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I. Introduction

My subject concerns the connection between religious premises and political decisions that restrict people's liberty. This topic has implications for the constitutionality of laws adopted on religious grounds, and I sketch the most important of these implications at the conclusion of this article. My main focus, however, is the proper attitudes of citizens and legislators in our liberal democracy, and, in particular, whether they should rest their judgments on religious premises. In addressing this issue, I concentrate on the responsibilities of citizens and on laws restricting consenting sexual acts and abortions. My main burden is to illustrate two radically different ways in which religious premises may figure in political decisions, and to claim that one of these ways is consonant with the premises of liberal democracy while the other is not.

This article is part of a broader treatment of religious convictions and lawmaking.[1] I try to place the present topic in perspective by indicating some critical features of that broader treatment, but I do so in a manner that is bound to be unsatisfactorily summary.

I first make a preliminary examination of the connection be-

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1. The broader treatment has been developed for a series of Thomas M. Cooley lectures delivered March 10-13, 1986, at the University of Michigan Law School. *See* Greenawalt, *Religious Convictions and Lawmaking*, 84 Mich. L. Rev. 352 (1985). A more expansive version of these is to be published as a book by Oxford University Press in autumn 1987. What appears in this article is a more extensive treatment of two concrete subjects addressed in the lectures. My work on this subject has been substantially aided by a grant from the Samuel Rubin Foundation for research during the summer of 1985.

tween religious premises and laws restrictive of liberty, the nature of religious premises, competing positions regarding the propriety of relying on religious premises, and some aspects of a model of liberal democracy. I then examine the premises underlying laws restricting consenting sexual acts and abortion, and consider whether it is legitimate for citizens to rely on religious premises to formulate their political positions on these subjects. This examination is followed by very brief comments[2] on political discourse, the roles of officials, and the boundaries of constitutionality in a strict legal sense.

My major substantive contention is that neither citizens nor officials should aim to prohibit actions in a liberal society just because they believe the actions are wrong from a religious standpoint. However, religious convictions do properly figure in determining how much protection particular entities deserve from society. I claim that laws in a liberal society must have a secular purpose, but that religious convictions sometimes properly affect what is viewed as a secular purpose and how that purpose should be fulfilled.

II. Preliminary Framework

I begin with an obvious point. Religious convictions of the sort familiar in the United States influence moral perspectives, which in turn influence opinions about desirable laws. Many laws derived from religious convictions in this way will restrict the liberty of others who do not share the convictions.

Major western religions, as well as most others, have ethical dimensions: the teachings of these religions have significance for how we should live and how we should treat others. The connection between religious conviction and ethical conclusion is complex and multifaceted. Ethical judgment may be affected, for example, by norms stated in authoritative scripture, by the positions of church leaders, by a view of God and of God's relation to human beings, by the views of the community of fellow believers, and by the perceived efficacy of prayer. Many religious persons who closely examine their ethical beliefs will understand that their religious convictions help determine their views about what is morally right. Even when a believer is highly skeptical that he understands what is morally right, his notions of what is *probably* right may be influenced by his religious convictions.

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2. *See infra* text pt. V.

No one asserts that any aspect of liberal democracy makes it inappropriate for one's private behavior toward others to be determined in part by religious conviction,[3] and organization with fellow believers to accomplish shared objectives is uncontroversial. Those who believe God calls on us to aid the homeless may give charity to homeless individuals and may organize to create facilities for sheltering the homeless.

Religiously determined ethical convictions also affect what people think are desirable laws and policies. A person who believes that the Bible's primary demand "of justice" is aid to the poor may support governmental assistance for the homeless and aid to starving children abroad. These measures, requiring the expenditure of public funds, impinge on the liberty of all taxpayers in the disposition of their incomes. When religiously based convictions lead to the legal prohibition of certain acts—such as the destruction of a rare animal species or purchase of obscene photographs—then the liberty of others is more directly restricted. Reliances on religious convictions to restrict liberty in the latter manner are more controversial and they are what I mainly discuss.

In the following discussion, I assume that religious convictions are nonrational. This is, as will subsequently be clear, a fairly crucial assumption. I do not undertake to defend the assumption here, but I need to explain it briefly. I roughly categorize convictions that bear on ethical judgments as rational, irrational, and nonrational. Among rational convictions I include those that are apparent to anyone with ordinary rational faculties or that can be demonstrated or persuasively argued on rational grounds. Beliefs, for example, that humans have greater ethical capacities than trees or that love is generally more productive of happiness than hate can be established on rational grounds. An irrational conviction is one that is contrary to what can be established on rational grounds.[4] A nonrational conviction is a conviction that, though not irrational, reaches beyond what rational grounds can establish. Though there is much disagreement about what rational thought can establish concerning religious truth, few, if any, religions are supposed by their adherents to be establishable on rational grounds alone. Even most

3. I put aside here situations in which religious convictions call for private actions that are themselves at odds with the premises of liberal democracy.

4. More strictly, perhaps, a conviction may be irrational only if it is contrary to what the individual involved could perceive on rational grounds.

Christians who think the existence of a divine being is rationally demonstrable do not believe that the special place of Jesus Christ is establishable on rational grounds. Something more is needed—a commitment through faith or a personal sense that recognition of the special place of Jesus conforms with how one comprehends human existence and its meaning.

I wish to avoid various misunderstandings in this context. I do not suggest that rationality plays no part in religious conviction. A large number of conceivable religious premises do appear to offend reason, and many people use their rational capacities to help decide what lies within the range of plausible religious positions. Moreover, highly refined rationality is used in the development of religious positions and their implications. Belief in the Trinity or in the divine authority of the Bible may be nonrational, but an elaboration of the concept of the Trinity or of the meaning of a biblical passage can be highly rational. Thus, to say that ethical judgments based on religious convictions are founded on nonrational premises does not mean that rationality plays no part in the underlying convictions and their applications, but only that a critical nonrational element is present.

Second, if I am correct in presuming a critical nonrational element in religious convictions, it certainly does not follow that every ethical judgment conforming to those convictions will itself be nonrational. Many ethical judgments are supportable on rational grounds. Human beings must teach that killing innocent people is wrong if we are to live in minimally peaceable and stable relations with each other. That moral principle can be established on rational grounds,[5] besides being endorsed by all important religions. When ethical judgments can be established on rational grounds, religious convictions, to oversimplify a bit, are largely superfluous in deciding what is right for society. On the other hand, religious convictions are important in deciding ethical questions that cannot be settled by rationality alone.

The third misunderstanding I wish to avoid is that I perceive some distinct and sharp line between rational and nonrational grounds. Imagine Carol, a Christian, who says:

> The complexity and immensity of the universe and the range of human capacities strongly point toward a divine creator. An understanding of human nature and of society would lead a

5. *See generally* H. HART, THE CONCEPT OF LAW 181-95 (1961) (on what he calls a "minimum content natural law").

> fully rational person to see that a Christian account does better to capture the truth of human existence than any alternative. Only ignorance, sin, and distorted judgment prevent people from perceiving the persuasiveness of that account.

At least in some sense, Carol believes that the basic premises of Christianity can be established on rational grounds. The belief that Christianity most fully captures one's own best sense of life's significance is not too far removed from the assumption that it would capture anyone's best sense, if all distortions of judgment were eliminated. Though not all Christians would take Carol's step from the first kind of judgment to the second, many would. However, I am concerned with the rational capacities of actual people, here and now. There are many people whose rational capacities are just as great as those of the most rational Christians, who understand at a rational level all the arguments for and against Christianity, but who do not believe that Christian premises are true. In actual conversations about deep religious truth, we reach a point at which we say, "This is how it seems to me," or "That's what my life and experience tell me," and we do not expect, if we are reasonable, that our strongest arguments will convince others whose life and experiences are quite different. That is what I mean by referring to religious premises as nonrational.

Finally, I intend no impression that religion and nonrational premises are coincident. Not only does rationality have a great deal to say about religious truth, but not all nonrational convictions are religious. When ethical choices cannot be settled on rational grounds, people who do not rely on religious convictions—convictions related to transcendent truth or adopted in some conjunction with other typical indicia of religious belief and organization[6]—must rely on nonrational convictions of some other sort. It is crucial to this article's thesis that religious convictions are a subset of the larger category of nonrational premises.

I have so far suggested that religious convictions, although not establishable on rational grounds, may determine ethical judgments that bear on laws and policies restrictive of liberty. The critical question is whether it is proper for citizens in a liberal democracy to rely on such convictions, "proper" not in the

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6. *See generally* Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984).

sense of merely legally permissible but proper in terms of a full understanding of what it is to be a good citizen of a liberal democracy.

The two extreme positions are fairly easy to identify. One is that the premises of liberal democracy are silent as to the grounds of, or judgments about, its laws and policies. Certain practices, such as racial oppression and restraints on speech, may be at odds with liberal democracy, but, according to this position, any grounds for policies that are not themselves illiberal are proper and, therefore, reliance on religious grounds presents no problem. My treatment of consenting sexual acts is designed to challenge this extreme position and to suggest more particularly that reliance on certain kinds of religious grounds is improper.[7]

The other extreme position is that conscious reliance on religious convictions is always inappropriate. This position is based on the premise that liberal democracy commits citizens and officials alike to secular resolution, or rational and secular resolution, of political problems. My treatment of abortion challenges the second extreme position. This treatment highlights the manner in which a more tenable intermediate position can be developed.

It remains in this introductory section to propose a partial model of our liberal democracy, one which can be used to analyze consenting sexual acts and abortion. In any liberal democracy, political power is largely dispersed, and ordinary citizens have, at least formally, ultimate political authority and the right to express themselves in the process of governance. Either by formal constitution or by tradition, governmental power over individuals is limited. People are free to develop their own values and, at least within limits, their styles of life; they are free to express their views not only on political questions but also on other human concerns; and they are free to develop and practice a wide variety of religious perspectives.

Although relations between government and religion in a liberal democracy are not disposed of so simply, one consistent aspect of liberal democratic political theory has been a secular justification for the state. Both liberal social contract theory and

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7. The thesis that reliance on religious grounds is not a problem for liberal democracy may be maintainable in a highly nuanced form. In this form, the characteristics that "disqualify" certain religious grounds are broader, and the grounds for saying that reliance on them is inappropriate may be stated independently of their religiousness.

utilitarianism provide a justification for the government and its powers and an explanation for the citizen's duty to obey that are independent of religious truth. For my aims, the theory of a government's justification is much less important than the proper purposes of government, particularly whether government should promote religion.

If religious liberty is a defining feature of liberal democracy, promotion of religious truth is subject to some obvious constraints. Burning heretics and compelling worship are obviously out of bounds. In the United States, the range of serious possibilities is further constrained by our Constitution, our traditions, and our present degree of diversity. The political theory of the United States, as well as somewhat controversial constitutional doctrine,[8] plainly bar any government authority from promoting particular religious denominations or doctrines. The more serious issue is whether government may promote religion generally, or theism, or a Judeo-Christian perspective, or Christianity. The establishment clause has been interpreted to bar such support as well; but Mark DeWolfe Howe has argued powerfully that this was not its historical import,[9] and many modern observers, including representatives of the Reagan administration,[10] have claimed that the Supreme Court's reading of permissible support is much too restrictive.

I accept the assumption, though I do not here defend it, that our liberal democratic government should not promote religion, even in this broader sense. That position seems to me to represent the fullest working out of a sound principle of religious liberty, and seems most adequately to represent the country's tradition of religious tolerance and separation of government from religion as applied to modern social conditions. The theory of liberal democracy appropriate for our society envisions that political authority should not promote particular religious views, that church and state should be substantially separate, that government officials should not dictate the decisions of religious organizations, and that religious authorities should not possess

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8. What is most controversial in this respect is whether the United States Constitution should be understood as barring such promotion of religion by state and local governments.

9. M. HOWE, THE GARDEN AND THE WILDERNESS 149-76 (1965).

10. *See generally* Meese, *The Battle for the Constitution*, POL'Y REV., Winter 1985, at 32 (arguing that a constitutional prohibition should be read to invalidate a law only when the Constitution "clearly speaks").

secular political authority by virtue of their clerical positions. Further, laws adopted by the government should rest on some secular objective; they should seek to promote some good that is comprehensible in secular terms.

With these principles in mind, I now turn to the concrete subjects of consenting sexual acts and abortion.

III. Prohibitions of Consenting Sexual Acts

Three simple yet powerful arguments oppose criminalization of actions that directly and substantially affect only those adults who freely choose to engage in them, a class into which many consenting sexual acts among adults fall. The first argument is that such matters of individual choice are none of the state's business. The basic idea, going back at least as far as Locke,[11] is that liberal government should protect the rights of individuals against infringements by others. Since consenting acts by two people that do not directly or significantly affect others do not infringe the rights of others, and since people do not need the protection of government against their own inclinations to perform such acts, no occasion for criminal penalties arises.

The second argument against restrictions, found most familiarly in John Stuart Mill's *On Liberty*,[12] is more utilitarian. It urges that people should have the power to live their own lives as they wish, so long as they do not harm others. If they are denied this power, the regime of penalties and inhibitions of desire will inevitably cause suffering and frustration. It will also stunt capacities for human development that could have benefited the individuals involved and contributed indirectly to broader enlightenment about fulfilling forms of life.

The third argument against prohibition rests on actual and likely patterns of enforcement. This argument claims that efforts to enforce such laws are unavoidably ineffective and convictions are rare. Allowing only occasional convictions to befall a few unfortunate persons is arbitrary and unjust; hence criminal measures should be eschewed altogether.

Several rational secular arguments can be mounted to the

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11. J. Locke, A Letter Concerning Toleration (J. Gough trans. 1968) (1st ed. 1689); J. Locke, *Second Treatise on Civil Government*, in Two Treatises of Government (T. Cook rev. ed. 1947) (6th ed. 1764).

12. J. Mill, On Liberty 9, 73-74 (Rapaport ed. 1978) (1st ed. London 1859).

contrary. There is first the paternalistic claim that prohibition is necessary to help people resist the temptation to engage in acts that are psychologically self-destructive or likely to cause harm to them in their future social relations. This claim has some plausibility for adultery, but it rings hollow with respect to most people who want to engage in homosexual acts. Homosexuals often are firmly committed in their sexual preferences and suffer serious frustration if they refrain from homosexual encounters. Whether in some general sense heterosexual acts are healthier or more natural than homosexual ones seems largely beside the point for people whose powerful inclinations are homosexual.

A second ground for prohibition is protection of family life. Understood as a concern about deleterious effects on family relations, the argument applies most strongly to incestuous relations. Sexual involvements between parent and child or brother and sister may gravely impair family relations even when the persons involved are adults; the prospect of such relations in the future may adversely affect interactions before children reach maturity. The argument about protecting family life is hardly relevant to homosexual acts committed by persons who are not married, except insofar as any sexual relations outside of marriage compromise an ideal that all sex should occur within marriage. The argument has more application to acts of heterosexual intercourse that may lead to conception and birth of children outside of ordinary family situations.[13]

The argument about protection of family life applies with greater force to extramarital sexual acts. The main worry here is not that extramarital sexual acts may reduce the number of children born into families, but that such acts undermine marriages and that failing marriages are bad for children. Extramarital acts can also be seen as impairing family life in a way that does not depend on harmful consequences. They may be viewed as infringing the rights of spouses, at least when married couples have no understanding that permits them to engage in such acts. The idea of forbidding adultery so as to protect spousal rights and stable family environments for children founders, however, on the frequency with which adultery is committed and the impossibility of effective enforcement.

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13. If pregnancies outside marriage more often lead to abortions, the wish to curb abortions could be a subsidiary reason for curbing sexual relations that lead to a particularly high incidence of abortions.

Another ground for penalizing consenting sexual acts is protection of children from sexual advances by adults. However, barring adult sexual acts bears little plausible relation to the avoidance of sexual impositions on children.

A fourth argument, now applicable most strongly to homosexual acts, concerns the physical dangers of unrestrained sexual relations. In addition to the traditional worries about venereal disease, there is now the grave danger of AIDS (Acquired Immune-Deficiency Syndrome), a killing disease that up to this time has been passed mainly during homosexual intercourse.

Finally, a claim may be made that the general moral tone of the community will deteriorate if acts that most people regard as morally obnoxious are not illegal. In its most plausible version, this claim rests on a connection between sexual morality and aspects of morality that are undoubtedly the state's business. The concern is that people will be so dismayed or alienated by the state's failure to enforce powerful sexual mores that they will be less inclined to respect the liberty and property of their fellows and to contribute to the common purposes of all society.[14] Since the posited connection is virtually impossible to prove or disprove,[15] estimating the strength of this argument in any society is very difficult.

With the exception of the criminal prohibition of incest, which I believe supportable on rational secular grounds[16] (and putting aside the threat of AIDS, which one hopes will pass), my own judgment is that the rational secular arguments against prohibiting private sexual acts among adults are far stronger than the rational secular arguments in favor of prohibition. I make this judgment despite my acceptance of the conservative premise that existing practices and laws may have a degree of social value that is not immediately apparent.[17]

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14. In my view, this is the interpretation of Lord Patrick Devlin's argument in *The Enforcement of Morals* that gives it the most persuasive power. P. DEVLIN, THE ENFORCEMENT OF MORALS 13-15 (1965).

15. H.L.A. Hart is thoroughly skeptical of this argument in *Law, Liberty and Morality*. H. HART, LAW, LIBERTY AND MORALITY 19 (1963).

16. Both the universal taboo against incest and the intuitive sense that family life is disturbed if one's parents, children, and siblings are regarded as potential objects of sexual attachment are sufficient to sustain the prohibition absent clear evidence that incest is harmless or criminalization futile. Not only are the arguments for prohibition of incest especially powerful, but also the impairment of liberty is very slight.

17. The hesitancy to abandon established practices and laws is most eloquently defended in Edmund Burke's writings. *See, e.g.*, E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (n.p. 1790). As H.L.A. Hart states: "[T]here is a presumption that com-

For purposes of this article, the implications of my judgment are more important than its correctness. Assume that Sam, who is persuaded that my view is right, also believes that homosexual acts are a religious sin and that God wants them stopped. He supposes that public coercion and the symbolic condemnation of these acts represented by legal proscription are appropriate devices to reduce their number.

The aim to forbid homosexual acts on this ground is at odds with basic premises of liberal democracy. We may start with the proposition that a liberal society has no business dictating matters of religious belief and worship to its citizens. It cannot forbid or require forms of belief; it cannot preclude acts of worship that cause no secular harm; it cannot restrict expression about what constitutes religious truth. Only a modest extension of these uncontroversial principles is needed to conclude that a liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition. As John Plamenatz said about Locke's argument for toleration of belief: "[L]ogically, it follows from this that no man ought to be punished for any action which is merely immoral and not injurious."[18] Freedom to worship and express opinion may enjoy a special place in a liberal democracy but, as liberals have recognized at least since Mill's *On Liberty*,[19] freedom to choose one's pattern of life is also very important. Though the claim for liberty to determine one's sexual activities might be strongest if it rested on some religious or conscientious ground, the curbing of these activities simply because they conflict with the religiously based convictions of others is unwarranted in any event. The inappropriateness of the state's pursuing religious objectives or promoting particular religious views implies the inappropriateness of its relying on particular religious views to foreclose actions whose impact would not warrant restraint on secular grounds.

Though I suppose that the balance of secular arguments is

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mon and long established institutions are likely to have merits not apparent to the rationalist philosopher." H. HART, *supra* note 15, at 29. A simple preference for what exists is not in itself a rational argument, but belief that changes are disruptive and that people are often unaware of all the ways in which institutions serve shared social ends may well be rationally based.

18. 1 J. PLAMENATZ, MAN AND SOCIETY 84 (1963).

19. J. MILL, *supra* note 12; *see also* Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 778 (1984).

substantially against prohibition, that supposition is not critical here. My position is that the possible sinfulness of sexual activities is not *by itself* a legitimate consideration. Even if Sam believes that the secular arguments tip only slightly against prohibition, he should either refrain from seeking the prohibition or should acknowledge that his aim to prohibit is at odds with the model of liberal democracy presented here.

A religious advocate of prohibition like Sam might try to respond with a more expansive version of the paternalist argument or by an extended claim about his freedom and welfare and those of his family. The paternalist concern about the welfare of the actors might be expanded to reach their spiritual welfare—what will happen to their souls or personalities after death and what their relationship to God will be in this life. That such an argument trespasses the boundaries of what is left to individuals in a liberal democracy is evident enough not to require lengthy explication: the fate of someone's soul or personality after death and the healthiness of his relationship to God in this life are not matters for the state, given the separation of religion from government and other liberal democratic premises.

A more complex reliance on religious grounds to justify paternalist prohibition is possible. Sam might claim that those who commit immoral sexual acts will be less happy and will suffer psychological maladjustments, understood in ordinary secular terms, that could be avoided by successful prohibition. So put, Sam's argument seems a straightforward paternalistic one, subject to ordinary factual evidence. But suppose that, when challenged as to the factual basis of his claims, Sam responds:

> I realize the ordinary factual evidence is now inconclusive as to whether prohibition will relieve unhappiness and maladjustment or cause them, but I am confident that no one living in a continual state of sin can be happy or well adjusted; so I am sure that any prohibition that reduces the incidence of homosexual acts will improve matters.

In this form, an ordinary paternalistic argument is based on factual claims that are grounded in religious convictions about the nature of sin and its consequences. Since I do not here address the problem of religiously informed factual judgments, it is enough to say that this version of the paternalistic argument is not subject to the simple objection that some possible grounds for state interference with individual lives are wholly inappropriate.

Sam might make another response: that his own freedom is involved because tolerance of sinful sexual activities impinges on his life and that of his family. Is he not justified in trying to prevent offense to his own religious sensibilities and to foreclose the presence of what he regards as examples dangerous to the religious life of those dear to him? No doubt, toleration of sinful acts may be so viewed by some people, but so also may toleration of sinful beliefs and their expressions. Of course, if liberty is understood to include the freedom to do anything one wants, the frustration of Sam's wish not to have homosexual acts committed is a restraint on his liberty. In liberal society, however, knowledge that others are performing acts that one regards as sinful cannot count as a diminishment of any recognizable liberty. Nor can any indirect danger to the religious life of loved ones caused by the known existence of sinful acts constitute a basis for prohibition.

What of the unhappiness that the knowledge of sin causes? Can the prevention of such unhappiness be a permissible secular ground for prohibition? So long as the religious basis for the unhappiness is treated as essentially irrelevant, the prevention of unhappiness is a secular reason. But that does not necessarily mean it will count very heavily; and perhaps it should not count at all. The aim to prevent unhappiness about the performance of sexual acts will typically be a reason of much less power than the religious basis from which it derives. Someone's damnation is a terrible consequence; Sam's actual unhappiness over the acts that cause another's damnation is likely to be less momentous since he has his own life to live. Further, liberal democracy may well be understood to make illegitimate, or at least highly suspect, any argument for prohibition that rests simply on the unhappiness that some people feel about knowing that others are committing certain kinds of acts. Permitting prohibition on this basis could undermine principles of respect for individual liberty and minority rights;[20] thus, reliance on unhappiness about

20. *See* H. HART, *supra* note 15, at 46-47. Hart makes this point in a passage that is eloquent but may be interpreted to support the mistaken proposition that perfect application of a thoroughly utilitarian approach, one that counts all the unhappiness caused by sins, would obviously produce a high degree of suppression. The degree of suppression would depend not only on the numbers of people on each side but also on the intensity of their feelings, and perfect application of the utilitarian standard might actually yield considerable freedom for deviant minorities. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 233-37 (1977) (arguing that "external preferences" about the behavior of other people should not count in legislative decisions).

knowing that acts are taking place may be viewed as improper, whatever the reason for the unhappiness.[21]

These observations highlight a profound theoretical difference between nonprohibition and the more positive aspects of a program that seeks nondiscrimination against those who perform "deviant" sexual acts. If a private employer is prohibited from discriminating in his hiring decisions against someone he believes is engaging in sinful practices, his religious liberty is implicated, at least if the employer will have continuing personal contact with the employee.[22] Religious liberty is also implicated if religious institutions cannot discriminate on grounds they regard as religiously appropriate. Since preservation of religious freedom and autonomy and equal protection against socially unwarranted discrimination are both legitimate governmental objectives in a liberal society, the model of liberal democracy yields no easy resolution to this legislative dilemma.

If the foregoing analysis is sound, there is at least one kind of religious reason that should not count for good liberal citizens of a liberal democracy.[23] The aim to prevent an act condemned from a religious perspective is not a proper ground on which to legislate a prohibition. Though I have illustrated this thesis with consenting sexual acts, the important conclusion is independent of whether prohibitions of such acts can be justified at all. Other reasons, including some that relate to religious premises, may properly support such prohibitions. My point concerns a certain kind of religious reason that is not consonant with liberal democracy. If reliance on that kind of reason is not proper with respect to consenting sexual acts, it is not proper with respect to other social issues either.

Whether the claimed bar on this sort of reason is one that relates peculiarly to religious reasons or to a broader category of

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21. A good deal remains to be said as to exactly which grounds are improper. If the acts of others create real insecurity about how one might be treated, as consensual euthanasia might engender fear that others will fabricate one's own consent when one is old, such insecurity would be a proper ground for prohibition.

22. Viewed more precisely, the matter may be one of degree. The religious liberty of an owner of a large company may be slightly affected if the company must hire persons who offend the owner's religious sensibilities, but the owner's religious claim is more significant if he is in continuing association with his employees.

23. One might draw from our tradition a model of liberalism that permits limited support of some broad religious positions, though not a preference for any particular denomination. I believe that prohibition of sexual acts is in tension even with that alternative model though the tension is less evident than with the model I have posited.

reasons is somewhat complex. The analysis can be generalized to conclude that a simple belief, whether religiously based or not, that acts are morally wrong is never an appropriate ground for prohibition; to support prohibition in a liberal society, one must be able to point to some genuine damage or danger to individuals or society. So understood, the bar on legislation extends to some nonreligious as well as religious views of wrong. But because a nonreligious moral view is much less likely than a religious one to have notions of wrong that can be detached from notions of ordinary harm, the bar mainly concerns religious reasons for prohibition. Further, given the special concern, historically grounded and reflected in the religion clauses of the Constitution, over imposition of religious positions, the bar is of particular practical importance as it applies to religious notions of wrong.

IV. Abortion and the Law

Induced abortion is the most controversial social issue as to which religious views figure prominently. Abortion is a tragic problem for our society. What some people sincerely regard as murder, others see as the exercise of a fundamental human right. The level of mutual understanding is very low, and confusion abounds about the proper place of religion. The rhetorical oversimplification of both sides of the debate was beautifully exemplified in the 1984 presidential debates. Walter Mondale exclaimed that the Republican platform's position that federal judicial appointees should be "pro-life" embodied a religious test of office; President Reagan responded that abortion was a constitutional, not a religious, issue.[24]

The real issue, more precisely put, is whether citizens of a liberal democracy do anything wrong if they base their position regarding the law of abortion on moral views derived from religious premises. I argue that the primary use of religious premises in this regard, to assign value to the fetus, is radically different from condemning behavior just because it is wrong from a religious standpoint. I also argue that because rational secular

24. Presidential Debate of Oct. 7, 1984, at Louisville, Ky., *reprinted in* N.Y. Times, Oct. 8, 1984, B4 & B5. Mondale said, "[T]he Republican platform says that from here on out we're going to have a religious test for judges before they're selected for the Federal court . . . ." *Id.* at B5, col. 1. Reagan said, "With me, abortion is not a problem of religion. It's a problem of the Constitution." *Id.* at B5, col. 4.

morality is incapable of answering critical questions about abortion, liberal citizens properly rely on nonrational premises, including religious premises, in developing their positions.

My aim is decidedly not to make yet another contribution to the proper legal treatment of abortion, how the existing Constitution should be interpreted, what legislatures should do, or whether a constitutional amendment should be adopted. My personal positions, based on complicated grounds including the appropriate judicial role in interpreting the Constitution, are (1) that *Roe v. Wade*, the case establishing a woman's general constitutional right to an abortion,[25] was wrongly decided; (2) that legislatures, were they free to decide, should adopt a permissive approach to abortion; (3) that a constitutional amendment requiring restrictive laws would be gravely misconceived; and (4) that even an amendment allowing such laws would be undesirable. If the tenor of the remarks that follow is more sympathetic to the "pro-life" position on abortion than is typical for those whose position is "pro-choice," the explanation is not a desire to promote covertly adoption of the "pro-life" perspective, but rather my belief that the "pro-life" position has often been mistakenly equated with the naked imposition of religious views.

The nub of whether a restrictive abortion law is justifiable turns on when a fetus warrants significant protection from society. Other arguments are obviously inadequate to justify restrictive laws. One traditional argument was that abortion endangered the pregnant woman's health; no one seriously argues that given modern medical technology this argument warrants any wholesale ban on abortions. Another traditional argument is based on the claim, especially associated with the Roman Catholic Church, that a proper openness of the sexual act to procreate precludes any artificial means of preventing the generation of life, whether contraception or abortion. Though purportedly based on a rational analysis of natural law, this claim presently has limited appeal to ordinary Catholics,[26] much less to most others. Still another argument for laws restricting abortion is

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25. 410 U.S. 113 (1973). More precisely, *Roe v. Wade* established the constitutional right of women, with a doctor's consultation, to have an abortion through the sixth month of pregnancy.

26. *See, e.g.*, M. NOVAK, CONFESSION OF A CATHOLIC 118-24 (1983). Novak dissents from the Catholic position on artificial contraceptives and states that studies show nearly 80% of Catholic married couples use contraceptives at some time during their married lives.

that permitting abortions causes a general decline in the value attributed to human life. In fact, little empirical evidence exists that permissive attitudes toward abortion lead to general diminishment of concern for human life.[27] *A priori,* one supposes that the likelihood that permissive abortion leads to devaluation of human life would depend on whether many people regard aborted fetuses as having a status similar to that of entities that are unarguably living humans. If many people did regard the fetus as a human life, the legal right of a pregnant woman to have the fetus destroyed might represent a cavalier attitude toward the protection of innocent life; but if fetuses were generally thought to have no intrinsic value, their destruction would have little bearing on the sanctity of life of developed humans.[28] Thus the worry about devaluing life turns substantially on what status should be, or presently is, assigned to the fetus.

The abortion issue is particularly intractable because of sharp disagreement over the moral status of the fetus. Those who think, for example, that at the moment after conception a fetus, (or, more precisely at this early stage, a zygote) has moral rights as extensive as those of a newborn baby tend to take a very different view of the morality of abortion from those who think a fetus is only potential life and that moral rights arise only at birth or at some later time.

If rational secular morality by itself is to resolve public policy on abortion, it must either (1) resolve the stage of development at which the zygote, conceptus, embryo, or fetus[29] warrants protection, or (2) show that the propriety of various legal solutions can be answered independently of the question of fetal rights. Adopting the common terminology of referring to the "fetus," whatever the stage after conception, I shall briefly examine the second strategy first.

I shall assume that if the fetus as such does not warrant any protection, the legal permissibility of abortion follows.[30] The

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27. *See* D. CALLAHAN, ABORTION: LAW, CHOICE & MORALITY 127-28 (1970).

28. It is possible that acceptance of permissive abortion would contribute to acceptance of less than rigid protection for others whose status as full humans was subject to doubt, such as those who have suffered irreparable impairment of all mental capacities, even if it did not dilute regard for those whose status as full humans was undisputed.

29. Passage from zygote to conceptus occurs within the first 24 hours, from conceptus to embryo after about two weeks, and from embryo to fetus at about seven weeks. Feinberg, *Introduction* to THE PROBLEM OF ABORTION at 2-3 (J. Feinberg 2d ed. 1984).

30. This assumption is not wholly uncontroversial. James Sterba has advanced an argument for protection of the fetus that depends only on the fetus being a potential

claim that the permissibility of abortion can be settled without resolution of the status of the fetus depends on the claim that a permissive law is appropriate even if the fetus has a significant moral status.

A. Arguments for Permissive Laws that Concede a High Moral Status to the Fetus

One frequent argument in favor of permissive laws appears at first glance to be independent of the moral status of the fetus, but it is not. That argument is that most aborted fetuses would have been born into exceedingly difficult life situations. Unless this argument rests on an assumption that the lives of most aborted fetuses would not have been worth living at all,[31] the

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person, not on its having yet acquired any special status. He claims that if one violates a right *not to be born* by giving birth to an infant known to be highly defective whose life will be miserable, then it must violate a right *to be born* to prevent from being born a baby that is presumptively healthy. *See* J. STERBA, THE DEMANDS OF JUSTICE 143-48 (1980). The theoretical answer to Sterba's argument is that the born but predictably miserable baby becomes a person with a life to lead and can then make claims about events that would have avoided this misery. (I personally reject the position that legal damages are appropriate for the quality of a miserable life for someone whose alternative was no life at all; I do not think we know enough about the quality of life under extremely difficult conditions to say that the person involved was damaged by being born.) The potential person who is never created never reaches the position of having moral rights. Sterba explicitly challenges this asymmetry but unsuccessfully.

Related to this point is the consideration that most people have the opportunity to generate large numbers of reasonably satisfied offspring. But the present consensus is that the world is considerably overpopulated, and no one asserts that we all have duties to create as many children as possible. Thus the failure to generate presumptively healthy offspring does not strike us as a wrong. Sterba recognizes that an argument not grounded on the fetus's acquired status casts into question the moral legitimacy of contraception-on-demand as well as abortion. *Id.* at 148-49. Few regard contraception as a moral wrong to the potential life whose existence is foreclosed, and no one regards that wrong as sufficient to justify a legal prohibition on contraceptive use. (I put aside here arguments that some contraceptives actually function to abort already created zygotes.) Of course, in having a fixed or established genetic composition the fetus differs from the potential fetus whose development is foreclosed by contraception, but, if that fixed genetic composition is significant, the point is precisely that it gives the fetus a status that a shadowy potential person would not have. Thus, any plausible argument for a legal prohibition on abortion does rest on the fetus having a status that is important rather than on its pure potentiality.

In the interest of completeness, I should perhaps also mention the argument about the general sanctity of life discussed above. *See supra* text accompanying notes 27-28. It would not be illogical for someone to support a restrictive law on the theory that because many people (wrongly) assume the fetus has great intrinsic value, the permissive law might compromise respect for life generally. This position would not be illogical, but such a severe restriction on a woman's privilege to control her body could hardly be warranted by vague disquiet about indirect effects deriving from a misconception.

31. Society does not, with the possible exception of newborns suffering extreme

argument presupposes that the fetus does not warrant significant protection.[32] Society does not allow parents to kill newborn babies who face difficult life situations, and it preserves the lives of children and adults who are locked into such situations. Further, as with unwanted babies actually born, adoption is a possibility for most unwanted fetuses who could be brought to term. Thus, the quality-of-life argument for permissive abortion is not, in its usual formulation, truly independent of some judgment about the moral status of the fetus.

At least two basic arguments for permissive abortion laws do not rest on assigning the fetus an intrinsic moral status lower than that commonly thought appropriate for newborns. One argument is associated with Judith Thomson's famous analogy of a violin player who can survive only if connected to another's body.[33] The assertion is that since one individual has a right not to have his body used against his will to sustain the life of another individual, a woman cannot be required to use her body to sustain a fetus even if the fetus is valued as highly as a living human being. This basic argument has been developed with great subtleness and persuasiveness by Donald Regan, who asserts that *Roe v. Wade* can be defended on equal protection grounds; he argues that since people generally are not required to be good Samaritans, it is unfair discrimination to require women to be good Samaritans to the fetuses they carry.[34]

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physical defects, make such judgments about the lives of existing people.

32. I am oversimplifying slightly here. If one took the position that the continuation of any human life depended on a balance of satisfactions for all lives affected by it, one could conceivably give the fetus the same intrinsic moral status as existing persons and still support permissive abortion. Such an attitude would, in theory at least, severely diminish the protection now thought to be warranted for newborn babies, although the attitude could allow some differential treatment of fetuses and newborns in terms of the general effects of their deaths on other people. I assume here that the quality-of-life argument does not depend on such a radical alteration in the theory of protection for existing people.

33. Thomson, *A Defense of Abortion*, 1 PHIL. AND PUB. AFF. 47, 48-49 (1971), *reprinted in* THE PROBLEM OF ABORTION 173, 174-75 (J. Feinberg 2d ed. 1984).

34. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979). Regan does not himself endorse the freedom our law leaves to "bad Samaritans." He makes clear that his argument starting from that freedom is one of constitutional law rather than of moral philosophy. *Id.* at 1645-46. He states that had he been writing moral philosophy he "would have made the argument in favor of abortion turn centrally on the proposition that a fetus is not a person." *Id.* at 1646. In my own view the equal protection argument, forcefully put forward as it is, is not convincing. I think the ordinary situations in which aid to others is not required are too far removed from pregnancy to support an equal protection ruling, especially when pregnancies far outnumber the other situations and involve, as the other situations often do not, an absolutely clear indication of what aid is

Although an unvarnished pure act utilitarian might doubt the premise that an individual cannot morally be required to dedicate his body over a period of time to saving another, I assume that the premise is sound. The analogy between it and abortion applies closely to the woman who is raped and becomes pregnant as a result. She should not be required to carry the fetus to term against her wishes. Of course, if her right concerns only the use of her body, she could not object if the fetus could be removed and grown in another women's body or in a test tube.[35]

In ordinary pregnancy, however, the woman is something other than an unwilling victim. Hence, a more complicated analysis of her responsibility is needed. If she has voluntarily performed an act (sexual intercourse) that she knows carries some risk of pregnancy, she bears some degree of her responsibility for the creation of the fetus.[36] On the other hand, perhaps the degree of her responsibility is so slight, especially given reasonable precautions against conception, that the woman does not lose a right she would otherwise have to free her body of the demands of the fetus. This view seems especially powerful if periodic, relatively frequent sexual intercourse is regarded as a part of virtually every healthy life. From that perspective, insisting that someone choose abstinence as the price of avoiding the risk of a pregnancy brought to term would be unfairly harsh. But neither that view of sex nor the conclusion that the pregnant woman is effectively freed of responsibility is obvious. For we are assuming at this point that the fetus deserves as much protection as a full

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needed and who uniquely can provide it. I also find the analogy to conscription somewhat closer than does Regan, and I think there is difficulty in equating the active termination of the fetus with an omission to act. (On this problem and various techniques of abortion, see Bok, *Ethical Problems of Abortion*, 2 HASTINGS CENTER STUD. 33 (1974).) Moreover, I am troubled by the quasi-voluntary aspect of most pregnancies. Regan candidly recognizes and carefully deals with these problems, and I can only report a sense of the balance of arguments that differs from his. In any event, insofar as the issue is a constitutional amendment to permit restrictive abortion laws, the argument from moral philosophy is the more crucial one; an explicit amendment could clearly authorize what would otherwise be an equal protection violation. As an argument against such an amendment, the gist of the equal protection argument could play some role if reformulated as an argument of fairness—that restrictive laws should not impose burdens on pregnant women of a sort that society is not willing otherwise to impose.

35. *See* Thomson, *supra* note 33, at 66, *reprinted in* THE PROBLEM OF ABORTION 173, 187 (J. Feinberg 2d ed. 1984) (arguing that the permissibility of abortion is not the same as the right to secure the death of the unborn child).

36. *See* Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 43, 49-51 (1973), *reprinted in* THE PROBLEM OF ABORTION 102, 107-09 (J. Feinberg 2d ed. 1984).

human being. On that assumption, the pregnant woman has voluntarily acted in a way known to risk creation of a relationship of dependence between her and a new human being, and she has in fact helped produce that relationship—a relationship that a great many women welcome. It is not unreasonable to believe that a woman who has chosen to take the risk of giving life to a new human being has a moral duty not to terminate its life within her body.

A different argument in favor of permissive abortion laws stems from present social reality. The essential claim is that even if the fetus intrinsically warrants as much protection as full human beings, it is inappropriate to force a restriction on people who do not believe in its bases and will not comply. Though nonbelief and noncompliance are often joined in practice, they are analytically separable; and the strength of an argument against a restrictive law depends on whether both are likely to be present. This principle can be illustrated by the following example:

> A shipwreck deposits Beth in a society in which infanticide is widely practiced and accepted, people generally believing that a baby becomes a person entitled to rights only when it acquires a capacity to communicate with others. The society is ruled by a monarch who is susceptible to new ideas, and birth records are adequate, so that examples of infanticide are easy to establish and would be easy to punish. Were infanticide outlawed and adequate enforcement efforts instituted, the law would be generally observed and the rate of infanticide sharply reduced. Having been persuaded by Beth that infanticide is morally wrong, the ruler asks her advice whether the practice should be prohibited. Beth recognizes that if predictable discontent with a change were intense enough, she might recommend waiting until the population were better educated about the intrinsic value of infant life; but given her view that each infant is intrinsically worth as much as every other human being, she thinks a prohibition would mean a great saving in human life. Not being an extreme proponent of the view that law should conform with popular sentiments, and not believing grave indirect negative consequences would flow from a prohibition, she advises in favor of the prohibition. However, if because of inadequate records and enforcement, the law would predictably have little effect on actual practices, Beth would approach the problem differently. Considering that law should not often forbid practices that will continue unabated and be regarded as matters of moral right by most who engage in

> them, and believing that blatant disregard would undercut any positive educative value the law might have,[37] Beth would in this case advise against prohibition.

This illustration's application to abortion is straightforward. Many women believe they have a moral right to have abortions and many will have them notwithstanding a restrictive law. Abortions will be less safe on the average if they are illegal; and the law will have much more impact on poor women, who are unable to afford trips to jurisdictions with permissive laws or to pay for safe illegal abortions, than on women with means. These difficulties should properly give pause about a prohibition even to one who is convinced that the fetus is morally entitled to the protection of a full human being. This is evidenced in Governor Mario Cuomo's thoughtful explanation of why he is opposed to a more restrictive legal treatment than presently exists, though he accepts the Catholic Church's moral teaching about abortion.[38]

If a fetal life definitely counts as much as an ordinary human life, however, a legal prohibition on abortion, with minimal enforcement efforts, almost certainly will save some lives: the number of fetuses that the law would cause not to be aborted would exceed the number of pregnant women who would die because of the increased danger of abortions. Such a law, too, may well exercise some influence on moral attitudes in the direction of protecting fetal life. The Supreme Court's implicit declaration that abortion is a moral right and its decision that early fetal life does not deserve the same protections as full human life may have encouraged the attitude that destruction of fetal life is morally acceptable; a return to general legal prohibition of abortion might have the opposite effect on adults of uncertain view and on some young people considering the question for the first time. To one persuaded of the full moral status of the fetus, the prudential arguments in favor of a permissive law, cast in terms of the practical limits on what a restrictive law can

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37. If disobedience were certain to be widespread but those violating the law did not view themselves as having a moral right to disobey (these conditions may be met, for example, by the 55 m.p.h. speed limit on highways), then modest gains in deterrence plus some educational value might seem ample to justify legislation despite its predictable ineffectiveness.

38. Address by Governor Mario Cuomo to the Department of Theology at the University of Notre Dame (Sept. 13, 1984), *reprinted in* N.Y. REV. BOOKS, Oct. 25, 1984, at 32.

accomplish, may not seem powerful enough to overcome the modest benefits achievable by a restrictive law.

A related but different version of the argument stemming from present social reality asserts that, when many people regard abortion as a moral right, it is inappropriate in a liberal democracy to forbid it. In the foregoing illustration, Beth has implicitly rejected this basis for not prohibiting infanticide, but Beth was dealing with a monarch, not with the institutions of a liberal democracy, and perhaps Beth was wrong in her judgment. Though Governor Cuomo's arguments for a permissive law are mostly those of political prudence, he also says:

> Our public morality, then—the moral standards we maintain for everyone, not just the ones we insist on in our private lives—depends on a consensus view of right and wrong. The values derived from religious belief will not—and should not—be accepted as part of the public morality unless they are shared by the pluralistic community at large, by consensus.[39]

Insofar as this comment indicates a special disqualification of religiously grounded positions, I shall deal with it below. I want now to consider it as a broader possible principle of political morality: that people should not be restricted in their actions except on the basis of a consensus of values. One might try to avoid the thrust of this position's application to abortion by suggesting that a consensus does exist as to the sanctity of human life—that the disagreement concerns the boundaries of human life. But Cuomo obviously supposes that the *relevant* consensus is lacking if the status of the fetus is disputed, and I agree.

When people perceive that some human beings are being grossly imposed upon by others, it is unreasonable to expect them to await a consensus before seeking protection of the innocent victims. Slavery and racial discrimination are apt examples. If seventy percent of the population regards those practices as vicious wrongs, that majority is plainly justified in prohibiting their practice by anyone. The way that opponents of abortion understand that practice is not so different. I do not mean to suggest that in a liberal democracy restrictive legislation is proper when only a minuscule proportion of the population holds a moral view supporting restriction. But in a liberal democracy those who hold such a view can suppose they will not be successful in achieving legislation unless their position enjoys

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39. *Id.*

substantial support. When they perceive the legislative decision as whether to protect innocent beings whose moral status equals that of full human beings, they need not await near-universal adoption of their position before imposing on those who disagree.

As with the argument based on present difficulties of enforcement, the argument based more directly on present diversity of value judgments falls short of supplying a convincing reason why a believer in the high moral status of the fetus should support permissive laws. Despite substantial arguments against restrictive laws, one convinced that the fetus is morally entitled to full protection may reasonably believe that legal prohibition is warranted to save fetal life in the short and long runs.

Though I have concluded that the appropriateness of a permissive legal approach to abortion cannot be demonstrated if one makes the concession that the fetus is intrinsically entitled to as much protection as an ordinary human being, that assumption is not a requisite for what I claim about reliance on religious convictions. If, contrary to what I assume, rational secular arguments can establish the illwisdom of a *general prohibition* of abortion regardless of the moral status of the fetus, other questions of law and policy will still make its status crucial. Should public financial assistance be given for abortions? Should methods of terminating pregnancies that will destroy possibly viable fetuses ever be allowed when other methods might produce live births? Once technology permits, should the fetus of a woman who wishes to discontinue a pregnancy be grown outside the womb if she wishes it destroyed? These questions may not be resolvable without attention to the status of the fetus even if the right to end a pregnancy can be established independent of that status.

The status of the fetus also has implications for the timing of the basic right to terminate a pregnancy. Present constitutional law permits severe restrictions on abortion after the sixth month of pregnancy, and many states impose such restrictions. So long as a woman has ample opportunity to have an abortion prior to this period, the impairment of the woman's right to control her body inherent in a third trimester restriction is much less than that involved in a blanket prohibition. But even that impairment may not be warranted if the fetus properly has no moral status prior to birth. Thus the modest restrictions of the

present permissive legal regime may themselves be supportable only if the post-viable fetus deserves protection.

B. The Moral Status of the Fetus

If resolution of the moral status of the fetus is crucial to its appropriate legal protection, rational secular analysis might resolve legislative questions by indicating that status at relevant stages of fetal development or by showing what the law should do in case of uncertainty. Though I cannot, of course, demonstrate that no rational argument is conclusive, I believe that rational secular thought cannot determine the points when a fetus is entitled to particular degrees of moral consideration or what should be done in case of uncertainty. I now sketch the grounds for those beliefs.

We need initially put aside two red herrings. The first is whether the fetus is alive. One can uncontroversially say that the fetus is a living, growing entity with the genetic composition of a human being, but that, at the early stages of pregnancy, it is incapable of independent life. That appraisal does not settle whether the fetus deserves moral consideration. The second red herring is the hope that science can resolve the moral status of the fetus. Science as a study of empirical truth can tell us the characteristics of a fetus at each stage of its growth, and it can inform us of possibilities for independent life. Science in the form of technology can push back the time at which a fetus might survive outside the womb. But neither factual knowledge nor technology can establish how much consideration the fetus deserves. Two people may agree on precisely how much a three-month-old fetus factually resembles a live baby, yet disagree radically about its moral status. Those who think that only very advanced fetuses deserve protection are not likely to alter their opinions because of a technological advance permitting a five-day-old fetus to be extracted from a pregnant woman and grown in another womb or in a laboratory. Understanding of fetal life and new technologies may very well affect judgments about the moral status of the fetus, but science cannot settle the moral issue.

1. Stages of development and inherent worth

Our society lacks any shared decisive moral principle to establish when an entity that will become a human being deserves

protection, and rational thought may be incapable of settling upon any one of the plausible choices. Initially I explain briefly why, as far as abortion is concerned, the critical issue concerns likely development and moral status, rather than the characteristics of full human beings that are sufficient to confer moral status.

Let us first consider a single-cell zygote. The zygote, formed when the female ovum is fertilized by the male spermatozoon, has the genetic structure of a human being, and some have spoken of any entity conceived of human parents as being human.[40] But imagine that for some reason a particular zygote could survive as a single cell but could not develop further. It is almost unthinkable to suppose a stringent duty to preserve the zygote in that form since we believe that the undeveloped zygote has no feeling or other capacity that would set it apart from a plant or a single-cell animal. As the fetus develops, the conclusion becomes less obvious and the exact characteristics at any particular stage less certain; but let us imagine that midway through a pregnancy the fetus, now possessing the limbs of a full human being, has a minimal capacity to feel pain but no self-consciousness or other mental powers.[41] If for some reason the growth of the fetus were permanently halted but its present existence could be continued, perhaps we would owe *some* duty to preserve the life of this minimally sentient being. But the duty owed would be far less than that accorded ordinary human beings; and a conflict between preservation of such an entity and the strong interests of the pregnant woman carrying it should certainly be resolved in favor of the pregnant woman. Although the moral status of the early fetus would seem most significant given a belief that God had given it a soul, even then an early fetus incapable of further development might appropriately be denied the kind of protection afforded full human beings.[42] Though I have certainly not

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40. *See, e.g.*, Noonan, *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION 1, 51 (J. Noonan ed. 1970).

41. Though no one is certain when sentience first occurs, one author suggests that it does so at some point in the second trimester of pregnancy. *See* L. SUMNER, *A Third Way*, in ABORTION AND MORAL THEORY 149 (1981), *reprinted as revised in*, THE PROBLEM OF ABORTION 71, 87 (J. Feinberg 2d ed. 1984).

42. I assume that the belief is not that a *fully developed* soul inheres in the physical body of an early fetus. If it were clear that the fetus could not develop further physically or mentally, one might well conclude that its "death" would not frustrate its spiritual development but would allow that development to proceed in another realm of existence. I acknowledge that this conclusion is debatable and, standing alone, may have disturbing

countered every possible contention that the early fetus deserves protection because of the capacities it then possesses, I have said enough to suggest that most concerns for fetal protection rest heavily on what the fetus is highly likely to become if it is not destroyed: a human being with ordinary human capacities.

Our culture, in its struggles over the status of the fetus, starts with a relatively firm consensus on two matters. First, we do not owe anything to entities that might be brought into being. Second, for most purposes and on most occasions, a newborn baby has a moral status equivalent to more developed humans and should have equivalent legal protection of its life. I explore these assumptions briefly, before turning to the special problem of the fetus. Attention to that problem will show that some of the possible bases for denying full moral status to the fetus cast into doubt the assumption that newborn babies have full moral status.

Neither the doctrine of the Roman Catholic Church that artificial methods of birth control are unnatural and therefore sinful, nor the idea that society owes something to successor human beings, is at odds with my claim of a consensus that we do not owe anything to entities that might be brought into being. The Church's position on artificial birth control is not grounded on some notion that preventing pregnancy denies the rights of beings that might have been created; and the Church accepts the "nonartificial" rhythm method as a means of forestalling pregnancy. The idea of obligations to future generations—and more particularly the sense that a given generation has a moral duty to perpetuate the human race—is widely accepted; but almost everyone agrees that no potential entity is denied any right when couples intentionally avoid pregnancy.[43] This is the consensus that I mean to convey roughly by the idea that we do not owe protection to potential, unconceived fetuses.

Some troubling questions arise about newborn babies. Among the most sensitive are the steps that should be taken to

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implications in respect to severely retarded babies. However, I think those real cases of "halted growth" are distinguishable in that the entities involved have reached a physical stage for which the most stringent protections are ordinarily wholly uncontroversial, and the entities are capable of at least further physical growth. I have, of course, not dealt with a possible religious position that God forbids any infliction of death, or even failure to preserve life, of any entity that has received a soul. But the notion that heroic efforts need not be made to keep alive ill people who have permanently lost all higher mental capacities suggests a common qualification to any such position.

43. *But see supra* note 30.

keep severely handicapped babies alive. At least some people draw certain distinctions in this respect between newborn babies and developed humans, believing that if the prognosis for a decent life is very discouraging, a newborn baby should be allowed to die even though a mature human being who suffers an equally impaired future should be kept alive. Such a distinction might be based on a theory that the treatment of developed humans more gravely affects the sense of security of healthy, developed persons, or be based more directly on the view that once someone becomes a developed human being society simply owes him more in the way of preservation than it owes a newborn baby. A related qualification about the full status of newborn infants concerns those who almost certainly will never reach a stage of self-consciousness; these may deserve less protection than human beings who have acquired self-consciousness or who probably will acquire it. Though the experiment might have been justified in any event as a necessary step in saving other human lives, the transplant of a baboon's heart into Baby Fae raised this issue, given the prognosis that Baby Fae would almost certainly not live beyond a few months.[44] If the probable quality of a life span is seen as critical, six months of life for a mature baboon might be valued more highly than six months of life for a human infant who will never reach a stage of development as advanced as that of the baboon. These controversial questions expose some uncertainties and paradoxes in our regard for newborn infants. They do not, however, undercut the basic conclusion that newborns with a potential for an ordinary, mature existence are widely thought in our culture to deserve as much protection as fully developed human beings.

If infants warrant full moral consideration and legal protection and potential zygotes warrant none, how are the moral status and legal protection of the fetus to be determined? As far as proper moral consideration is concerned, one can distinguish a "sharp break" approach from a gradualist one. A "sharp break" approach posits one or more particular points at which the moral status of the fetus changes drastically. There might be one point, often cast rhetorically as the time at which one becomes a human being or a person, at which the change is from no moral

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44. *See generally Baby with Baboon Heart Better; Surgeons Defend Experiment*, N.Y. Times, Oct. 30, 1984, at A1, col. 2; Franklin, *Baboon-to-Human Transplant Draws Mixed Reviews*, 126 SCI. NEWS 276 (1984).

consideration to the full consideration owed ordinary people; or there might be two or more points at which the amount of consideration increases dramatically. To accept a "sharp break" position, one need not be certain exactly when in the life of a fetus each shift—say the initial acquisition of sentience—occurs, but one would need to believe that certain discrete factual changes have great moral significance. A gradualist approach would conceive the moral status of the fetus as increasing slowly and steadily over time until it reaches that of the newborn infant. At each successive point the weight of interests necessary to override those of the fetus would increase.

The law of abortion cannot directly embody a gradualist approach; if the law is to limit at all, it must indicate with reasonable precision what choices by pregnant women, doctors, and other interested adults are permitted at which stages of pregnancy.[45] The criminal law should be clear about these matters, and constitutional standards must mark off which areas of choice are preserved from legislative restriction. However, a law expressed in terms of discrete stages could be justified in terms of a gradualist theory of moral consideration, the lawmakers recognizing that they could only crudely reflect the more subtle moral reality.

Among possibly significant stages of fetal development are conception, the end of the period in which the fertilized egg may split to form twins, the beginning of development of face and limbs, brain activity, sentience, "quickening," viability, and birth itself. As the fetus passes through each stage up to birth it becomes more and more like a newborn baby.

To many people, the most obviously significant stage is birth; at that point the fetus becomes physically independent of the mother and is socially visible.[46] Complex social practices, including many legal rules, make birth a critical point in the life of a developing human.[47] But to say that the fetus is owed no moral consideration prior to birth is troublesome.

What basis is there for valuing the fetus less than the new-

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45. It would be conceivable to proscribe abortion generally with an exception for "justified abortions," in which case the standard of justification using a gradualist approach would be applied to the status of the fetus.

46. *See* Noonan, *supra* note 40, at 53-54.

47. *See* Lomasky, *Being a Person—Does It Matter?*, in THE PROBLEM OF ABORTION 161, 172 (J. Feinberg 2d ed. 1984); Potter, *The Abortion Debate*, in UPDATING LIFE AND DEATH 85, 117 (D. Cutler ed. 1969).

born? Many people, including myself, have an intuitive sense that as the fetus approaches fuller development its moral claim to protection increases. But how does one defend this intuition or decide when a valid claim to protection and a valid claim to full protection are justified? On the latter question, suppose that a woman's obstetrician advises that labor should be induced for a pregnancy that has already proceeded beyond the usual length, and that hours before the scheduled delivery the pregnant woman has the fetus's life terminated. Many would regard this as just as wrongful as killing a newborn baby. But if birth is not the obvious place at which full protection should attach, no other stage in the development of a fetus has even that plausible a claim.

For some legal purposes, quickening has been regarded as significant. But in a more advanced scientific age, it makes little sense to base the moral rights of the fetus on the mother's sense that the fetus is moving within her.

The Supreme Court has fixed on the chance of life outside the womb as critical to legal protection of the fetus,[48] but that stage also is far from self-evidently crucial to the fetus's moral status. If the key issue in the abortion debate were the unfairness of imposing on the pregnant woman, then viability would be obviously significant. One could reasonably say that once viability is reached the woman should attempt to deliver her fetus in a manner that would allow it to survive. The relevance of viability, so understood, would concern a limit on a woman's exercise of her rights over her body; it would not describe a point at which the moral status of the fetus is radically altered. This argument against abortion, however, would not explain why a woman could be required to maintain a viable fetus in her body rather than having premature labor induced if that is her wish. Since viability may precede the point at which a fetus could actually *be delivered* and survive,[49] and doctors will not induce

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48. Roe v. Wade, 410 U.S. 113, 163-64 (1973). The Supreme Court found a constitutional requirement that abortion be allowed even after viability, if the health of the mother is at stake. *Id.* The Court apparently supposes that a viable fetus has less status than a newborn baby, though its rule might be grounded on a view that a woman's right to preserve her health permits detaching even an entity that would otherwise be valued as a full human being.

49. *See* Zaitchik, *Viability and the Morality of Abortion*, 10 PHIL. & PUB. AFF. 18, 19 (1981), *reprinted in* THE PROBLEM OF ABORTION 58, 59-60 (J. Feinberg 2d ed. 1984) (pointing out that viability means, not deliverability, but the ability to survive with the best medical assistance if somehow removed alive from the womb).

premature labor without strong medical indications, the thrust of laws forbidding abortion in the last trimester (in the absence of strong medical reasons) is to require most women to carry their fetuses to term once viability is reached. This restriction tends to confirm that viability is thought to affect the fetus's moral status, not just the liberty of the woman;[50] and we are left with the question whether that view is sound.

A minor problem with the claim of a critical threshold is the percentage of fetuses that would actually be capable of surviving if prematurely born. Suppose five percent of fetuses could survive at a given stage, why should all fetuses at that point be protectable? Is the point *really* that only the five percent warrant protection but that all need to be protected to safeguard the five percent? This question presses the general doubt as to whether survivability outside the womb is critically important to having substantial moral rights.

A further anomaly of the viability threshold is that, under this test, the rights of the fetus depend on changing technology. If a one-day-old zygote could be transplanted into a test tube and could grow to maturity, in some sense virtually all fetuses would then be viable. Would that mean they would all be apt candidates for protection? One might say that only viability in a free environment counts, but the moral distinction between being a fetus growing in a test tube and being a newborn baby kept alive in an incubator with the aid of expensive medical equipment is not strikingly apparent.

This possible distinction suggests a more persuasive doubt about the idea of independence. A newborn baby cannot survive by itself. Birth involves a kind of organic independence and alters the way in which the fetus is dependent, but survival still depends on the existence and efforts of others.[51] When the fetus

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50. I should acknowledge the possible position that the status of the fetus does not change with viability, but that the law should treat most abortions after viability as impermissible since a woman with strong reasons for an abortion has already had ample time to get one, and since the risk of a live but severely handicapped baby is great with premature deliveries.

51. One possible line for a shift in moral status would be when a baby reaches true independence and is capable of surviving by its own efforts. What exactly this would amount to is hard to say. Would a child have to be able to contribute productively or would the ability to beg be sufficient? And if begging is enough, why would not the capability passively to create caring sympathy be enough—a capability that a newborn baby does have? If that capability is enough, it may also be possessed by the fetus, since in this society most pregnant women do feel some concern for the potential human beings they carry. Moreover, outsiders would often be willing to make some sacrifices to

becomes viable, it moves from being necessarily totally dependent in one way to being conceivably able to be totally dependent in another way. Does this shift mark a sharp distinction in its moral rights against society and against the pregnant woman on whom it has been totally dependent in the first way? Perhaps viability increases imaginative links with the fetus because we can conceive of it as a living being; but for "bad luck," it would already be outside the mother's womb, a separate, legally protected entity.[52] But it is still not easy to understand why the capability to be totally dependent in a different way gives the fetus a right to remain dependent organically until natural processes end that organic dependence.[53]

One important difference between the nonviable fetus and a baby is that prior to viability only the pregnant woman can actually provide the necessary aid; after birth others may save the baby without the mother's help. This difference relates more directly to possible moral rights of the pregnant woman than to the comparative moral status of the fetus and the helpless baby; but it shows how difficult it is to think of the fetus's moral status independent of the rights of the pregnant woman. In theory we can conceive of clashes of independent rights, but in actuality we are loathe to acknowledge that millions of beings with a moral right to society's protection can be terminated because of

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save the life of a fetus if they could. If the outsiders are willing and able to force women not to have abortions, then fetuses would have this passive capability to survive. In this sense, survival capability provides no independent standard for moral protection, because to a large degree it reflects present social morality. If no one cared whether fetuses survived, then they would lack this capacity; if almost all people thought fetuses had a right to survive, then even early-term fetuses would have the capacity.

If capability to survive by one's own efforts were to mark an independent standard for moral protection, the relevant efforts would have to involve some more positive ability to secure one's survival. Certainly no child would reach this stage until he had a rudimentary command of the language, so that infants up to the age of approximately two years would certainly be excluded. I shall not speculate about how much more would be necessary because the whole position is so at odds with the present moral notion that beings that we can communicate with and that can make claims upon us and demonstrate their affection for us are morally entitled to protection though they are not able to survive independently.

52. *See* Zaitchik, *supra* note 49, at 21, *reprinted in* THE PROBLEM OF ABORTION 58, 60-61 (J. Feinberg 2d ed. 1984).

53. *See* P. DEVINE, *Scope of the Prohibition: Nonhumans, Robots and Infants* and *Scope of the Prohibition: Fetuses and Human Vegetables*, in THE ETHICS OF HOMICIDE 87 (1978), *reprinted in revised form as The Scope of the Prohibition Against Killing*, in THE PROBLEM OF ABORTION 21, 39 (J. Feinberg 2d ed. 1984).

an exercise of will on the part of women with a right not to have their bodies employed against their wishes.[54]

2. The relevance of potential capacity

An attempt to decide the moral consideration owed the fetus entails asking how much an entity's potential capacity bears on its present worth.

Perhaps it is fair to say that the intuitive moral sense of most people in our culture is that both potential capacity and present, or past, characteristics matter. I have suggested that many people feel that a graduated approach or a multistage approach best captures the moral worth of the fetus. The only respect in which the *potential* capacities of the ordinary fetus change over time is that the likelihood of its surviving to birth increases somewhat; but this increased likelihood hardly explains the feeling that the moral consideration we owe the fetus increases substantially. Thus, present characteristics are felt to be relevant as well; the more a fetus is like a baby, the more consideration it is owed.

As I have suggested, however, with my imaginary example of a fetus whose growth is completely halted, it is improbable that present characteristics alone are determinative of moral status. One reason newborn babies and late fetuses are thought to have so much value lies in what almost all of them will become.[55] If the great majority of babies never developed capacities beyond those of newborn babies and the members of this majority were identifiable at birth, giving them much greater care and protection than is given mature higher animals with greater present capacities would be a striking form of specism; and it seems unlikely that in such radically different conditions of life, *all* newborn babies would be regarded as having the inherent worth of developed human beings.

Perhaps because this mix of present characteristics and potential capacity is not very neat as a way to assign value, various theories have been advanced that avoid its anomalies. Classic utilitarianism makes potential capacity ultimately critical. What

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54. It is partly for this reason that the fantasy of the violin player attached to another's body yields such an insecure grasp of the moral situations that arise continually in everyday life.

55. *See* Noonan, *supra* note 40, at 53 (suggesting how probabilities of development affect our moral outlook).

is morally good, it asserts, is the maximization of happiness and minimization of unhappiness. Given the aim to achieve the maximum happiness possible, one's *present* capacity to feel pain and pleasure confers no special status; what counts are one's future possibilities for experiencing pleasure and pain and how one's treatment and actions will affect others. If a present early fetus is capable of experiencing more happiness and less unhappiness in the future than an existing human being, then, other considerations aside, its interests should be preferred.

But both this conclusion and the broader implications of the emphasis on potential capacity are strongly counterintuitive. The utilitarian view that entities should be valued only as potential receptacles for pleasure and pain has the startling implication that there is as much intrinsic reason to create potential entities as to protect existing ones. Under this view, people might have a moral duty to increase population to whatever level is necessary to effect total maximum happiness over time; or, alternatively, to regulate the level of population so as to maximize average happiness. Were it possible that some all-powerful being could increase happiness by wiping out all existing humans to make room for a new race of beings, it would be morally appropriate for that being to do so. However, the conclusion that destroying all existing people might be morally desirable is paradoxical for a philosophy that begins with people's desire for happiness and urges that their maximum happiness be the aim of actions.

A utilitarian might respond that I have disregarded a crucial human characteristic which distinguishes fetuses from existing human beings—the capacity to feel fear and anxiety. A critical distinction exists between fetuses and mature people: if one fetus is destroyed, another fetus does not experience distressing anxiety; but if mature human life is treated as cheap, everyone feels insecure. Social institutions should minimize fear and anxiety, and it is sufficient for these purposes mainly to protect beings that have those feelings.

One objection to this response is that it still does not make replacement of human beings wrong if an all-powerful being could destroy the human race without creating human fear *and* could substitute new entities that would not suffer anxiety because of the previous destruction of human beings. More importantly for our purposes, if fear and anxiety are the critical capacities, newborn infants are indistinguishable from fetuses; future

development would be necessary before they warranted the protection accorded more mature humans. If the capacity to feel fear and anxiety is essential to protection *because* these painful emotions should be avoided, destruction of babies in a way sure to avoid these feelings is not precluded. Perhaps a utilitarian could support present moral views by stressing the sense of identification between mature people and babies, but the argument would not do justice to the feeling most people have that babies deserve protection in their own right.

To avoid these difficulties, a utilitarian might suggest that our aim should be maximization of happiness for entities that now exist or that will, in any event, exist in the future. On this construction, society need not protect entities that might come into being. Such a principle, however, affords no standard for fixing the line between potential being and existing being. The utilitarian might, of course, simply respond that nothing counts as an entity until it is born or viable, but neither of these lines can be derived from utilitarian premises.

In contrast to an exclusive emphasis on potential capacity, some authors have argued that absent actual capacity, moral status, or at least full moral status, is inappropriate. In a sense the claim is terminological, but typically it is also seen as having important substantive implications. The terminological claim is that the fetus cannot be the subject of moral rights or justice because it lacks the necessary capacities. Michael Tooley, for example, argues that a thing cannot have a right to life unless it is capable of having an interest in its continued existence, that it cannot have such an interest unless it is capable of conceiving a continuing self, and that, therefore, neither fetuses nor newborn babies have a right to life.[56] Others suggest that only moral agents can have claims of rights and justice.[57] The substantive conclusion, explicitly or implicitly drawn, is that killing a fetus, or a newborn baby, is either not inherently wrong at all or is less wrong than killing a mature human being.

Neither the conceptual claim nor the substantive conclusion is particularly forceful. Terms are used in a variety of ways but there is nothing particularly odd in thinking of entities that lack present moral capacities or the ability to conceive of a continu-

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56. *See* Tooley, *In Defense of Abortion and Infanticide*, in THE PROBLEM OF ABORTION 120, 129-33 (J. Feinberg 2d ed. 1984).

57. *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 74-75 (1980).

ing life as having a moral right to life. Suppose that Calvin, an adult, is in a coma that predictably will last three months, after which he will regain the capacities of a normal adult. We certainly think that Calvin has a right to life though he cannot now presently conceive his own continued existence or act as a moral agent. Of course, Calvin did previously have these capacities, but that alone cannot be determinative if Calvin is thought, as commonly is the case, to have greater rights than someone who is in an irreversible coma. Many people regard the family's choice to turn off life-sustaining medical support as morally permissible if someone is in an irreversible coma, and many states permit that choice. Neither morally nor legally is the choice permissible in the case of a temporary coma. If Calvin's combination of past and potential future capacity is plainly sufficient to confer rights, the supposed inability of future capacity to confer rights cannot be based on some straightforward conceptual bar.

In any event, the critical point is acceptable moral behavior by those who lie under duties. Even if we grant the terminological claim about rights, the substantive conclusion about nonprotection does not follow. Let us suppose that fetuses cannot possess rights. It would not *automatically follow* that human beings have no duties toward them. A coherent moral view could claim that there are some things human beings should not do to entities that are incapable of having rights. Most uncontroversially, humans should not inflict gratuitous cruelty on higher animals. Once this much is granted, humans might have a duty to avoid intentionally destroying the life of a sentient or potentially sentient being. Given that principle, a fetus, though it holds no rights, might warrant protections like those given mature humans; and the stringency of the duty to respect its life might be as great as if the fetus did have rights. Of course, one could assert that the same incapacities that render the fetus an inappropriate subject of rights also make it less deserving of protection; but substantive argument, rather than merely conceptual analysis of what is necessary for rights, is needed to reach that conclusion. Once the need for substantive argument is seen, we revert to the problem of the relevance of present characteristics and potential capacities.

The notion that moral capacity is, in some sense, critical to moral status is less clear in its applications here than is classical utilitarianism, and is no more helpful in lighting the way to a convincing resolution. For both John Rawls and Bruce Acker-

man, the attainment of moral personality—the ability to make moral claims and to understand the claims of others—[58] is essential to being a subject of rights and justice. Given the common assumption that higher animals are owed at least some moral consideration, I shall understand the claim to be that entities engaging in moral practices deserve a much higher degree of consideration than other entities.[59]

One way of understanding the basic idea is that membership in the moral community is what counts; another interpretation would emphasize one's participation in moral practices whatever community is involved. This distinction can be illustrated by a variation on the fable about space travelers that Ackerman uses to develop his theory of justice.

> Travelers from earth land on a far distant planet. They discover inhabitants who appear to have developed highly complex patterns of life evidencing an intelligence and concern for others which exceed those of most humans. Though the travelers are confident that the inhabitants have these characteristics, communications between the two groups is presently impossible. The travelers suppose that with enough time and effort they might learn to communicate, but they think their own lives would be more convenient if they simply exterminated the inhabitants; they would not hesitate to exterminate beings having the characteristics of other animal species on earth, but they wonder if they would be doing anything wrong by killing these highly developed creatures.[60]

If one adopted a strong position that present capacity to communicate with members of the moral community is a condition of substantial moral consideration, the extermination would be justifiable. But one is hard put to understand how such a position could plausibly be defended—how it could be that rational liberal morality must, or should, take as a starting point

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58. *See id.*; J. RAWLS, A THEORY OF JUSTICE 505-10 (1972). There is a subtle distinction between simply making and acknowledging claims and the more advanced ability to comprehend a moral dimension of life, but we need not pause over which point might be critical.

59. To be significant, this higher degree of consideration would need to reach matters like the protection of innocent life, as well as matters that obviously depend on reciprocal interaction.

60. *See* B. ACKERMAN, *supra* note 57, at 72-73. Ackerman's example ends inconclusively in the comment that the earthlings *might* treat the inhabitants as if they were citizens. *Id.*

that only those who can communicate *with us now* deserve substantial moral concern.[61]

The illustration contains two lessons. It suggests that capacity and intelligence have independent significance; a duty not to take innocent life has at least some application to beings with capacities as great as those of humans even if communication with them will never be possible. The illustration also suggests that insofar as ability to communicate moral claims to those constituting the relevant society *does matter,* ability to communicate at the present moment cannot be the only relevant consideration. If the expectancy based on past space travels is that communication can be established in a matter of weeks, and all agree that in that event equality of consideration would be appropriate, the travelers should not frustrate that probability by *now* treating the inhabitants as a lower order of beings.

The inhabitants in the illustration do differ significantly from fetuses, which presently engage in *no* moral practices and now totally lack communicative and moral capacity. If present moral capacity itself counted for substantial moral status, fetuses would still be denied the protection given to the distant planet's inhabitants. So also would infants until the age of two or so. The conclusion that young babies do not intrinsically warrant full protection is not only strongly counterintuitive in our culture;[62] its grounding is dubious. If present *reciprocity* is not determinative, why should a culture not accord protection to en-

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61. A defender of this extreme position might claim that the example is unfair and that, in fact, we could never know that beings are intelligent and possessed of moral capacity absent an ability to communicate with them. Whether moral positions can fairly be tested by wholly artificial factual assumptions is a troubling question. Though I believe this illustration, however artificial, does suggest that capacities themselves have significance independent of the power they confer to communicate with those making the moral judgment about how to act toward those who possess the capacities, I also want to resist the challenge of artificiality.

Is it so implausible to suppose that we might discover creatures so different from us physically that we could be fairly certain about their substantial capacities without their being able to communicate with us? Is it not even possible that such a conclusion might be reached about some animals on earth, such as dolphins? In earlier eras of this world, explorers landing on unfamiliar shores were initially able to have only limited communication with the natives. No doubt, common physical characteristics made possible a degree of immediate bodily communication, but that alone may not have been sufficient for asserting moral claims. Did not the explorers owe the natives substantial moral consideration upon recognizing the natives as humans possessed of intelligence and almost certainly also possessed of moral capacity?

62. Ackerman courageously endorses this conclusion though he relies on less direct reasons to protect healthy newborns from infanticide. B. ACKERMAN, *supra* note 57, at 128-31, 145-46.

tities capable of developing a moral capacity that will lead to reciprocal relations? Though Ackerman assumes that present capacity is critical to full protection, Rawls supposes that newborn babies would be protected by a principle defining moral personality "as a potentiality that is ordinarily realized in due course."[63] Once we regard potentiality of existing entities to engage in future moral interactions as relevant, no clear basis exists for drawing the line at birth and not extending protection to fetuses.

In sum, like utilitarianism, a moral capacity approach can be understood in a way that yields answers to the relevance of potential capacity, but these answers are offensive to present intuitions. The most straightforward version of utilitarianism offends by making potential capacity all that matters; a strict present moral capacity approach offends by making potential capacity of no direct account. Understood in other ways, neither the moral capacity approach to moral status nor utilitarianism resolves whether a fetus warrants protection, because the theories do not themselves provide a standard for when entities begin to deserve protection.

3. The limits of rational secular morality and borderline questions of status

I have suggested thus far that rational secular analysis provides no convincing answer to the moral status of the fetus at various stages, and that more generally such analysis cannot tell us how much potentiality should matter for the inherent worth of a being already living in some form.[64] In concluding that rational secular morality cannot settle the status of the fetus, I do not, of course, mean that no version of secular morality can do so. We have seen that both simple utilitarianism and Ackerman's theory of justice do provide clear answers to the issue. But ability to give *some* answer to a difficult question cannot be the basis on which one decides what moral theory to accept in general or to cope with the particular difficult question.[65]

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63. J. RAWLS, *supra* note 58, at 505.

64. *See* Wertheimer, *Understanding the Abortion Argument*, 1 PHIL. & PUB. AFF. 67, 73-74, 76-78 (1971), *reprinted in* THE PROBLEM OF ABORTION 43, 46, 48 (J. Feinberg 2d ed. 1984); *see also* L. SUMNER, *supra* note 41, at 131.

65. One cannot, of course, be expected to accept an otherwise unconvincing theory just because it gives answers to troublesome questions. Moreover, a secular morality that can provide clear theoretical answers to some social questions may have more difficulty

The capacity of one particular secular moral theory to answer a question does not establish that rational secular morality *in general* answers the question, unless the superiority of the moral theory itself is establishable on rational grounds. Though I shall not argue the point, my strong belief is that rational argument is inconclusive as to the merits of various plausible overarching approaches to morality.[66] Even if I am wrong about this, the arguments are so complex that an ordinary person is ill-suited to make a rational decision between, say, utilitarianism and some version of the moral capacity theory, insofar as they speak to substantial moral status. Individuals must somehow decide which perspective among plausible candidates has greater appeal, but they cannot by rational argument demonstrate to others the correctness of their choice. Because rational secular morality is incapable of demonstrating the superiority of any one version of that morality over some others, the hope that it can resolve the status of the fetus by reference to a single more embracive theory is ill-founded.

A further, and more subtle, point is worth mentioning in this context—the comparative strength of rational argument and widely shared reflective intuitions. I have noted that the theories with the clearest answers to the status of the fetus also yield other answers that are strongly counterintuitive—simple utilitarianism, for example, suggesting that present beings can be dispatched in favor of potentially happier entities; and one version of the moral capacity approach radically downgrading the inherent moral status of infants in comparison to that of mature persons. If one assigns the fetus to either a highly protected or a nonprotected status on the basis of persuasive rational arguments for a comprehensive theory, one must accord the theory and the arguments their full scope. That means, for example, that if a fetus is denied protection *because* it lacks present moral capacity, the moral status of infants must be conceded to be much less than that of mature persons. What is a citizen to

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with others. And even when the theory itself is clear, the relevant facts may sometimes be so elusive that *application* of the theory to resolve a particular problem of social choice may be extremely difficult. Even if every social problem were clearly answerable by at least one secular moral perspective, a rational individual could not endlessly shift his moral perspectives to accord with whichever perspective happened to give an answer to the problem at hand.

66. My scepticism is far from complete. I do think rational argument is capable of showing the unacceptability of many conceivable approaches. All I assert is that plausible approaches remain whose competing claims cannot be resolved on rational grounds.

do if the apparently most persuasive position on rational grounds about the status of the fetus is one that he *feels* is deeply abhorrent because of its broader implications? Moral philosophers debate the weight of rational thought and reflective intuition[67] when they are not reconcilable; but it would take an extreme rationalism to assert that every good citizen must give priority to the arguments he finds rationally stronger. In light of the tremendous shifts throughout human history over what people have thought was rationally demonstrable, requiring people to deny some of their deepest feelings—feelings not dissipated by reflection—[68] in fealty to their present perception about the balance of persuasion in abstract rational arguments would be to give rational argument a preeminence not required by any basic premise of liberal democracy. Perhaps it would be illiberal to refuse to abandon a moral conviction that one thinks rational argument can demonstrate to be patently wrong; but it is neither illiberal nor irrational to adhere to the basic starting point that the healthy newborn has a status equal to that of a developed human being in the face of a belief that extremely complex rational arguments seem to tip slightly in a different direction.

I conclude that rational thought cannot resolve the status of the fetus. Some conceivable positions about fetuses are unreasonable on their face. One might say that about the position that inherent value declines as the fetus develops or that the hair color of a pregnant woman is relevant to the value of the fetus. What I claim is that rationality cannot tell us whether at various stages of development a fetus is entitled to no protection, full protection, or some protection but less than is afforded full human beings; it cannot settle that question standing alone, and it cannot direct us to one among the overarching philosophic views that would settle that question.

Though I have spoken mainly of inherent unresolvability on rational secular grounds, my basic thesis actually requires only the weaker assertion that *most people* are unable to resolve the status of the fetus on rational secular grounds. An individual would be able to achieve such a resolution if either he himself

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67. *See* P. DEVINE, *supra* note 53, at 61, *reprinted in revised form as The Scope of the Prohibition Against Killing*, in THE PROBLEM OF ABORTION 21, 39 (J. Feinberg 2d ed. 1984).

68. Ideally, the comparison of abstract principles with concrete intuitions brings about a reflective equilibrium in which a match is achieved, but people are not always fortunate enough to reach that stage.

could understand the rational grounds that settled the issue or he could find rational secular grounds for trusting someone else's judgment. But if the individual finds neither sort of inquiry dispositive, he will need to turn elsewhere.

These pessimistic conclusions about the power of rationality may be unpalatable to full-blooded rationalists, but they should not surprise us. Borderline questions of status—the kind of problem discussed here—have proved among the most intractable for those developing comprehensive moral positions. Many questions of this sort are not susceptible of techniques that permit rational moral judgment in other areas. Rationality has an extensive domain concerning the conditions of a moderately peaceful social life and the choice of means to accomplish valued ends.[69] Rational analysis also has powerful implications for how we should treat other beings when we recognize them as like ourselves. If we acknowledge that another human being is like us but fail to show him the respect we ourselves demand, we may demean him, and perhaps ourselves, in a way at odds with a basic principle of morality (universalization) that is perhaps not logically compelled but is rooted in our notions of what is rational. Finally, when moral positions are tested by a standard of coherence with other moral positions, rational thought can often establish whether or not one position is out-of-line with other positions an individual or culture takes.

What is significant about many borderline questions of moral consideration is that they simply do not yield easily to these approaches. Rational analysis can show the implications of various positions and it can show how well one position on a borderline question coheres with a second position on another borderline question, but rational analysis cannot supply the critical value judgment that may be determinative. The issue typically is how to weigh the ends and welfare of entities that are in some ways like us and in others not like us. The question is not one of means and ends nor of the conditions for mutual existence of entities already assumed to need to exist mutually. We

69. In this respect the question of the status of fetuses is, as I have already indicated in my discussion of fear and anxiety, radically different from otherwise similar questions about the status of persons whose intelligence, moral capacity, and ability to communicate have been lost through accident or age. One relevant inquiry about those whose capacities have faded is what effect variant practices will have on the security of persons who now have full capacities but realize that they may some day lose their capacities. Barring reincarnation, none of us will ever again be fetuses or infants, so the treatment of these beings can affect our security only in some much more indirect way.

must decide whom we will recognize as beings like us, or somewhat like us, not what the implications of such recognition are. Various positions on borderline questions will fit comfortably with otherwise similar moral positions, as is shown by the fact that people who agree across a wide spectrum of moral issues can disagree strongly over the moral status of the fetus.

C. The Dimension of Uncertainty and the Status of Nonrationally Grounded Claims

I have so far indicated that there is no rationally convincing answer to the status of the fetus at various stages. I have also suggested the failure of the argument that the pregnant woman's right takes priority even if the early fetus is assigned the highest possible status (that equivalent to a full human); and that, if the foregoing judgment is wrong, other actual or potential policy decisions about abortion will turn on the status of the fetus. The implication is that legal policy is not wholly determinable without regard to the status of the fetus and therefore is not wholly determinable on rational grounds.

Before we embrace that implication, however, we should consider two possible ways of avoiding it. One line would be that (1) rational analysis does tell us that the status of the fetus is uncertain and (2) there is one rational moral and legal response to this uncertainty. Unfortunately, however, there are competing responses to the possible uncertainty. The first would be that in cases of doubt, people should be morally permitted to do what they think is *probably* morally permissible,[70] especially if they have powerful reasons for their actions. Thus, absent a confident conclusion that the fetus has a right to life, a woman with strong reasons would be morally justified in having an abortion, and a permissive legal approach to abortion would be appropriate. The contrary response is that the taking of innocent life should not be risked, at least barring the most extreme justification, so that abortion is morally unwarranted and should generally be forbidden.[71] A conceivable third response is that whatever the moral propriety of "running the risk," the law should at least leave the

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70. *See* P. DEVINE, *supra* note 53, at 81, *reprinted in revised form as The Scope of the Prohibition Against Killing*, in THE PROBLEM OF ABORTION 21, 34 (J. Feinberg 2d ed. 1984) (discussing the notion of probablism, an idea whose applications are caustically and entertainingly attacked in Pascal's Provincial Letters, B. PASCAL, LES PROVINCIALES OU LETTRES ÉCRITES PAR LOUISE DE MONTALTE (Clermont en Auvergne 1756)).

71. *See* G. GRISEZ, ABORTION 306, 344 (1970).

choice to private individuals. The kind of "risk" involved is so different from ordinary risks based on uncertain facts that I believe other moral practices provide unsure footing for resolving the issue. Much may depend on exactly *how strong* one regards the need or putative right of women seeking abortions. Uncertainty introduces an important additional dimension to the abortion discussion, but I am skeptical as to whether, in general, it brings us any closer to rational resolution of legal policy.[72]

A second possible, and somewhat related, way of resolving legal policy is to say that, in case of conflict, a rationally grounded right should take priority over a claimed right resting on a nonrational value judgment. (This point is related to the previous one in that many people regard judgments as uncertain when they recognize their ultimate grounding in nonrational premises.) This position largely undercuts the power of those claims on behalf of fetuses which inevitably rest on nonrational judgments since the claims of the pregnant woman to control her body can be rationally derived from, or are closely analogous to, more general and fundamental principles of personal integrity and liberty. I shall not pause to try to demonstrate that these fundamental principles are establishable on rational grounds (or at least are inextricably linked with political liberalism), but I think the demonstration can be made.

Put in absolute terms, the asserted priority of rational grounds is implausible. Suppose protection for the remnants of a species rested on a nonrational judgment about the relation of human beings to the natural environment, while the desire to kill members of the species was based on rational economic reasons. Given the minimal impairment of liberty wrought by a protective law,[73] the nonrational judgment should be able to prevail over the rationally grounded economic reason.

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72. The qualification "in general" is important here. Suppose that Nancy and Olive live in a society in which they recognize that 80% of the people regard fetuses as having no moral status, that a restrictive law would not be effectively enforced, and that such a law would cause great social tension. If Nancy thinks the fetus demonstrably does have the moral entitlement of a person, she nonetheless might rationally support a restrictive law. If Olive thinks the moral entitlement uncertain, the appropriateness of a permissive law under these conditions might seem to her clear from a rational point of view. Thus, whether acknowledgment of the uncertainty of the status of the fetus makes resolution of any particular issue easier from the standpoint of rational secular morality depends considerably on relevant facts and the strength of other arguments in context.

73. I am assuming that the economic reasons for killing relate to extra profits rather than to the survival of individuals or to the way of life of some cultural subgroup.

The hard question concerns two competing claims of roughly equal power—roughly equal power in terms of the premises each asserts. One might so view the competing claims on behalf of pregnant women and fetuses. In such a situation, the argument might be that the rationally based claim should always take priority, or that it should at least take priority if there is not a widespread consensus in favor of the nonrationally based claim. In this form, the question raises critical issues about liberal democracy's commitment to rationality.

When a widespread consensus exists about priority between two competing claims, liberal democracy does not prohibit the use of the law to favor the nonrational claim receiving the consensus. Thus, the lives of newborn infants can receive full protection even if the moral status of infants is not establishable on rational grounds alone. In a hypothetical liberal society in which more than ninety-five percent of the people assigned to an early fetus the same moral status as a newborn, legal implementation of that judgment by a restrictive law would be apt even if people recognized that a woman's claim to abort could be grounded on rational arguments alone and that belief in the moral status of the fetus required a critical nonrational judgment.

Whether the rational claim should take priority if it is roughly equal in power and if there is not a consensus behind the priority of the nonrationally grounded claim is much more troublesome. I am inclined to reject even that notion, believing that it assigns too high a place to the results of rational analysis over those of deep-seated feeling. However, I do see that notion as a serious competitor to my own position, and as a competitor that would compel a permissive approach to abortion.

D. The Place of Religion

If the moral status of the fetus is a borderline question not resolvable on rational grounds, individuals must resolve that issue on some nonrational basis; and that resolution will affect their sense of desirable legal policy. For many religious persons, the basis of judgment is supplied in whole or part by their religious perspectives, which indicate either some clear answer to the question of moral status or strongly influence their thinking about the problem. Nonreligious people, and religious people who do not think their religion enlightens consideration of this question, must decide on the basis of some other nonrational premises—premises that either directly determine the status of

the fetus or embrace a broad perspective, such as a particular version of utilitarianism which in turn determines the status of the fetus.

No basis appears for assigning a priority to nonrational, nonreligious judgments over religious convictions.[74] By definition, nonrational religious judgments are not fully susceptible of critical appraisal and rational discourse. Only a society actually hostile to religion or riven by religious strife would think it preferable to rely on nonreligious nonrational judgments rather than religious convictions. Significantly, today's nonrational secular premises are often yesterday's religious convictions. It has been suggested that Christianity was largely responsible for development of the idea that newborn babies are entitled to protection of their lives.[75] Whether or not that is universally true, it certainly is true in our country, which has a rich religious tradition and traces its cultural roots to a civilization in which religion has been a major element, so that even positions that are not obviously religious are often deeply influenced by religion. This happens for individuals with a religious upbringing who abandon religious belief but still make many nonrational judgments in terms that comport with their religious training, often without identifying the tight link to their abandoned convictions. This kind of residual effect also operates in a broader cultural way when premises once seen to rest on a religious basis come to be viewed as axiomatic truths not derived from any outside source. Neither a liberal nor any other political view could plausibly purport to eradicate the role of all such premises in the determination of social policy. It would be anomalous to treat such premises as legitimately playing a role only for one who consciously holds them independent of religious grounds or when their religious roots have receded far enough into the past that most people no longer recognize those roots as the cause of present understandings.

Most religious believers would be hard put to evaluate the

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74. A conceivable position is that citizens could employ religious convictions to choose a comprehensive overall secular theory of morality, but that they would then have to apply that theory without further reference to religion. Such a demand would display an unwarranted preference for systematic theories in the face of the skeptical position that they are unreliable. Further, no basis appears for allowing religious convictions to influence the decisional process only at this most abstract level.

75. *See* P. SINGER, PRACTICAL ETHICS 76-78 (1979); *see also* Warren, *On the Moral and Legal Status of Abortion*, in THE PROBLEM OF ABORTION 102, 118 (J. Feinberg 2d ed. 1984).

status of the fetus in purely secular terms. This is not a matter of weighing evidence pro and con, but of adopting one of a number of debatable perspectives—either a general philosophic overview or the narrow question of rights of existing entities that are potential persons. If one believes he already has a clear answer or an overarching perspective derived from his religion, figuring out what perspective he would adopt if he limited himself to purely secular considerations would often be virtually impossible.

I may illustrate this general point by discussing with greater specificity how religious convictions can figure in abortion and the status of the fetus. One might think that either divine scripture or prayer reveals decisively the moral consideration owed to the fetus. I believe it is rather rare for Christians and Jews to suppose that the Bible contains a straightforward answer to the problem; and insofar as prayer may be the basis for people's judgment, it is understandably not often invoked in public defense of any particular position. Much more common, especially among practicing Roman Catholics, is a position on abortion based solely on authoritative Church pronouncements. Without working their own way through the arguments that the Church claims are persuasive, they have a conviction based on the Church's religious authority that the fetus is a person and that abortion is morally wrong.

The place of religious conviction in other positions on abortion is more subtle and complex. To one who thinks that the only way to create a religious morality regarding abortion is first to work out an appropriate natural morality and then to import the transcendental perspective, any religious convictions might seem redundant to resolution of the moral and political issue. At first glance this may resemble the manner in which the Catholic Church defends its own position on abortion,[76] at least if we put aside the extent to which the present Church relies on consonancy with previous authoritative statements. The Church begins with natural law ideas, which it claims are rationally persuasive independent of religious belief; these preclude artificial impediments to procreation and protect innocent life. Absent a determination of when human life relevantly begins, those principles alone do not explain why abortion, or abortion at a certain stage, is a worse moral wrong than the use of contraceptives;

76. *See generally* D. CALLAHAN, *supra* note 27, at 409-47.

rather, that determination also depends on naturalistic moral reasoning. One first asks what is the most *natural* point at which to fix the beginning of human life, and *then* concludes that in all likelihood it is the same point at which God ensouls the fetus.[77] That the Church's position has been so formed is evidenced by its shift since the Middle Ages, in response to altered scientific understanding, over when God ensouls the fetus and when human life begins.[78] In this so far simplified view, the point at which God ensouls the fetus may have special religious significance, but the determination of when this occurs effectively depends on a prior determination of when the fetus warrants moral consideration. Thus, the religious perspective does not actually affect resolution of the moral and legal problem.

On deeper examination, however, one sees that the religious perspective in this inquiry is not wholly passive and dependent. The very notion that at a specific time God gives each human being a soul may move someone to look for a critical either-or point, a shift from virtually no moral status to the moral status of a full human being. The ensoulment notion itself is relatively inhospitable to a gradualist or multistage approach to the moral status of the fetus.

Relatedly, when considered with an absolute proscription on the direct taking of innocent human life, the ensoulment idea is unfavorable to the claim that the pregnant woman's interests override those of the fetus. Not only does it make it harder to assert that the fetus with *some* worth has less inherent worth than that of a human after birth, it also tends to undercut the argument that the woman may extinguish her fetus in "defense" of her own body. The religious moralities with which we are familiar are more duty-based than right-based, and not impairing innocent life is one of their most stringent duties. No one doubts that the fetus is without moral guilt, and finding "innocent aggression" in the natural process of fetal growth is especially difficult if one decides that ensoulment takes place very early in that process. Thus, even if the point of ensoulment is determined by purely naturalistic reasoning, the perspective surrounding that notion will subtly influence perception of the moral status of the

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77. *See, e.g.*, Donceel, *A Liberal Catholic's View*, in 1 ABORTION IN A CHANGING WORLD 39 (R. Hall ed. 1970), *reprinted in* THE PROBLEM OF ABORTION 15 (J. Feinberg 2d ed. 1984); Noonan, *supra* note 40, at 51-57. Though the authors reach different conclusions, both employ the methodology suggested here.

78. *See* Donceel, *supra* note 77.

fetus, and that perception, in combination with a religiously influenced duty-based morality, will influence views on the permissibility of abortion.

If Pauline has tried very hard to assess the Church's natural law arguments against abortion and finds them less persuasive than their competitors, but she nevertheless accepts the Church's position on grounds of religious authority, she understands that her view would be different if she declined to rely on religious convictions. (She might, of course, believe *on faith* that the Church's position is not only correct religiously but also correct from the standpoint of the best secular morality, but she would not understand on rational secular grounds why the Church's position is best from a secular standpoint. *If* reliance on religious conviction is inappropriate, it could not become appropriate by being joined with a faith that that conviction was, in ways not comprehended, actually coincident with the best secular morality.) Pauline, thus, presents the clear case of someone who should not support a law restricting abortion if reliance on religious conviction is improper.

Most people, however, do not perceive the distinctive import of their religious views as does Pauline. Many come to the rational arguments about abortion with preformed views about when, if ever, abortion is justified. Their assessments of the rational arguments are strongly influenced by a disposition to discover consonance between the most powerful of the rational arguments and their religious convictions. That much is obvious, and it certainly affects the degree to which religious convictions realistically can be eradicated as influences; but perhaps this simple difficulty does not compromise the ideal of secular bases of judgment. The proponent of that ideal may say: Of course the religious influence is pervasive and unavoidable, but our point is that citizens should try to decide on secular grounds; all we can ask is that they make the attempt and cast their justifications in wholly secular terms.

This response might be sensible if the religious convictions and secular arguments were separable and all that were involved were an attempt to try to assess the latter on their own merits. But I have indicated that the problem is much deeper. Religious conviction often pervades the way in which one regards the problem. The idea of ensoulment leads Rita to look for a critical single stage of transition, and respect for innocent life and a duty-based religious morality form the background from which

she assesses a woman's claim to control her body. To ask Rita to pluck out her religious convictions is to ask her to decide how she would think about a fundamental moral problem if she started from scratch, disregarding what she presently takes as basic premises of moral thought. Asking that people perform this exercise is not only unrealistic because the exercise is impossible; the request is positively objectionable in demanding an attempt to compartmentalize beliefs that constitute some kind of unity in one's approach to life.

These concerns about the unity and integrity of religious believers and the unrealism of expecting them to discount the influence of their religious perspectives on their moral judgments reinforce my central point that, when nonrational judgments are unavoidably critical, liberal democratic premises afford no solid basis for preferring nonreligious nonrational premises over religious convictions. This central point is further confirmed by the reality that many religious people are highly skeptical about the claims of rational secular morality. To ask these people to adopt a form a reasoning they believe is infected with pretension and likely error is to ask a great deal.

What I have said so far provides the basis for an answer to the claim that reliance on religious convictions to oppose permissive abortion laws violates the liberal principle that the religious convictions of one segment of society should not be imposed on the rest.[79] If most people in society think that a fetus is entitled to protection for religious reasons and vote for legal protection on that ground, those who do not believe in the entitlement are, it is true, restricted in their actions. No religious beliefs are imposed on them, but limits on action deriving from the religious beliefs of others are so imposed. In this sense a prohibition on abortions resembles a prohibition on homosexual acts. But there is a fundamental difference. What I have supposed about homosexual acts between consenting adults is that in terms of harm to other members of society of the kind a liberal society should take cognizance of—harm to their persons, property, or other secular interests—and in terms of secular paternalistic care for the participants, a prohibition cannot be justi-

79. Roger Wertheimer talks about religious premises as "inadmissible in the court of common morality." Wertheimer, *supra* note 64, at 81, *reprinted in* THE PROBLEM OF ABORTION 50 (J. Feinberg 2d ed. 1984). It is not clear whether he means that such premises are not a basis for argument, or that they are inappropriate for a citizen to rely upon when an issue of public policy is involved.

fied. Under these conditions, I claimed that grounding a prohibition squarely on the view that the acts are intrinsically wrong—wrong from a religious perspective—is inappropriate in a liberal democracy. Abortion is quite different; that is, it is different if the basis for restriction is protection of the fetus. The religious perspective in this case informs a judgment of who counts as a member of the community, a judgment that I claim each citizen must make in a nonrational way. Once that judgment is made, the restriction on abortion is a protection of the most obvious and vital interest—life—held by members of the community. The restriction then resembles an ordinary law against murder. Indeed, if I am right that the protection of newborn babies is itself the product of largely nonrational judgments, then, in what it protects and in the reasons for protection, a prohibition on abortion is not different in principle from the almost universally approved prohibition on infanticide.[80]

V. A Sketch of Remaining Concerns: Public Discourse, Political Organization, Official Reliance, and Constitutionality

A complete account of religious premises and laws restrictive of liberty would have to address a number of additional issues in depth. I do not do so here, but I try to state what some of those issues are and indicate how what I have discussed bears on them and how I would resolve them.

One obvious question is how wide is the range of political issues as to which religious convictions may properly figure if I am correct that they do properly figure for abortion. Among other borderline questions not resolvable on rational grounds are the status of the environment, the status of animals, and the status of people who have permanently lost virtually all the higher capacities that make human beings distinctive. Rational analysis is also incapable of resolving many conflicts among admitted values, including conflicts that concern peripheral government involvements with religion, and of settling some highly complex questions of fact. My conclusion is that religious con-

80. A ban on infanticide does not, of course, impose on any person to the degree a prohibition on abortion imposes on pregnant women. If, as in some earlier eras, parents had duties toward newborn children that could not be shed by putting the children in the hands of the state, the analogy between the two prohibitions would be closer.

victions properly figure in individual resolutions of such problems across a wide range of social issues.

Without suggesting that anyone set out to conceal the bases of his own judgments, I believe that public advocacy for the benefit of the general community should ordinarily be phrased in rational and secular terms. Public arguments for political positions should be cast in terms that are widely comprehended and accepted to avoid religious divisiveness and alienation of people who do not hold conventional beliefs. Generally, organization on political subjects should be carried out along nonreligious lines, and only in extreme circumstances should religious leaders endorse particular candidates or urge that any one issue determine votes.

When legislators find rational arguments inconclusive, they also may sometimes appropriately rely on the religiously grounded opinions of their constituents or on their own religious convictions. Legislators should be able to rely on bases that are appropriate for voters, so they should be able to take into account citizen opinion that is grounded in religion in a way I have suggested is proper. Because a legislator represents all citizens, however, he should be hesitant to rely on religious convictions that are not shared by all when other bases for decision are available, but sometimes he will have no recourse but to rely on a nonrational judgment of his own or his constituents. In that case, he need not prefer nonreligious nonrational premises to religious ones. Judges should generally seek to avoid such grounds of decision, but occasionally even they may appropriately rely on moral judgments based on religious convictions.

The question of unconstitutionality is complicated by various senses of unconstitutionality and by the courts' limited capacities to review legislative motives. Roughly, the boundaries of unconstitutional purpose under the establishment clause should correspond with the appropriate limits of reliance on religious convictions. In practical terms, this would mean that a law against homosexual acts that courts could say was predominantly based on the simple belief of citizens or legislators that such acts are a religious sin should be declared an unconstitutional effort to establish religion. On the other hand, if religious premises predominantly determine which entities warrant protection, or resolve conflicts among concededly secular values when rational secular morality is inconclusive, then the establishment clause is not violated.

These last few paragraphs are evidently insufficient to expose the complexity of the issues and to take account of needed qualifications; much less do they offer any real defense of the positions indicated. My reasons for including them are to show how the subjects I discuss in greater depth fit within a more comprehensive perspective, as well as to invite the reader's attention to these larger dimensions.