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I. INTRODUCTION

In the United States, a trend is emerging where "freedom of choice" is used to connote "freedom from responsibility." However, responsibility is required for the fruitful exercise of any freedom. In order to act responsibly, one must give due consideration to the consequences of various courses of action and be willing to accept the consequences flowing from the chosen action. Freedom of choice, therefore, should not be interpreted as the freedom to remove oneself from the consequences of one's own actions. Unfortunately, when it comes to the issue of abortion, many individuals interpret freedom of choice as exactly that—the freedom from accepting the consequences of one's actions.1 It should be noted at the outset that this "freedom of choice" is exercised not only by women but also by men who support or urge their wives or significant others to have abortions in order that they too can be free from accepting the consequences of their actions.2

Each of us, while growing up, was given more freedom as we matured. This was a sign that our parents, or other care providers, believed that we were mature enough, not so much to enjoy the freedom, but more to handle the responsibilities that came with the freedom. It was important that our maturity evidenced our ability to accept responsibility for the consequences of our actions. If we were later found unable to guide ourselves responsibly while exploring the limits of our newfound freedom, it was taken away until we matured sufficiently to again convince our care providers that we were indeed worthy of that desired freedom. This was done to teach

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1. See infra note 17 and accompanying text.

2. See infra note 8 and accompanying text.
us that true freedom requires responsible action and that irresponsible action or carelessness towards that freedom would eventually enslave us by the dangers latent in experiencing that freedom.\textsuperscript{3}

Now that we are adults making our voices heard in society, many of us have lost sight of this simple but important lesson of life. Instead, we engage in self-justifying rhetoric in order to enjoy (and abuse) our freedom while we shun the consequences of our actions. Such self-justification can be found in the rhetoric of many who view abortion as a viable alternative to traditional methods of birth control. It is true that restricting abortions can place an ominous burden on women; but it need not be so. The mere fact that only women can biologically give birth does not make childbearing and childrearing solely a woman's issue. Instead, it is, and should be, a societal issue, in which men should play a major role.

It is interesting to note that while men revelled in the sexual freedom gained from the "sexual revolution" of the 1960s, there emerged a new underclass of poverty largely comprised of women and children.\textsuperscript{4} More women are having children with no financial or other support from men;\textsuperscript{5} divorces are increasing at an alarming rate\textsuperscript{6} with many women being

\begin{flushright}
3. For example, one should not drive an automobile without first understanding the operation of the vehicle and having an appreciation of the dangers inherent in driving. Further, an individual should not have the freedom to drink alcoholic beverages until one has the capacity to understand the effect of alcohol on one's body and an appreciation of the dangers to oneself and to others when too much alcohol is consumed. Lastly, one should not decide to have children unless there is first an appreciation of the responsibility required to raise children properly.

4. In her critique of individualism, Elizabeth Fox-Genovese noted that the shift from communitarianism to individualism has resulted in disadvantaging women who had previously been cared for by social institutions, such as marriage, leaving them with the empty notion of individualism with no substantive liberation. \textit{Elizabeth Fox-Genovese, Feminism Without Illusions} 40-41 (1991).

5. [M]ore than a third of all noncustodial parents (usually fathers) ignore the obligation to support their children, and many others pay only a fraction of what they owe. Only one single parent in four receives the full amount of court-ordered child support . . . .

\textit{This is not because most fathers cannot pay} . . . . \textit{But they do not feel a sense of personal responsibility for their children} . . . .


6. William J. Goode, \textit{World Changes in Divorce Patterns}, \textit{in Economic Consequences of Divorce: The International Perspective} 11, 13, 16, 22 (Lenore J. Weitzman \& Mavis Maclean eds., 1992).\end{flushright}
forced to become the sole providers for their families. These facts support the notion that society, and particularly men, are shifting the burden of responsible action, i.e., the foreplanning and the responsibilities inherent in raising children, onto women. To make matters worse, those who embrace the abortion rights argument subscribe to this line of thinking. Implicit in the argument of those who view abortion rights only in terms of the right of the woman to her own body, with men having no role in the abortion decision, is the assumption that childbearing and childrearing are issues that concern only women. They commit to the woman alone responsibility for handling these issues.

The purpose of this Article is not to relegate women to reproductive enslavement; rather, the purpose of this Article is to raise the question of whether abortion is an answer to the numerous inequalities that confront many women when there is an unwanted pregnancy, or whether abortion exacerbates the inequalities by encouraging the subordination of women to men. There is the additional question of whether the judicial system is the appropriate forum for deciding the abortion issue—an issue that invokes high emotions and one that is fraught with deeply held and divergent moral convictions. It is my opinion that abortion has provided women with only an illusion of choice rather than meaningful choice because the societal value systems currently in place devalue and oppress women.

7. A handful of recent studies... have begun to map out the contours of divorce settlements in the no-fault era.... These studies indicate in general a decrease in every facet of women's settlements as compared with settlements under fault regimes. Alimony is granted less frequently, in smaller amounts, and for shorter durations. Similarly, child support awards shrank in size and were granted less often. Women also received smaller shares of the family assets and greater shares of the family debt.


The... data [from another study]... reinforces the conclusion drawn by other researchers that a woman's chance of becoming poor increases greatly after divorce.... Economically, the father's standard of living increases dramatically after the divorce....

Id. at 394-95.

8. "Many men support women's right to abortion because they perceive that if women believe that they can engage in intercourse without having to accept an unwanted pregnancy, they will become more sexually available." Susan Sherwin, No Longer Patient: Feminist Ethics and Health Care 115 (1992).
The divergent, deeply held convictions manifested by our pluralistic society dictate that justice would be better served by attempting to resolve the abortion issue via the legislative process rather than by judicial fiat. Notwithstanding Roe v. Wade, there has never been a consensus of approval for providing women with an unrestricted right to abort their unborn. As Justice Scalia remarked in Webster v. Reproductive Health Services,

[The Court has awarded itself] sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.

The legislative system is better equipped to wrangle with the differing views in order to produce a result which, although not receiving uniform consensus, can provide the populace with a sense that each view was considered and represented in reaching the result.

II. THE RATIONALE FOR ABORTION

Over 1.5 million abortions are performed in the United States every year. In 1988, Aida Torres and Jacqueline Forrest asked 1900 women to explain why they had an abortion. Of the women surveyed, arguably over 70% had used abortion as a method of birth control. Fewer than 1% of all abortions are performed because the pregnancy was the result of rape or incest. Although the reasons why women who were not victims of rape or incest or whose lives were not

11. Id. at 532 (Scalia, J., concurring in part and concurring in the judgment).
12. THE ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: ABORTION IN THE UNITED STATES 1 (1993) [hereinafter FACTS]. "In 1988, there were 1.6 million abortions in the United States. From 1973 through 1988, more than 22 million legal abortions took place in the United States. Since 1967, when many states began liberalizing their abortion laws, almost 24 million legal abortions have been performed." Id.
14. In 1988, only 16,000 of the 1.6 million abortions occurred as a result of rape or incest. FACTS, supra note 12, at 1.
threatened by pregnancy chose to have an abortion varied, the majority were concerned about how a baby would change their lives, whether they were ready for the responsibility, whether others would discover they had had sex or were pregnant, and whether the relationship they were in was stable.\textsuperscript{15} Further, statistics published by The Alan Guttmacher Institute indicate that, of the total number of pregnancies among American women, 50\% are unintended and 50\% of that number are terminated by abortion.\textsuperscript{16} These statistics, coupled with the reasons women have abortions, suggest that there is either inadequate foreplanning or a lack of concern for the consequences of sexual activity.\textsuperscript{17} Although the abovementioned reasons are valid, these are important concerns both women \textit{and men} should sincerely consider \textit{before} engaging in sexual activity. Doing so is the beginning of responsible action.

Among developed countries, the United States has one of the higher abortion rates.\textsuperscript{18} In fact, it has been estimated that the rates of abortion and unintended pregnancy in the United States are about five times those of the Netherlands.\textsuperscript{19} With such alarming statistics of unintended pregnancies and the high number of abortions, it is this author's conclusion that the availability of abortion and its ease of procurement have discouraged women and men from engaging in responsible action such as foreplanning, traditional birth control methods and abstinence.\textsuperscript{20} These high numbers reflect an emerging value system where individuals shun responsibility for their actions and society lacks concern for the plight of its individual members.

In 1921, Margaret Sanger, the founder of the forerunner to Planned Parenthood, stressed the importance of responsible action, stating:

\begin{itemize}
  \item \textsuperscript{15} Torres & Forrest, supra note 13, at 170.
  \item \textsuperscript{16} FACTS, supra note 12, at 1.
  \item \textsuperscript{17} "The level of unintended pregnancy is in part a reflection of poor contraceptive practice among American women." Torres & Forrest, supra note 13, at 176 (citation omitted).
  \item \textsuperscript{18} FACTS, supra note 12, at 1.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} "The available data . . . indicate that abortion has . . . become a primary method of birth control. . . . By providing unrestricted access to abortion throughout the first six months of pregnancy, Roe (and now Casey) discourage women and men from exercising sexual responsibility." Steven R. Hemler, Richard G. Wilkins & Frank H. Fischer, \textit{Abortion: A Principled Politics}, NAT'L REV., Dec. 27, 1993, at 40, 41.
\end{itemize}
Responsible sex-action requires forethought, and irresponsible action is immoral. Every civilization involves an increasing forethought for others, even for those unborn. The reckless abandonment of the moment and the careless regard for the consequences, is not morality. Nature's way of reducing her numbers is controlled by disease and famine. Primitive man achieved the same results by infanticide, abandonment of children, or abortion.

Discounting this concern for responsible sex-action, some argue that abortions must remain legal so as not to enslave women via their bodies. This argument plays upon the sympathies of the American public by parading images of women who are subjected to rape and incest and who then will be further traumatized by being forced to carry an unwanted child to term. These sympathies also embrace the poor women who, through no choice of their own as to their economic circumstances, will be forced to bring more children into the world, serving only to stretch the circle of poverty and increase the burden on the national welfare system.

22. Those who would outlaw abortion . . . would rely upon economic and physiological circumstances—the supposed dictates of the natural—to conscript women . . . as involuntary incubators and thus to usurp a control over sexual activity and its consequences that men . . . take for granted. To one who regards this outcome as unjust, a right to end pregnancy might be seen more plausibly as a matter of resisting sexual and economic domination than as a matter of shielding from public control “private” transactions . . . .


Although there may be some injustice in requiring women to bear the children they conceive, it is important to comment that it is not the unborn child who has caused the injustice. It is my opinion that to get rid of the root of the injustice, the cultural value system which, to paraphrase Mr. Tribe, allows men to engage in sexual activity and take for granted its consequences, must be dismantled. See infra notes 106-109 and accompanying text.

23. But, as noted, supra note 14 and accompanying text, rape and incest account for fewer than 1% of all abortions.

24. It has been argued that making abortions illegal would only make them so for the poor and that the rich would continue to have abortions. 123 CONG. REC. 1991 (1977) (statement of Sen. Garn), adapted and reprinted in Jake Garn, An American Standard, HUM. LIFE REV., Spring 1977, at 43, 44. However, as Senator Jake Garn indicated in his address to the Senate in 1977, in support of two life-protecting constitutional amendments, what the rich are able to do is irrelevant. Id., adapted and reprinted in Garn, supra, at 44. “This country cannot predicate its laws upon the practices of the wealthy, particularly when such practices deprive humans of their lives. ‘Equal justice under law’ does not mean
Realities bear out, however, that women are already enslaved—enslaved by an ideology which thrives on self-centered, competitive superiority to the exclusion and demise of others and which is buttressed by moral decay. For example, why are women subjected to rape and incest? Why is there a tendency in rape laws to hold the woman responsible for the crime committed against her by putting her on trial for being raped? Further, why are women without economic opportunities such that their only “logical” choice is to abort? Why is there not a better system in place to force non-custodial fathers to pay for the rearing of their children? These questions point to the real enslavement of women. Our culture’s ideology of self-centered, competitive superiority uses domination and oppression to enslave women. If women want true “freedom of choice,” then the use of abortion to counteract “reproductive enslavement” is not the answer.

It is the author’s opinion that the availability and the ease of procurement of abortion as a method of birth control encourages the irresponsible action of both men and women, which leads to this “enslavement.” Abortion allows many men to perceive women as more available for them sexually. Moreover, men are socialized to use sex to oppress women and women are socialized to be compliant. This cultural value system perpetuates the true “reproductive enslavement” of women. The use of abortion may eliminate some of the symptoms of oppression through “reproductive enslavement” but it does not eliminate the oppression. Permitting women to use abortion as a method of birth control encourages women to embrace this same ideology of self-centered, competitive superiority when it comes to the rights of the fetus.

The dangers of such an ideology have been manifest in the past. Semantics and legal rationalizations were employed to nullify the rights of others and justify the enslavement of African-Americans, the killing of Jews, and countless

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26. See supra notes 16-19 and accompanying text.
27. See supra note 8.
28. See infra notes 101-102 and accompanying text.
29. Who is a “person” under the fourteenth amendment is not the sort of question which can be left to individual or local decision. Too
other atrocities through the years. Similar semantics and justifications are present in the debate over the rights of an unborn life.

Such sundry justifications are also advanced in the economic realm. Obviously, abortions save the government money when compared to government funding of social programs for the poor when abortion is restricted. Further, abortions permit women and men alike freedom to pursue goals of self-realization without being impeded by unwanted or burdensome children. Nonetheless, the awful truth is that those who view abortion as a necessary evil balance and find wanting the life of the fetus against dollars saved or careers

many basic rights hinge upon the answer. Are blacks, Jews or others, "persons"? The questions about foeti, blacks and others are not merely similar. They are the same questions—how do we define a human being, separately entitled to respect and value?


By concluding . . . that the foetus could be no more than potential life, the Court [as in Plessy v. Ferguson, 163 U.S. 537 (1896)] has gained support by sacrificing invisible people. . . . Will future generations ponder these abortion decisions with the same incredulity with which many have come to view the segregation decisions?

*Id.* at 409.

30. Dr. Leo Alexander, who served as an expert at the Nuremberg trials of the physicians who developed the German euthanasia program and, subsequently, the medical experiments and genocide carried out by the Nazis, wrote:

Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings. The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.


31. *See* Nat Hentoff, *The 'Small Beginnings' of Death*, HUM. LIFE REV., Spring 1988, at 53, 53 (recording the trend of the courts to intervene and allow the killing of born individuals through euthanasia, who are deemed to have "li[ves] not worthy to be lived") (quoting Alexander, *supra* note 30, at 44).

32. For every $1.00 spent by government to pay for abortions for poor women, about $4.00 are saved in public medical and welfare expenditures incurred as a result of the unintended birth. FACTS, *supra* note 12, at 2.
achieved or other self-serving endeavors. Who among us would like our lives reduced to such a simple equation?33

If we are honest about the plight of women and the welfare of our children, then we have to realize that abortion, while a short-term “fix,” is not the answer to the oppression and inequalities women face. The use of abortion for purposes of birth control provides an illusion of choice34 but not true “freedom of choice” for women because our social culture devalues and oppresses women.35 Further, by strategically framing the issue of abortion in terms of a woman’s rights, abortion remains specifically an individual “woman’s problem.” Such issue framing places the decision for childbearing and childrearing on the woman and is a sign of a society trying to divorce and distance itself from responsible action.36 Indeed,

33. Abraham Lincoln understood how people could use semantics in order to accomplish their selfish desires when he wrote:

Made so plain by our good Father in Heaven, that all feel and understand it, even down to brutes and creeping insects. The ant, who has toiled and dragged a crumb to his nest, will furiously defend the fruit of his labor, against whatever robber assails him. So plain, that the most dumb and stupid slave that ever toiled for a master, does constantly know that he is wronged. So plain that no one, high or low, ever does mistake it, except in a plainly selfish way; for although volume upon volume is written to prove slavery a very good thing, we never hear of the man who wishes to take the good of it, by being a slave himself.


This same reasoning can be applied to the abortion debate. It has been argued that abortion is good for the child that may be unwanted, abused or poor if born. However, if this argument is valid, then why do we not hear these same people pushing for the deaths of those that are rejected, abused and poor?

34. We see the woman who, without support, often feels she has “too much to lose” by continuing an unwanted pregnancy. She is the one whose college peers are most apt to say, “You should have been smarter than that. This isn’t supposed to happen to someone like you.” She is the one whose boss is still apt to find a good excuse for terminating her employment and whose family is still apt to respond with shame and rejection.

I have found that there are [multiple] sources of pressure directed toward a woman facing this most personal and vital crisis. The influences end up having a lot more to do with impossible trade-offs and Catch-22s imposed by those with vested interests than a liberating opportunity to express freedom of choice. To put it simply, the vast majority of women who submit themselves and their babies to abortion do so, not by “choice,” but because they feel they have no other choice.

Mary C. Agee, Practical Compassion, HUM. LIFE REV., Fall 1991, at 48, 50-51.

35. See infra notes 101-102 and accompanying text.

36. See supra note 8 and accompanying text. Other examples include our
unintended pregnancies and the burden of childrearing should be a societal concern. Until women realize this and push for real change, i.e., a dismantling of society's current value systems which serve to oppress women, society, and particularly men, will not be held accountable and women will continue to be enslaved.

III. IS THE JUDICIAL FORUM THE PROPER BATTLEGROUND FOR THE ABORTION DEBATE?

In Roe v. Wade, the United States Supreme Court decided, by judicial fiat, that women have a fundamental right under the Constitution to have an abortion prior to the time of fetal viability. It has been contended that this Supreme Court decision, through its failure to explore the moral underpinnings surrounding the abortion issue, created the current abortion debate.

[T]he Supreme Court in Roe . . . ruled that unless the unborn child is viable, the only legally significant moral factor is the mother's desire. All other moral considerations were declared to be constitutionally irrelevant. The [law struck down in Roe] denied the moral dilemmas involved in pregnancies resulting from rape or incest, in pregnancies involving severe and medically untreatable birth defects, with maternal health-impairing pregnancies, and others—moral dilemmas which, by the 1960s, troubled most Americans. Likewise, the Roe rule of abortion on demand completely disregards the moral dilemmas of the use of abortion for birth control, for financial reasons, for population control, and for other reasons of mere social convenience, which trouble most Americans today.

Because of our diverse society, it is doubtful that there can be a uniform consensus on the propriety of abortion. Whether

society's response to the failure of affirmative action to meaningfully incorporate minorities into the "American Dream," by calling it a "minority," or more particularly, a "Black problem"; and our society's growing response to the difficulties facing its elderly, terminally ill, mentally ill and otherwise challenged individuals by allowing them to "die with dignity" before they become completely without value and a greater burden on the national welfare system.

37. As is said in an African proverb of unknown authorship, "It takes a whole village to raise a child."
40. Id. at 207.
to bear a child and, more importantly, whether to require a woman to bear a child rather than allow her to abort the fetus are emotionally charged questions whose answers are embraced in deeply held beliefs. Accordingly, the use of the judicial system to answer the important question on the future viability of abortion as an alternative to traditional methods of birth control will not resolve the issue. The judicial system cannot provide a solution that is workable because it is not a forum in which the moral concerns of the people can be weighed in a balance that is right for them. What is needed is a forum where the people can be involved in the decisionmaking process. The forum must permit people to communicate their concerns regarding abortion and allow them to work towards a solution that is amenable to all. The forum best qualified for

41. Michael Perry had indicated that, although the Constitution did not support a woman's decision to terminate her pregnancy as a right of privacy, the dimensions of the right of privacy invoked in Roe are determined not by the Constitution but by conventional morality. Consequently, to say that the right of privacy protects a woman's decision to have an abortion is necessarily to say that the objective of prohibiting such decisions lacks support in conventional morality. To say that is to say the objective is illegitimate, because conventional morality is the touchstone of the legitimacy of governmental objectives under substantive due process. Thus, in Roe the Court did not really balance two competing "goods," but concluded that the legislation, the objective of which was illegitimate according to conventional morality, was not a "good" at all.


Perry's contention that the Court was accurate in its implicit evaluation of conventional moral culture was later criticized:

This argument turns on the notion that Roe rests on moral notions widely shared among the American people. Note however, that this defense is effective only if the principle of conventional morality is stated at a relatively high level of generality. If we look at enacted statutes as evidence of what Americans conventionally believe is correct, we may acquire a more precise—and quite different—understanding of what conventional morality requires.


Perry subsequently modified his views:

Just as there is no singular American tradition sufficiently determinate to be of help to the Court in resolving particular human rights conflicts, and just as the concrete traditions that do exist are fragmented and point every which way, so too there are no consensual values sufficiently determinate to be of help to the Court, and the values that do enjoy significant support are, in our pluralist culture, fragmented and point in many different directions.

this is the legislature. Moreover, because of the diversity of the populace, it is best that the individual state legislatures rather than the federal legislature handle this issue so that all will have their views heard and represented. However, within the current judicial framework, the Court is ill-equipped to address all the moral bases for and against abortion such that all people can believe that their views were heard and adequately represented. The Court in Roe hinged its decision on two points: the right of a woman to her own body and the right of the woman to be free of undue interference by the state in her choice to have an abortion prior to the viability of the fetus. Since Roe, the Court has acknowledged some of the moral tensions present in the abortion decision and has also de-

42. For example, in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), the Court considered Pennsylvania’s restrictive abortion statute and struck down the spousal notification clause but upheld the parental consent requirement.

[T]he Court failed to accord pregnant adolescent victims of family violence the same protection it granted similarly victimized pregnant women. . . .

. . . Because children are physically and emotionally dependent on their parents, minors are more vulnerable to violence and psychological maltreatment and are more susceptible to developmental setbacks as a result of such abuse. . . .

Surely an adolescent who fears violence and psychological abuse should her parents learn of her pregnancy or her intention to have an abortion is entitled to the same protection as an adult woman who fears her spouse.


43. Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. . . .

. . . .

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. . . .

. . . .

. . . As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations . . . .
moted the right to an abortion from a fundamental right to a liberty interest protected by the Fourteenth Amendment. Nonetheless, this acknowledgment has not served to provide the populace with a sense of representation such that the abortion issue can be put to rest. The role of morals is even acknowledged by Laurence Tribe. Initially, he was of the opinion that the Roe Court was correct in assigning decisionmaking responsibility to the woman because any answer to the question of when a separately valued human life began was necessarily a religious affirmation. He has since recanted this opinion, stating:

[My former] view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question.

These morals also play a role in the appropriate scope of judicial review. Harry Wellington expressed this view when he stated:

Roe perpetuates . . . a basic terminological mistake: The Court insists on describing the plaintiff's interest as "fundamental." This is misleading, for it suggests either that the text of the Constitution has singled out the abortion decision for special attention or that the judge, as wise philosopher, has imposed his ethical system upon the people. My claim has been that the plaintiff's interest is protected under the Fourteenth Amendment by reference to the people: that the meaning of liberty in that Amendment and its weight in the context of the Texas abortion statute depends . . . upon its weight in conventional morality.

Casey, 112 S. Ct. at 2803-08 (citation omitted).
44. See infra notes 51-57 and accompanying text.
46. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1350 (2d ed. 1988) (emphasis added; footnote omitted).
The analysis that follows in this section continues this line of reasoning and attempts to demonstrate that, although the Court has tried to address some of the moral concerns underlying the abortion decision, it has not been successful in resolving them nor has it negated the public's need for a moral discourse on the circumstances, if any, in which an abortion should be allowed and with what restrictions.

A. A Woman Has a Right to Control Her Own Body

In *Roe v. Wade,* the United States Supreme Court found that a woman had a right to reproductive choice. Her right to have an abortion was fundamental and could only be impaired if the state could demonstrate a compelling reason. Evolving from the right of privacy, a woman's right to reproductive choice signified her right to control her own body. However, subsequent cases have retreated from the position that reproductive choice is a fundamental right and have instead settled on the notion that reproductive choice is a liberty interest protected by the Fourteenth Amendment. This demotion from a fundamental right to a constitutionally protected liberty interest means that states need only demonstrate that their regulatory scheme does not unduly burden a woman's choice to have an abortion. Consequently, states have greater latitude in proscribing abortions in those situations which may morally offend its citizenry than they did immediately after *Roe v. Wade.* States can express a preference for childbirth over abortion and can demonstrate that preference by allocating pub-

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49. See id. at 152-55.
50. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153.
52. See generally Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade,* 138 U. PA. L. REV. 83 (1989) (criticizing the plurality opinion in *Webster* for not explaining why the right to have an abortion is no longer fundamental).
53. *Casey,* 112 S. Ct. at 2804.
54. See id. at 2830.
55. *Webster,* 492 U.S. at 509 (upholding a Missouri statute which prohibited public funding of abortion, restricted the use of public employees and facilities for the performance of non-therapeutic abortions and required physicians to test for
lic monies to assist in the raising of children rather than for abortion.\textsuperscript{56} States can also prohibit the use of public family planning funds for abortion counseling or referrals.\textsuperscript{57}

The argument can be made that by procuring an abortion, a woman is merely exercising the right to control her own body. The fallacy of this argument, however, is that this right has never been absolute.\textsuperscript{58} For example, women are not free to commit suicide,\textsuperscript{59} to introduce illegal substances into their systems, or even to sell their own bodies for sex.\textsuperscript{60} Further, in the case of the pregnant woman, arguably there are two bodies involved—that of the mother and that of the developing fetus.\textsuperscript{61} Although \textit{Roe} indicated that the fetus does not have any rights entitled to Fourteenth Amendment protection,\textsuperscript{62} the Supreme Court in \textit{Webster v. Reproductive Health Services}\textsuperscript{63} upheld a Missouri statute which stated in its preamble that "[t]he life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health and well-being."\textsuperscript{64} By so holding, a plurality of the Court affirmed the right of the State to determine the point at which its inter-

\textsuperscript{56} Harris v. McRae, 448 U.S. 297, 324-26 (1980) (holding that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment).

\textsuperscript{57} Rust v. Sullivan, 111 S. Ct. 1759, 1776-78 (1991) (upholding a Department of Health and Human Services regulation prohibiting federally funded family planning clinics from counseling or referring women for abortions).

\textsuperscript{58} "In fact, it is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy . . . . The Court has refused to recognize an unlimited right of this kind in the past." \textit{Roe v. Wade}, 410 U.S. 113, 154 (1973).

\textsuperscript{59} From a practical standpoint, a successful suicide is not a chargeable offense for lack of a perpetrator. However, in a failed suicide attempt, steps are taken to prevent a person from repeating the attempt.


\textsuperscript{61} For example, it is not possible for one body to have two different blood types. However, a pregnant woman can be RH negative with a blood type of B and the fetus can be RH positive with a blood type of AB. This fact alone demonstrates that the fetus is a separate intrauterine being. \textit{See also infra} note 70 and accompanying text.

\textsuperscript{62} \textit{Roe}, 410 U.S. at 157-58.

\textsuperscript{63} 492 U.S. 490 (1989).

\textsuperscript{64} \textit{Id.} at 504 n.4 (quoting \textit{Mo. Rev. Stat.} §§ 1.205.1(1), (2) (1986)). The U.S. Supreme Court upheld this language, holding that the preamble of the Missouri statute was merely a declaration that did not regulate abortion in any way.
'est in preserving fetal life is sufficiently compelling to justify regulating abortion.65

B. A Woman Has a Right to Be Free of Undue Influence by the State in Her Choice to Have an Abortion Prior to Viability of the Fetus

The Court in Roe v. Wade acknowledged that the woman's right to her own body in her decision to have an abortion was not absolute and could be infringed upon by the State at the point of viability.66

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus . . . . [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.67

The point of viability is an important moment because it signals the time when the State's interest in maternal health and the developing human life becomes sufficiently compelling to justify abortion restrictions. As medical technology increases and becomes more refined, the viability of the fetus moves closer and closer to the point of conception. As Justice O'Connor argued in City of Akron v. Akron Center for Reproductive Health,68

The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual

65. In urging the abandonment of the Roe trimester framework, three Justices stated, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." Id. at 519 (plurality opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.).

66. Specifically, viability is defined as the point at which the fetus "has the capability of meaningful life outside the mother's womb." Roe, 410 U.S. at 163. Therefore, viability also presumably includes survival outside the mother's womb with the assistance of medical technology. See, e.g., infra text accompanying note 69.

childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. ... The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues.  

Theoretically, it is possible for the point of viability to converge with the point of conception since the zygote, or fertilized egg, at the instance of conception, has all the genetic and other information needed to develop into a healthy human being; the only thing needed is a proper environment.

The absurdity of looking at viability as the point where the fetus can survive independently outside its environment is illustrated by the following question: Who among us can survive independently outside our proper environment? If a person is forcefully removed from the Earth and blasted off to Mars without the proper gear to sustain life, he or she will surely die. Does such a person lose his or her humanity or personhood because he or she is not in the proper environment to sustain life?

Such inconsistencies of the viability test have been recognized. In Webster, the plurality stated that the Roe framework of trimesters and viability was not found in the text of the Constitution. Further, they saw no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability ... " The State's interest, if compelling after viability, is equally compelling before viability."

70. "The fertilized egg or zygote ultimately develops into the adult organism. The physical characteristics of the adult organism are determined by the information coded in the DNA molecules within the zygote. No information can be added later. All that is required is present in that single, original cell." T.H. Milby, The New Biology and the Question of Personhood: Implications for Abortion, 9 AM. J.L. & MED. 31, 35 (1983).
71. For example, the people of Somalia were dying from starvation. Arguably, their drought-ridden and war-ravaged environment was not capable of sustaining their lives. Without external assistance, many were doomed to die. Should we have written them off as non-persons as well?
73. Id. at 519 (plurality opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting)).
To distinguish our lives from that of the embryo as actualized life versus potential life misses the point as well.\textsuperscript{74} At the point of conception, the fertilized ovum is a living cell and is distinctly human.\textsuperscript{75} The mere fact that medical science is not presently advanced enough to nurture the extrauterine fertilized ovum to full development does not mean that the fertilized ovum is not alive. It only indicates that medical science has not been able to successfully duplicate the proper environment for fetal development. Since the fertilized ovum at the point of conception has all the information it needs to develop into a complete and healthy \textit{human} being,\textsuperscript{76} it is impossible for the fertilized ovum to develop into any other type of animal or plant life. Dr. Bernard Nathanson, M.D., the co-founder of the National Abortion Rights Action League (NARAL)\textsuperscript{77} and former director of the Center for Reproductive and Sexual Health, the largest abortion clinic in the nation,\textsuperscript{78} stated that

\begin{quote}
[as] early as six weeks we can detect heart function in embryos, with an electrocardiograph. We can record brain activity
\end{quote}

\begin{footnotes}
\item[74.] As Justice O'Connor aptly stated:
The difficulty with [the analysis that the State does not have an important and legitimate interest in protecting human life until the point of fetal viability] is clear: \textit{potential} life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the \textit{potential} for human life. . . . The choice of viability as the point at which the state interest in \textit{potential} life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.


\item[75.] \textit{Stedman's Medical Dictionary} defines fertilization as "[t]he process that begins with the penetration of the secondary oocyte by the spermatozoon and is completed with the fusion of the male and female pronuclei." \textit{Stedman's Medical Dictionary} 516 (23d ed. 1976). In its definition of pronucleus, it states that "[w]hen the pronuclei merge in fertilization, the diploid number of chromosomes \textit{characteristic} of the species is reestablished." \textit{Id.} at 1148 (emphasis added). Lastly, \textit{Stedman's Medical Dictionary} defines a \textit{zygote} as "[t]he diploid cell resulting from union of a sperm and an ovum. . . . \textit{The individual that develops from a fertilized ovum.}" \textit{Id.} at 1588 (emphasis added).

\item[76.] \textit{See supra} note 70 and accompanying text.

\item[77.] Bernard Nathanson, \textit{A Righteous Censorship}, \textit{Newsdary}, June 4, 1991, at 56, 56.

\item[78.] \textit{Id.} "As former head of the world's largest abortion clinic . . . I bear ultimate responsibility for over 75,000 abortions. His dramatic move to the pro-life pulpit evolved, he says, with advances in obstetrics and fetology, which have 'allowed us to perceive without question the unmistakable humanity of the unborn child.'" \textit{Kristin McMurran, Picks & Pans—Video: Eclipse of Reason, People}, July 17, 1989, at 17, 17.
\end{footnotes}
at eight weeks. Our capacity to measure signs of life is becoming more sophisticated every day, and as time goes by we will undoubtedly be able to isolate these signs at earlier and earlier stages in fetal development. To vehemently deny that life begins when conception begins is absurd!79

Perhaps our existence can be distinguished and justified by the fact that the fetus's proper environment happens to be in the body of another human being. But should such dependence make the fetus less alive and less human so that it should have no rights at all in the decision of whether it should be allowed to live or die? "The fact that a fetus depends on the placenta for life and can't survive independently doesn't nullify its existence as a human being. A diabetic is wholly dependent on insulin, but that doesn't make him less human."80

The argument is also raised that even though a woman should or ought to permit the birth of her unborn child, it does not follow that the unborn child has a right to be born.81 Judith Thomson, a proponent of this view, advanced a hypothetical situation wherein she compared the right to life of an unborn child with her right to have Henry Fonda save her life.82 She concluded that, although she may be "sick unto death, and the only thing that will save [her] life is the touch of Henry

79. Garn, supra note 24, at 46 (quoting Dr. Bernard Nathanson).
80. Id. (quoting Dr. Nathanson).
82. In some views having a right to life includes having a right to be given at least the bare minimum one needs for continued life. But suppose that what in fact is the bare minimum a man needs for continued life is something he has no right at all to be given? If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow. It would be frightfully nice of him to fly in from the West Coast to provide it . . . . But I have no right at all against anybody that he should do this for me. . . .

. . . . But suppose he isn't on the West Coast. Suppose he has only to walk across the room, place a hand briefly on my brow—and lo, my life is saved. Then surely he ought to do it, it would be indecent to refuse. Is it to be said "Ah, well, it follows that in this case she has a right to the touch of his hand on her brow, and so it would be an injustice in him to refuse"? So that I have a right to it when it is easy for him to provide it, though no right when it's hard?

Id. at 55, 61.
Fonda's cool hand on [her] fevered brow," she had "no right at all against anybody that he should do this for [her]."83

The fallacy with this reasoning is that in Thomson's example, Henry Fonda did nothing to cause her impending and seemingly certain demise. If he had, his subsequent failure to cross the room or fly from the West Coast to touch his hand on her brow would be morally reprehensible. He was the one who initiated the process leading up to her certain death. Therefore, from a moral standpoint, he should be required to take steps to prevent her death.

Thomson's fallacious reasoning continues when she contends that, although the woman who aborts may be deemed a "bad samaritan" for refusing to assist the child in its quest to be born, there is no law requiring her, or anyone else for that matter, to be a "good samaritan."84 Accordingly, the argument continues, a woman should not be required by law to be a "good samaritan" and allow her unborn child to use her body for the complete term of pregnancy.85 Implicit in this argument is

83. Id. at 55.
84. Id. It is worth drawing attention to the fact that in no state in this country is any man compelled by law to be even a Minimally Decent Samaritan to any person . . . . By contrast, in most states in this country women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them. Id. at 63. This argument is refuted by the fact that a legal duty of affirmative action arises if a tortfeasor caused the injury.

Justifications for the traditional reluctance of courts to impose affirmative duties to warn or otherwise act to prevent injury to another include the impracticability of imposing such duties and a recognition of a defendant's interest in "keeping to himself" and in not being inconvenienced by a requirement to act for the prevention of harm to others. Neither of these policy justifications outweigh society's interest in preventing avoidable injuries and providing a remedy to those injured when otherwise innocent affirmative conduct by a defendant has contributed to the creation of a danger. In such cases, by limiting liability to those whose actions have created a hazard, an unmanageable extension of tort liability is avoided. Further, to the extent that the defendant had already decided to act in the manner he did in creating the danger, his interest in self-autonomy is diminished in importance since he has "already injected himself into the plaintiff's realm."

85. Thomson, supra note 81, at 63.
that the woman has not contributed to the condition now requiring her to be a "good samaritan." However, statistics indicate that only approximately 1% of all abortions are the result of rape or incest. 66 This means almost all women who receive abortions do so despite the fact that they and their partner have deliberately engaged in activity which causes the incidence of pregnancy. 87 The good samaritan/bad samaritan analogy does not and should not apply to situations in which the person who "ought" to help is the one who caused the plight of the helpless victim. Therefore, if the purpose of the law is to make persons accountable for their injurious actions, then preventing women from having abortions would not, in the overwhelming majority of cases, work an injustice by forcing them to become "good samaritans." Indeed, it would be forcing them to become accountable. 88

There is a tension, however, that arises when a person is forced to become accountable—a tension between the right to self-autonomy and societal concerns. John Stuart Mill suggests a resolution to this tension:

What, then, is the rightful limit to the sovereignty of the individual over [her]self? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society?

... To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society.

... Everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. This conduct consists, first, in not injuring the interests of one another, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person's bearing [her] share... of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing at all costs to those who en-

86. See supra note 14 and accompanying text.
87. The author recognizes that nearly 20% of women have abortions because of circumstances beyond their control, such as fetal deformity and maternal health problems. Torres & Forrest, supra note 13, at 170.
88. Accountability in this context means to accept consequences, i.e., the benefits and risks flowing from one's deliberate actions or omissions.
deavor to withhold fulfillment. . . . As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it . . . . 89

In short, when others can be injured by our choices that are motivated, not by necessity, but by our desire for self-realization and well-being enhancement, we should be required to refrain from fulfilling our individual desires. 90 Such a commitment to the common good is necessary for justice and fairness to be accorded to all members of society.

In order for members of society to be willing to sacrifice for the common good, they must first engage in a moral discourse to determine the level and extent of the sacrifices needed in order to accomplish an objective benefitting society as a whole. To require sacrifice without this discourse can cause a sense of estrangement among individuals and groups who believe that their concerns were not considered. Because of this estrangement, individuals and other underrepresented groups often resort to legal recourse using rights-based arguments. The use of legal recourse at this stage can be detrimental to the common good when the issues sought to be resolved have moral underpinnings. When the judicial system addresses the rights-based arguments without considering all of the moral dilemmas surrounding the issue, a controversy is sparked.

Such was the case in Roe v. Wade because it prohibited states from taking any action premised on their citizens' moral objections to abortion. 91 Justice Ruth Bader Ginsburg echoed

89. JOHN S. MILL, ON LIBERTY 73 (Elizabeth Rapaport ed., 1978).
90. Since only women will be required to refrain from abortions, men should be required to sacrifice financially and the community at large should be required to restructure in such a way as to provide meaningful accommodations for people with families.
91. It is popularly believed that Roe legalized abortion on demand only during the first trimester. This is not true, for the Court held in Roe that a woman's decision whether or not to have an abortion could not be regulated at all before viability . . . . The end of the first trimester is only significant in that it marks the point at which the state may presumably regulate the medical aspects of abortion . . . . But during the second trimester, until viability, the state may not restrict or interfere with the right of the woman to choose to have an abortion for any reason, or for no reason whatever. And even after viability, the Supreme Court said, the state cannot prohibit abortions necessary to save the life or health of the mother . . . . Thus, the Court effectively mandated legalized abortion on demand until viability, and, depending on the interpretation of "health," possibly afterward as well.
this sentiment when she concluded that the Court in Roe should have merely declared the Texas criminal abortion statute unconstitutional, rather than proceeding on and supplanting every state abortion law then in force. Roe then, represents a failure of the judicial system to serve as the “weather vane” of opinion when the issues that need to be resolved have divergent moral bases.

IV. EFFECTING TRUE SOCIAL CHANGE

In my experience, I have found that both sides of the abortion controversy can agree that abortion represents a tragedy. For abortion proponents, it is seen as an all-too-necessary evil. For abortion opponents, the obvious tragedy is the termination of the unborn life. It is doubtful whether the pro-life and pro-choice forces will agree on the propriety and morality of abortion. However, these two forces should be able to agree that abortion is not a procedure that one should strive to obtain because it is good in and of itself. Therefore, the focus of any fruitful meeting between pro-life and pro-choice forces should be on developing strategies to eliminate the necessity

WARDLE & WOOD, supra note 39, at 53.

92. As Ruth Bader Ginsburg stated:

The 7-2 judgment in Roe v. Wade declared “violative of the Due Process Clause of the Fourteenth Amendment” a Texas criminal abortion statute that “[excepted] from criminality only a life saving procedure on behalf of the [pregnant woman].” Suppose the Court had stopped there, thus declaring unconstitutional the most extreme brand of law in the nation, and had not gone on, as the Court did in Roe, to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force? Would there have been the 20-year controversy we have witnessed, reflected most recently in the Supreme Court’s splintered decision in Planned Parenthood v. Casey? A less encompassing Roe, I believe . . . might have served to reduce rather than to fuel controversy.


93. In my own discussions with those who are proponents of abortion rights, I have yet to find anyone who would say that abortion is something that is good for the woman or something that every woman should experience. They agree that abortion represents a failure: a failure in planning, a failure in the birth control method used, a failure in conceiving a child free of birth defects, a failure of the mother’s body to safely withstand childbearing, a failure of the relationship between the man and woman, etc. However, what we disagree on is whether the availability of abortion as an alternative for traditional methods of birth control for women is good.

94. It is not realistic that our pluralistic society could achieve true communal solidarity and unity of social purpose for such an issue. See Lawrence B. Solum, Pluralism and Modernity, 66 CHI.-KENT L. REV. 93, 95 (1990).
for abortion as an alternative to traditional methods of birth control.

To see the issue of abortion only in terms of the rights of the fetus or of the rights of the woman skirts around the concerns central to a woman's decision whether to have an abortion. The only way to persuade women to not have abortions is to first attempt to see life through their eyes and then work towards solutions for their particular problems. For the individual woman, the focus is on her alternatives and the consequences of those alternatives, not on her or her child's rights. Thus, progress in the abortion context can only occur when both sides of the abortion debate agree to look beyond their own rhetoric and generalities and look to specific situations for ways to address the abortion problem, both short- and long-term.

A first step in effectuating true social change is persuading women that they can have meaningful opportunities to pursue their goals of self-realization without using abortion as an optional method of birth control. For them to be persuaded, women need to feel confident that having and raising children will not be a burden that they alone must bear. Therefore, the first strategy should encompass ways to restructure society so that women will have meaningful support—psychologically, economically and morally—in the bearing and rearing of their children. It is inappropriate and indeed callous for society to force women to bear children by prohibiting abortions without providing concomitant relief for the certain burdens that go along with childbirth and childrearing.

I view the following legislative and societal changes as providing the support women need and should receive: (1) businesses should be required to accommodate mothers and fathers who need to spend time with their families by provid-

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95. The multiplicity of reasons for choosing to have an abortion suggests that even if one specific problem is solved, it will not be enough to change most women's decision. . . . This suggests that actions directed toward helping women who are unintentionally pregnant avoid abortion would be most effective if tailored to the individual.

Torres & Forrest, supra note 13, at 175.

96. "Findings from [the survey on why women have abortions] indicate that eliminating (or even substantially reducing the number of) abortions once women have become unintentionally pregnant will be very difficult, if not impossible, because the reasons women turn to abortion are so numerous and varied." Id. at 176.

97. It is important for businesses to recognize that men share responsibility
ing flexible schedules and leave time for new parents; (2) parents who choose to continue working while raising their children should not be penalized by being taken off the promotion track; and (3) government needs to assist in establishing safe, high-quality, low-cost child care centers. These changes will provide women with some flexibility, enabling them to achieve their career goals and aspirations without sacrificing their own or their children's well-being. As for women who abort because of rejection by family members, economic difficulties or unstable relationships, centers should be established to provide shelter and medical treatment during their pregnancy. Opportunities for education and job training should be made available to them to assist them in becoming financially independent. The money spent by businesses and society at large would be well spent because it would assist women in their self-realization efforts, increase their contributions to society, and provide the children with an environment which prepares them to become productive members of society.

In addition to legislative efforts to provide women support, the legal system must better enforce existing laws that condemn men's oppression of women. Our legal system needs to be more sensitive to victims of rape and other forms of sexual abuse and enforce the laws more stringently against the perpetrators. Individuals who rape and/or commit incest should receive punishment commensurate with their crime. The perpetrators, rather than the victims, should suffer the shame, humiliation and rejection resulting from their crime. Additionally, a better system needs to be put in place to make non-custodial fathers financially accountable.98

However, accountability should not stop there; a fair system would also require the men to become more accountable by requiring them to become "good samaritans" in the raising of their children.99 Arguably, a law prohibiting men and women from using abortion as an alternative to traditional methods of birth control does not overstep the boundary between the rights of the individual and the rights of society at large. Without its children, in quality and in quantity, society is doomed to extinction. As future wage earners and taxpayers, children play a vital role in preserving the societal infrastructure. Consequent-

for childrearing that goes beyond providing financial support.

98. See supra note 5.

99. See supra note 8 and accompanying text.
ly, it is only reasonable that society seek ways to protect its children, both born and unborn.

Although such legislation is an important first step in acknowledging the fact that women suffer inequalities, it is not altogether effective in changing the societal value systems from which the inequalities stem. Generally, the law only reflects a society’s prevailing values, beliefs and mores; it cannot create them. If there is a societal belief that devalues women and their contributions, legislation may initially provide some relief for women, but ultimately, there must be a conscious dismantling of the value systems in place which operate to subordinate women to men. It is not enough for society to say that women should not allow themselves to get pregnant without first changing the social culture that subordinates women and makes them vulnerable sexually to men. “Women are socialized to be compliant and accommodating, sensitive to the feelings of others, and frightened of physical power; men are socialized to take advantage of every opportunity to engage in sexual intercourse and to use sex to express dominance and power.” Since legislation alone is insufficient, society must use the power of socialization positively to abolish the subordination of women.

Abortion, like the sexual revolution, will not free women from their subordination and enslavement. Instead, it can only serve to exchange one type of bondage for another. Aborting the unborn may give women more flexibility in their

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100. Catharine MacKinnon defined women's rights “in the negative as a boundary protection to freedom of individual action and says ‘no amount of negative freedom legally guaranteed to the [oppressed] group will make it the equal of the first [group].’” Susan G. Kupfer, Autonomy and Community in Feminist Legal Thought, 22 GOLDEN GATE U. L. REV. 583, 594 (1992) (quoting CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 164 (1989)).

101. Women's subordinate status often prevents them from refusing men sexual access to their bodies. . . . [P]regnancy often forces women to become dependent on particular men. Because a woman's dependence on a man is assumed to entail her continued sexual loyalty to him, restriction of abortion serves to commit women to remaining sexually accessible to particular men and thus helps to perpetuate the cycle of oppression. SHERWIN, supra note 8, at 103.

102. Id. at 103-04.

103. See supra note 22 and accompanying text.

personal life choices, but when women make these types of personal life decisions, the overwhelming majority of them are affirming the same self-centered, atomistic attitude that many feminists find objectionable in men. Further, abortion as a birth control option does not eliminate the domination and oppression many women face and consequently does not necessarily represent a meaningful choice to the next woman who is at that same crossroad of decision.

We need to make an effort to affect true social change to solve the problems that cause the demand for abortion. A subtle tragedy of abortion is the failure of a society to take care of its own to the point that both men and women alike honestly believe that abortion is the only answer. I believe efforts should be made at the grass roots level to change the heart and mind of society so that it can better appreciate the intrinsic value of its female members. In the final analysis, the lives of unborn children should not hinge on the ability of women to have re-

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105. Critical legal studies theorists join with radical feminists to construct the following syllogism: individualism maximizes the selfish, atomistic goals of (male normed) beings, leads to a concern for rights which protect the privileges gained against the state or the claims of others within the community and defeats collective movement for social change. Some see rights as alienating in themselves, creating a situation where there is no possibility of true community.

Kupfer, supra note 100, at 595 (footnote omitted).

106. In feminist terms, [Roe] translates the ideology of the private sphere into the individual woman's legal right to privacy as a means of subordinating women's collective needs to the imperatives of male supremacy.

.... [U]nder conditions of gender inequality, [Roe] does not free women, it frees male sexual aggression. The availability of abortion ... removes the one remaining legitimized reason that women have had for refusing sex besides the headache.


107. See supra note 34 and accompanying text.

108. In fact, because of the ease of procurement and the relative low cost of abortion, many women will succumb to an abortion, not because it is their personal decision but because of pressure from others. See supra note 34. It is my contention that many women abort their unborn because they believe that it is expected of them; to do otherwise would be selfish and not provide the best environment for the child. Although women have other alternatives besides abortion, they are not viable because of these external pressures. As long as women continue to succumb to such pressures rather than demand respect for their decision to carry their fetus to term and demand support during their pregnancy, women will not have meaningful choice.
productive freedom, but rather on the ability of women to experience freedom in the purest sense of the word.

In order to experience this type of freedom, first, women must awaken to the fact that their ability to bear children is not a curse hindering them from achieving self-realization. Nor is this ability something to be taken lightly, with no deliberate effort given to responsible action and foreplanning. The ability to physically bear children is a unique and special gift that only women have and childbearing and childrearing are two of life's greatest experiences.

Second, women should push for a shift in societal values, urging society to give the proper deference to motherhood and women's equality in general. Sexual promiscuity of both men and women, done under the guise of sexual freedom, reinforces the notion that women, and more particularly, their bodies, are provided for the pleasure of men. Currently, contributions by women, whether maternal, intellectual or otherwise, are discounted and devalued. When women begin to value themselves, not in reference to men, but for what they are intrinsically and for all their unique qualities and abilities, then they can be a force in urging men and society in general to give equal credence to them—not because they have become like men—but because as women they have, in and of themselves, inherent value. The reinstilling of moral values and virtues

109. See infra note 111 and accompanying text.

110. A person's social worth should not be determined by someone else. Instead, a person's quality of life should be defined by their individual moral expression that gives their life meaning. In defining the appropriate region of human liberty, John Stuart Mill stated that

[i]t comprises, first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. . . . Secondly, the principle requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

MILL, supra note 89, at 11-12 (emphasis added).

111. Since the effect of sexist or patriarchal experience in our culture is to demean, marginalize and subordinate women, it seems necessary to undo that damage, to rekindle the individual sense of self-worth before undertaking the dismantling of the cultural constructs. It is difficult to see how the collective experience can fuel movement toward change without attainment of autonomy for individual women.

Kupfer, supra note 100, at 598.
that promote self-esteem and care for others should be promoted through education, through laws that encourage and compel non-custodial parents to financially provide for their children, and most importantly, through laws that promote and encourage equal employment opportunities among the populace.

Third, along with true equality for women, efforts should be made to reverse the trend in which people determine what quality of life is sufficient in order to have a human being's life considered worth living. It is indeed a sad commentary that a society, supposedly compassionate and enlightened, would permit any group of individuals to decide whether another human being should live or be born. Who among us living today understands the meaning and purpose of life such that we feel qualified to find that someone cannot live up to that standard? How can we determine with any degree of certainty whether their contribution (or potential contribution if unborn) is so insignificant and devoid of value that it would be better for everyone that they die or never be born? Further, once we commit to this line of reasoning, how can we rebut another's contention that we do not measure up to his or her understanding of what life is and should be? It is true that to allow those who are not fully functional or independent to live or be born will create a burden on those around them, but then again, we have all been burdens at some point in time and, if we live long enough, we will be burdens again.

112. President Lincoln saw the danger in allowing one group of individuals to determine the rights of others when he asked:

If A. can prove, however conclusively, that he may, of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A?—

You say A. is white, and B. is black. It is color, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own.

You do not mean color exactly?—You mean the whites are intellectually the superiors of the blacks, and, therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

But, say you, it is a question of interest; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.

Abraham Lincoln, Fragment on Slavery, in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848-1858, supra note 33, at 222, 222-23.

113. It is my belief that not all burdens are negative in their impact on the provider. For example, there may be spiritual or emotional benefits to people caring for those often considered burdensome.

114. Indeed, each one of us, through our decisions and our very being, impact
It has been said that those who argue for the rights of the fetus to be carried to term have a "love affair with the fetus" but no concern for the rights or well-being of children once they are born. While it is true that society has not done a good job in protecting its children from abuse, it must be conceded that society is not comprised solely of pro-life individuals; the pro-choice contingent needs to accept some of the blame itself. A lot of money has been raised through private efforts to protect the rights of women to have abortions; media coverage abounds on the pro-choice and "safe sex" messages. Why do we not see this same demonstration of commitment and support, financially and otherwise, to stopping rape, child abuse and promiscuous sex? Are we not at all concerned about eradicating the problem that gives rise to the symptoms? Although problem eradication takes a long-term focus and women considering abortion will not receive as much, or any, benefit as the "short-term fix" that abortion would allow, women as a group will benefit in the long run as beneficiaries of a more enlightened, compassioned society which protects and values each of its members.

In such a society, the role of the legal system should be to ensure that everyone's rights, as evidenced by the societal value structures, are protected. Consequently, it is of utmost importance that the societal value structures stress the sanctity of life and the intrinsic value of all its members. In addition, the value structure should not permit the making of laws that enable people to escape responsibility for their actions.

those around us, both positively and negatively. This impact can be viewed by others as a burden upon them because it forces them to make changes and adjustments in their lives. Notwithstanding this view, we still assert our right—not only to live, but to live our way despite the effects on others.


116. If this is true, then it must also be true that those who see the issue of abortion as embracing only the woman’s rights have a “hate affair with the fetus” because of their absolute resolve to place the desires of the woman paramount to the life of her unborn child.

117. As Douglas Wilder, then-Governor of Virginia, noted:

More than ever, our young people must come to understand that making mature decisions; making life-long commitments; making structured and loving families—rather than merely making babies; and making the most of the opportunities that do exist in every aspect of life; these are the actions that constitute the beginning of a passage into manhood.
If we lived in an ideal world, there would be no abortions; every child would indeed be a wanted child. However, the world we live in is an imperfect one, where, if I must concede anything to the pro-choice movement, the realities of today's life offer little support to women in trouble. Consequently, abortion is considered to be the most logical and viable option for many of them. Nevertheless, living in an imperfect world does not mandate the use of imperfect solutions. Abortion is an imperfect solution because it does not correct or eradicate the oppression and domination to which many women are subjected. Abortion can only eliminate one of many symptoms of the oppression. If meaningful change is desired, then strategies for change and equality for women must emphasize problem eradication strategies rather than symptom elimination strategies alone. With symptom elimination strategies, the problem remains yet becomes less obtrusive to people because they are not confronted with the symptoms they find most offensive, such as child abuse, unwanted children and poverty. However, symptom elimination does not eliminate the child abuser, the selfish reasons why children become unwanted or the poverty mentality of materialistic people who seek more no matter how
much they already have. In fact, by not eliminating the problem, new symptoms become manifest to take the place of those previously eliminated.

It can be argued that problem eradication is unrealistic and can never be achieved. However, along with seeking to eliminate the problem, problem eradication strategies operate under the assumption that humanity's position is not hopeless, therefore serving to inspire the populace to adopt a less reactionary stance when confronted by life circumstances. It is at this point where the individual, whether male or female, is truly free in making a choice. The circumstances do not dictate the course of action; the individual does.

That is why it is necessary that with legislative rather than judicial action, emphasis should be placed on changing the heart and mind of society to care for those in need (problem eradication) rather than upon abortion rights (symptom elimination). Although this approach has a long-term focus and does not provide the immediate "benefit" abortion offers, I believe it is the more lasting one and the only one in which women will ever become truly free.