 15 percent of Catholics then believed that abortion should never be permitted. The same survey showed that Lutherans (9 percent of whom would permit no abortions) and Methodists (8 percent) were more liberal denominations, Episcopalians (5 percent) and Jews (4 percent) even more so. Regular churchgoers of all faiths in America are much more likely to hold conservative views about abortion than nonchurchgoers or people who attend church only sporadically. Since religion tends to correlate, at least roughly, with other social divisions in America—with economic class, for example—these divisions may express other influences. But

the controversy over abortion in the United States does seem to have a strong religious dimension.[6]

The anti-abortion movement is led by religious groups, uses religious language, invokes God constantly, and often calls for prayer. It embraces members of many religions, as the statistics I just described suggest, including not only fundamentalists but Orthodox Jews, Mormons, and Black Muslims. But Catholics have provided the organizational leadership. In 1980, John Dooling, a federal court judge in New York, declared that the Hyde amendment—which Congress had adopted in 1976 and which prohibited the use of federal medicaid funds to finance abortions—was unconstitutional because it denied people's right to free exercise of religion.[7] In the course of an extraordinarily thorough opinion, Dooling, himself a devout Catholic, said, "Roman Catholic clergy and laity are not alone in the pro-life movement, but the evidence requires the conclusion that it is they who have vitalized the movement, given it organization and direction, and used ecclesiastical channels of communication in its support."[8]

But it is important to note that leaders of many other religious faiths have also spoken out on the subject, including many who hold liberal rather than conservative views, and Dooling cited testimony from a number of them. Many of these statements, both those condemning abortion and those approving it in certain carefully limited circumstances, do not rely on the presumption that a fetus is a person. They all assert the different idea underlying most people's views about abortion: that any instance of human life has an intrinsic, sacred value that one must strive not to sacrifice. Not surprisingly, they all declare or suggest a particular source of that intrinsic, sacred value; they regard human life as the most exalted creation of God.

Dooling quoted, for example, the testimony of Dr. James E. Wood, Jr., executive director of the Baptist Joint Committee on Public Affairs, who reported that Baptists were divided about abortion and that there was no official Baptist position. But Dr. Wood also said that in 1973 the joint committee, reacting to the decision of Catholic bishops to work for a constitutional amendment reversing *Roe* v. *Wade*, objected to a campaign that "would coerce all citizens to accept a moral judgment affirmed by one member of the Body of Christ." Similarly, the 1976 Southern Baptist Convention rejected any "indiscriminate attitude toward abortion, as contrary to the biblical view" but refused to adopt a submitted resolu-

tion that declared, "Every decision for an abortion, for whatever reason, must necessarily involve the decision to terminate the life of an innocent human being." Dr. Wood said that in his own opinion, sound Baptist faith condemned abortion for frivolous reasons but recognized it as permissible when pregnancy was involuntary (including pregnancies of very young girls not of an age to consent and of women whose contraceptive devices had failed), cases of fetal deformity, and cases where significant family reasons argued against a pregnancy.[9]

The Reverend John Philip Wagoman, a Methodist minister who in 1980 was dean of the Wesley Theological Seminary in Washington, D.C., and had been president of the American Society of Christian Ethics, testified, in Judge Dooling's words, that "it was a common view among Protestant Christian theologians, and to some extent among other religious bodies, that human personhood—in the sense in which the person receives its maximum value in relation to the Christian faith—does not exist in the earlier stages of pregnancy . . . there is not a fully human person until that stage in development where someone has begun to have experience of reality." But, said Dooling, Dean Wagoman nevertheless insisted that "nearly no aspect of life is more sacred, closer to being human in relation to God, than bringing new life into the world to share in the gift of God's grace. . . . In bringing new life into the world human beings must be sure that the conditions into which the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled. . . . It matters whether a new life . . . might threaten to undermine the theologically understood fulfillment of already existing human beings." A pregnant woman "responding out of faith and love of God to the love which God has provided to human beings" might decide to have an abortion when the new life would be unlikely to receive the nurture necessary for human fulfillment, either because she is herself only a teenager, for example, or because she is close to menopause or because the existence of a new child would make life much harder for the existing family.[10]

According to the testimony of Rabbi David Feldman, "in Jewish law a fetus is not a person, and no person is in existence until the infant emerges from the womb into the world," so in Jewish law abortion is not murder. (If it were, Rabbi Feldman pointed out, it would not be permissible for a doctor to perform an abortion even to save the mother's life, because that would mean killing one innocent person to save another.)

But Judaism nevertheless holds that abortion is in principle wrong. In the stricter Jewish tradition, Rabbi Feldman said, abortion is objectionable for any reason except to protect the mother's life or sanity or personal well-being; a more liberal tradition, he said, allows more exceptions: protecting a woman from "mental anguish," for example. In both traditions, however, abortion is not merely permissible but mandatory in some cases. In those cases, abortion is required by a woman's sound sense of religious duty, because it is a choice, sanctioned by the Jewish faith, for life in this world as against life in any other. In 1975, the Biennial Convention of the United Synagogues of America declared that abortions, "though serious even in the early stages of pregnancy, are not to be equated with murder, hardly more than is the decision not to become pregnant." It added, "abortions involve very serious psychological, religious, and moral problems, but the welfare of the mother must always be our primary concern." [11]

Each of these declarations insists that any decision about abortion requires reflection about an important value: the intrinsic value of human life. Each interprets that value as resting on God's creative power and love, but each insists that a proper religious attitude must recognize and balance a different sort of threat to the sanctity of life: the threat to a woman's health and well-being that an unwanted pregnancy may pose. To show a proper respect for God's creation, in such cases, requires judgment and balance, not asserting the automatic priority of the biological life of a fetus over the developed life of its mother.

Some conservative theologians and religious leaders have also explicitly said that the crucial question about abortion is not whether a fetus is a person but how best to respect the intrinsic value of human life. The late Professor Paul Ramsey of Princeton, an influential Protestant theologian, was a fierce opponent of abortion. Writing before *Roe* v. *Wade* was decided, he insisted that even the use of intrauterine contraceptive devices, which prevent the implantation of a fertilized egg, was sinful, and he suggested that all young girls be given German measles deliberately to immunize them from that disease so that it would not be necessary to abort any fetuses damaged because a woman contracted the disease in pregnancy. But Ramsey made plain that his strong opinions were based not on the assumption of fetal personhood or rights but on respect for the divine dignity that is "alien" to man but "surrounds" him.

"From this point of view," he said, "it is *relatively* unimportant to say

exactly when among the products of human generation we are dealing with an organism that is human and when we are dealing with organic life that is not human. . . . A man's dignity is an overflow from God's dealings with him, and not primarily an anticipation of anything he will ever be by himself alone. . . . The Lord did not set his love upon you, nor choose you because you were already intrinsically more than a blob of tissue in the uterus."[12] Ramsey argued that it is respect for God's creative choice and love of mankind, not any rights of a "blob of tissue in the uterus," that makes abortion sinful.

The Roman Catholic church's condemnation of abortion does seem an important counterexample, however, to my claim that for most people the abortion controversy is not about whether a fetus is a person with a right to live but about the sanctity of life understood in a more impersonal way. The church's present official position about fetal life is set out in its *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation,* published in 1987 by the Vatican's Sacred Congregation for the Doctrine of the Faith with the consent of the pope. The *Instruction* declares that "every human being" has a "right to life and physical integrity from the moment of conception until death. . . ."[13] But most American Catholics do not seem to accept that view, and it has been the clear official view of the church itself for little more than a century, a fraction of Catholicism's long history. For substantial periods, if there was any reigning opinion within the church hierarchy it was to the contrary: that a fetus becomes a person not at conception but only at a later stage of pregnancy, later than the stage at which almost all abortions now take place. I do not mean that the church ever sanctioned early abortions. Quite the opposite: from its earliest beginnings, the church's condemnation of early as well as late abortion was clear and imperative; it was, as a prominent Catholic layman has put it, a nearly absolute value in the church's history.[14] But it relied not on the derivative claim that a fetus is a person with a right not to be killed, but on the different, detached view that abortion is wrong because it insults God's creative gift of life.

The detached reason for condemning abortion is historically firmer than the view set out in the Vatican's 1987 *Instruction* and also, according to many Catholic philosophers, better grounded in traditional Catholic theology. It also unites the church's opposition to abortion with its other

historical concerns about sexuality, including its opposition to contraception. For many centuries, Catholic theologians stressed these connections, but the claim that a fetus is a person from the moment of conception dissipates them. The church's official view that abortion is sinful in nearly all circumstances would not change dramatically if it were now to abandon the new fetus-is-a-person justification and return to the older one. That step would have the important advantage, as we shall see, of changing the nature of the confrontation between the church and its members in the United States and other countries who hold strikingly more liberal views about abortion.

Abortion was common in the Greco-Roman world; but early Christianity condemned it. In the fifth century, St. Augustine called even married women "in the fashion of harlots" who in order to avoid the consequences of sex "procure poisons of sterility, and if these do not work, they extinguish and destroy the fetus in some way in the womb, preferring that their offspring die before it lives, or if it was already alive in the womb, to kill it before it was born."[15] None of the early denunciations of abortion presupposed that a fetus has been ensouled—granted a soul by God—at the moment of conception. Augustine declared himself uncertain on that point, and so allowed that in early abortion an "offspring" may die "before it lives." St. Jerome said that "seeds are gradually formed in the uterus, and it is not reputed homicide until the scattered elements received their appearance and members."[16] Catholicism's great thirteenth-century philosopher-saint, Thomas Aquinas, held firmly that a fetus does not have an intellectual or rational soul at conception but acquires one only at some later time—forty days in the case of a male fetus, according to traditional Catholic doctrine, and later in the case of a female.

Aquinas and almost all later Catholic theologians rejected Plato's view that a human soul can exist in a wholly independent and disembodied way or can be combined with any sort of substance. Under the Platonic view, God might combine a human soul with a rock or a tree. Aquinas accepted instead the Aristotelian doctrine of hylomorphism, which holds that the human soul is not some independent free-floating substance that can be combined with anything, but is logically related to the human body in the same way as the shape or form of any object is logically related to the raw material out of which it is made. No statue can have a given form unless *it*—the whole stone, or wood, or wax, or

plaster—has that form. Even God could not bring it about that a huge unformed block of stone actually had the shape of Michelangelo's David. By the same token, nothing can embody a human soul, on this view, unless it already is a human body, which meant, for Aquinas and later Catholic doctrine, a body with the shape and organs of a human being. Aquinas therefore denied that a human soul is already instinct in the embryo that a woman and a man together create through sex. That initial embryo, he thought, is only the raw material of a human being, whose growth is directed by a series of souls, each appropriate to the stage it has reached, and each corrupted and replaced by the next, until it has finally achieved the necessary development for a distinctly human soul.

Aquinas's views about fetal development, which he took from Aristotle, were remarkably prescient in some respects. He understood that an embryo is not an extremely tiny but fully formed child who simply grows larger until birth, as some later scientists with primitive microscopes decided, but an organism that develops through an essentially vegetative stage, then a stage at which sensation begins, and, finally, a stage of intellect and reason. But he was wrong about the biology of reproduction in two important respects. He believed that the active power that causes a new human being to grow is what he called the "generative" soul of the father, acting at a distance through "froth" in the semen, and that the mother contributes only nourishment sustaining that growth. Of course, we now know that both parents contribute chromosomes to the embryo, which has a genetic structure different from that of either of them. Aquinas also apparently thought that the fetal brain and other organs necessary to provide the bodily form required for a sentient or intellectual soul are in place by the time of fetal "quickening" or movement. Modern embryologists believe that the neural substrate necessary to make any sentience possible has not formed until much later.[17]

Catholic philosophers are currently engaged in a strenuous debate about whether Aquinas would have modified his view about when a fetus is ensouled if he had been aware of what biological science has now discovered. One group argues that he would then have maintained that a fetus has a soul from conception: they say that because he believed that the organic development of a fetus must be directed by a soul, and because science has shown that this cannot be the soul of the father

acting alone in the way Aquinas supposed, he would have decided that embryological development is directed by the fetus's own soul, which must therefore be present from the start.[18] But this argument seems doubtful. Aquinas thought that the father's soul controlled fetal development at a distance, through some frothy power in the semen. If he had formed his view in the light of modern embryology, he might well have said that the generative souls of both parents direct fetal development together, acting at a distance through the chromosomes each contributes, an opinion that seems much closer to the spirit of his original view than the more radical claim of immediate ensoulment.

The rival group of Catholic philosophers, who argue that Aquinas would not have changed his view, say that his most fundamental reason for denying immediate ensoulment was his hylomorphism—his conviction that a full human soul, which is essentially intellectual, cannot be the form of a creature that has never had the material shape necessary for even the most rudimentary stage of thought or sentience. Joseph Donceel, S.J., puts the point this way: "If form and matter are strictly complementary, as hylomorphism holds, there can be an actual human soul only in a body endowed with the organs required for the spiritual activities of man. We know that the brain, and especially the cortex, are the main organs of those highest sense activities without which no spiritual activity is possible."[19] Donceel and others seem to me right in taking that position (which is the Aristotelian version of the view I defended that a fetus cannot have interests of its own before it has a mental life) to be fundamental to Aquinas's views about ensoulment. But this implies not simply that Aquinas would have continued to deny immediate ensoulment, even if he had had the benefit of modern discoveries, but that he might well have thought that a fetus is ensouled later than he said it was—perhaps not until twenty-six weeks, which is, according to the expert opinion I cited, a cautious choice for a point in fetal development before which sentience is not possible. The combination of traditional Thomist metaphysics and contemporary science might therefore produce a spiritual version of the main distinction drawn in *Roe* v. *Wade:* a fetus has no human soul, and abortion cannot be considered murder, until approximately the end of the second trimester of pregnancy. In any case, however, it is at least problematic whether the now official Catholic view, that a fetus has a full human soul at conception, is consistent with the Thomist tradition.

Nor was that view thought necessary, in the past, to justify the strongest condemnation of even very early abortion. For many centuries, Catholic doctrine, following Aquinas, held that abortion in the early weeks of pregnancy, before the fetus is "formed," is not murder because the soul is not yet present. An instruction manual described as the most influential book of seminary instruction in the nineteenth century still declared, "The fetus, although not ensouled, is directed to the forming of a man; therefore its ejection is anticipated homicide." But though early abortion was not considered murder during this long period, it was certainly considered a grave sin, as the expression "anticipated homicide" insists. Though Jerome did not think an early fetus had a soul, and Augustine was uncertain on the matter, neither of them distinguished between the sinfulness of early and later abortion. Augustine condemned contraception, early abortion—before the fetus "lives"—and later abortion in the same terms. In the Middle Ages, the term "homicide" was sometimes used to name any offense, including contraception, against the natural order of procreation and thus against the sanctity of life conceived as God's divine gift. Decrees of Pope Gregory IX provided that anyone who treated a man or woman "so that he cannot generate, or she conceive, or offspring be born, let it be held as homicide."[20] This expanded conception of homicide, to include not just the killing of an actual human being but any interference with God's creative force, united the church's various concerns with procreation. Masturbation, contraception, and abortion were together seen as offenses against the dignity and sanctity of human life itself. That idea was restated in 1968, in Pope Paul VI's influential encyclical letter about contraception, *Humanae Vitae.*

> Just as man does not have unlimited dominion over his body in general, so also, and with more particular reason, he has no such dominion over his specifically sexual facilities, for these are concerned by their very nature with the generation of life, of which God is the source. For Human life is sacred—all men must recognize that fact, Our Predecessor, Pope John XXIII, recalled, "since from its first beginnings it calls for the creative action of God." Therefore . . . the direct interruption of the generative processes already begun, and, above all, direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of control-

> ling the birth of children. Equally to be condemned . . . is direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is an action, which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation—whether as an end or as a means.[21]

For many centuries, this traditional church view—that abortion is wicked because it insults the sanctity of human life even when the fetus killed has not yet been ensouled—was believed capable of sustaining a firm and unwavering moral opposition to early abortion. Even in 1974, when the doctrine that a fetus has a right to life from conception had become fixed in official Catholic doctrine, a declaration by the Sacred Congregation for the Doctrine of the Faith declared that its opposition to abortion did not depend on "questions of the moment when the spiritual soul is infused"—on which, it said, authors are still in disagreement—because even if ensoulment is delayed there is nevertheless a human life preparing for a soul, which is enough to ground a "moral affirmation" that abortion is sinful. The declaration noted that the church's opposition to abortion was just as strong in the long period when this doctrine was denied.[22] Canon and secular law waxed and waned in severity about abortion, but even the severest condemnation of early abortion was thought consistent with denying immediate ensoulment: for a brief period in the sixteenth century, for example, even excommunication was thought a permissible punishment, as it is now, for an early abortion. It is true that the church's present position about abortion is particularly severe by historical standards, not just in the punishment it provides for early abortions but, even more significantly, in the exceptions it refuses to recognize for late ones. In 1930, for example, a papal encyclical made the church's refusal to permit a late-stage abortion to save the life of a mother more rigid; that change had nothing to do with any shift in theological doctrine about ensoulment or the status of an unformed fetus.

It is widely thought that a papal decree in 1869, in which Pius IX declared that even an early abortion is punishable by excommunication, marked the first official rejection of the traditional view that a fetus is ensouled sometime after conception and official adoption of the contem-

porary immediate-ensoulment view. There is considerable debate among religious historians and philosophers about what prompted the change. Some Catholic philosophers suggest that modern biological discoveries were responsible, but as we saw, these discoveries were at least as likely to lead church leaders to believe that ensoulment takes place not earlier but later than Aquinas thought. Some historians suggest a theological rather than philosophical inspiration for the change in doctrine. In 1854, Pius IX pronounced the dogma of Immaculate Conception, that "the Virgin Mary was, in the first instant of her conception, preserved untouched by any taint of original sin," which seems to presuppose that the Virgin had a soul from that moment. But, as Michael Coughlan has argued, alternate constructions of the dogma are available that suppose that God made an exception in this case, for which there are ample historical precedents.[23]

Though it remains controversial whether any philosophical or doctrinal thesis adequately explains the church's official change of view, there is no doubt that the change gave it a considerable political advantage in its campaign against abortion. Since the eighteenth century, Western democracies had begun to resist explicitly theological arguments in politics. In the United States, the First Amendment to the Constitution provides that Congress has no power to establish any particular religion or to legislate in service of any religion's dogma or metaphysics. By the late nineteenth century, the idea that church and state should be separate was becoming orthodox wisdom in many nations of Europe as well. In a political culture that insists on secular justifications for its criminal law, the detached argument that early abortion is sin because any abortion insults and frustrates God's creative power cannot count as a reason for making abortion a crime. It is revealing that though anti-abortion statutes were enacted throughout the United States in the mid-nineteenth century, religious groups and arguments played almost no part in the campaign, which was conducted largely by doctors newly organized into professional associations. (Some of the campaigning doctors opposed abortion on moral grounds; others wanted to stop competition from nondoctors who performed abortion.)

The Roman Catholic church's change to the doctrine of immediate ensoulment greatly strengthened its political position. People who believe, for whatever reason, that a fetus is a person from the instant of its conception are free to argue that even early abortion is the murder of

an unborn child, an argument they cannot make if they believe a fetus acquires a soul or becomes a person only later. In other words, Catholic doctrine now allowed a derivative secular as well as a detached religious argument. Just as any religious body can properly argue, even in a pluralist community that separates church from state, that the rights of children or minorities or the poor should not be neglected, so it can argue that the rights of unborn children must not be sacrificed either. God need not be mentioned in the argument. The declaration by the Sacred Congregation I mentioned, published the year after *Roe* v. *Wade,* emphasized this point. "It is true that it is not the task of the law to choose between points of view or to impose one rather than another. But the life of the child takes precedence over all opinions. One cannot invoke freedom of thought to destroy this life. . . . It is at all times the task of the State to preserve each person's rights and to protect the weakest."[24]

The immediate-ensoulment doctrine had another practical political advantage. The older, traditional doctrine—that early abortion is a sin because it insults the inherent value of God's gift of life—was part of a larger general view of sexuality and creation that condemned abortion, masturbation, and contraception as different manifestations of the sin of disrespect of God and life, all aspects of "homicide" in the broadest sense. The church continues to condemn contraception in the strongest terms; in *Humanae Vitae,* Pope Paul VI denounced deliberate contraception as "intrinsically wrong."[25] But contraception is so firmly a fact of life in many Western countries and has seemed so desirable a part of the attempts made to curb population growth and improve economic life in the nations of the Third World that the church needs a sharp and effective way to distinguish abortion from contraception; in the United States, this became particularly important after the Supreme Court's 1965 decision in *Griswold* v. *Connecticut,* which, together with other decisions in its wake, altogether prohibited states to outlaw contraception. Of course, even according to the traditional view, abortion can be distinguished as much the graver insult to God's creative power, and many deeply religious people plausibly believe that contraception, which frustrates no investment in an actual human life, is no insult at all. But the doctrine of immediate ensoulment makes a more dramatic distinction, because it claims that a conceptus has a divine soul, though a sperm or an ovum does not.

The doctrine has had the conspicuous disadvantage, however, of making official Catholic dogma much more remote from the opinions and practices of most Catholics. In 1992, a Gallup poll reported that 52 percent of American Catholics thought that abortion should be legal in "many or all" circumstances, a further 33 percent in "rare" circumstances, and only 13 percent under no circumstances. It also reported that 15 percent of Catholics believe that abortion is morally acceptable in all circumstances, a further 26 percent in many circumstances, 41 percent in rare circumstances, and only 13 percent in none.[26] As I said, in America, Catholic women are actually no less likely to have an abortion than women generally.

Practicing Catholics could not accept the exceptions that most of them do if they really believed that a fetus is a person with a right to life from the moment of conception. Even in Ireland, a country long dominated by conservative Catholicism, where abortion is constitutionally forbidden, most Catholics apparently reject that view. As I mentioned earlier, when an Irish court forbade a fourteen-year-old rape victim to have an abortion in Britain, the order produced a furor. On appeal, the Irish Supreme Court held that the constitutional ban exempted abortions necessary to save a mother's life, and that because the young woman had threatened to kill herself if forced to bear the child, the exception applied in this case. As Catholic critics pointed out, that opinion would seem to permit abortion not just abroad but in Ireland as well on any occasion on which a pregnant woman threatened to kill herself if abortion was refused and a doctor believed her. But the Irish Supreme Court nevertheless felt compelled by public opinion to find some way of permitting the abortion. The series of events provoked the November 1992 referendum I mentioned, in which a majority refused a constitutional amendment declaring that abortion might be lawful when necessary to save the mother's life, but nevertheless approved constitutional changes allowing Irishwomen to have abortions abroad and information about foreign abortion services to be distributed within Ireland. Though the first of these votes was widely understood as a refusal to liberalize abortion, the law that resulted from the referendum plainly presupposes that a fetus is not a person from conception; if it were, a state would certainly be justified in ordering its citizens not to kill a fetus in a foreign country—indeed, it would be morally obliged to do so. (What if some impoverished country decided to permit infanticide in

order to encourage tourism? It would certainly be proper for other countries to forbid their citizens to take unwanted young children there.)

So the Irish people's latest vote is further confirmation that even people who believe, on religious grounds, that the state should prohibit almost all abortions do not actually think that a fetus is a person from the moment of conception. They believe something different but more firmly grounded in Catholic tradition: that abortion is a fierce and rarely justified waste of the divine gift of human life. People who oppose abortion for that reason might well find it acceptable that citizens be permitted to have an abortion abroad. Almost no one is such a moral relativist as to believe that infanticide is morally proper if done where the laws permit it, but many people do think that each nation should be permitted to decide for itself what may be done on its soil, out of respect for fundamental intrinsic values, when no one's rights are violated.

These statistics and events tend to support Gary Wills's strong claim that "most Catholics have concluded that their clerical leaders are unhinged on the subject of sex."[27] If the church were to return to its traditional view about the moral status of a fetus, early and late, it would no longer find itself in such sharp doctrinal confrontation with its own members. According to its present view, Catholics who accept the permissibility of abortion in cases of rape or serious fetal deformity are condoning the murder of innocent persons; official doctrine permits no other description. But in the more traditional view, the differences between hierarchy and laity could be regarded as differences in interpretation of a shared and fundamental commitment—to human life as the gift of God—that all Catholics share. For, of course, Catholics who reject the doctrine of immediate ensoulment and deny that an early abortion is murder may nevertheless agree that early abortion is a very grave act, sinful except in the most pressing circumstances. Joseph Donceel, S.J., does not believe that an early fetus is a person, but he nevertheless insists, "Although a prehuman embryo cannot demand from us the absolute respect which we owe to the human person, it deserves a very great consideration, because it is a living being, endowed with a human finality, on its way to hominization. Therefore it seems to me that only very serious reasons should allow us to terminate its existence."[28] Donceel might well recognize exceptions that more conservative Catholics would not, but the ground of judgment he pro-

poses—whether an exception is permitted by the best understanding of the respect owed to any example of developing human life—encourages conservative and liberal alike to understand their differences as less important than their shared respect for human life as intrinsically and overwhelmingly valuable.

Perhaps Catholic doctrine is already moving in this direction, if not explicitly or self-consciously. One of the most interesting religious developments today is the emergence, among Catholics and Protestants who are firmly opposed to any abortion, of the doctrine some of them call the Consistent Ethic of Life. This doctrine insists that people who oppose abortion must show a consistent respect for human life in their views about other social issues. Joseph Cardinal Bernardin, the archbishop of Chicago, has been a pioneer in developing and defending that thesis. In a series of important essays and speeches, he argues that Catholics who oppose abortion out of respect for human life must, if they are consistent, also oppose the death penalty (at least when its deterrent value is in doubt), work toward a fairer health-care policy for the poor, promote welfare policies that will improve the quality and length of human life, and oppose the legalization of active euthanasia even for terminally ill patients.[29]

Cardinal Bernardin has not, so far as I know, cast any explicit doubt on the official contemporary Catholic view that a fetus is a person from conception. In a recent speech, he urged his listeners to help "save the lives of millions of our unborn sisters and brothers."[30] But his argument—that it is *inconsistent* to support capital punishment or euthanasia while condemning abortion—presupposes that principled opposition to abortion is based on respect for the intrinsic value of life, rather than on any assumption that a fetus is a person with a right to life. For someone who based his condemnation of abortion on the latter ground—that a fetus does have such a right—would *not* be inconsistent in endorsing capital punishment if he also thought (as Bernardin does) that a murderer has forfeited his right to live.[31] Nor would he be inconsistent in supporting euthanasia if he agreed with Bernardin's view about why euthanasia is wrong.

Bernardin explicitly bases his own opposition to euthanasia on a detached, not a derivative, argument. "The grounding principle . . . is found in the Judeo-Christian heritage which has played such an influential role in the formation of our national ethos. In this religious

tradition, the meaning of human life is grounded in the fact that it is sacred because God is its origin and its destiny." That principle explains, he says, why it is wrong to judge euthanasia by looking only to the question whether it benefits or injures the patient as an individual, rather than to the deeper question of whether it harms a "social good" which can be in "tension" with "personal rights." It would be inconsistent to oppose abortion and support euthanasia only if opposition to abortion necessarily embraced a parallel detached view: that abortion, too, is wrong not just because a fetus has a right to live, if it does, but because abortion insults the "social good" of respect for life, which it would do even if a fetus had no such right. Of course, I do not mean that Cardinal Bernardin or others drawn to his views cannot also insist that a fetus is indeed a person with rights and interests. But their attractive call for consistency assumes that the case against abortion in no way depends on that view.

FEMINISM

I have been arguing that doctrinal religious opinion about abortion can be better understood as based on the detached assumption that human life has intrinsic value rather than on the derivative idea that a fetus is a person with its own interests and rights. I should like to make an opposite but parallel claim about a large and diverse movement rallying its forces mainly on the "pro-choice" side: I suggest that feminist arguments and studies are grounded not just in denying that a fetus is a person or claiming that abortion is permissible even if it is, but also in positive concerns that recognize the intrinsic value of human life.

Of course, it is a crude mistake to treat all women who regard themselves as feminists, or as part of the women's movement in the general sense, as parties to the same set of convictions. There are serious divisions of opinion within feminism about the best strategies for improving the political, economic, and social position of women—for example, about the ethics and wisdom of censoring literature some feminists find demeaning to women. Feminists also disagree about deeper questions: about the character and roots of sexual and gender discrimination, about whether women are genetically different from men in moral sensibility or perception, and about whether the goal of

feminism should be simply to erase formal and informal discrimination or to aim instead at a thoroughly genderless world in which roughly as many fathers are in primary charge of children as mothers and roughly as many women hold top military positions as men. Feminists even disagree about whether abortion should be permitted: there *are* "pro-life" feminists.[32] The feminist views I shall discuss are those that are central to this book, those that are concerned with the special connection between a pregnant woman and the fetus she carries.

In the United States, during the decades before *Roe* v. *Wade,* feminists were leaders in the campaigns to repeal anti-abortion laws in various states: they argued, with an urgency and power unmatched by any other group, for the rights that *Roe* finally recognized. They have since expressed deep disgust with Supreme Court decisions that have allowed states to restrict those rights in various ways,[33] and they have demonstrated in support of their position, risking, in some cases, violent injury at the hands of anti-abortion protesters. Nevertheless, some feminists are among the most savage critics of the arguments Justice Blackmun used in his opinion justifying the *Roe* decision; they insist that the Court reached the right result but for very much the wrong reason. Some of them suggest that the decision may in the end have worked to the detriment rather than the benefit of women.

Blackmun's opinion argued that women have a general constitutional right to privacy and that it follows from that general right that they have the right to an abortion before the end of the second trimester of their pregnancy. Some feminists object that the so-called right to privacy is a dangerous illusion and that a woman's freedom of choice about abortion in contemporary societies, dominated by men, should be defended not by an appeal to privacy but instead as an essential aspect of any genuine attempt to improve sexual equality. It is not surprising that feminists should want to defend abortion rights in as many ways as possible, and certainly not surprising that some should call attention to sexual inequality as part of the reason why women need such rights. But why should they be eager not only to claim an additional argument from equality but actually to reject the right-to-privacy argument on which the Court had relied? Why shouldn't they urge both arguments, and as many others as seem pertinent?

Many of the reasons feminist writers offer to explain their rejection of the right to privacy are indeed unconvincing, but it is important to

see *why* in order to identify the illuminating and revealing reasons they also offer. Professor Catharine MacKinnon of the Michigan law school, for example, a prominent feminist lawyer, argues that the right-to-privacy argument presupposes what she regards as a fallacious distinction between matters that are in principle private, like the sexual acts and decisions of couples, which government should not attempt to regulate or supervise, and those that are in principle public, like foreign economic policy, about which government must of course legislate.[34] That distinction, she believes, is mistaken and dangerous for women in several ways. It supposes that women really are free to make decisions for themselves within the private space they occupy, though in fact, she insists, women are often very unfree in the so-called private realm; men often force sexual compliance upon them in private, and this private sexual domination both reflects and helps sustain the political and economic subordination of women in the public community.

Appealing to a right to privacy is dangerous, MacKinnon suggests, in two ways. First, insisting that sex is a private matter implies that the government has no legitimate concern with what happens to women behind the bedroom door, where they may be raped or mauled. Second, the claim that abortion is a private matter seems to imply that government has no responsibility to help finance abortion for poor pregnant women as it helps finance childbirth for them. (Other feminists expand on this point: basing the right to an abortion on a right to privacy seems to suggest, they say, that government does all it needs to do for sexual equality by allowing women this free choice, and ignores the larger truth that any substantial advance toward equality will require considerable public expenditure on welfare and other programs directed to women.) MacKinnon argues that the Supreme Court's 1980 decision in *Harris* v. *McRae,* which reversed Judge John Dooling's decision that the Hyde amendment prohibiting the use of federal funds to finance abortion was unconstitutional, was a direct result of the Court's rhetoric about privacy in *Roe* v. *Wade.*

Is this persuasive? It is certainly true that many women are sexually intimidated and that a presumption of much criminal and civil law—that women who have sexual intercourse have either been raped or have freely and willingly consented—is much too crude, and the American law of sexual harassment has begun slowly to change (in part thanks to MacKinnon's work) to reflect that realization. But there is no evident

connection between these facts and MacKinnon's claims about the rhetoric of privacy. The right to privacy that the Court recognized in *Roe* v. *Wade* in no way assumes that all or even some women are genuinely free agents in sexual decisions. On the contrary, that women are often dominated by men makes it more rather than less important to insist that women should have a constitutionally protected right to control the use of their own bodies. MacKinnon, it is true, disparages the motives of men who favor women's right to abortion. Liberal abortion rules, she says, allow men to use women sexually with no fear of any consequences of paternity; allow them, she says, quoting a feminist colleague, to fill women up, vacuum them out, and fill them up again. But her suspicion of men who are her allies, even if it were well founded, would offer no ground for being more critical of the right-to-privacy argument than of any other argument for liberal abortion rules that men might support.

Nor is the second reason she gives against the right-to-privacy argument—that recognizing privacy in sex means that the law will not protect women from marital rape or help to finance abortions—any more persuasive, for she conflates different senses of "privacy." Sometimes privacy is territorial: people have a right to privacy in the territorial sense when they are entitled to do as they wish in a certain specified space—inside their own home, for example. Sometimes privacy is a matter of confidentiality: we say that people may keep their political convictions private, meaning that they need not disclose how they have voted. Sometimes, however, privacy means something different from either of these senses: it means sovereignty over personal decisions. The Supreme Court has cited, for example, as precedents for the right to privacy in contraception and abortion decisions, its earlier rulings that the Constitution protects the right of parents to send their children to a private school or a school in which a foreign language is taught.[35] That is a matter of sovereignty over a particular parental decision that the Court believed should be protected; it is not a matter of either territorial privacy or secrecy. (It is true that in *Griswold* v. *Connecticut,* the contraception case I described earlier, one justice said that the law must not forbid contraceptives because if it did, policemen would have to search bedrooms. But he alone urged that rationale, and the Court explicitly rejected it in a decision soon after when it held that the right to privacy meant that teen-agers were free to buy contraceptives in drugstores.[36])

The right to privacy that the Court endorsed in *Roe* v. *Wade* is plainly

privacy in the sense of sovereignty over particular, specified decisions, and it does not follow, from the government's protecting a woman's sovereignty over the use of her own body for procreation, that it is indifferent to how her partner treats her—or how she treats him—inside her home. On the contrary: a right not to be raped or sexually violated is another example of a right to control how one's body is used. Nor does it follow that the government has no responsibility to assure the economic conditions that make the exercise of the right possible and its possession valuable. On the contrary: recognizing that women have a constitutional right to determine how their own bodies are to be used is a prerequisite, not a barrier, to the further claim that the government must ensure that this right is not illusory.[37]

These explanations that MacKinnon and some other feminists give for their opposition to the language of privacy do not go to the heart of the matter. But other passages in their work suggest a far more compelling explanation: claiming that a right to *privacy* protects a woman's decision whether to abort assimilates pregnancy to other situations that are very unlike it; the effect of that assimilation is to obscure the special meaning of pregnancy for women and to denigrate, by overlooking, its unique character. The claim of privacy, according to these feminists, treats pregnancy as if a woman and her fetus were morally and genetically separate entities. It treats pregnancy, MacKinnon says, as if it were just another case in which two separate entities have either deliberately or accidentally become connected in some way and one party plainly has a "sovereign right" to sever the connection if it wishes. She offers these examples of other such cases: the relationship between an employee and her employer, or between a tenant on short lease and his landlord, or (in a reference to a well-known article about abortion by the philosopher Judith Jarvis Thomson that many feminists dislike) between a sick violinist and a woman who wakes to find that the violinist has been connected by tubes to her body, an attachment that must be maintained for nine months if the violinist is to remain alive. MacKinnon insists that pregnancy is not like those relationships; in a striking passage, she describes what pregnancy is like from the perspective of a woman.

> In my opinion and in the experience of many pregnant women, the fetus is a human form of life. It is alive. . . . More than a body part but less than a person, where it is, is largely what it is. From the

> standpoint of the pregnant woman, it is both me and not me. It "is" the pregnant woman in the sense that it is in her and of her and is hers more than anyone's. It "is not" her in the sense that she is not all that is there.[38]

MacKinnon also cites the poet Adrienne Rich's comment, "The child that I carry for nine months can be defined *neither* as me nor as not-me."[39]

By ignoring the unique character of the relationship between pregnant woman and fetus, by neglecting the mother's perspective and assimilating her situation to that of a landlord or a woman strapped to a violinist, the privacy claim obscures, in particular, the special *creative* role of a woman in pregnancy. Her fetus is not merely "in her" as an inanimate object might be, or something alive but alien that has been transplanted into her body. It is "of her and is hers more than anyone's" because it is, more than anyone else's, her creation and her responsibility; it is alive because *she* has made it come alive. She already has an intense physical and emotional investment in it unlike that which any other person, even its father, has; because of these physical and emotional connections it is as wrong to say that the fetus is separate from her as to say that it is not. All these aspects of a pregnant woman's experience—everything special, complex, ironic, and tragic about pregnancy and abortion—is neglected in the liberal explanation that women have a right to abortion because they are entitled to sovereignty over personal decisions, an explanation that would apply with equal force to a woman's right to choose her own clothing.

The most characteristic and fundamental feminist claim is that women's sexual subordination must be made a central feature of the abortion debate. MacKinnon put the point in a particularly striking way: if women were truly equal with men, she said, then the political status of a fetus would be different from what it is now. That seems paradoxical: how can the inequality of women, however unjustified, doom fetuses—half of whom are female—to a lower status, and a lesser right to live, than they would otherwise have? But this objection to MacKinnon's suggestion, like so much else in the public and philosophical debate about abortion, presupposes that the pivotal issue is whether a fetus is a person with interests and rights of its own. The objection would be

sound if that were the central issue—if the debate were about a fetus's status in *that* sense. But MacKinnon's point becomes not only sensible but powerful if we take her to be discussing a fetus's status in the detached sense I have distinguished. Then the crucial question is whether and when abortion is an unjustifiable waste of something of intrinsic importance, and MacKinnon's point is the arresting one that the intrinsic importance of a new human life may well depend on the meaning and freedom of the act that created it.

If women were free and equal to men in their sexual relationships, feminists say—if they had a more genuinely equal role in forming the moral, cultural, and economic environment in which children are conceived and raised—then the status of a fetus would be different because it would be more genuinely and unambiguously the woman's own intended and wanted creation rather than something imposed upon her. Abortion would then more plainly be, as of course many women now think it is, a kind of self-destruction, a woman destroying something into which she had mixed herself. Women cannot take that view of abortion now, some feminists argue, because too much sexual intercourse is rape to a degree, and pregnancy is too often the result not of creative achievement but of uncreative subordination, and because the costs of pregnancy and child-rearing are so unfairly distributed, falling so heavily and disproportionately on them.

This argument, at least put in the way I have put it here, may be overstated. It takes no notice of the creative function of the father, for example, and though it shows what is objectionable in relying wholly on the concept of privacy to defend a woman's right to an abortion, it does not prove that the Supreme Court was misguided in relying on that concept in deciding the constitutional issue in *Roe* v. *Wade.* After all, appealing to privacy does not deny the ways in which pregnancy is a unique relationship or the ambivalent and complex character of many pregnant women's attitudes toward the embryos they carry. In fact, the best argument for applying the constitutional right of privacy to abortion, as we shall see in chapter 6, emphasizes the special psychic as well as physical costs of unwanted pregnancies. I do not believe, finally, that even a great and general improvement in gender equality in the United States would either undercut the argument that women have a constitutional right to abortion or obviate the need for such a right.

In spite of these important reservations, the feminist argument has

added a very important dimension to the abortion debate. It is true that many women's attitudes toward abortion are affected by a contradictory sense of both identification with and oppression by their pregnancies, and that the sexual, economic, and social subordination of women contributes to that undermining sense of oppression. In a better society, which supported child rearing as enthusiastically as it discourages abortion, the status of a fetus probably would change, because women's sense of pregnancy and motherhood as creative would be more genuine and less compromised, and the inherent value of their own lives less threatened. The feminist arguments reveal another way, then, in which our understanding is cramped and our experience distorted by the one-dimensional idea that the abortion controversy turns only on whether a fetus is a person from the moment of conception. Feminists do not hold that a fetus is a person with moral rights of its own, but they do insist that it is a creature of moral consequence. They emphasize not the woman's right suggested by the rhetoric of privacy, but a woman's responsibility to make a complex decision she is best placed to make.

That is explicitly the message of another prominent feminist lawyer, Professor Robin West, who argues that if the Supreme Court one day overrules *Roe* v. *Wade,* and the battle over abortion shifts from courtrooms to legislatures, women will not succeed in defending abortion rights if they emphasize their right to privacy, which suggests selfish, willful decisions taken behind a veil of immunity from public censure. Instead, she says, women should emphasize responsibility, and she offers what she calls a responsibility-based argument to supplement the right-based claims of *Roe.*

> Women need the freedom to make reproductive decisions not merely to vindicate a right to be left alone, but often to strengthen their ties to others: to plan responsibly and have a family for which they can provide, to pursue professional or work commitments made to the outside world, or to continue supporting their families or communities. At other times the decision to abort is necessitated, not by a murderous urge to end life, but by the harsh reality of a financially irresponsible partner, a society indifferent to the care of children, and a workplace incapable of accommodating or supporting the needs of working parents. . . . Whatever the reason, the

> decision to abort is almost invariably made within a web of interlocking, competing, and often irreconcilable responsibilities and commitments.[40]

West is obviously assuming that the audience to which this argument is addressed has firmly rejected the view that a fetus is a person. If her claims were interpreted as proposing that a woman may murder another *person* in order to "strengthen her ties to others," or because her husband is financially irresponsible, or because society does not mandate maternity leave, these claims would be politically suicidal for the feminist cause. West assumes what I have been arguing throughout this chapter: that most people recognize, even when their rhetoric does not, that the real argument against abortion is that it is irresponsible to waste human life without a justification of appropriate importance.

West and other feminists often refer to the research of the sociologist Professor Carol Gilligan of Harvard University. In a much-cited study, Gilligan argued that, at least in American society, women characteristically think about moral issues in ways different from men.[41] Women who are faced with difficult moral decisions, she said, pay less attention to abstract moral principles than men do, but feel a greater responsibility to care for and nurture others, and to prevent hurt or pain. She relied on, among other research studies, interviews with twenty-nine women contemplating abortion who had been referred to her research program by counseling services. These women were not typical of all women considering abortion; although twenty-one of them did have abortions following the discussions (of the others, four had their babies, two miscarried, and two could not be reached to learn of their decision), they were all at least willing to discuss their decisions with a stranger and to delay their abortions to do so.

One feature of the responses is particularly striking. Though many of the twenty-nine women in the study were in considerable doubt about what was the right decision to make, and agonized over it, none of them, apparently, traced that doubt to any uncertainty or perplexity over the question of whether a fetus is a person with a right to live. At least one—a twenty-nine-year-old Catholic nurse—said she believed in the principle that a fetus is a person and that abortion is murder, but it is doubtful that she really did believe that, as she also said that she had come to think that abortion might sometimes be justified because it fell

into "a 'gray' area," just as she now thought, on the basis of her nursing experience, that euthanasia might sometimes be justified in spite of her church's teaching to the contrary. In any case, even she worried, like the others, not about the metaphysical status of the fetus but about a conflict of responsibilities she believed she owed to family, to others, and to herself.

The women in the study did not see this conflict as one between simple self-interest and their responsibilities to others but rather as a conflict between genuine responsibilities on both sides, of having to decide—as a twenty-five-year-old who had already had one abortion put it—how to act in a "decent, human kind of way, one that leaves maybe a slightly shaken but not totally destroyed person." Some of them said that the selfish choice would be to have their babies. One nineteen-year-old felt that "it is a choice of hurting myself [by an abortion] or hurting other people around me. What is more important?" Or, as a seventeen-year-old put it, "What I want to do is to have the baby, but what I feel I should do, which is what I need to do, is have an abortion right now, because sometimes what you want isn't right." When she wanted the child, she said, she wasn't thinking of the responsibilities that go with it, and that was selfish.

All of Gilligan's subjects talked and wondered about responsibility. They sometimes talked of responsibility to the child, but they meant the future hypothetical child, not the existing embryo—they meant that it would be wrong to have a child one could not care for properly. They also worried about other people who would be affected by their decision. One, in her late twenties, said that a right decision depends on awareness of "what it will do to your relationship with the father or how it will affect him emotionally." They talked of responsibility to themselves, but they had in mind not their pleasure, or doing what they wanted now, but their responsibilities to make something of their own lives. One adolescent said, "Abortion, if you do it for the right reasons, is helping you to start over and do different things." A musician in her late twenties said that her choice for abortion was selfish because it was for her "survival," but she meant surviving in her work, which, she said, was "where I derive the meaning of what I am."

Gilligan says, in summary, "Here the conventional feminine voice emerges with great clarity, defining the self and proclaiming its worth on the basis of the ability to care for and protect others." But her subjects

talked of another, more abstract, kind of responsibility as well: responsibility to what they called "the world." One said, "I don't need to pay off my imaginary debts to the world through this child, and I don't think that it is right to bring a child into the world and use it for that purpose." Another said that it would be selfish for her to decide to have an abortion because it denied "the survival of the child, another human being," but she did not mean that abortion was murder or that it violated any fetal rights. She put it in very different, more impersonal and abstract terms: "Once a certain life has begun it shouldn't be stopped artificially."

This is a brief but carefully accurate statement of what, beneath all the screaming rhetoric about rights and murder, most people think is the real moral defect in abortion. Abortion wastes the intrinsic value—the sanctity, the inviolability—of a human life and is therefore a grave moral wrong unless the intrinsic value of other human lives would be wasted in a decision *against* abortion. Each of Gilligan's subjects was exploring and reacting to that terrible conflict. Each was trying, above all, to take the measure of her responsibility for the intrinsic value of her *own* life, to locate the awful decision she had to make in that context, to see the decisions about whether to cut off a new life as part of a larger challenge to show respect for all life by living well and responsibly herself. Deciding about abortion is not a unique problem, disconnected from all other decisions, but rather a dramatic and intensely lit example of choices people must make throughout their lives, all of which express convictions about the value of life and the meaning of death.

OTHER NATIONS

In democracies, people's convictions about the nature of the abortion controversy are often reflected not just in their own opinions as individuals and in the positions of groups to which they belong but also in the details of the legal restrictions on abortion that their governments enact. In the United States, since 1973, such legislation has been restricted by the Supreme Court's *Roe* v. *Wade* decision. But there has been a good deal of legislation about abortion in Europe in recent decades, and like the Irish referendum I described it supports the view that most people's concerns about abortion are based on detached rather than derivative reasons.

Professor Mary Ann Glendon of the Harvard Law School wrote an influential book, published in 1987, comparing the American laws of abortion and divorce with those of other Western countries. She argued that the abortion law imposed by *Roe* v. *Wade* is very much out of step with the law of many Western European countries. Some of those nations permit early abortions subject to either few or no practical constraints. But they also, in different ways, recognize and seek to protect the intrinsic value of human life in any form, which Glendon said *Roe* v. *Wade* does not because it unduly emphasizes individual rights and individual liberty, and encourages "autonomy, separation, and isolation in the war of all against all" in contrast with European emphasis on "social solidarity."[42] She suggested that the Supreme Court should revise its holdings so as to permit American states each to reach its own resolution of the abortion dilemma, forbidding only laws that, in the words of an Italian decision she quoted, place "a total and absolute priority" on survival of the fetus. She hoped that a spirit of reasonable compromise would then produce, state by state, compromises along the lines of the European laws she discussed.

I disagree with much of Glendon's analysis. I believe the contrast she draws between "individual rights" and "social solidarity," though now very popular among conservative critics of the liberal tradition, is both simplistic and dangerous. The United States' historical commitment to individual human rights has not proved isolating or Hobbesian, as she and other critics have suggested, nor has it undermined a national sense of community. On the contrary. The United States is a nation of continental size, covering many very different and very large regions, and it is pluralist in almost every possible aspect: racial, ethnic, and cultural. In such a nation, individual rights, to the extent they are recognized and actually enforced, offer the only possibility of genuine community in which all individuals participate as equals. The United States can be a *national* community, moreover, only if the most fundamental rights are national, too, only if the most important principles of freedom recognized in some parts of the country are honored in all others as well. It is true that many of the claims that different groups in America now make about what they are entitled to have by right are inflated and sometimes preposterous. But the possibility of abuse no more refutes the need for genuine individual rights than fascism or communism, each of which has claimed authority in the name of "social solidarity," refutes Glendon's appeals for a greater sense of common goal and purpose.

The European nations that Glendon said have chosen solidarity over rights are increasingly recognizing the poverty and danger of that contrast, moreover. The most distinctive contemporary movement within Western European law is not any communitarian striving to place the virtues of "other important values" above the "values of tolerance," as she recommends.[43] Europe remembers only too well the results of that ordering in its recent past, and is horrified at its return in some parts of Eastern Europe now. No, the most important legal trend is toward constitutionally embedded individual rights adjudicated and enforced by courts—not just national courts, but also the international courts in Luxembourg and Strasbourg, which strive to unite Europe as a community of principle as well as commerce.[44]

Europe is different from America in many ways that make Glendon's hopes that American states will one day follow the European pattern of compromise about abortion seem unrealistic. The United States is much less homogeneous, racially and culturally, than France, Britain, Germany, Spain, Italy, or other European nations, and in some regions of the country, politics are more dominated by religious attitudes and groups than the national politics of many of those countries are.[45] In that respect, parts of America are more like Ireland than they are like Britain, France, Germany, or Italy. As I said, several American states and the territory of Guam, each hoping to persuade the Supreme Court to overrule *Roe* v. *Wade,* recently adopted very stern anti-abortion statutes—Gaum's did not allow exceptions even for rape—and several other states would be likely to produce such laws if that decision is ever overruled. Nor does it seem likely that either the national Congress or many state legislatures will soon provide the welfare and other support for poor young mothers that is an important part of the European dedication to human life.

Nevertheless, in spite of these important reservations about Glendon's overall argument, I find her comparisons of American law with that of other countries extremely informative and revealing. They confirm, internationally, the hypothesis I have been defending: that the argument over abortion is not well understood as an argument about whether a fetus is a person, but must be reconstructed as an argument of a very different character.

One European country—Ireland, as we have seen—has very strict anti-abortion laws. Five others—Albania, Northern Ireland, Portugal,

Spain, and Switzerland—nominally restrict abortion, even in early pregnancy, to circumstances in which the mother's general health is threatened and, in Spain and Portugal, to cases of rape, incest, or fetal deformity. The remaining Western European countries, including Belgium, Britain, France, Italy, Germany, and the Scandinavian countries, have laws that either explicitly or in practice allow abortion almost on demand in the first stages of pregnancy—during the first three months in most, though until 1991 up to twenty-eight weeks in Britain, which is *beyond* the point at which *Roe* allows American states to prohibit it. Glendon believes that these restrictions do not significantly reduce the level of abortion. The Netherlands, which has one of the most liberal abortion laws, also has one of the lowest rates of abortion, lower than nearly all countries with stricter laws.[46] But, she argues, the European laws nevertheless contrast with *Roe* because whatever their practical effect on the incidence of abortion, they affirm the central communal value of human life and educate people to respect that value.

Glendon points to the French law, which permits abortion in the first ten weeks only if the pregnant woman is "in distress." The law allows a woman to decide herself whether or not she is in distress, and does not require a medical certificate or any other party's approval, though it does require her to accept "counseling." The government pays at least 70 percent of the cost of the abortion, moreover—all of it if the grounds are wholly medical. The practical effect of the French law may therefore be almost the same as if it had explicitly allowed abortion on demand for ten weeks. Any moral condemnation of abortion implicit in the language of the law seems undercut by the nation's willingness to help pay the costs. But Glendon insists on a different point: the language of the law, by requiring that women declare themselves in "distress," instructs that abortion for whimsical reasons or only for convenience is morally wrong.

Professor Laurence Tribe of the Harvard Law School has said that the "French solution, within an Anglo-American legal system . . . seems to teach mostly hypocrisy."[47] The French law would indeed be duplicitous if the French legislature had claimed, as justification for it, that a fetus is a person with a right to live. It would be hypocritical to declare that a woman is free to take the life of another person if she thinks she is "in distress," and even worse to show no collective interest in the good faith or plausibility of her decision. But the statute is not duplicitous but,

rather, finely judged if it aims at a detached rather than a derivative goal: that people recognize the moral gravity of a decision about abortion and take personal moral responsibility for it. It lays down an official standard that a woman is expected to interpret and define for herself as an exercise of personal responsibility, and it provides for an occasion of counseling at which the moral gravity of the act can be explored without usurping her own right and duty to make the moral decision for herself.

Glendon rightly calls attention to an important decision of the Federal Republic of Germany's Constitutional Court. In 1974, the West German parliament adopted a liberal abortion statute providing that abortion was permissible for any reason until the twelfth week of pregnancy but illegal after that time except for serious reasons: fetal deformity or a threat to the health of the mother. In 1975, in a complicated and very controversial opinion, the Constitutional Court held that law unconstitutional on the ground that it did not sufficiently value human life.

The court relied, among other provisions, on Article 2(2) of the 1949 West German Basic Law, which declares, "Everyone shall have the right to life and to inviolability of his person." This suggests a derivative ground for the court's decision; it suggests that the court may have believed that even an early fetus has a right to life as powerful as the right of any other person. But the argument the court offered, and the decision it actually reached, are inconsistent with that proposition. The decision can only be understood as resting on the different, detached, ground that any German law of abortion must be drafted so as to acknowledge the intrinsic importance of human life.[48] For the court did not declare that any statute that permitted abortion except, perhaps, to save a mother's life, would be unconstitutional, as it should logically have done if it really meant to declare that every fetus has a guaranteed right to life. Instead, it held that the 1974 statute was invalid because it formally required no reason at all for abortion during the first twelve weeks, and so evidenced no sign of the moral gravity of deliberately ending a human life. The court held that the statute's complete disregard for what, at least after fourteen days of gestation, was plainly a form of human life was inconsistent with the meaning of the 1949 Basic Law, which rests, as the court put it, on "an affirmation of the fundamental value of human life," an affirmation intended wholly to repudiate the utter contempt the Nazis had shown for that value.

The court made plain that it was not ruling out abortions, even on

grounds that any conservative would reject as improper. It invited the parliament to adopt a new statute allowing abortion but showing more respect for the intrinsic value of life than the 1974 statute had. By way of illustration, and to ensure that abortion was available for good cause in the interval before a new law was completed, the court drafted and imposed its own "transitional" abortion scheme, which made plain, again, that it did not really affirm a fetal right to life. The transitional rules provided, for example, that abortion was permissible not only in cases of rape, or fetal deformity, or when the mother's health was threatened, but also "in order to avert the danger of a grave emergency" of some other kind to the pregnant woman.

Glendon suggests that the practical differences between these transitional rules the court itself drafted and the law that it had declared unconstitutional were speculative. The real difference, she says, is in the social meaning of the court's declaration that, in principle, abortion is not a matter for whim or caprice but is an issue of moral gravity. In 1976, the West German parliament enacted a new statute whose practical difference from the overruled 1974 law, in terms of what each law in practice prohibits, is even more marginal. The 1976 law provided that abortion is permissible within twelve weeks if continued pregnancy would place a woman in a situation of serious hardship, and up to the twenty-second week if fetal deformity would make it unreasonable to require a woman to continue the pregnancy. It also provided, like the French law, for mandatory counseling before even an early abortion, and for a three-week waiting period between counseling and abortion. As I noted in chapter 1, the unified German parliament adopted a new, even more liberal law in 1992, and the Constitutional Court was expected to rule on the constitutionality of that new law early in 1993.

In 1985, the Spanish Constitutional Court, obviously influenced by the German decision of 1975, considered the constitutionality of new Spanish laws that had repealed old and very strict constraints on abortion and introduced new rules allowing abortion in cases of rape, fetal deformity, and threat to the mother's physical or mental health. The court made the distinction I have been pressing, between the derivative claim that a fetus has rights as a "person" and the detached idea that human life has an intrinsic value that must be recognized and endorsed collectively. It denied that a fetus is a person for purposes of the Spanish constitution, or has the rights of a person, but it said that the Spanish constitution does

endorse human life as a value that the nation's laws must respect.[49] By a close vote, it held the new abortion law unconstitutional but nevertheless set out guidelines for amendment it said would make the law constitutional: that a doctor must certify any claimed threat to the mother's physical and mental health, and that abortion facilities must be licensed.[50] The Spanish parliament accepted these guidelines and amended the law accordingly. The changes did not, as a practical matter, substantially strengthen restrictions on abortion, but they did signal the collective concern for the gravity of abortion that a majority of the Constitutional Court thought essential.

In 1992, the European Court of Human Rights made an important decision that also presupposed that a fetus is not a person with rights or interests of its own, and that laws prohibiting or regulating abortion can be justified only on the different ground that abortion is thought to jeopardize the inherent value of human life.[51] Before the 1992 referendum, Irish law forbade any organization to supply to a pregnant woman within Ireland the name, address, or telephone number of an abortion clinic in Great Britain, and an Irish court had issued a permanent injunction against two abortion-counseling services that did provide that information. The judge had considered the argument that an injunction would violate a pregnant woman's constitutional right to information, but he had declared that "I am satisfied that no right could constitutionally arise to obtain information the purpose of which was to defeat the constitutional right of the unborn child." The counseling services appealed to the European Court, arguing that the injunction violated the European Convention of Human Rights, to which Ireland is a party. That court did not decide whether the convention guarantees a right to abortion, because it did not need to. But the court did decide that the ban on information violated Article 10 of the Convention, which protects freedom of speech and information. Among other arguments, it said that since information about abortion clinics is available from other sources in Ireland—for example, from British telephone books there—the ban on organizations supplying that information to pregnant women who request it would not prevent enough abortions to justify the constraint on freedom of information. It used, in other words, a test of "proportionality" between the degree to which the ban on information would aid Ireland's policy of protecting fetal life and the degree to which it would harm freedom of speech; it held that the gain to the

policy was not significant enough to justify the cost to freedom. But that proportionality test would be bizarre if, as the Irish government argued, a fetus is a person with a right to life: if it is, then a government would be entitled to try to prevent the murder of even one additional fetus, and a ban on direct information about foreign abortion clinics would be appropriate even if most pregnant women had other ways of obtaining that information. The Irish law has now been changed, but the European Court's decision remains important because its proportionality test presupposes that the point of laws banning abortion is not to prevent murder but to protect a public sense of the inherent value of life. It is proper to argue that minor or very marginal gains in achieving *that* goal would not justify substantial abridgments of other rights, including the rights protected by the Convention's Article 10.

THE NEXT STEP

Though this chapter has covered much ground, it has been dedicated mainly to a single claim: that we cannot understand the moral argument now raging around the world—between individuals, within and between religious groups, as conducted by feminist groups, or in the politics of several nations—if we see it as centered on the issue of whether a fetus is a person. Almost everyone shares, explicitly or intuitively, the idea that human life has objective, intrinsic value that is quite independent of its personal value for anyone, and disagreement about the right interpretation of that shared idea is the actual nerve of the great debate about abortion. For that reason, the debate is even more important to most people than an argument about whether a fetus is a person would be, for it goes deeper—into different conceptions of the value and point of human life and of the meaning and character of human death.

I have tried to show the inadequacy of the conventional explanation. But so far I have said little to make the concept of intrinsic value, or of sanctity or inviolability, more precise or to answer the objection that these ideas are too mysterious to figure in a genuine explanation of anything. Nor have I yet explained, except in the most tentative way, how we can make sense of the abortion debate in light of these ideas. These are crucial challenges, and we must confront them at once.