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## Abortion Rights: Taking Responsibilities More Seriously Than Dworkin

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# ABORTION RIGHTS: TAKING RESPONSIBILITIES MORE SERIOUSLY THAN DWORKIN

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## INTRODUCTION

IN his most recent book, *Life's Dominion*,<sup>1</sup> Ronald Dworkin maintains that the abortion debate is not really about rights, but is rather about how proper respect ought to be shown for the sanctity of life. Dworkin contends that the key issue in the polarized abortion debate is religious. More controversial still, Dworkin asserts that *both* pro-life and pro-choice adherents insist upon the sanctity of life as a religious value. This value does not necessarily involve belief in a personal deity but is, says Dworkin, "sufficiently similar in content to plainly religious beliefs."<sup>2</sup> Applying his assertions to American Constitutional Law, Dworkin concludes that, since the abortion debate is about the intrinsic worth

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\* Professor of Law, Dalhousie Law School; B.Comm., LL.B. Cape Town; LL.M., S.J.D. Harvard. Research for this article commenced while the author was a Visiting Professor of Law at the University of Wisconsin, School of Law. This article is part of a more extensive study on the reconstruction of rights in general. That analysis is applied, here, to reproductive rights. The author thanks the Social Sciences and Humanities Research Council of Canada and the Department of Justice of Canada for funding the study.

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1. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

2. *Id.* at 155.

or sanctity of life, reproductive rights can be protected under the First Amendment as well as by the right to privacy.<sup>3</sup>

*Life's Dominion* represents a noticeable and disappointing shift from Dworkin's part participation in, and use of, the rights debate. In marginalizing abortion *rights* in favor of intrinsic *values*, Dworkin fails to acknowledge the extent to which rights can be transformed to encompass such values. He also passes over the real possibility of transforming rights to encompass both intrinsic and extrinsic social values, not limited to those he dubs "religious."

We argue for a new and different approach towards abortion. Our central thesis is constructive: the abortion issue is most suitably expressed by associating abortion rights with social responsibilities that arise out of those rights. Drawing, in part, from Wesley Hohfeld's important work,<sup>4</sup> we argue that any meaningful solution to the abortion issue resides, not in preserving reproductive autonomy in isolation, but in giving weight to the social and cultural responsibilities which perpetuate that right. Jurists who ignore the responsibilities of the pregnant woman, the fetus, the state and religious institutions that claim to represent the fetus, rely on an intractable image of right and wrong. They also denude the very value of a rights discourse, failing to provide a meaningful alternative.

This article is divided into two parts. The first part presents Ronald Dworkin's approach to reproductive autonomy in *Life's Dominion*. The second part critically evaluates Dworkin's approach and advances a transformative conception of rights that accommodates both intrinsic and extrinsic values. Included among these values is the need to take account of social and cultural responsibilities that are owed by and to those who assert rights. In supporting this thesis, we argue for an expansive conception of rights in which right-holders assume responsibilities. We contend, further, that Dworkin displaces the *real* potential of rights in favor of out-moded value-foundationalism. His approach ultimately regresses into dogma.

## I. DWORKIN'S PROPOSAL

### A. REJECTION OF DERIVATIVE RIGHTS DEBATE

A major argument in *Life's Dominion* is that the abortion debate revolves around two very different grounds for protecting human life: a "derivative" and a "detached" ground.<sup>5</sup> The derivative ground for protecting human life is that human beings have rights and interests. Among these is the right not to be killed.<sup>6</sup> The detached ground for protecting human life is that life has intrinsic value that does not depend upon, nor

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3. *Id.* at 160-68.

4. Wesley N. Hohfeld, *Rights and Jural Relations*, in *PHILOSOPHY OF LAW* 357 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

5. DWORKIN, *supra* note 1, at 11.

6. *Id.* at 14.

presuppose the existence of, rights or interests.<sup>7</sup> Dworkin evaluates, first, the derivative and then, the detached position on abortion. The derivative position focuses on the issue of rights, especially the right to life and to reproductive autonomy. The detached position concentrates on those interests that are deemed to be intrinsically valuable.<sup>8</sup>

Dworkin advances two reasons for rejecting the derivative approach towards abortion. First, he argues that the majority of responses to opinion polls demonstrate that abortion can be coherently explained only on detached, but not derivative, grounds. In particular, the majority of those polled believe that human life, including the *life* of the unborn fetus, has intrinsic value that should be protected. Yet only a small portion of that majority believe that abortion should always be illegal.<sup>9</sup> Dworkin concludes from this that it cannot consistently be held that a fetus has a *right* not to be terminated, but that it would be wrong for the government to protect that right *per se*.<sup>10</sup> In contrast, he contends that it *can* consistently be held that it is intrinsically wrong to end a human life, while also believing that ending a human life early in pregnancy is a moral decision for the pregnant woman to make, not the state. Dworkin insists that the popular view, that the state has no business in dictating personal morality, reinforces his stance.<sup>11</sup>

Dworkin's second source of support for the detached view on abortion is a group of arguments that underscore the difficulty of maintaining that the fetus could have interests of its own.<sup>12</sup> He asserts that it is not until late in pregnancy that a neural substrata exists by which one can suppose that the fetus has sentience. Therefore there is no sense in which the fetus itself has interests before that time.<sup>13</sup> Dworkin contends further, that the detached perspective has the advantage of not having to concern itself with whether the fetus is a person with interests and rights. It is necessary to establish, simply, that a manifestation of human life has intrinsic value.<sup>14</sup>

Dworkin claims that heated division among pro-life and pro-choice factions often makes it difficult to determine when a claim is made on a derivative or detached basis. As a result, the debate appears to be more polarized than it really is.<sup>15</sup> This is especially apparent when opposing

7. *Id.* at 11.

8. *Id.* The derivative objection to abortion is that the fetus has a right not to be killed. The detached objection is that the fetus is a form of human life that is intrinsically valuable.

9. *Id.* at 13-14.

10. *Id.* at 14.

11. *Id.* at 15.

12. *Id.* at 15-19.

13. *Id.*

14. *Id.* at 19-20.

15. *Id.* at 20-21. Essentially Dworkin claims that people say one thing and mean another. He explains, "My claim is not, then, that people do not know what they think, but rather that we cannot discover what they think simply by fixing on the high rhetoric of the public debate." *Id.* at 21. Dworkin supposes that his interpretation of what people mean better reveals *their* views than their own enunciation of them. While this may hold for

rights claims are *both* made at the derivative level. For example, the fetus is a person with a *right* not to be terminated or, the fetus is not capable of having rights, so that the pregnant woman is entitled to have an abortion.<sup>16</sup> In Dworkin's opinion, these opposing sides, both using derivative arguments to justify their respective positions, lead to an impasse. Either the fetus has an absolute right to life, or the pregnant woman has an unconditional right to an abortion.

Dworkin insists that the detached perspective avoids this polarization. By focusing on the point of agreement that human life is sacred, it encourages more meaningful debate over how best to respect *that* value, whether by giving primacy to the intrinsic value of fetal life, or to the intrinsic value of the life of the pregnant woman.<sup>17</sup> Dworkin maintains further, that this perspective also has the virtue of not having to decide whether a fetus is a full human being at conception, nor over the point at which it becomes one.<sup>18</sup> Using these means, Dworkin avoids having to address the legal status of the fetus.

The success of Dworkin's approach depends, in part, upon his assumption that there is more agreement in society on the sanctity of life and the manner of respecting it than on the nature, form and content of abortion rights. Dworkin remarks: "The idea that I said binds us all together, that our lives have intrinsic, inviolable value, also deeply and consistently divides us, because each person's own conception of what that idea *means* radiates throughout his entire life."<sup>19</sup> Dworkin hopes that, once it is recognized that both pro-choice and pro-life sides accept the importance of their shared belief in the sacredness of life, they will resolve their differences on how best to respect the intrinsic value of life, in the same way as they resolve their religious differences.<sup>20</sup>

## B. ENDORSEMENT OF DETACHED VALUES DEBATE

Having laid out his basic program, Dworkin evaluates different perspectives on abortion. His purpose is to show that there is fundamental agreement across the political spectrum that life has intrinsic value and ought to be protected. Dworkin first identifies the conservative derivative view on abortion. Conservatives hold, very basically, that the fetus

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some, it undoubtedly does not hold for others. Certain abortion activists may not mean what they say, as a political ploy; however, their action is likely to be deliberate. Anti-abortion activists often mean exactly what they say when they claim that a fetus is a person, rather than some intrinsically valuable form of human existence falling short of personhood. Others might concede that human life becomes sacred, at some stage of fetal development, but deny that such sacredness renders abortion *per se* illegal. They, too, mean what *they* say, whatever Dworkin otherwise might want to impute to them. For a similar objection to Dworkin's claim that people say one thing and mean another, see Stephen L. Carter, *Strife's Dominion*, THE NEW YORKER, Aug. 9, 1993, at 88.

16. DWORKIN, *supra* note 1, at 20-21.

17. *Id.* at 19.

18. *Id.*

19. *Id.* at 28.

20. *Id.*

has a right to life and further, that terminating that life is wrong. Some conservatives take the stand that, while they personally abhor abortion, the state should not interfere with a woman's choice. Dworkin argues that this conservative stance cannot be sustained. If a fetus is a person with a right to life, the government is obliged to protect that life. This is consistent with both government and civil society's responsibility to protect persons from murderous assault.<sup>21</sup> Other conservatives hold that abortion should be illegal, except when the mother's life is in danger, when pregnancy arises from rape or incest, or when severe physical or mental defects are in issue. Dworkin asserts that these views are also untenable on the derivative view. If the fetus is a person with a right to life, that right does not disappear because the mother was victimized in conceiving it. Two victims are worse than one. So Dworkin concludes that, to be consistent, conservatives must reject the derivative view in favor of a detached position.<sup>22</sup>

Dworkin states that the liberal paradigm, as applied to abortion, is equally untenable on the derivative level. He identifies four elements in the liberal position on abortion: (i) abortion can be morally problematic; (ii) abortion can be justified for "serious reasons"; (iii) a woman's concern for her own interests can warrant an abortion if the consequences of childbirth are serious or irreversible; (iv) the state must not impose its moral views on the mother.<sup>23</sup> Dworkin contends that the liberal position is inconsistent with the right to fetal personhood: if the fetus were a person, abortion would always be morally problematic. The state would have a duty to intervene in the mother's decision and the woman's concern for her own interests would have to be continually balanced against the rights of the fetus. Further, Dworkin argues that liberals are unable to explain coherently why abortion is morally problematic at the derivative level. Given that liberals generally deny the right to fetal personhood, they have scant derivative justification to argue that abortion is morally reprehensible.<sup>24</sup> Dworkin finds that the liberal view also becomes coherent only when it is evaluated from the detached perspective.

Having rejected both conservative and liberal derivative positions, Dworkin concludes that the abortion debate really revolves around intrinsic values. The issue is not whether the right of either pregnant woman or fetus ought to prevail, but which option gives proper respect to the intrinsic value of life.<sup>25</sup> Dworkin insists that, acknowledging the in-

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21. *Id.* at 31.

22. *Id.* at 31-32.

23. *Id.* at 32-33.

24. It is Dworkin's characterization of the liberal position which makes it difficult to explain the morally troubling nature of abortion. Certainly, as is articulated below, the liberal position can take account of the values that render abortion morally problematic. See *infra* part I.C.

25. DWORKIN, *supra* note 1, at 34. It is difficult to resist questioning Dworkin's argument at even this preliminary stage. He points out that a component of the liberal position is that the state must not impose moral views on the pregnant woman. This presupposes that the state distances itself from any particular conception of morality. But, of course,

trinsic value of life does more than give coherence to different political positions. It helps to comprehend the claims, insights and doctrines on abortion advanced by religious and political movements, including those in other countries.<sup>26</sup>

Dworkin finds much support for the detached approach towards abortion among religious movements. Leaders of many faiths oppose abortion on the detached ground that *life* has intrinsic value as the most exalted of God's creations.<sup>27</sup> This is apparent among orthodox religious leaders.<sup>28</sup> Conservative theologians and religious leaders explicitly state that the central question in the abortion debate is how best to respect the intrinsic value of human life, not whether a fetus has rights or is a person.<sup>29</sup>

Dworkin claims that pro-choice feminists also adhere to a detached conception of abortion. They deny the derivative claim that fetuses have rights and interests, while affirming the detached notion that life has intrinsic value.<sup>30</sup> According to Dworkin, Catharine MacKinnon, Robin West, and Carol Gilligan all, implicitly, hold that life, even fetal life, should not be wasted.<sup>31</sup> Pro-choice feminists accept that the fetus has intrinsic value, but rank that value differently from those who adopt a pro-life view of intrinsic value.<sup>32</sup>

Dworkin concludes that the polar disagreement between fetal and women's rights at the derivative level becomes one of degree at the detached level. Discourse shifts from the choice of one right over another

the state does and must promote certain values, and debates about which values it should promote are constantly carried on at the derivative level (or at least at a mixed or quasi-derivative level). Dworkin seems to base his position on a false dichotomy in which he segregates detached from derivative views. In fact, discourse is mixed at varying levels and rights are cast in light of values and vice-versa. The image of a "pure" derivative discourse and a "pure" detached discourse is contrary to social practice.

26. *Id.* at 35.

27. *Id.* at 36-38. Some religious communities, notably Baptists, Methodists, and Orthodox Jews, insist upon the sanctity of life. However, they recognize that different threats to that sanctity deny automatic priority to the fetus over the mother.

28. *Id.* at 36.

29. *Id.* The Catholic Church is the exception. It does not rely primarily on the detached ground, but insists upon a right to fetal personhood, along with the intrinsic value of fetal life. *Id.* at 39. Dworkin argues that only since 1869 has the Catholic Church held that a fetus is a person from the moment of conception. This view varies from the view held by the Church throughout most of its history, that a fetus was not a person until it was "ensouled" (the time of quickening or first movement). The newer derivative position, Dworkin suggests, is not as persuasive or consistent with Catholic tradition as is its earlier derivative position. Dworkin also maintains that the Catholic stance on abortion often reverts, when pressed, to the detached view. *Id.* at 49.

30. *Id.* at 50-60. Dworkin's argument is that, from a feminist perspective, the detached view of life has intrinsic value. However, he demonstrates only that the feminists he canvasses state that *life* at some stage has intrinsic value, not that fetal life has intrinsic value. Accordingly, he fails to show that feminists would tacitly concur that abortion is primarily about intrinsic value.

31. *Id.* Dworkin refers to: CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281 (1991); Robin L. West, *Taking Freedom Seriously*, 104 *HARV. L. REV.* 43 (1990).

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

to an evaluation of the *degree* to which the intrinsic value of life warrants or denies reproductive freedom.<sup>33</sup> Dworkin's examination of French, German, Spanish, and Irish law, as well as the decisions of the European Court of Human Rights also supports this shift to the detached perspective.<sup>34</sup> He suggests that European laws, being more deeply rooted in egalitarianism, affirm the communal value of human life and seek to educate in light of that value.<sup>35</sup> He takes issue with communitarians in the United States, like Mary Ann Glendon, who in his opinion are unjustified in arguing that American jurists place undue emphasis on rights.<sup>36</sup> Dworkin does not think that the individual rights approach in the United States has proved to be either isolating or destructive of a sense of community.<sup>37</sup> However, he does agree with Glendon that Europeans, being less preoccupied with rights, are far more willing to debate the intrinsic value of life.

Having found this support for the detached approach, Dworkin turns to an examination of the concept of intrinsic value. He uncovers "different conceptions of the value and point of human life and of the meaning and character of human death."<sup>38</sup> At the same time, he finds that "[t]he idea of intrinsic value is commonplace, and it has a central place in our shared scheme of values and opinions."<sup>39</sup> However different the view, each variant evinces a common morality in which human life is treated as intrinsically and inviolably valuable. According to Dworkin, life is considered intrinsically valuable in being appraised independently of human desire, want, and need. It is viewed as inviolable, once it is found to exist, because of what it represents. It is also viewed as important that life flourish and not be wasted once it has commenced. Dworkin affirms: "Something is sacred or inviolable when its deliberate destruction would dishonor what ought to be honored."<sup>40</sup>

Dworkin maintains that the "nerve of the sacred lies in the value we attach to a process or enterprise or project rather than to its results considered independently from how they were produced."<sup>41</sup> He illustrates

33. *Id.*

34. *Id.* at 63-67.

35. *Id.* at 63.

36. According to Glendon, the U.S. Supreme Court in *Roe v. Wade* "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.'" *Id.* at 61 (quoting MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 58 (1987)).

37. Dworkin, in the same breath, defends rights against Glendon's claims that rights are isolating and destructive of community and in the next, proposes abandoning rights in favor of a detached perspective. He seems to suggest that rights discourse is too narrow to accommodate a debate about values, while also claiming that rights are sufficiently expansive so as not to be unduly individualistic and polarizing. *Id.* at 61-62; see MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 58 (1987).

38. DWORKIN, *supra* note 1, at 67.

39. *Id.* at 70.

40. *Id.* at 74. See *id.* at 71-74 for Dworkin's examination of commonly held intuitions grounding his claim that these sorts of values exist.

41. *Id.* at 78.



"the sacred" by referring to these specific examples: nature, art, culture, and humankind.<sup>42</sup> Demonstrating that "the sacred" is the product of a "complex network of feelings and intuitions," he concludes that people's convictions about abortion have a complex structure resembling feelings and intuitions about nature, art, culture, and humankind.<sup>43</sup> Liberals and conservatives share the belief that human life is inviolable and that the waste of a life is "a shame"<sup>44</sup> that is "intrinsically regrettable."<sup>45</sup> However, their common belief does not lead to an overarching principle governing the sanctity of life. In other words, when sacred things come into conflict, liberals and conservatives make choices between different conceptions of the sanctity of life. In making these choices, they accept that life is valuable, choosing instead to measure the extent to which life is wasted.

Dworkin proposes that our intuitions on how to measure the sanctity of life can best be explained on two dimensions: (1) the stage of the life, and (2) the degree of frustration of natural and human investments in that life.<sup>46</sup> He roots the inviolability of life in a concern for the survival of the species arising out of both natural divination (e.g. nature, evolution, God, etc.) and human creation (e.g. artistic, lived, societal effort).<sup>47</sup> Liberals believe that abortion may prevent a greater frustration of natural and human investments in a life. Conservatives disagree.<sup>48</sup> Conservatives emphasize frustration of the *natural* investment in a life; liberals stress frustration of the *human* investment. Dworkin finds that *both* believe that frustration of the natural and human investments in human life is fundamental to abortion.<sup>49</sup> He demonstrates this by arguing that the key disagreement in the abortion debate is a detached one. It revolves around identifying that investment which contributes most to the sanctity of life.

### C. THE CONSTITUTIONAL ARGUMENT

Dworkin raises the difficult constitutional issues arising in cases like *Roe v. Wade*<sup>50</sup> by asking two questions. First, do women have a right to

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42. *Id.* at 74-78.

43. *Id.* at 81. Are all convictions with this complexity and structure essentially religious convictions? Dworkin does not define the scope of the religious precisely enough to answer this question. Clearly, human life is sacred, as Dworkin defines religious, because life has impersonal, intrinsic value. However, Dworkin appears to define religious beliefs more expansively, as those beliefs which tie our lives to impersonal value and are fundamental to moral personality. *Id.* at 155-57. So conceived, many beliefs fall under the rubric of "religious." In relating to the sanctity of life and how best to respect it, many beliefs are likely to attract First Amendment protection under Dworkin's schema of things. See *infra* notes 62, 64, and 72.

44. *Id.* at 84.

45. *Id.* at 68-69.

46. *Id.* at 88.

47. *Id.* at 82-83.

48. *Id.* at 90-91.

49. *Id.* at 93-94.

50. 410 U.S. 113 (1973).

control their reproductive capacity? Alternatively phrased, do women have “a constitutional right of procreative autonomy”?<sup>51</sup> Second, do states have compelling reasons to hold otherwise on account of their detached responsibility to protect the sanctity of life?<sup>52</sup>

Dworkin maintains that these questions bring into tension “two competing traditions” of America’s “political heritage,” namely, between personal freedom and the responsibility of the government to protect the moral space in which all citizens live.<sup>53</sup> According to Dworkin, that tension is about intrinsic values. For example, in demonstrating its legitimate interest in protecting the sanctity of life, the state requires its citizens to “acknowledge the intrinsic value of human life in their individual decisions.”<sup>54</sup> While the state continues to have an interest in protecting life in cases like *Roe v. Wade*, its interests encompass the intrinsic value of life, as distinct from any right to life.

Dworkin believes that this transformed version of the state’s interest in protecting human life is still too ambiguous, since it encompasses two conflicting state goals: responsibility and conformity.<sup>55</sup> A state that strives for responsibility expects its citizens to consider decisions about abortion as morally important: it expects them to decide such matters reflectively, out of their examined convictions about fundamental intrinsic values. A state that seeks conformity expects its citizens to “obey rules . . . that the majority believes best express and protect the sanctity of life,” beyond the dictates of their own consciences.<sup>56</sup> Dworkin clearly favors the goal of responsibility: he believes that the state should encourage its citizens to consider different conceptions of intrinsic value in order to arrive at their own view of the meaning of that value.

A state may reasonably think . . . that a woman considering abortion should at least be aware of arguments against it that others in the community believe important, so that “even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy.”<sup>57</sup>

Dworkin expects courts to discourage the state from coercing citizens into making *responsible* choices of *its* choosing. However, he accepts that the state has a legitimate interest in regulating abortion, so long as it does

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51. DWORKIN, *supra* note 1, at 148.

52. *Id.*

53. *Id.* at 150.

54. *Id.*

55. *Id.*

56. *Id.* Dworkin argues that these two goals are “submerged” when the abortion debate is framed derivatively. In limiting that debate to the protection of persons, the state does not deal with either responsibility or conformity. However, when the state’s goals switch from the protection of persons to the protection of intrinsic values, a competition between these two goals arises.

57. *Id.* at 153 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2821 (1992)). In *Casey* the United States Supreme Court upheld certain restrictions (e.g. waiting periods) that Pennsylvania had placed on abortion. *Casey*, 112 S. Ct. at 2826.

not impose an "undue burden" on women by devising "substantial obstacles" which impede their choices.<sup>58</sup> In addressing this concern, Dworkin stresses that the goals of responsibility and conformity are distinct and antagonistic and cannot be pursued simultaneously.<sup>59</sup> The state is justified in pursuing conformity by coercive means in order to protect select intrinsic values, like taxes for national museums and conservation measures to protect endangered animals.<sup>60</sup> However, it is not justified in coercively protecting the sanctity of life as an intrinsic value. Dworkin gives two reasons for arriving at this conclusion. First, a state that coerces citizens to make reproductive decisions is likely to affect some persons more than others, often with devastating effect. For example, it is likely to affect pregnant women more harmfully in coercing them to bear an unwanted fetus than when it protects art or animal species. Second, the state ought not to protect the sanctity of life coercively on grounds that our convictions about the intrinsic value of human life are fundamental to our "overall moral personalities."<sup>61</sup> According to Dworkin, "our convictions about how and why human life has intrinsic importance, from which we draw our views about abortion, are much more fundamental to our overall moral personalities than our convictions about culture or about endangered species, even though these too concern intrinsic values."<sup>62</sup>

Dworkin concludes that our essentially religious beliefs about the intrinsic value of life, including our beliefs about procreative autonomy, are constitutionally protected.<sup>63</sup> That protection takes the form of freedom of religion under the First Amendment, due process of law under the Fifth Amendment and equal protection of the law under the Fourteenth Amendment.<sup>64</sup> Dworkin adds that such protection is not accorded to non-religious beliefs, that is, beliefs are not protected when they do not connect persons, among other things, to a source of impersonal, intrinsic importance.<sup>65</sup>

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58. DWORKIN, *supra* note 1, at 153. Dworkin accepts the test governing abortion regulations in *Casey*. He describes the test as follows: "[A] state regulation is unconstitutional, even if it does not purport to prohibit abortion, if either its purpose or effect is to create an 'undue burden' on a woman who chooses abortion by posing 'substantial obstacles' to that choice." *Id.* at 153 (quoting *Casey*, 112 S. Ct. at 2820). However, he would apply this test restrictively in light of: (1) the degree to which reflection and responsibility are promoted; (2) the risk of preventing responsible women from aborting; (3) other options in achieving responsibility by less invasive means. *Id.* at 173.

59. *Id.* at 150.

60. *Id.*

61. *Id.* at 154.

62. *Id.* at 154-55.

63. *Id.* at 155. Dworkin uses the term "religious" in a wide sense. He does not take it to entail a belief in, or commitment to, a personal deity.

64. *Id.* at 160-68.

65. *Id.* at 156. Dworkin's "religiousness" is marked by its attempt to connect persons, among other things, to a source of impersonal, intrinsic importance. For Dworkin, views about why human life and human interests possess intrinsic value are religious. Interestingly, Dworkin contrasts religious beliefs (which are fundamental to our moral personality) with secular beliefs about morality, fairness, and justice. It seems counter-intuitive to say that these "more secular" beliefs are not religious. Dworkin's reasoning is that morality, fairness and justice concern the manner in which competing human interests should be

Dworkin reaches three broad conclusions. First, the Constitution protects procreative autonomy. Second, the state has a legitimate interest in regulating that autonomy, so long as it satisfies the tests enunciated by the Supreme Court, notably, the *Casey* test.<sup>66</sup> Third, the trimester balancing solution in *Roe v. Wade* is constitutionally acceptable, or at least, is not so self-evidently wrong that it ought to be overruled.<sup>67</sup>

In reaching these conclusions, Dworkin argues that the Constitution embodies protections of "principle," not "detail."<sup>68</sup> Those who reduce its protections to mere detail limit it to the static vision of its drafters. Those who adopt a principled approach "do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that [the Constitution's] great clauses, in their majestic abstraction, command."<sup>69</sup> Dworkin encourages courts to decide abortion cases on the basis of good argument, high intellectual standards, judicial independence, and integrity. He opposes judicial resort to political compromise, strategy, or accommodation in deciding abortion cases. He is in favor of reasoned argument, aided by consistent precedent, leading to the *best* result.<sup>70</sup>

## II. CRITIQUING DWORKIN

We advance two primary arguments in response to Dworkin. Our first argument is a negative one: that Dworkin's rejection of the rights discourse in favor of discourse about intrinsic values is strategically flawed. Our second argument is that the debate can be better resolved by transforming rights themselves, not by adopting Dworkin's detached perspective. Dworkin's supposition that the abortion issue is more aptly resolved through debate over the sanctity of life rather than derivative rights is, at best, politically naive. Dworkin's conjecture that the abortion issue is more coherent when it revolves around intrinsic values than rights is manifestly mistaken. At worst, it hides substantive and intractable issues behind value differences and avoids recourse to a more promising transformation of rights.<sup>71</sup> At best, it addresses some intrinsic values at the expense of others which it happens to ignore. In seeking to ground abortion in a system of intrinsic values, Dworkin appears to expand upon the

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balanced and not why humans and human interests have intrinsic value. *See id.* Like his derivative/detached distinction, Dworkin's distinction between the religious and the non-religious seems arbitrary, even false. If human life is sacred, why should one's beliefs about what others are owed not also involve convictions that are primitive and fundamental to one's moral personality? While he opens up many areas for First Amendment protection by adopting an expansive view of "the religious," he unduly excludes ancient beliefs about that which humans owe one another on grounds that they are non-religious. (Is not the 'Golden Rule', at root, a conception of justice?) *See also* T.M. Scanlon, *Partisan For Life*, *THE NEW YORK REVIEW OF BOOKS*, July 15, 1993, at 47.

66. *See supra* note 57 and accompanying text.

67. DWORKIN, *supra* note 1, at 168-71.

68. *Id.* at 119.

69. *Id.* at 145.

70. *Id.* at 145-46.

71. For a discussion of this transformation of rights, see *infra* Part II.B.

abortion debate. However, he undermines this expansion by confining the intrinsic values underlying abortion to "religious" values, subjugating other values.<sup>72</sup>

Our approach is to accommodate diffuse beliefs within a reconstituted rights discourse, not to extend an already exacerbated religious polemic. An abortion debate that sidelines rights in favor of religious values throws out the baby with the bathwater. In raising intrinsic values above rights, it impedes rights from serving as common denominators in the rights discourse. In restricting the arena of debate, it hinders reconciliation among opposing groups. As a result, it turns the clock backward, not forward.

#### A. THE NEGATIVE CRITIQUE

Dworkin rejects the derivative approach to abortion in favor of intrinsic values by invoking data culled from opinion polls, by raising philosophical objections to fetuses having interests, by arguing that intrinsic values allow for more compromise and tolerance than do rights, and by arguing that conservative, liberal, religious, and feminist views all are intelligible from a detached perspective.

Dworkin's rejection of the derivative perspective breaks down into two segments: (1) A political-strategic claim that discourse over intrinsic values reveals a deeper agreement than arises from the rights discourse; and (2) his explanatory claim that various positions on abortion are only coherent from the detached perspective. The first claim is implausible and the second rests on an unduly limited conception of rights.

##### 1. *A Political-Strategic Failure*

There is reason to believe that deep divisions over reproductive autonomy at the derivative level will persist despite Dworkin's re-characterization of the abortion issue in detached terms. This is especially so if one holds that rights are expressions of values that are grounded in values. In other words, Dworkin offers little more than a change in structural terminology without really furthering debate on reproductive autonomy. If rights are really embodiments of values held in a society, then arguments about rights are root arguments about values, viewed in shorthand. Persons who disagree about the existence of a fetal right to life therefore differ about values, not unlike those who disagree over what value to ascribe to the sanctity of life.<sup>73</sup>

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72. See *infra* text accompanying note 96. Dworkin's hope that a sense of religious tolerance will prevail under the detached approach towards abortion seems so optimistic as to border on naivete. Whether his program would suffice as a legal fiction is another issue, but Dworkin's concern with public opinion would then seem misplaced.

73. Dworkin seems to rely on a sleight of hand. He argues, as we have shown in Part I, that there is substantial agreement among the opposed sides in the abortion debate as to whether that human life has intrinsic value. His approach implies that there is a common conception of this value, or object of respect, and we just differ as to how much to respect it. What Dworkin hides is the undeniable fact that many of us differ on how much to

Furthermore, Dworkin's assumption that disagreements about the sanctity of life are religious, while disagreements about rights are not, is false.<sup>74</sup> The sanctity of life need not be expressed religiously any more than disagreements about rights need be expressed in non-religious terms. Each disagreement depends upon the *values* that are attributed to it, including the values that are attributed to rights.

## 2. *The Explanatory Failure*

Dworkin's explanatory claim fails because his conception of the conflict between rights is misconceived. His view, that courts are forced to accept either the right of the fetus or the right of the pregnant woman, is coherent only by treating each right as inherently in competition with the other. This narrow "all or nothing" view of competing rights misses the point. However phrased in the abstract, rights are not necessarily, nor justifiably, viewed competitively. Nor is the apparent impasse between reproductive and fetal rights resolved simply by choosing one right over the other.

Dworkin is able to demolish the derivative approach towards abortion only by both inflating and conflating separate issues. He conflates the manner in which rights are applied to abortion with what rights *necessarily* entail. He inflates the plausible claim that rights have not yet rendered the abortion debate coherent with the implausible claim that rights *cannot ever* do so. In stating that the fetus's right to life is inconsistent with certain beliefs, such as the belief in the exception for rape or incest, he shows only that the derivative view is incoherent if the right to life is conceived of absolutely. He does not demonstrate the incoherence of a wider conception of rights that might take account of that belief, among others.

In rejecting the derivative perspective, Dworkin fails to present a clear view of the role rights can play in the abortion polemic. He subjects decisions about constitutional rights to the constraints of "integrity."<sup>75</sup> Each decision must be "principled." It must "fit" with precedent and with the general constitutional framework; and it must be applied to similar cases similarly.<sup>76</sup> At the same time, Dworkin insists that constitutional rights must accord with a social experience. The result is a mix of abstract moral idealism and the reinterpretation of that idealism in light of social practice.<sup>77</sup>

Clearly, Dworkin recognizes a distinction between rights that are constitutionally protected and rights that are not, but which have a moral

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respect the value of life because of what value we place upon life. To argue that we agree on this point is like arguing that all religious people agree upon the nature of God. This sort of agreement does not go far.

74. See DWORKIN, *supra* note 1, at 156.

75. *Id.* at 146.

76. *Id.*

77. *Id.* at 111.

basis nonetheless.<sup>78</sup> He appreciates that *moral rights* inform constitutional rights in accordance with the *best* interpretation of *current generations*.<sup>79</sup> However, he falters in failing to demonstrate that a single *best* interpretation is adhered to by current generations. This failure is most apparent in an abortion debate in which deep schisms over the intrinsic value of life and choice destroy the prospect of arriving at a *best* interpretation. Dworkin compounds these schisms by insisting that one interpretation of rights must prevail over all others. In presenting rights as an all-or-nothing affair, he envisages no alternative method of interpretation. Either the individual has a right, or it vanishes.

Dworkin's restrictive conception of rights is evident when he rejects, as internally inconsistent, the claims of conservatives that the fetus has a right to life due to its personhood, but that the murder of a born person is more serious than terminating a fetus, or that terminating a fetus in certain circumstances is justified.<sup>80</sup> Dworkin assumes that either an entity has a right to life or it does not. Once identified, the right exhausts all interests on the subject. No responsibilities arise on account of that right, other than the responsibility of the state to recognize and preserve it.

Dworkin does not recognize the possibility of balance or mediation, that is, that rights and responsibilities may each have varying degrees of plausibility. He also overlooks responsibilities, also of varying strength, that arise from those rights. For example, under his all-or-nothing construction of rights, a fetus does not have a right to life because that would impose a unqualified duty upon the state to protect that life against all threats, including the right claims of the pregnant woman. Dworkin's rights are never really balanced against other interests. He offers little room in which to weigh other interests which themselves expound upon the nature of rights. In particular, he does not conceive of responsibilities beyond the duty to respect the right-holder's victory over the vanquished. This is a narrow, yet familiar, view of rights. It is also woefully incomplete.

#### B. A TRANSFORMATIVE ALTERNATIVE: RESPONSIBILITIES

There is an alternative to Dworkin's rejection of the derivative approach towards rights. Rights could be modified to accommodate different positions on abortion without receding into value foundationalism. This could be accomplished by contextualizing rights in light of multifaceted social interests that include, but are not exhausted by, intrinsic values. In proposing such a transformative view, we propose that rights be viewed in light of responsibilities.

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78. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1978); see also DWORKIN, *supra* note 1, at 145. This view underlies chapter 5 of *LIFE'S DOMINION*. DWORKIN, *supra* note 1, at 118-47.

79. DWORKIN, *supra* note 1, at 145.

80. *Id.* at 13-14, 31-32.

As a first step towards such a transformative view, rights can be made to serve as key elements within an interactive set of social and legal relations. Among these interactive relations is the realization that rights correlate with duties, obligations and responsibilities. "A political order in which rights consciousness is highly developed is prone to instability unless counterbalanced by norms of duty, obligation and responsibility."<sup>81</sup> Wesley Hohfeld, writing over fifty years ago, offered such an expansive view of rights. He situated them, not simply in relation to duties, but as one of four basic legal relations, their opposites and correlates.<sup>82</sup> Hohfeld's schema of legal relations can be illustrated as follows:

Basic Legal Relation <sup>83</sup>	Opposite/ Contradictory	Correlative
<b>Right</b> (A's claim against B)	<b>No — right</b> (A's lack of claim against B)	<b>Duty</b> (B's obligation to respect A's claim)
<b>Privilege</b> (A's freedom from claim of B)	<b>Duty</b> (A's obligation to respect claim by B)	<b>No — right</b> (B's lack of claim against A)

On the above view, A gets a right for B's obligation; a privilege for B's lack of claim; a power for B's subjection; an immunity for B's lack of control. The idea is that the rights, privileges, powers, and immunities held by each member of society can be balanced and limited by the rights, privileges, powers, and immunities of others. For example, A's right can be limited by A's duty to recognize the rights of B.

Hohfeld's schema has the advantage of recognizing that rights are contingent, not absolute in nature. In particular, each right is contingent upon a duty or responsibility that the right-holder owes to another or

81. Alan C. Cairns II & Cynthia Williams, *Constitutionalism, Citizenship and Society in Canada: An Overview*, in CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA 1, 3 (Alan C. Cairns II & Cynthia Williams eds., 1985).

82. Wesley N. Hohfeld, *Rights and Jural Relations*, in PHILOSOPHY OF LAW 357 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991); see also Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

83. Hohfeld's schema has four basic legal relations: rights, privileges, powers and immunities. See Hohfeld, *Rights and Jural Relations*, supra note 82, at 308. The table is completed by the inclusion of powers and immunities. (Note that "wrt" = "with respect to").

Basic Legal Relation	Opposite/Contradictory	Correlative
<b>Power</b> (A's affirmative control over a legal relation)	<b>Disability</b> (A's lack of affirmative control over a legal relation wrt B)	<b>Liability</b> (B's subjection to A's control over a legal relation)
<b>Immunity</b> (A's freedom from B's power)	<b>Liability</b> (A's subjection to B's control over a legal relation)	<b>Disability</b> (B's lack of control over a legal relation wrt A)



others. A right-holder who fails to fulfil that duty subverts the right itself.<sup>84</sup>

The problem with Hohfeld's schema is that each right is unqualified within its own sphere. A's right is unfettered so long as A does not exercise it in a way that infringes upon the rights of others. This allows A to infringe upon B's competing interests that are not protected by a right. As a result, B has a duty to respect A's right, but A has no duty to respect B's competing interests that are not protected by a right. A gets what could be called "a free lunch."<sup>85</sup>

Despite its pitfalls, Hohfeld's conception of legal relations can be rendered transformative by taking account of the dynamic, yet sometimes discordant nature of rights. This includes displacing rights claims that are absolute and unconditional in nature. It also means orienting rights around a social context that includes responsibilities.<sup>86</sup> These ends could be accomplished by imposing an *internal* restriction upon Hohfeld's legal relations, especially (but not exclusively) upon rights. This *internal* restriction could be called a *responsibility*.<sup>87</sup> Rather than A having a right that is unqualified within its own sphere, A could have a right only by accepting a responsibility towards others, like B, on account of it. A's right would then attract a responsibility to respect B's interests not protected by B's rights. This adds to Hohfeld's analysis responsibilities that are more expansive than the correlative rights and duties that otherwise would arise between A and B.

This extended rights discourse could give rise to responsibilities that vary in light of the nature of the rights involved. For example, A's responsibility could vary in rough proportion to the extent to which his rights are seemingly *inherent*, that is, associated with an apparently

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84. It is not suggested here that Hohfeld's approach is necessarily the correct view. Indeed, Hohfeld's schema does not impose on the right-holder any corresponding obligation or responsibility. Nor do we wish to posit an *a priori* analytical framework. However, Hohfeld's schema can serve as the basis for a transformative rights discourse.

85. The fact that B's competing interests are not protected is complicated by the further assumption in Hohfeld's schema that everyone has comparable rights, privileges, powers, and immunities. This assumption is incorrect, resulting in imbalances in the nature of such correlatives and opposites.

86. LEON E. TRAKMAN, *REASONING WITH THE CHARTER 1* (1991). Here, the argument is made that, by isolating a conflict between particular parties, ties to a wider social context are often ignored. Such ties are important, and indeed underlie the communicative discourse if it is to be mediatory. The importance of recasting rights in the context of an expansive conception of duties and responsibilities has been asserted by the Honorable Justice Frank Iacobucci of the Supreme Court of Canada. See Frank Iacobucci, *The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture* (Nov. 21, 1991), in 26 U. BRIT. COLUM. L. REV. 1 (1992).

87. The restriction is "internal" in that it is a positive restriction on the right-holder rather than a negative one. The negative/external restriction is that A has a right to do X unless doing X impairs a right of another. The positive/internal restriction is that A has a right to do X but also a responsibility to exercise it in a way that allows for a continuing social dialogue and ensures that each party both "get" and "give" something.

permanent ethical ideal.<sup>88</sup> The more inherent his right, the less would be his responsibility towards others and vice versa. One inference is that, while a seemingly inherent right-holder like A might owe scant responsibility to B, others who claim the right to protect A might owe B a far greater responsibility on account of *their* right claims. The underlying assumption is that a right holder should not be responsible to others for a right he could not help but possess. Conversely, the more his rights hinge upon social convention, the greater should be the extent of his accounting for that right. This infers that A's responsibility will vary along a spectrum, between seemingly inherent rights and rights that arise out of social convention. Determining precisely where A's responsibility lies on that spectrum will depend upon social inquiry into the attributes of the rights in issue, including the effect of their exercise upon others.

This proposed schema modifies Hohfeld's basic relations in three primary respects. First, A's responsibility is a social responsibility. It is owed not only to others, like B, whose interests may be directly affected, but to the community at large. Second, that responsibility is more expansive than Hohfeld's relationship between rights and duties. A not only has a duty to respect B's rights; in exercising his right, A also has a responsibility to respect the interests of others, like B. Third, basic legal relations vary according to the social context in which they apply. They are *not* fixed in an immutable relationship between opposites and correlatives. Illustrating these modifications to Hohfeld's schema, A is obliged to accept some responsibility for or towards B, as well as towards others whose interests are identified with, or represented through, B. That responsibility includes the need for A to recognize social interests, not limited to B's interest, in the manner in which A exercises a right claim. Finally, A's right claim is determined communicatively, in light of its nature and the social conditions under which it is exercised.<sup>89</sup>

The modified legal relations can be presented as follows:<sup>90</sup>

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88. This transformative conception is not necessarily incompatible with a natural rights perspective, such as that proposed by John Finnis. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

89. The responsibilities attaching to rights, privileges, powers, and immunities could be construed as "inverse correlatives," so long as the correlation is seen as one resulting from communicative discourse, rather than some metaphysical necessity. By "inverse correlative" we invert Hohfeld's correlative duty to approximate our expansive conception of "responsibility." The correlative of A's right is B's obligation to respect A's right. The inverse of this correlative is A's obligation to respect B's interests in A's exercise of her claim.

90. Responsibilities would attach to powers and immunities as well. But we are not so much interested in how many basic legal relations there are as we are interested in how rights ought to be construed.

Basic Legal Relation		Opposite	Correlative
<b>Right</b> A's claim against B	<b>Responsibility</b> A's responsibility to respect B's (and others') interests in the exercise of her right	<b>No—right</b> A's lack of claim against B	<b>Duty</b> B's obligation to respect A's claim
<b>Privilege</b> A's freedom from B's claim	<b>Responsibility</b> A's responsibility to respect B's (and others') interests in the exercise of A's freedom	<b>Duty</b> A's obligation to respect B's claim	<b>No—right</b> B's lack of claim against A

Applying these modified legal relations to the abortion controversy, the first step is to identify the parties and interests involved. Centrally, there is the pregnant woman and the fetus. The woman's interests, in part, consist of her bodily security, freedom of choice, and the contribution of both to her self-esteem, integrity, and identity. As the fetus is the subject of interests, its interests are appropriately presented through others. For example, the impregnator, potential relatives of the fetus, and the state *all* might express an interest in fetal survival. The state might assume a vicarious interest in the fetus, as when it protects the fetus on grounds that the fetus is unable to protect itself. Alternatively, the state might assume a direct interest in the fetus on grounds of general public policy or social morality. Religious groups also might assert an interest in the fetus on grounds of divine creative power, or in terms of rights which they assume arise from that power.

The legal relations imputed to the fetus, the pregnant woman, and the state are analyzed first in Hohfeldian terms and second, under our modified approach. Hohfeld's compromise has these characteristics. In situation 1, the pregnant woman has a right which the fetus has a duty to respect and the state has the duty not to infringe. In situation 2, the pregnant woman has a duty to respect the fetus's right and the state has a duty not to infringe that right. The relationship between pregnant woman, fetus, and state is depicted diagrammatically as follows:

	Pregnant Women (W)	Holders of interests in Fetus (F)	State (P)
situation 1	W has a right against F	F has a duty to respect the right of W	P has a duty not to infringe right of W
situation 2	W has a duty to respect the right of F	F has a right against W	P has a duty not to infringe right of F

The Hohfeldian compromise in the relationship between the pregnant woman and the fetus would be to apply situation 1 to the earlier stages of pregnancy. During these stages, the pregnant woman would have a right against the fetus which the fetus would have a duty to respect. Situation 2 would apply to the later stages of pregnancy. During these stages, the woman would have duty to respect the right of the fetus.

The Hohfeldian compromise, however, has restricted worth because it attributes to each right-holder an *unfettered* right. The pregnant woman has an unfettered right during the earlier stages of pregnancy. The fetus has an unfettered right during subsequent stages. Neither has any responsibilities, other than a duty to respect the right of the other.

A transformative alternative is to conceive of the relationship between the fetus and pregnant woman more expansively, so that neither has an unfettered right.<sup>91</sup> For example, in the earlier stages of pregnancy, the pregnant woman would retain her right to choose. However, she would be required to exercise it responsibly insofar as it impacts upon others. Certain safeguards and restrictions would be imposed upon her choice. For example, she might be required to comply with a waiting period. In the later stages of pregnancy, the fetus could be accorded a right to life. But this right would give rise to responsibilities owed to the pregnant woman by those who claim to have an interest in the fetus, not limited to the state.<sup>92</sup> These responsibilities might include the duty to provide for the economic, physical, and emotional well-being of the pregnant women, as well as for the future child.

Our transformative construction of the legal relationships is depicted as follows:

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91. A predictable objection at this stage is that some will hold the fetus's right to be unfettered because it evolves from an inherent right to life. But this cannot be assumed. The degree to which the right is inherent, or should be treated as such, is to be decided by communicative discourse, not as an *a priori* fact. Even if the right is inherent, and is not subject to the "no free lunch" principle, it must also be communicatively decided what will "trump" it and when this will occur.

92. See *infra* text accompanying notes 94-96 for a discussion on the interest of the impregnator in the fetus.

	Pregnant Women (W)	Holders of interests in Fetus (F)	State (P)
<b>situation 1</b>	W has a right against F.  W also has a responsibility to respect the interests of F in exercise of that right.	F has duty to respect the right of W.	P has duty not to infringe the right of W.  P has responsibility to promote W's responsibility.
<b>situation 2</b>	W has duty to respect the right of F.	F has a right against W.  F also has a responsibility to respect the interests of W in exercise of that right.	P has duty not to infringe the right of F.  P has responsibility to ensure F's right is not oppressive to W.

Several consequences are likely to flow from this modified relationship between rights and responsibilities in relation to abortion. First, an abdication of responsibility by a right-holder will count against her. For example, a pregnant woman who declines to exercise her rights responsibly will forego some of the benefits that otherwise would derive from them. Second, the more inherent the right is agreed to be, the less will be the responsibility that attaches to it. For instance, the more inherent the fetus's right to life, the less will be the responsibility it owes the pregnant woman. Third, the nature of each legal relationship will depend upon discourse into the responsibilities of opposing parties, not simply upon their abstract rights. For example, the extent to which the pregnant woman is entitled to an unfettered choice will depend upon discourse into the nature of her responsibility owed to others in the exercise of her rights. Similarly, the extent to which the state is entitled to restrict her choice will hinge upon discourse into the nature of its responsibility towards her, quite apart from its claim that the fetus's rights are seemingly *inherent*.<sup>93</sup>

Participants in this mediated rights discourse are likely to vary in opinion along a spectrum of rights and responsibilities. However, they are also likely to concur upon the basic nature of those rights and responsibilities. For example, they might well agree that some form of choice contributes to the self-identity, integrity, agency, solidarity, and anti-objectification of pregnant women. They might also acknowledge that reproductive choice can impinge upon other interests which pregnant

93. While it is arguable that the state and other public institutions, such as religious organizations, have no greater right in the fetus than the fetus itself has, this is not necessarily so. The right asserted may entail state and public interest concerns that are distinct from fetal rights.

women, as members of civil society, ought to pay heed. They might even agree that, in moral terms at least, pregnant women ought to have *some* choice so long as they exercise it responsibly. For example, pro-life groups well might concede the *cost* that pregnant woman must bear in giving rise to and caring for *life*, especially when both the state and civil society are reluctant to assume that cost. The discussants might also agree that, if the state is to constrain the rights of the pregnant woman, it ought to discharge economic, social and emotional responsibilities towards her, not only provide for a quality of fetal life. They might concur, further, that religious organizations that insist upon the sanctity of life owe comparable responsibilities to the pregnant woman.

This reconstituted schema of rights might well lead to a more dynamic rights discourse and also to more harmonious results. For example, pregnant women who are subject to responsibilities owed to biological *fathers*, might also benefit from responsibilities owed them by those *fathers*. The result might well be a more responsible attitude towards rights by those who lay claim to them.<sup>94</sup>

This reconstruction of legal relations also makes extreme rights claims harder to sustain. It not only denies *both* the absolute claim to life *and* the unqualified right to abortion on demand; it orients that denial around a feasible reconstitution of rights themselves. It does this by taking account of the nature and significance of social relations, including the relationship between the right held and the social responsibility that arises from it.

A mediated rights discourse need not force rights claimants to capitulate strongly held beliefs. The pro-choice side still can insist that the ultimate choice whether or not to have an abortion rests with the woman. At the same time, it can endorse a moderated vision of that right. For example, it can concede that a woman's choice to have an abortion, in limited circumstances, should take account of the biological *father's* interest in the fetus, without disclaiming the salient interest of the pregnant woman in the sanctity of her body. It can also insist that the biological father assume economic and social responsibility to both woman and fetus in light of *his* rights claims.

Another benefit of a mediated rights discourse is that it would limit the conflict that all too often arises when pro-choice and pro-life groups advance wholly opposing positions. For example, the pro-choice side often presents abortion as a difficult social issue only because pro-lifers

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94. The transformative conception of rights offered here may tie into Carol Gilligan's insight that rights have a transformative effect on women's sense of self and moral judgement. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT, *supra* note 31, at 128-50. Gilligan claims that women move from an ethic of care and self-abnegation to an ethic stressing care not only for others but also for themselves. *Id.* at 149. A transformative conception of rights can temper a moral consciousness and sense of self that focuses exclusively on responsibility and interconnectedness with others, resulting in a more balanced person and ethic. Similarly, responsibilities can temper a politics of rights, leading to more balanced analysis of social and legal relationships.

make it so. The pro-life side conceives of abortion as troublesome only because liberals and feminists render it so. If each side were to expound upon its interests through a co-existent discourse, the political divide between them well might narrow. The pro-choice side might admit that fetal life has intrinsic value which makes abortion morally problematic.<sup>95</sup> It might even recognize that the intrinsic value of fetal life justifies imposing limited restrictions upon choice, so long as appropriate responsibilities are exercised in favor of the pregnant woman. The pro-life side, often viewed as morally intractable, might temper its hostility towards pro-abortion laws by acknowledging that women have a distinctly moral interest in their bodies, while still insisting on the intrinsic value of fetal life.<sup>96</sup>

If the abortion debate were to encompass this kind of communicative accord, the issue of fetal personhood that dominates contemporary thought would become only one among other interests to be considered in determining the nature of reproductive choice. The purpose would be to ensure that different views are tolerated, in place of the current competition for dominance. The end would *not* be to arrive at total agreement about the nature of abortion rights: it would be to consummate a social atmosphere where diverse interest groups might concede that all must give if any are to take. The means of arriving at such agreement would be through enhanced communication, compromise and a desire for social harmony. The result likely would be an expanded vocabulary of rights in constitutional, civil, and criminal law.

### III. CONCLUSION

Dworkin's attempt to resolve the abortion debate by transforming derivative into detached claims in *Life's Dominion* is unlikely to resolve the differences among contesting factions. In limiting the detached perspective to religious values, he unduly constrains discourse over abortion and discourages mediation over difference. However broadly he frames his

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95. Dworkin appropriately identifies this as a problem for the pro-choice side. See DWORKIN, *supra* note 1, at 8. However, the transformative view of rights presented here does the work Dworkin expects of his detached discourse and more. It is worth noting the supportive argument, that pro-choice discourse sometimes fails to deal adequately with the status of the fetus. *E.g.*, M. JANINE BRODIE ET AL., *THE POLITICS OF ABORTION* 72 (1992).

96. The pro-life side is faced with a difficult choice. It ordinarily advocates that a woman's choice to abort ought to succumb to social values, such as the value of life, family and a particular view of community. However, in advancing this viewpoint, the pro-life movement must confront the fact that it does not determine those social values, but only participates in their expression. The pro-life side also cannot deny the presence of other social values in relation to the sanctity of life if it is to avoid being accused of being blatantly inconsistent. At any rate, Dworkin's proposal largely denies the social values presented by the pro-life side, while protecting the values advocated by the pro-choice side. The position, here, does not commence with that *a priori* assumption: it argues instead for a substantive recognition of the social values advocated by different interest groups, not one at the expense of all others.

conception of religion,<sup>97</sup> he excludes a broad range of countervailing arguments that arise in the abortion debate.<sup>98</sup>

Even if one concedes that Dworkin's shift from derivative to detached perspectives extends the abortion debate, *that* expansion remains inadequate. Pro-life advocates go well beyond Dworkin's detached space when they claim that fetal life is intrinsically valuable as a natural and creative investment. They also go beyond Dworkin's detached space when they contend that the creative investment in life requires that fetal *life* be preserved. Dworkin fails to offer a mediatory scheme by which to reconcile these pro-life values with the pro-choice alternatives.<sup>99</sup>

Dworkin also fails to acknowledge the extent to which different interest groups attribute prescriptive norms to choice and to life. For example, the only manner in which Dworkin acknowledges the prescriptive value of fetal life is by favoring weak state regulation of abortion and only so long as such regulation does not pose "substantial obstacles" to a woman's choice.<sup>100</sup>

What is required is not Dworkin's cloak of value foundationalism that hides his pro-choice stance, but the capacity of rights discourse to encompass a richer array of social and legal relations. This occurs when contesting factions acknowledge the responsibility of rights claimants to exercise their rights in a manner that is sensitive to the interests of others. This includes recognizing the responsibility of pregnant women for the social and economic impact of their actions. It also means acknowledging the responsibility of those making rights claims on behalf of the fetus to materially support *that* fetus *and* also, provide for the pregnant woman, should her choice be limited in some way.

This wider conceptualization of rights locates rights within a dynamic social matrix that takes account of evolving social attitudes towards rights. It also means appreciating that perceptions of *choice* differ in relation to abortion. Some discussants envisage reproductive choice as the right to decide to be young, careless and amoral. Others view choice through distinct rules that are created to govern its exercise. Yet most concur that to preserve the pregnant woman's choice is to attribute intrinsic value to *it*, even though they might weight it differently. They also agree that to preserve fetal life is to safeguard the intrinsic value of life, even though they might measure *that* value differently.

To an extent, Dworkin *does* attempt to better encompass these concordant and discordant views on abortion. In earlier writings, he certainly

97. See DWORKIN, *supra* note 1, at 155 for an explanation of Dworkin's use of the term 'religious'; see *supra* note 63.

98. See *supra* note 65.

99. See DWORKIN, *supra* note 1, at 172-78. Dworkin addresses what he sees to be the legal arguments arising now and into the near future. *Id.* By bringing selected views on abortion under the auspices of the First Amendment, he justifies a restrictive regulation of abortion. *Id.* at 173. Dworkin's resolution of the abortion controversy certainly will not satisfy pro-life advocates. Indeed, this result is a total loss from their perspective.

100. *Id.* at 173; see also *supra* note 57.



*did* propose constructive ways in which to expand upon the discursive ambit of rights. For example, in *Law's Empire*, he contended:

Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.<sup>101</sup>

However, if "law's attitude" towards rights is to be communicative, it ought to develop a discourse that is inclusive, conciliatory, and open-ended. If it's "attitude" is to be unifying, it ought to try to reconcile the values of those communities that are "divided in project, interest, and conviction." In both cases, a constructive "attitude" towards abortion values justifies a constructive "attitude" towards abortion rights as well.

In arguing for this new approach towards abortion, we do not submit that either choice or life should prevail. We simply do not favor a "winner take all" solution to the abortion debate. We submit, instead, that a multi-textured inquiry into different attitudes towards abortion can assist in tempering fervent extremes that, all too often, trammel the debate. The fact is that most Americans do not adhere to either pro-life or pro-choice extremes: they merely impute different values to life and choice. We believe that most Americans would agree that rights should be evaluated in light of the responsibilities that accompany them. We conclude that, to maintain otherwise, would be to preserve rights that are hollow in nature and values that are fanatical in intent.

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101. RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986).

# **Book Reviews**

