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Who is a Victim

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Articles

Who is a Victim?

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It is fashionable these days to talk of "victimless crimes", but the phrase can be dangerous for it may lead us with deceptive simplicity around problems which deserve to be squarely faced. If everyone agreed that an offense was truly without any discernible victim, then arguments for its retention would be hard to imagine. But the disagreement is really about whether in particular cases we can convincingly identify victims who may legitimately claim protection. The primitive model of the victim is the individual human being who is knocked on the head or whose goods are stolen. Other candidates for the role of victim also claim attention and invite us to consider what social interests may legitimately be protected by the criminal law other than the person and property of the individual. We shall now pursue this theme by looking at two test cases — cruelty to animals and abortion.

Cruelty to Animals

Many people (most, we may hope) find it extremely repugnant to witness or imagine the infliction of torture or other kinds of cruelty upon animals. And yet our relationships with animals and our moral views about what it is permissible to do with them are very ambivalent and difficult to harmonize. We think it perfectly proper to kill animals for food and the law does not generally prohibit killing animals at all, as long as they do not belong to somebody else. I may kill my pet dog any time I like, always provided that I do not do it in a cruel manner. We also find it quite acceptable to exploit animal labor and to control the lives of animals so that they are useful for human purposes. For the most part, we still view animals as non-human pieces of property with which we can deal as we please. The one exception is the prohibition on treating them cruelly and this is of

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comparatively recent origin. In England and America such laws got on the statute books in the mid or late nineteenth-century, through active lobbying and pressure from a minority of enthusiasts. It does not appear that there was at the time any great majority sentiment for such legislation.

Today there is broadly based support for such laws and this may be an interesting example of how legislation and law enforcement can, with the passage of time, make an important contribution to elevating the morals of the community. But we are still left with the task of explaining exactly why it is wrong to be cruel to animals. One explanation has been offered by Professor Louis Schwartz, one of the architects of the Model Penal Code:

"It is not the mistreated dog who is the ultimate object of concern; his owner is entirely free to kill him, though not cruelly, without interference from other dog owners. Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its suffering."[1]

But this explanation, stressing as it does the element of shock or offense to human sensibilities as the justification for prohibiting cruelty to animals, is surely not acceptable. Suppose I get great pleasure out of torturing my dog, but, realizing that my neighbors would be upset by the howls of the tormented animal, I insulate and soundproof my attic and take the dog up there to torture him at leisure, leaving my neighbors quite undisturbed. It is true that, if I were detected by the authorities and my conduct made public, my neighbors would then suffer indignation and shock at contemplating what I had done. Their reaction would be the same, and to an even greater degree, had I been killing or torturing a human being. But this would hardly justify the conclusion that the law of murder is designed to protect the sensibilities of the public rather than the murderer's potential victim. The shock to sensibilities is a result of knowing that a murder has been committed but it is not the prime evil aimed at in the law of homicide.[2]

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1. H. Schwartz, "Morals Offences and the Model Penal Code" (1963), 63 Columbia Law Review 669, reprinted in R. Wasserstrom (ed.), *Morality and the Law* (Belmont, Calif. Wadsworth, 1971) 86, 94.

2. The same point has been made by J. Feinberg, "Harmless Immoralities and Inoffensive Nuisances" in N. Clare and T. Trelogan (eds.), *Issues in Law and Morality* (Case Western Reserve University Press, 1973) 83.

In the same way, the rules about cruelty to animals are surely primarily designed to protect animals, and not the sensibilities of people. Bentham made this point very well, when he said that it might one day come to be recognized that "The number of legs or the villosity of the skin or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the caprice of a tormentor. What else is it that should trace the insuperable line? Is it the faculty of reason or perhaps the faculty of discourse? But, the full grown horse or dog is beyond comparison a more rational as well as a more conversable animal than an infant of a day, a week or even a month old. But suppose the case were otherwise, what would it avail? The question is not, 'Can they reason?', nor, 'Can they talk?', but, 'Can they suffer?'"[3]

The justification rests, then, on the proposition or axiom that it is wrong to inflict suffering on sensate creatures. This leaves great uneasiness about where we presently draw lines. You may uproot plants, but you cannot tear limbs off dogs. And, although you may not tear limbs off dogs, you may kill them in a non-cruel manner if they belong to you. We are left with a patchwork sort of morality about animals, where we are, it seems, willing to embrace them with ourselves in the circle of sensate creatures for limited purposes only. In the theme of our discussion, we could say that animals are sometimes recognized as victims and sometimes not.

A further useful lesson flows from the animal example. The discussion reveals that it would be a mistake to elevate privacy to a preeminent position in this debate. The criminal law has the strongest warrant for invading our privacy when the activity we choose to pursue privately involves inflicting suffering on a non-consenting sensate creature. Privacy assumes importance only when it negates the only potential for inflicting harm that we can perceive in the conduct in question. This will be the case with consensual sexual conduct between adults but not with torturing dogs.

Abortion

The difficulties of deciding who is a victim worthy of protection crystallize in the most agonizing fashion in the debate about abortion. Here the last few years have seen a dramatic shift in public opinion in the United States and also in the state of the law. Ten years ago we

3. Bentham, *Principles of Morals and Legislation* (Harrison ed., 1948) 412 n. 1.

might have thought it absurd if someone had forecast that in such a short space of time the legislatures of some states would be permitting abortions on demand. The decision of the United States Supreme Court, in *Roe v. Wade* [4], requiring such permissive procedures and nullifying the laws against abortion was a surprise even to many of those who most welcomed it. But the swift change in the law cannot dissipate the moral argument. For the debate here is quite unlike the one surrounding homosexuality or other sexual behavior. Those who condemn abortion do not rest their case on principles of offensiveness or unnaturalness. They assert quite simply that to abort a foetus is to take a human life. This is unquestionably a moral position of the strongest kind and must be dissolved by analysis or else accepted.

It is perhaps easiest to begin by looking at the empirical argument, often made by advocates of abortion on demand, to the effect that women always have sought and always will seek abortions. This impulse and apparent need are so strong for many women that the law will not deter them and, in the absence of legalized safe facilities, they will often end by getting themselves killed through unsafe procedures. A major consequence of iroviding a legal method of abortion will thus be to save the lives of many women.

While this assertion is incontestable, it does not in itself provide an overwhelming argument for the legalizing of abortion and even less for regarding abortion as morally unobjectionable. For, if those who look upon abortion as the taking of a human life without justification are correct, then they could reasonably argue that many women will be deterred from having abortions by the existence of a criminal prohibition, and in this way more lives might be saved than lost. In any case, they might add, a quantitative analysis is not appropriate when we are discussing a species of murder. Murder should not be legalized because, when prohibited, it is a risky business for the murderers, some of whom will lose their lives in trying to kill others. The anti-abortion party is right in forcing us to face the central moral question of what we are doing when we practice abortion and how it may be different from murder.

The law itself has always refused to equate abortion with murder. The old common law made distinctions for the purposes of the law of homicide between children born alive, those capable of being born alive and a mere foetus. The crime of murder (or manslaughter) could only be committed when the child had been born alive, which

4. 410 U.S. 113 (1973).

the old cases defined as requiring total extrusion from the body of the mother, though it was not necessary that the umbilical cord should be cut. Before such time, but after the twenty-eighth week of pregnancy, English statutes designated causing the death of a foetus as the felony of "child-destruction"; before the twenty-eighth week of pregnancy the crime was known as abortion. Why should such distinctions be drawn at all and, if they are to be drawn, why should they not be distinctions between criminal and non-criminal conduct rather than between degrees of crime?

The initial difficulty here has to do with the problem of defining what quality it is that we seek to protect through our general moral condemnation of killing and the laws which support it. Are we concerned with protecting "life" or "human life" or the "human personality" and how can we distinguish meaningfully between these notions? The newly born baby is remarkably little different from the baby a week or a month before normal birth, except for the obvious circumstances of its new visibility. The recent conjugation of the spermatozoon and the egg may look very different indeed but, as the anti-abortion advocates always point out, it represents a separate genetic package and, apart from intervention of disease or human act, will inevitably and rapidly develop all the physical properties of a human being, which are even now inexorably programmed into its structure. This is the old "acorn to oak" analogy and those who condemn abortion launch a powerful offensive when they challenge its defenders to come up with a meaningful principle to justify excluding the foetus from the category of human life.

Even if the debate shifts to the question of the starting point of human personality, the defenders of abortion are in a difficulty. Bentham pointed out, in a passage quoted above, that a grown dog or horse is infinitely more "conversable" than a day old baby. In the same vein, there seems little to support the contention that a baby a few days after birth is more of an individual human personality than a baby a little time before birth. The foetus in the womb is admittedly invisible, unlike the baby after birth. But it is not obvious that our inability to see the foetus is a sufficient reason to disqualify it from enjoying human personality. For many people it is no doubt much easier to kill a foetus than a baby, just because we cannot generally see it move or smile or hear it cry. But many of us would also find it easier to drop a bomb on a city far below than to stick a bayonet into someone's body. As one writer has pointed out, it is after all a mere contingency of nature that we cannot see babies in the womb. Science

may very soon invent a device to enable us to make home movies of babies before they are born. Assertions that babies before birth are quite different creatures from babies after birth would then appear as fatuous to everybody as they already do to those with medical and biological knowledge.[5]

In recent years the abortion debate has swung into new territory with a package of arguments drawn from an emerging consciousness and assertion of the rights of women. The one remarkable feature of the unborn baby that does dramatically distinguish it from other forms of human life is, after all, that it occupies another's body. We certainly believe that we have important rights with respect to our bodies — to take care of them or neglect them as we wish, to place them in proximity to others, if they will permit it, or to withdraw them. How then can a woman reasonably be told that she has no right to expel an unwanted intruder who nestles in the very depths of her body? Nobody would want to claim a right for a woman to kill her born baby because she finds it annoying or inconvenient, but many strenuously assert that the situation is morally quite different when the question is one of disposing of a foetus for which the woman's body is a receptacle.

But foetuses are surely not quite the same as tapeworms — parasites which we may cheerfully decide to expel from our systems. A parasite is an uninvited guest, but whether a foetus is uninvited depends on the degree of the woman's responsibility for its implantation. If a woman is raped and becomes pregnant, then she clearly has no responsibility for the conception and many moralists and some legal systems have for a long time recognized her right to have an abortion in these circumstances, though religious doctrine has generally denied the right even here. If a woman uses careful contraceptive techniques when having sexual relations, but nevertheless becomes pregnant through some unavoidable failure in the device used, then again we could not say that she has intentionally or even negligently brought about her pregnancy. But, if a woman neglects to use any contraceptive precautions, it could reasonably be claimed that she is responsible for her pregnancy, at least in the sense of being negligent as to whether she became pregnant or not.[6]

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5. See R. Wertheimer, "Understanding the Abortion Argument" (1971), 1 Philosophy and Public Affairs 67, 91.

6. See J. Jarvis Thompson, "A Defence of Abortion" (1971), 1 Philosophy and Public Affairs 47, 57.

We might try to set up a moral frontier along these lines, viewing abortion as permissible when the woman is not in this sense responsible for the pregnancy, and as forbidden when she has been negligent. Such a position would not satisfy nost advocates of legal abortion, nor would it match the present state of the law. Whatever its moral merits, such a line of demarcation would also be quite impossible to apply as a standard of legality. To entrust a public body with the task of deciding whether a woman did or did not take reasonable contraceptive steps in the act of intercourse which led to her pregnancy would be impractical and ludicrous.

Those who defend the present availability of abortion on demand are not without moral arguments. They can point out that, both under the present state of the law, and under their own demands, there remain certain restrictions on abortion. Under the recent United States Supreme Court decisions, states may still prohibit abortions after the second trimester of pregnancy. This allows prohibition at an earlier date than the time which the old common law recognized as the one where a foetus becomes "capable of being born alive." It thus could be thought to serve as a reasonable although rough dividing line between a mere foetus and a baby capable of surviving as a human being after detachment from the mother. Certainly before this date, even from the very moment of conception, an entity exists which is a potential human being. But, so the argument might run, the potentiality of becoming a human being is an interest which must yield to the personal right of the woman to determine whether she wishes to carry something in her body to the terminus of birth. Though nobody else has any right to destroy a potential human being, the person who carries such a potentiality in her own body, and who will have to pay a certain price to bring it to fruition, has such a right.

The moral foundation of this right is the extraordinary and in some ways inhuman nature of the burden that its denial would entail. If abortion involves the snuffing out of a potential human life, then to deny a woman an abortion involves the suppression of her human right to make decisions about the fate of her body and the course of her life. We would immediately reject as barbarically unjust any scheme which sought to compel selected women to become pregnant and bear children, when they did not wish to do so. To compel a woman to carry a foetus to term is a similar encroachment on her human dignity, on her right to make a choice for herself whether to have children or not.

Here we must take into account the nature of the burden which pregnancy imposes on a woman in our society. The carrying of the child involves discomfort and perhaps danger to health. The process of birth may be painful and again possibly attended by danger to health and life. Once the child is born, the pressures of tradition and established sentiment combine to persuade the woman that it is her duty to bring up the child to maturity. Though this may impose great hardship on her and radically change the shape of her life, few women are able to resist the weight of the transmitted notion that duty requires such a price once the child is born. The fact that the conception may be in part due to the woman's own negligence does not alter the situation significantly. A mandatory obligation to carry a foetus to birth and then rear a child is a cruel and unusual punishment for a moment's carelessness, often the result of influences, temptations and pressures which make cool calculation difficult.

Even those who use these arguments to advocate a woman's right to abortion agree that the right is extinguished once the child is born and takes on a full extruded existence. It is presumably, then, the satellite or incubus character of the foetus in the body of the woman which is decisive in entitling her to determine its disposition. Here we would do well to remember that morality is not a manual of saintliness nor a doctrine of reverence for all forms of life. Our discussion of moral attitudes towards animals has already made that clear. Morality may be regarded as a system of enlightened self interest, consisting of rules and principles that make social life possible. The system requires that we extend to others the protections and considerations that we would claim for ourselves. This inevitably thrusts forward questions about whom we will regard as members of the group. Primitive moralities may have included within this circle only members of the family or the clan or the tribe or the nation, relegating others to the status of non-persons who might quite properly be attacked and enslaved or killed. An extension of our moral horizon has brought us to the perception that there are, *prima facie*, no significant differences between human beings with respect to the basic duties that we owe them. While we remain very ambivalent about the status of animals, many have concluded that there are sufficiently significant differences between a human person and a foetus to take the latter outside the sweep of the protective system.

The opponents of abortion are unmoved by such arguments and will catechistically respond that the right of life cannot be displaced by any interests having to do with another's freedom of choice. They

will also challenge their opponents with a thin-end-of-the-wedge argument. If the foetus is a non-person to be disposed of at the will of the mother, why, they will ask, is the same not true of the gravely ill or the mentally retarded or even of young babies? They do well to raise that point, for there can of course be no guarantee that at some time in the future someone will not point to the law on abortion as an analogy justifying the killing of such people. In reply it could be said that those who advocate a free choice for the mother as to abortion are not asking for such choice with respect to live babies or mentally retarded people and that significant differences can be shown between these classes. To hold the line rigidly to ensure the protection of all persons born alive at least provides a workable criterion for division.

But even if the arguments of the proponents of abortion have an initial appeal, we are still left with an unresolved question about the significance of the capability of the foetus to be born alive. Presumably not even the most committed advocate of abortion would want to legalize the killing by a mother of a partially extruded baby in the process of birth. How far back, then, should the line be drawn? One problem here is that advancing medical techniques may eventually force us into responses which would come close to denying the right to abortion altogether. Suppose that doctors may at some time in the future be able to remove a three month old foetus from the womb and nurse it to the same development as a normally born baby. Would the advocates of abortion then find it necessary to retreat to a position of permitting abortions only during the first twelve weeks of pregnancy?

The dilemma is more apparent than real. If medical science progresses to the point where most foetuses after removal from the womb could be brought to maturity, the case for abortion would be strengthened rather than weakened. It might be better to say that the demand for *abortion* would disappear and be replaced by a demand for an early termination of pregnancy and relief from the obligation to raise the child. For the mother could then be relieved of her unwanted baby at her request without the necessary loss of a potential human life. If there is felt to be a legitimate state interest in bringing the potential life to fruition, then the detached foetus could be brought to maturity and thereafter cared for at the expense of the state and in facilities provided by the state. The mother requesting the premature termination of pregnancy would forfeit all parental rights with respect to the child, a price she would presumably be willing to pay.

The hypothetical does, however, sharpen the outlines of two issues which recent debate over abortion has not fully brought out. The first is the need to clarify whether the case for abortion involves the assertion of a right to extinguish the life of a foetus or only the demand for the early termination of a pregnancy. At the moment the two possibilities generally merge into one, but this is only a contingency of the present state of medical science. If medicine were able to bring an early detached foetus to maturity outside the mother, and he state assumed the duty to care for the child, the advocates of abortion would have to clarify whether they would be satisfied with such an arrangement or whether they were asserting a right to terminate the life of the foetus. The second demand would be much harder to justify.

Secondly, the hypothetical shows that the case for abortion weakens in proportion to the lessening of the burden pregnancy imposes on the mother. If the state regularized good arrangements by which unwanted children were raised in a manner generally accepted as being as healthy, happy and promising for the future as the average upbringing a child receives in a middle class home, then the only case a woman could make for abortion would be to be spared the period of pregnancy and the process of birth. These burdens are certainly not inconsiderable, but if it became possible to detach a foetus at an early stage from the mother, the burden would become slight indeed. Let us say that such detachment became safe for the foetus five months into pregnancy. Would a woman three months pregnant then have a right to demand abortion at that time, on the ground that she could not be subjected to the imposition of carrying the child for two more months? This example reveals that the moral arguments for and against abortion on demand are to a considerable extent dependent on the present state of medicine and social arrangements for the care of children.

The Law on Abortion in the United States

At the behest of litigants American courts have been forced to plunge into these thickets of arguments, charged with the task of weighing them against the language of the Constitution and emerging with authoritative determinations. As the old uniformity of state prohibition of abortion began to crumble and some states (notably New York) enacted very permissive abortion legislation, attacks were mounted from both camps.

The New York statute which permits abortion by qualified medical practitioners in proper facilities on the request of the pregnant woman up to the twenty-fourth week of pregnancy, was challenged in the case of *Byrn v. New York City Health & Hospitals Corp.*[7] The plaintiff contended that an unborn child is a "person" who is entitled to the protection of the Fourteenth Amendment to the United States Constitution, as well as the similar clause in the New York State Constitution. The Fourteenth Amendment guarantees that no state "shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The New York Court of Appeals denied the claim and upheld the New York statute in a somewhat laconic opinion, ruling simply that there was no authoritative constitutional interpretation of the meaning of "person", which was therefore a proper matter for legislative determination.

In the *Byrn* case the plaintiff was asking the courts to strike down a state legislative determination that abortion was permissible. Their refusal to do so is in no way a precedent for the conclusion that a state statute prohibiting abortion is unconstitutional. Both statutes could be allowed to stand, in different jurisdictions, under the theory of the *Byrn* case itself that the matter is one for legislative judgment. But carefully orchestrated attacks were being planned which would compel the federal courts to decide squarely whether it was constitutionally permissible to prohibit abortion. The issue was finally seized and determined by judgments of the Supreme Court of the United States, early in 1973, in the companion cases of *Roe v. Wade*[8] and *Doe v. Bolton.*[9]

The *Roe* case challenged a Texas statute which made procuring an abortion a criminal offense, unless it was done "by medical advice for the purpose of saving the life of the mother." A synopsis of the reasoning of the Supreme Court in this vitally important opinion serves both as an example of the Court's working at this highest level of constitutional decision making and as a basis for an evaluation of the decision itself.

The Court began the substantive part of its opinion with a review of attitudes to abortion through the ages and in different cultures, pointing out that, even in common law countries, the rigorous prohib-

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7. 31 N.Y. 2d. 194 (1972).
8. 410 U.S. 113 (1973).
9. 410 U.S. 179 (1973).

ition of abortion as a serious felony at all stages of the foetal life is a comparatively recent creation of nineteenth-century statutes. Part of the historical explanation for the passage of these statutes seems to have been a concern for the protection of the mother. But if this was the original legitimate state concern, then its foundation has disappeared with the advance of medicine, which has developed simple and safe techniques for abortion, at any rate during the early stages of pregnancy.

Other state interests of a legitimate kind are identifiable. The Court recognized that as pregnancy progresses, the abortive procedure becomes more complicated and somewhat more hazardous, so that the state may legitimately require that the operation only be performed in adequate facilities. Then, in the latter stages of pregnancy, as the foetus becomes viable (that is capable of independent existence), the state may properly assert an interest in protecting prenatal life and thus prohibit abortions altogether. Those who condemn abortion argue, the Court acknowledged, that life begins at conception and the state interest is therefore apparent from that moment. This position insists that there is a duty on the part of the state (rather than a mere interest) to protect human life. But the Court was not persuaded by this argument. It pointed out as the New York court had done in *Byrn,* that there is no constitutional guidance on the meaning of "person" which is the entity protected in the language of the Fourteenth Amendment. But *Byrn* had used this point only to reach the conclusion that the state had a right or privilege to *permit* abortion. The Supreme Court put the reasoning to much more devastating use in reaching the conclusion that the state has no right to prohibit abortion.

Taken alone, this premise simply does not support the conclusion. A judgment that a foetus is not constitutionally protected is not dispositive of the state's power to protect it if it chooses to do so. Legislation is not to be confined to the four corners of what is mandated by the Constitution. There is nothing in the Constitution which imposes a duty on states to protect grey squirrels, but, if there is any reasonable basis at all for wishing to preserve the species, a state clearly may do so by penal legislation. We need to be instructed why states have a legitimate interest in protecting the foetus capable of being born alive but no sufficient interest in protecting a foetus before the time it becomes viable.

The Court attempted to supply this link by dwelling on a woman's right to personal liberty, grounded in the Fourteenth

Amendment, and the growing constitutional recognition of a right to autonomy. This recognition represents a revival in American constitutional law of the once discredited notion of substantive due process. Used by a conservative Supreme Court in the early years of this century to strike down social legislation, substantive due process was so infected with the taint of economic reaction dressed in a judicial garb that it languished in the shadows for decades. Now it has reappeared dramatically as a vehicle for the enlargement of personal liberties sheltered from state intervention.

The starting point of the revival of the doctrine was the Supreme Court decision in *Griswold v. Connecticut,*[10] a suit which challenged a Connecticut statute which prohibited the distribution of contraceptives even to married persons. In *Griswold,* the majority of the Supreme Court relied on constitutional notions of privacy which it derived from the emanations or penumbra of several provisions of the Bill of Rights. At least one Justice invoked more forthrightly the protection of "liberty" afforded by the Fourteenth Amendment. In *Eisenstadt v. Baird,*[11] the access to contraceptives for married persons was extended to the unmarried by use of the equal protection doctrine. In this way the Court had begun to build up a concept of "fundamental rights" of constitutional dimension having to do with the personal regulation of one's sexual life and the procreation of children. In *Roe v. Wade* this development took a great step forward in the recognition of a fundamental right in a woman to elect whether to carry a foetus to term or dispose of this burden that she carries within her body. Once a right is recognized as fundamental it cannot be dislodged by a mere showing of some state interest. To intervene validly the state must show what the Supreme Court has come to call a *compelling* interest. In the abortion context the Court held that the state's interest in protecting potential life only becomes "sufficiently compelling" at the moment when the foetus becomes viable.

This analysis enabled the Court to devise a neat trimester division of adjustment between the competing interests of the state and the woman. For the first three months the abortion decision must be left to the choice of the woman and the medical judgment of her physician. In practice this means abortion by untrammeled choice. The situation is substantially the same for the second trimester, except that the state, in promoting its interest in the health of the

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10. 381 U.S. 479 (1965).
11. 405 U.S. 438 (1972).

mother, may regulate the abortion procedure in ways that are reasonably related to maternal health. This clearly would not countenance prohibition, but is meant to permit regulations about the medical facilities in which the operation may be performed. For the last trimester, which is the stage where the foetus has become viable, the state may regulate and, if it chooses, prohibit abortion, except where good medical judgment holds it to be necessary to preserve the life or health of the mother. It should be noticed that, even in the last trimester, the state may permit abortion by choice if it so desires.

There is a strong congruence between the Court's constitutional reasoning and the ethical discussion of abortion earlier in this article. This demonstrates the inevitable overlap of the methods and materials of constitutional and moral argument. At the same time a crucial difference becomes apparent. The ethical debate about abortion, divorced from considerations of constitutionality, reveals some difficulty in asserting a woman's moral right to destroy a foetus. The argument is a nicely balanced one and we might well decide that the deep division in public opinion, taken together with the disagreement among moral philosophers, renders imprudent any state intervention. This would favor leaving the decision to the individual conscience of the pregnant woman. Legislation prohibiting abortion would in this light be seen as unwise.

But the task of the United States Supreme Court in applying the Constitution is not to strike down state legislation that it regards as unwise. A much stronger judgment, to the effect that the state law violates a constitutional or fundamental right without a compelling justification, must be arrived at before a statute should crumble. In the absence of any express constitutional reference to abortion, such a right can only be located in the Fourteenth Amendment's general concept of liberty or by a cumbersome extrapolation of the idea, expressed in *Griswold,* that a general right of privacy is to be deduced from the implications of numerous Amendments. The latter theory appears here to be particularly ill suited. The claim to have an abortion has almost nothing to do with the core concept of privacy. It is not a demand that others should not invade or intrude upon an activity which one reasonably expects to keep hidden. Instead it is a claim that others cooperate in providing facilities and services to reach a desired change in the body of the woman. As such it is more natural to think of it as a claim to autonomy which can certainly be made to fit under the "liberty" concept of the Fourteenth Amendment.

But why did a woman's claim to have an abortion suddenly become guaranteed by the Constitution in 1973, when no court had held to that effect before? Does this lend credence to the charge that in such fundamental matters Americans are at the mercy of the shifting whims of nine non-elected persons?

The decision is not so indefensible, for *Roe v. Wade,* though a considerable leap, was not reached quite without stepping stones. Cases like *Griswold v. Connecticut* and *Eisenstadt v. Baird* had adumbrated an emerging right for individuals to control the consequences of their sexual activity by making personal determinations about regulating conception. Such decisions may be fragile underpinnings for *Roe v. Wade,* but they provided at least a rudimentary scaffolding of precedent. More important, surely, was the actual assertion of a right to have an abortion by many women and a recognition of that right by many men. To claim a right is certainly not the same as having a right, either in morality or law. But when many people vigorously put forward a claim and passionately regard its denial as an injustice, then we have an obligation to weigh the demand carefully and to accede to it unless the opposing arguments are very strong. While it may not be possible to count heads in majority and minority terms, it is clear that by 1973 many women had come to see the state of the law on abortion as a simple denial of their human rights, and many men agreed with them. In a democracy, a Supreme Court is surely right in paying heed to such developments when it comes to pronounce what are and what are not fundamental rights.

This is not to say that the decision in *Roe v. Wade* can be received with uncritical enthusiasm. The Court might have done a stronger job of building an acceptable chain of reasoning. A more acute and penetrating exposition of the constitutional lineage of a woman's fundamental right to control her body as she pleases, even when pregnant, would have been welcome. And why exactly does a state have a compelling interest which permits it to prohibit the abortion of a viable foetus, but has no such interest before the foetus becomes viable? The Court laid this proposition down flatly, unsupported by analysis or argument. A comparison of the abortion decisions with recent Supreme Court decisions on pornography[12] may lead to further uneasiness.

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12. 410 U.S. 113, (1973).
13. See *Paris Adult Theatre v. Slaton,* 413 U.S. 49 (1973).

It appears that a state has a sufficient interest to uphold constitutionally its prohibition on the discreet display of pornography in places of public accessibility. But it does not have a sufficient interest to uphold constitutionally a prohibition on the abortion of a non-viable foetus. Is this because the right of the woman to dispose of the unwanted contents of her body is "fundamental," while the claim to have discreet public access to erotically stimulating material is not? Such a proposition may be reasonable but one would like to see it brought out and looked at carefully. Or is it that the social dangers of permitting the discreet availability of pornography are much more threatening than the social harm done by aborting the non-viable foetus? Or some combination of these grounds?

Constitutional doctrine now holds that a state may intervene with prohibitions to prevent the somewhat tenuous possibility of aesthetic deterioration, but that the snuffing out of a living organism, which is a well advanced form of a potential human being, provides no such justification. This is, when put in that fashion, so surprising a position that harder and more penetrating delving into these questions would have to be forthcoming before we could regard the Supreme Court decisions in these fields as good examples of the judicial art and craft.