Siberian Tigers and Exotic Birds: Ronald Dworkin's Map of the Sacred

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At its most abstract, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* is a meditation on the nature of individual freedom. However, as author Ronald Dworkin explains at the end of Chapter One, he believes in doing philosophy in much the same way common law jurists believe in doing law—from the inside out—that is, by starting with a concrete problem and then proceeding to the more general questions raised by that problem.¹ According to Dworkin, this generates a theory that is appropriately tailored to the issue, “Savile Row” so to speak, rather than “Seventh Avenue,” ² and thus a theory that is more likely to improve the quality of public debate. The crucible for Dworkin’s theory in this instance is the debate over abortion and constitutional rights. Although euthanasia is discussed in the last two chapters of the book, it is not as comprehensively explored as the abortion issue. Indeed, it is plausible to read the book as an elaborate justification of the U.S. Supreme Court decision on abortion rights, *Roe v. Wade,*³ which Dworkin suggests may be the most famous case in America, if not the world.⁴ The majority in *Roe v. Wade* found that although women’s constitutional privacy rights entitle them to choose to terminate a pregnancy, those rights diminish as their pregnancies progress in accordance with a trimester framework.

I shall focus my discussion on what Dworkin has to say about abortion and, in particular, on his elaboration of the role that conceptions of “the sacred” play in liberal justifications for state restrictions on women’s access to abortion. For Dworkin, “the sacred” comprises a complex set of intuitions about why certain things are treated as if they have intrinsic

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2. Ibid.
4. *Life’s Dominion, supra* note 1 at 102.
value. I am interested in comparing Dworkin’s analysis of the role of “the sacred” with feminist analyses of abortion and of reproductive issues generally. In varying degrees, access to abortion as an aspect of reproductive self-determination has been a central part of numerous feminist political agendas, especially in North America. Yet, while some American women view *Roe v. Wade* as an important plank in the reproductive freedom platform, the case has also been the subject of feminist criticism on a number of bases, including its articulation of the trimester framework and the wider implications of a rights claim based on privacy. Much of what Dworkin has to say is a defence of these two aspects of the *Roe v. Wade* decision.

My essay is organized around four theses that Dworkin sets out to demonstrate: first, that most reasonable Americans do not adhere to the belief that the foetus is a person, and, therefore, liberal moral principles appropriately reflect that view; second, that the privacy rationale on which the majority in *Roe v. Wade* based its reasons makes sense in terms of liberal moral principles and constitutional law, and privacy doctrine’s detractors—Robert Bork on the right and feminists on the left—are incoherent; third, that most reasonable Americans agree that abortion on demand, especially for late stage abortions, is problematic given liberal society’s moral commitments to the sanctity of human life. To this end, Dworkin provides the reader with a detailed map of conceptions of “the sacred” within liberal society. Finally, Dworkin devotes three chapters to explaining how U.S. constitutional law, in particular *Roe v. Wade*, fits his account of “the sacred” while at the same time respecting human freedom and autonomy.

I. Confused Conservatives and the Foetal Personhood Debate

In the first chapter, called “The Edges of Life,” Dworkin proposes that the conventional understanding of the abortion debate in terms of whether or not a foetus is a person with rights is rooted in “widespread intellectual confusion.” The confusion resides in the failure to distinguish between concerns about foetal personhood and concerns about sanctity of life. While it is true, Dworkin explains, that pro-life advocates believe absolutely that foetal life is intrinsically valuable, it is not true, on close examination of their claims, that they believe in foetal personhood. Furthermore, while it is true that most pro-choice advocates vigorously reject the notion of foetal personhood, it is not true that they reject the notion that foetal life is intrinsically valuable. In short, according to

Dworkin, the main contenders in the battle over abortion rights agree that foetuses are not persons but are nonetheless intrinsically valuable. The area of contention lies, instead, around the meaning and consequences of the idea that human life is intrinsically valuable. In constitutional terms, this is appropriately characterized, not as a debate over foetal rights, but rather as a debate over the extent to which the state can legitimately take steps to protect the intrinsic value of human life without compromising liberal commitments to individual freedom.

Dworkin develops the conceptual distinction between “derivative” and “detached” objections to abortion as an aid to understanding the structure of the abortion debate. Objections to abortion based on foetal personhood are “derivative” because they are derived from the notion of foetal rights and interests. On this view, abortion is murder because it “violates someone’s right not to be killed, just as killing an adult is normally wrong because it violates the adult’s right not to be killed.”

Objections to abortion based on sanctity of life, however, are “detached” because they are rooted in a claim about governmental responsibility that is detached from rights. On this view, government is obliged to protect against abortion, not because abortion is murder, but because abortion “disregards and insults the intrinsic value, the sacred character, of any stage or form of human life.” Dworkin claims that the derivative/detached distinction is the key to defusing the explosive rhetoric of the life versus choice debate and clarifying its terms. Most people, as Dworkin explains more fully in the second chapter, have “detached” rather than “derivative” objections to abortion. The life side of the life versus choice debate is about the sacredness of human life, not about rights to life.

The derivative/detached distinction seems to promise more than it actually delivers. The distinction reduces to a question of whether or not rights are the basis of the claim. However, it does not explain why pro-life groups have consistently resorted to the language of rights. Dworkin seems to genuinely believe that they are doing so inadvertently and sloppily. He does not consider that pro-life groups may be using rights language with great deliberation and insight, simply because it has currency and authority in political as well as legal discourse. This latter possibility is especially important in light of Dworkin’s stated objective of not simply contributing to the enterprise of political and legal philosophy but also “improv[ing] the quality of public political argument.”

6. Ibid. at 11.
7. Ibid.
8. Ibid. at 28.
Apart from this however, the derivative/detached distinction is key to understanding what I think is Dworkin’s more difficult argument, namely that a liberal who takes rights seriously might nevertheless agree that a substantial amount of state interference in women’s reproductive autonomy is justified. The elaboration of this latter point is the heart of the book and is pursued over the course of several middle chapters.

The second chapter is devoted to examining the intellectual confusion surrounding the abortion debate in more detail. For convenience, Dworkin assumes that the significant players in the debate are liberals and conservatives. He then proceeds to explain how, except for those at the extreme end of the conservative spectrum, both liberals and conservatives espouse views that would permit exceptions to a complete prohibition of abortion by the state. Dworkin’s point is simple: most of the exceptions are inconsistent with a belief that a foetus is a human person with rights that attract moral as well as legal recognition. For example, he argues, even extremely conservative pro-life advocates commonly believe that it is permissible for a doctor to abort a foetus where pregnancy endangers the mother’s life. While self-defence might justify the mother killing a person who threatens her life, it is inconsistent with most moral views, liberal or conservative, to permit third parties to kill an innocent person in order to save another. The rape exception makes even less sense, given that the foetus is not guilty of any crime. Thus, Dworkin concludes, “conservative opposition to abortion does not presume that a fetus is a person with a right to live.”

This demolition of the conservative position is accomplished skillfully. If one believes that Roe v. Wade is important and that its major weakness is its failure to address foetal rights, then Dworkin’s dissection of the logical contradiction inherent in conservative support for both foetal personhood and the endangerment to life and rape exceptions is useful and strategically significant. However, given the depth of resistance to meaningful access to abortion services, Dworkin’s analysis is as

9. Ibid. at 31. Dworkin concedes that “people’s opinions about abortion do not come in only two varieties, conservative and liberal.” However, he supposes “that people are spread along a conservative-liberal spectrum because this will make it easier to describe [his] main points” (ibid.).
10. Ibid. at 32.
likely to result in conservatives jettisoning the two exceptions. More importantly, the barriers to abortion access are not attributable simply to intellectually confused or immoderate conservatives. The way in which notions of foetal personhood function ideologically\(^{11}\) to justify institutional and material constraints on women’s access to abortion needs to be examined. In particular, the interconnections between the conservative discourse of foetal personhood and the medical discourse of foetal patienthood\(^ {12} \) reveal the way in which the “scalding rhetoric”\(^ {13} \) of the former is legitimized and authorized by the latter. Within medical practice, a pregnant woman is increasingly viewed as the “maternal environment” for the foetal “patient.”\(^ {14} \) In this way, the wider currency of the notion, promoted by the right-to-life movement, of the foetus as a helpless child vulnerable to the selfish and erratic whims of aborting women, renders medical circumvention of the autonomy of pregnant women in order to save or protect a foetus a feat of obvious and laudable heroism.\(^ {15} \)

The ideological impact of notions of foetal personhood on medical practice is perhaps most clearly discernible in the context of court-ordered caesarean sections. Consider, for example, the case of \textit{In re A.C.}\(^ {16} \) in which a Superior Court judge in the District of Columbia ordered doctors to perform a caesarean to deliver the foetus of a woman, Angela Carder, who was twenty six and one half weeks pregnant and dying of cancer. Carder was unconscious at the time of the original order. However, she regained consciousness shortly afterwards and refused to give her consent to the procedure. The trial court, nevertheless, declined a

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11. I am using the concept of ideology to mean a process through which ideas and beliefs are rendered natural, commonsensical, and seemingly detached from specific historical or institutional interests and practices. Thus, in the context of the abortion debate, for example, the ideology of foetal personhood seems to make it obvious that abortion is an unnatural murderous act and, at the same time, obscures the way in which constraints on access to abortion are rooted in historically specific social practices and privileges. For a discussion of the concept of ideology and of the relationship between law and ideology, see S.A.M. Gavigan, “Law, Gender and Ideology” in A. Bayefsky, ed., \textit{Legal Theory Meets Legal Practice} (Edmonton: Academic Printing and Publishing, 1988) 283.


15. \textit{Abortion and Woman’s Choice}, ibid. at 353.

Ronald Dworkin’s Map of the Sacred

request to change the order and adhered to the position that her refusal of consent was not clear. Her lawyer applied to the Court of Appeals for a stay. The application for stay was denied in a hastily held hearing by telephone. The prematurely delivered child died two hours after the operation. Angela Carder died two days later.

The reasons for denial of Carder’s application for a stay were issued several months after the decision. The Court of Appeals invoked the state interest in protecting potential life articulated in *Roe v. Wade,* and explained that it based its decision on the “medical judgement” that the foetus had a better chance of survival than Carder. It did so even though the surgery may have hastened Carder’s death.

The decision did not go unnoticed. As one commentator has written:

*In re A.C.* caused a furor in medical and legal circles. One outraged commentator wrote that the judges “treated a live woman as though she were already dead... then justified their brutal and unprincipled opinion on the basis that she was almost dead and her fetus’ interests in life outweighed any interest she might have in her own life or health.” The case, a stark illustration of the conflict between the competing interests of the fetus and the mother, was characterized as a “human sacrifice” by the patient’s lawyer.

Carder’s family and a large number of organizations asked the Court of Appeals to reconsider its decision. The Court vacated the trial judgment and scheduled the matter for reargument. At the subsequent rehearing, a majority of the Court of Appeals vacated the trial judge’s order on the basis that he had failed to determine whether or not Carder was competent to decide if she wanted surgery and, if incompetent, what her substituted judgment would be. However, the majority also stated that while patients have a right to refuse medical treatment, this right can be overridden where the state interest in preserving life is truly compelling. The majority observed that this is usually where the courts have “acted to vindicate the state’s interest in protecting third parties, even if in fetal state.”

18. *ibid.* at 614.
19. *ibid.* at 613.
20. *ibid.*
22. Diamond, *ibid.*
25. *ibid.* at 1246.
In re A. C. is an example of the growing trend to seek court orders to override the decisions pregnant women make regarding their medical treatment. A recent survey of directors of maternal-foetal fellowship programs in the United States found that forty-six percent of the respondents favoured detention of pregnant women whose refusal of medical advice endangers the foetus, and forty-seven percent endorsed judicial intervention to compel caesarean sections, intrauterine transfusions, and other medical procedures to save the life of the foetus. Twenty-six percent "advocated state surveillance of women in the third trimester who stay outside the hospital system." The survey also found that in eighteen out of twenty-one cases in which judicial applications were made to override pregnant women’s treatment decisions, the order was granted. In addition, not only are many cases unreported, but, on one account, doctors have performed caesareans without consent and without a court order.

Arguably, most of these cases fit comfortably within Dworkin’s concept of justified state action on the basis of a “detached” interest in foetal life. In re A. C., in so far as it contemplates state intervention in individual medical treatment decisions where the intervention would actually hasten the individual’s death in order to save a foetus, is perhaps distinguishable from the other cases. However, they all rely on medical judgment with respect to what is hastening death, endangering life, or simply affecting health, and what is required to protect potential life. These medical judgments, as in In re A. C., are, in turn, the basis for the

27. Ibid. at 1193–94.
28. Ibid. at 1193.
courts’ articulation of the constitutional limits on women’s choices. In other instances, legislatures specifically delegate to doctors the power to determine when considerations of health warrant access to medical services. Thus it is medical professionals who are effectively drawing the boundary between women’s autonomy and state power. This is not to suggest that such professionals are acting unethically or incompetently. However, given the import of medical decisions in these contexts, the implicit priorities and assumptions of medical practice and knowledge merit greater investigation and discussion than Dworkin has given them. Indeed, throughout his essay, Dworkin treats medical and scientific knowledge about the human body as completely transparent and devoid

31. Carol Smart characterizes the deferral to medical knowledge within law as an instance of the way in which law’s power is overshadowed by medical discourse. C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 17–20. However, Smart suggests that we should not assume from such instances that law has relinquished its role as the central mechanism of power to scientific disciplines such as medicine. Rather, she suggests that law, in particular the language of rights, acts in concert with medicine and other disciplinary mechanisms. Indeed, in some instances, law’s power is extended into new areas of regulation by the expansion of medical and social scientific knowledge. Smart uses the examples of the medical construction of homosexuality as a perversion and the medical and psychological construction of children as a distinct category of persons in need of protection and special treatment. In both instances, law incorporated the discourses of the human sciences in the extension of its power over new areas of social and personal life (ibid. at 15–17). Similarly, the medical construction of the foetus as a patient provides the basis for the extension of legal rights to the foetus and for the imposition of extensive legal controls on the actions of pregnant women.
of interpretive difficulty, much less ideological shaping. For Dworkin, it seems that science reflects the natural world back at us in increasingly remarkable detail, without distortion, and coincidentally, in ways that affirm liberal intuitions about the ordering of social life.32

A number of feminist analyses of law have endeavoured to problematize the way in which medical and legal knowledge both reinforce and inform each other within the larger context of social subordination.33 For example, in her exploration of how conservative claims of foetal personhood appear to be verified by sonographic images of the foetus floating disconnected from any woman's body, Rosalind Petchesky challenges the assumption that the separation of maternal and foetal interests is a medical fact rather than a political judgment. She writes:

But the presumption of fetal "autonomy" ("patienthood" if not "personhood") is not an inevitable requirement of the technologies.
Rather, the technologies take on the meanings and uses they do because of

32. Although Dworkin uses scientific claims to buttress and give content to his own claims about the moral issues at stake in abortion, he never actually discusses the problems of scientific interpretation in Life's Dominion. In Law's Empire, there are several indirect references to the nature of scientific interpretation. For example, he distinguishes scientific interpretation from other types of interpretation by observing that it is concerned with "events not created by people" and that it is "causal" in a "mechanical way" (R. Dworkin, Law's Empire (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1986) at 50 [hereinafter Law's Empire]). The same assumptions about the nature of scientific interpretation manifest themselves in Dworkin's discussion of the difference between claims of objectivity in moral discourse and similar claims in science. Within the former, Dworkin writes, the language of objectivity functions to repeat, emphasize, or qualify the content of a claim (ibid. at 81). Within the latter, it functions as an assertion that there is a verifiable causal explanation for a claim. He further elaborates by explaining how absurd it would be to treat a moral claim that slavery is wrong "the way [one] might prove some claim of physics, by arguments of fact or logic every rational person must accept: by showing that atmospheric moral quaverings confirm [one's] opinion, for example, or that it matches a noumenal metaphysical fact" (ibid. at 80–81). Shortly afterwards he asserts: "We do not say (nor can we understand anyone who does say) that interpretation is like physics or that moral values are 'out there' or can be proved" (ibid. at 83). In these passages, Dworkin is using common understandings of scientific interpretation to explore and highlight the complexities of interpretive claims about legal and other social practices. His focus is not on the nature of scientific knowledge or interpretation. In Life's Dominion, scientific claims are similarly treated as straightforward causal explanations that do not raise complex questions about the relationship between the interpreter's aims, the practices of the community, and the object of interpretation. However, unlike Law's Empire, in Life's Dominion scientific claims provide the basis for many of Dworkin's interpretations of the moral commitments and legal practices that characterize liberal societies. My point is that, given this enlarged role in Dworkin's analysis for scientific and medical information about human biology, the problems and complexities of scientific interpretation warrant closer inspection.

the cultural climate of fetal images and the politics of hostility toward pregnant women and abortion. As a result, the pregnant woman is increasingly put in the position of adversary to her own pregnancy/fetus, either by having presented a "hostile environment" to its development or by actively refusing some medically proposed intervention (such as a cesarean section or treatment for a fetal "defect").

Lisa Ikemoto would further complicate Petchesky’s analysis. Ikemoto discusses, from the perspective of intersecting axes of social oppression, the same survey of directors of maternal-foetal fellowships mentioned earlier. She points out that in seventeen of the cases in which court orders were sought to force pregnant women to undergo medical treatment, the women were either Black, Hispanic or Asian. In addition, “all of the orders were sought against women being treated at public hospitals or receiving public assistance.” In Ikemoto’s view, one must look at the way the institutionalized authority of the medical profession which is “presumed to be a source of valuable knowledge and truth” internalizes racial, cultural, and class based stereotypes of good and bad mothers.

Dworkin’s account of the conservative position leaves one without any sense of the nature and complexity of the conceptual separation between pregnant women and foetuses. Indeed, the general structure of Dworkin’s essay reinforces that separation. As noted above, he creates a moral world for his reader that is peopled mostly by reasonable liberals and moderate conservatives. This community of thoughtful and concerned moral actors contemplates the problem of the foetus with very little reference to the women whose bodies nurture foetal life. When women appear, as they do more frequently in Dworkin’s elaboration of the liberal position, they have personal concerns or aspirations that place them in opposition to their foetuses. It is a sign of the success of the pro-life movement that one cannot discuss abortion without, to a certain extent, participating in the construction of foetuses as separate and distinct entities. However, Dworkin never acknowledges that the separation itself is an interpretive claim which must be scrutinized as carefully as the more inflammatory pro-life arguments.

In addition, I think the flatness of Dworkin’s account of conservative politics can be at least partially attributed to his overall interpretive
approach which makes a virtue of reordering claims and practices so that they appear in the best light from the perspective, ultimately, of the established order. In *Law’s Empire*, he espouses an approach to the interpretation of art and social practices that is constructive in the sense that it is “a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”

The key question is, How does one attempt to determine what constitutes the best for any area of practice? With respect to social practices such as law, Dworkin answers by suggesting that we endeavour to determine what is best by proposing a justification in the form of a principle or aim which fits the standing features of the practice examined. The proposed aims and principles need not be uncontested. Nor need they be widely shared within the community. However, an interpreter’s claims about the nature of the principles or aims underlying the practice will be judged in accordance with how well they fit and explain the various aspects and characteristics of the standing practice.

Furthermore, the degree of fit required in order to make a persuasive claim about the meaning of a practice is determined in accordance with community standards which, although situated historically, must be

41. *Law’s Empire*, supra note 32 at 52. Dworkin calls the interpretation of art and social practices “creative interpretation” in order to distinguish it from scientific interpretation and conversational interpretation. The latter is aimed at deciding what another person has said. The former is aimed at providing a causal explanation of phenomenological data. Creative interpretation is different from both of these because it is aimed at interpreting “something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation” *(ibid.* at 50).


widely shared. One can infer from Dworkin’s analysis of competing claims about the nature of American legal practice that his sense of how closely such claims should fit existing practices allows for very little leeway. For example, Dworkin dismisses the claim advanced by some critical scholars that legal thought and practice is so fundamentally contradictory that a coherent interpretation of its principles is impossible. In Dworkin’s view such a claim cannot be taken seriously because its proponents “have [not] looked for a less skeptical interpretation and failed.” He goes on to state that such critics must “show that the flawed and contradictory account is the only one available.”

In *Life’s Dominion*, the aspect of legal practice under examination is the holding in *Roe v. Wade* that women have rights of reproductive autonomy which can be significantly limited by government. Each chapter is, in a sense, a step in the constructive interpretation of *Roe v. Wade* with reference to the purposes and principles that underlie legal practice within the American political community. Dworkin’s constructive approach is deployed to defend *Roe v. Wade* by giving the worst or most restricted interpretation to any view that is inconsistent with his understanding of the political and moral vision of the U.S. Constitution.

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44. Ibid. at 67–68. This is an extremely over-simplified account of Dworkin’s very elaborate and careful discussion of interpretation. A slightly less simplified account is as follows. Constructive interpretation has three analytically distinct stages. The first “pre-interpretive” stage is the identification of “the rules and standards taken to provide the tentative content of the practice” (ibid. at 65–66). Dworkin indicates that there must be a large degree of consensus within the community at this stage. Thus with respect to law, lawyers and legal scholars within a specific culture must largely agree on “exactly which practices should count as practices of law” (ibid. at 91). The second “interpretive” stage consists of fitting the proposed purpose or aim of the practice with the standing features of the practice. The required closeness of the fit will also depend on a roughly shared consensus about fit within the community (ibid. at 67–68). However, the substantive convictions of the interpreter about what aims and purposes show the practice in its best light need not be so widely shared (ibid.). Fortunately for legal theorists, however, there is considerable agreement, at least provisionally and at a very abstract level, with respect to the general purpose of law, namely that it is “to guide and constrain the power of government” in accordance with “individual rights and responsibilities flowing from past political decisions about when collective force is justified” (ibid. at 93). Thus, interpretive disagreement within legal practice is, for the most part, at a much less abstract level. It is largely over which of several rival conceptions of law is “the best interpretation of what lawyers, law teachers, and judges actually do and much of what they say” (ibid. at 94). Finally, if the interpretive claim succeeds as the best interpretation possible, the practice in question may be reformed at the post-interpretive stage in order to better reflect the underlying principle or aim of the practice. For the purposes of my discussion, the most problematic feature of Dworkin’s constructive interpretive approach is the ultimate importance given to a large degree of consistency with the established practices within the community.

45. Ibid. at 274.
46. Ibid.
47. Ibid.
and, conversely, by giving the best or most expansive interpretation to any view that is supportive of that vision.

The rhetorical moves which characterize Dworkin's constructive approach are roughly similar to those which lawyers within the common law tradition are trained to apply to the interpretation of precedent, namely to give unwelcome precedents a narrow and strict reading (using their facts or procedural contexts to limit the breadth of the application of the case) and to give welcome precedents a broad and expansive reading (interpreting their holdings as authoritative with respect to a wide range of factual and procedural contexts). In many respects, Dworkin treats both conservative and feminist critiques of Roe v. Wade the way lawyers treat unwelcome precedents. He interprets symbolic language narrowly and literally, emphasizes logical inconsistencies, and limits broad claims to their factual or historical circumstances.

Perhaps Dworkin's constructive approach to interpreting law, in particular his sense of the community's requirement of fit with established practices, makes sense in the institutional context of judicial decisionmaking. However, the arena of scholarly and political debate is generally less constrained by the social values of stability and predictability that attend direct application of the state's coercive power. Indeed, scholars who have sought to illuminate the link between established traditions of thought and social inequalities in power have referred to the need to engage in "methodological rebellions." Dworkin's sense of what counts as a coherent critique of legal practice, namely that it should be the only account available, is constructed in a way that inevitably perpetuates the dominant conception of what is politically important and implicitly keeps marginal what is marginal. An interpretive approach

48. See K.N. Llewellyn, The Bramble Bush (New York: Oceana Publications, 1951) at 66-69 for a succinct account of what Llewellyn calls the "two faced doctrine of precedent" (ibid. at 69). Llewellyn characterizes the strict approach to the interpretation of precedent, whereby a case is given its minimum value as a guide to future cases, as follows: "It is the recognized, legitimate, honorable technique for whittling precedents away, for making the lawyer, in his argument, and the court, in its decision, free of them. It is a surgeon's knife" (ibid. at 67).
50. Karl Llewellyn observes that the notion that the common law should develop in accordance with precedent is rooted in the same "group pressure to force conformity with the existing and expected social ways" that characterizes social intercourse generally (supra note 48 at 65).
that tends to describe as “best” the set of principles that most clearly fits existing U.S. constitutional and legal practices, and tends to describe as “incoherent” anything that challenges or disrupts those practices and principles, will ultimately fail to grapple with the more difficult and intractable issues that concern political and social relations. With respect to Dworkin’s analysis of conservative resistance to abortion, this results in an interpretation that fails to capture and fully engage with the political vision, in particular its patriarchal features, which animates the pro-life movement. One is left with the sense that Dworkin’s main points rest on a skillful evasion of how those who disagree with him see the world. Instead of intellectual confusion, we are presented with intellectual sleight of hand.

Dworkin’s final analytic foray into conservative politics entails an examination of the Roman Catholic position on abortion. Dworkin sets out to do this as part of a consideration of what he identifies as the two main institutional players in the abortion debate, religion and feminism, and as the final step in clearing up the intellectual confusion that surrounds the debate.

Religious groups have been at the forefront of the anti-abortion movement in the United States. However, Dworkin, quoting from Baptist, Methodist, and Jewish religious leaders, argues that what is being articulated is an opposition to abortion based on the sacredness of life rather than foetal rights or personhood. Dworkin does not seem to consider that rights language is a specifically jurisprudential mode of understanding social relationships that might have very little to do with the central preoccupations of religious thinkers. Even so, religious opposition cannot be so easily reformulated as “detached” from foetal rights because Roman Catholics, Dworkin concedes, have taken an explicitly rights based, and therefore extremely inflexible, position on abortion. Dworkin also concedes that the Roman Catholic Church has been one of the most prominent and powerful players in the struggle over abortion. Dworkin is left to argue that the present position of the Church that the foetus is a person from the moment of conception is consistent neither with the beliefs of most American Catholics nor with its own historical precedents.

The most important historical precedent for Roman Catholic thought, in Dworkin’s view, is contained in the theories of St. Thomas Aquinas. Aquinas, on Dworkin’s account, did not think that the foetus could have a rational or intellectual soul until it had developed a human form which Aquinas claimed occurred at the point of quickening. Dworkin is impressed that Aquinas’s notion of foetal growth as a developmental process with distinct stages rather than simply the enlargement of a tiny, fully formed human was later confirmed by science. However, Dworkin points out that science has proved Aquinas wrong on two important points. Aquinas thought that the father exclusively controlled foetal growth “acting at a distance through ‘froth’ in the semen,” and that quickening corresponds with the development of the organic basis of sentience. Science, Dworkin informs us, has since shown that both parents contribute chromosomes to the embryo and that the organic basis of sentience does not develop until, at the earliest, the twenty-sixth week of gestation, or, roughly, the beginning of the third trimester. Dworkin relies on the work of a leading embryologist for this latter piece of information and, at various points in his essay, argues that sentience rather than foetal viability (the criterion proffered in Roe v. Wade) provides the better scientific basis for the moral and constitutional importance accorded third trimester pregnancies. Sentience or the ability to feel pain, Dworkin suggests, falls short of what we mean by personhood and therefore does not give rise to rights. However, it does give rise to an interest in not feeling pain. Thus, Aquinas’s framework plus a few adjustments based on contemporary science might “produce a spiritual version of the main distinction drawn in Roe v. Wade: a fetus has no human soul, and abortion cannot be considered murder, until approximately the end of the second trimester of pregnancy.” In sum, for Dworkin, God as revealed by Roman Catholic theology, nature as revealed by science, and liberalism as revealed by U.S. constitutional law all yield the same answer.

54. Ibid. at 41.
56. Ibid. at 42.
57. Dworkin deals one final blow to the credibility of the Vatican. The current stance of the Roman Catholic Church is not only bad theology, but also, Dworkin suggests, politically motivated. If foetal personhood is established, then abortion prohibitions become a matter of state as well as Church doctrine, and, in addition, Vatican pronouncements that abortion is a sin are placed on a distinctly different foundation than the more unpopular Vatican pronouncements that contraception is a sin (ibid. at 45–46).
II. Incoherent Feminists and Constitutional Privacy Rights

Having cleared up the confusion among conservatives, Dworkin next turns to the liberal, pro-choice position. He describes the paradigm liberal position as follows. First, "abortion is always a grave moral decision, at least from the moment at which the genetic individuality of the fetus is fixed and it has successfully implanted in the womb, normally after about fourteen days." Therefore, abortion for trivial or frivolous reasons such as "a long-awaited European trip" is never acceptable. Secondly, abortion is justified for serious reasons such as saving the life of the mother, rape, incest, or severe foetal abnormality. Thirdly, a woman’s concern for "permanent and grave" consequences to herself or her family, such as a chance to have an education, a career, or a satisfying life, also justifies abortion. Finally, the state should not intervene to prevent even morally impermissible abortions until the point in pregnancy when the foetus is "sufficiently developed to have interests of its own." Clearly, Dworkin points out, this position is inconsistent with foetal personhood and thus liberals do not believe foetuses have rights. Rather, the difficulty with the liberal position is in justifying both the moral and the constitutional limits on individual autonomy which most liberals, on Dworkin’s view, support. For this we need to examine the widely shared notion that human life is sacred, a task on which Dworkin embarks in Chapter Three. However, first there is the matter of feminist critiques of the liberal position on abortion, in particular of the central liberal text in this regard, namely Roe v. Wade. Feminism, like religion, is a major institutional player in the abortion debate. Catharine MacKinnon, for the most part, stands in for American feminism and perhaps for all women in the world given that the United States, according to Dworkin, has the world’s most powerful women’s movement. Like the Pope, MacKinnon is difficult to fit into Dworkin’s reconfiguration of the abortion debate.

Dworkin sets out to show that, in general, "feminist arguments and studies are grounded not just in denying that a fetus is a person or claiming that abortion is permissible even if it is, but also in positive concerns that recognize the intrinsic value of human life." In addition, Dworkin wishes to demonstrate that feminists, such as Catharine MacKinnon, who

58. Ibid. at 32–33.
59. Ibid. at 33.
60. Ibid.
61. Ibid.
62. Ibid. at 6.
63. Ibid. at 50.
have been "among the most savage critics" of the majority opinion in Roe v. Wade, advance arguments that are ill-founded and do not make sense. Thus, feminists not only fail to offer a coherent critique of the present constitutional status of reproductive rights, they also, like most liberals, implicitly accept the justification of extensive state constraints on reproductive rights on the basis of the intrinsic value of foetal life.

Dworkin never fully explains at this stage why it is important to his account of women's rights to abortion to thoroughly discredit the feminist critique of Roe v. Wade. Like Dworkin's reasonable liberals, most feminists in the United States agree that women have a right to abortion. On reflection, it seems that what is most challenging to Dworkin's analysis is not the feminist demand for unrestricted access to abortion with its attendant moral insensitivity to Dworkin's conception of "the sacred." Rather, the central difficulty for Dworkin is MacKinnon's claim that the abortion issue is about the unequal social and political power of men and women, and not about the acceptable limits on individual freedom. MacKinnon's analysis is rooted in her critique of the ideological and structural features of the liberal state, in particular, the public/private split. In this regard, she has written:

The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society. This stance is especially vivid in constitutional adjudication, thought legitimate to the degree it is neutral on the policy content of legislation. The foundation for its neutrality is the pervasive assumption that conditions that pertain among men on the basis of gender apply to women as well—that is, the assumption that sex inequality does not really exist in society. The Constitution—the constituting document of this state society—with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general, reflect that; and that government need and should right only what government has previously wronged.

In MacKinnon's view, constitutional privacy rights and the negative notion of liberty on which they are founded abandon women to the conditions of sexual, racial, and class oppression which coercively shape their reproductive lives within liberalism's private sphere. For her, constitutional privacy doctrine is one of the central examples of "the assumption that sex inequality does not really exist in society." At the core of MacKinnon's analysis is a claim that sexual intimacy and in

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64. Ibid. at 51.  
66. Ibid.
particular, heterosexual intercourse, has been constructed as free and consensual when, in fact,

[w]omen feel compelled to preserve the appearance—which, acted upon, becomes the reality—of male direction of sexual expression, as if it were male initiative itself that women want, as if it were that which women find arousing. Men enforce this. It is much of what men want in a woman, what pornography eroticizes and prostitutes provide.67

The notion that social power can determine the meaning of freedom and equality, as well as sexual intercourse, is both the most powerful and (for some feminists concerned with the absence of any place for female agency within her theories) the most problematic aspect of MacKinnon’s analysis.68 The claim that power and meaning are interconnected is also extremely threatening to the entire edifice of Dworkin’s argument. His strategy in this essay seems to be to ignore this aspect of MacKinnon’s critique. Indeed, his approach at this juncture is reminiscent of his flat, dismissive reading of conservative objections to abortion. Gone is the openness to viewing other theoretical claims expansively, displayed, for example, by the willingness to link Aquinian discussions of fluttering spirits and the life force of frothy sperm to larger, transhistorical, and secular concerns about the sanctity of human life.

Instead, Dworkin adopts a posture of mild exasperation with respect to MacKinnon’s rejection of constitutional privacy doctrine. Dworkin, as we later find out,69 thinks that Justice Blackmun, the author of the majority reasons in Roe v. Wade, got it exactly right. Dworkin agrees with MacKinnon’s view that women have very little freedom in the private sphere because of sexual domination by men but points out that the law is slowly changing for the better, in some instances because of MacKinnon’s work.70 Therefore, he wonders, should not lack of control over their bodies make it even more important that women have constitutional recognition of their rights to privacy in sexual matters? MacKinnon’s critique of the way in which “private” heterosexual relations are shaped to reflect and perpetuate male power and domination largely disappears from Dworkin’s consideration. Rather, he presents her rejection of Roe v. Wade’s support for women’s privacy rights as

67. Ibid. at 184–85.
69. Life’s Dominion, supra note 1 at 168–72. See also infra notes 135–45 and accompanying text.
70. Ibid. at 52.
illustrative of her inability to understand that all women need is *more* privacy.

MacKinnon is also wrong, Dworkin continues, to attribute the failure of the state to protect women from marital rape or provide funding for abortions to the doctrine of constitutional privacy rights. With respect to marital rape, he alleges that MacKinnon has confused territorial privacy with privacy in the sense of individual sovereignty. Nothing in the notion of privacy as individual sovereignty, Dworkin explains with just a hint of impatience, prevents the state from entering the territorial space of the home or bedroom to protect women from domestic violence.71 Again, Dworkin manages to turn MacKinnon’s account, which is focused on the ideological power of the language of privacy, into a perplexing inability to understand that the use of the word privacy to denote sovereignty is coincidental. Ironically, Dworkin’s persistent confoundedness in this regard underscores MacKinnon’s main point, namely that “the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of privacy doctrine’s coverage.”72

One way of understanding MacKinnon on Dworkin’s terms is to view her analysis of privacy doctrine as a critique rather than endorsement of the way social and constitutional practices conflate the notions of self determination and exclusive occupation of a boundaried space. To this extent, Dworkin’s distinction between the two meanings of privacy is extremely helpful. However, from MacKinnon’s perspective, the centrality of the imagery of the home and the bedroom in judicial elaborations of the meaning of liberty and reproductive autonomy is much more than coincidental. Nor is it metaphoric in the sense of a figure of speech that merely implies a comparison between private bedrooms and individual sovereignty. Instead, the imagery of the inviolability of private property constitutes a central cultural narrative about the meaning of

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autonomy and human freedom. MacKinnon’s argument is that the notion of sovereignty as exclusive and boundaried personal space into which the state may not intrude definitionally excludes women’s experiences of lack of autonomy. For MacKinnon, spatial privacy has, in a sense, captured the meaning of autonomy in a specifically gendered manner. In addition, autonomy as privacy, defined in opposition to the public, renders any redefinition of autonomy that requires public responsibility for the social structures of oppression a potential trespass or violation of boundary.

In sum, Dworkin’s analysis of MacKinnon provides an interesting parallel to his analysis of the conservative pro-life movement. By overlooking the rhetorical power of the conservative assertion of foetal rights and personhood, Dworkin fails to fully explore the social and political vision that underlies that assertion and its implications for women. By overlooking MacKinnon’s critique of the ideological power of the concept of the private and the attendant imagery of boundary, bedroom, and exclusive space, Dworkin fails to recognise, much less
engage in, an analysis of MacKinnon’s challenge to the way liberal theory conceptualizes individual freedom and autonomy.74

With respect to MacKinnon’s second point, that privacy rights have turned out to mean that poor women cannot get state funded abortions but can get state funded pregnancies,75 Dworkin agrees that such a result is inconsistent with meaningful reproductive rights. However, he insists that the notion that women have privacy rights makes it more, not less, likely that governments will ensure that the right is meaningful.76 Again, Dworkin’s response to MacKinnon in this regard seems oblivious to her central claim, namely that the privacy description of liberty assumes background conditions of social equality thereby rendering government support for women potentially violative of male privacy rights.

According to Dworkin, the one useful and coherent thing that MacKinnon has said about the right to privacy is that it obscures the special nature of pregnancy and the relationship between a pregnant woman and a foetus by assimilating it to other legal relationships. For Dworkin this is particularly important because it illuminates “the special creative role of a woman in pregnancy... [A]n intense physical and emotional investment in it unlike that which any other person, even its father, has.”77 Dworkin agrees that describing the woman’s interest in free reproductive choice as a right of personal sovereignty places the

74. MacKinnon’s theory of gender oppression has been criticized for its universalization of the experiences of white women, in particular her failure to take account of race in the development of theoretical categories and her emphasis on the centrality of sexuality to women’s oppression. See M. Kline, “Race, Racism, and Feminist Legal Theory” (1989) 12 Harv. Women’s L.J. 115 and A. Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 Stan. L. Rev. 581. Indeed, both Dworkin and MacKinnon fail to examine how the theoretical category of “the private” assumes a race specific experience of privacy and autonomy. For example, Rhonda Williams has argued that “[c]hattel slavery denied black familial autonomy, and white men’s use of rape as a weapon of terror undermined black women’s integrity, forcefully demonstrating the absence of a patriarchally protected ‘private sphere’ for black families” (R. Williams, “Race, Deconstruction, and the Emergent Agenda of Feminist Economic Theory” in M.A. Ferber & J.A. Nelson, eds., Beyond Economic Man (Chicago: University of Chicago Press, 1993) 144 at 151). See also infra notes 93–97 and accompanying text.

75. In Maher v. Roe, 432 U.S. 464 (1977) the Court found that a state may refuse financial aid for abortions while providing aid for childbirth. In Harris v. McRae, 448 U.S. 297 (1980) the Court found that the federal government may prohibit the use of medical welfare funds for medically necessary abortions.

76. Life’s Dominion, supra note 1 at 54. Dworkin comments that, in his view, Harris v. McRae was wrongly decided, but that the Court’s “decision was hardly the result of its having previously recognised a right of privacy in matters of procreation” (ibid. at 37). See also Dworkin’s analysis of why the abortion funding decisions should perhaps be reconsidered (ibid. at 175–76).

77. Ibid. at 55.
abortion decision on the same level as decisions about what clothes to wear. This ignores "everything special, complex, ironic, and tragic about pregnancy and abortion."\textsuperscript{78}

Finally, Dworkin gives a surprising reading to MacKinnon's assertion that the central issue in abortion is women's substantive equality. This must mean, suggests Dworkin, that MacKinnon believes that if men and women were truly equal so that pregnancy was more clearly consented to by women, "[a]bortion would then more plainly be, as of course many women now think it is, a kind of self-destruction, a woman destroying something into which she had mixed herself."\textsuperscript{79} Thus Dworkin reformulates MacKinnon's thesis that abortion is an equality issue into a revelation that women identify with as well as feel oppressed by their pregnancies.\textsuperscript{80} This is reinforced, Dworkin continues, by cultural feminists such as Robin West who, relying on work by Carol Gilligan, call for a responsibility rather than rights based argument for abortion. Indeed, Dworkin concludes, many of the subjects in Gilligan's famous abortion study talk about the "awful decision" as one which involves balancing her responsibility to respect the intrinsic value of her own life against her responsibility to respect the value of foetal life in order to avoid a "grave moral wrong."\textsuperscript{81} In the end, the only thing that Dworkin has heard feminists say that he considers worth listening to is that pregnancy raises distinct moral issues, and that the abortion decision is mostly about responsibility to care for oneself and others. Ultimately, Dworkin maintains that \textit{Roe v. Wade}'s trimester framework appropriately reflects the moral significance of pregnancy and, as well, allows the incorporation of notions of moral responsibility into the analysis of rights. This latter point turns out to mean, not that pregnant women should be respected as responsible moral actors, but that the state should monitor and structure the abortion choice in order to ensure that pregnant women act responsibly.\textsuperscript{82}

Much of feminist work on the issue of abortion, in particular the work of MacKinnon, requires a fundamental rethinking of the concept of liberty as privacy and of the social and institutional structures within which constitutional liberty claims are defined and enforced. However, Dworkin's "constructive" interpretation of MacKinnon never explores the breadth of that challenge.

\textsuperscript{78} \textit{Ibid.}
\textsuperscript{79} \textit{Ibid.} at 56.
\textsuperscript{80} \textit{Ibid.} at 57.
\textsuperscript{81} \textit{Ibid.} at 60.
\textsuperscript{82} \textit{Ibid.} at 151–54, 173–76. See the discussion of Dworkin's notion of the state's role as guardian of the public moral space, \textit{infra} notes 138–43 and accompanying text.
III. Siberian Tigers and Exotic Birds: Dworkin’s Map of the Sacred

Chapter Three is called “What is Sacred?” Having established that all reasonable people, including feminists and most Roman Catholics, not only reject foetal personhood but also implicitly accept restrictions on abortion access, Dworkin enters into the task of explaining the moral underpinnings of this position which turn out to be rooted in the “familiar but widely misunderstood idea of the sacred.”

Sacredness, in Dworkin’s lexicon, is about intrinsic value. The vitriolic rhetoric of some conservative pro-life groups is really about this notion of intrinsic value, as is the liberal position that some constraints on abortion access are appropriate. Intrinsic value, Dworkin continues, is distinct from both instrumental value (things that are important because they are useful to us) and personal value (things that are important to us because, as individuals, we desire and enjoy them). Art, culture, and knowledge are examples of things, other than human life, that most people think of as intrinsically valuable. Dworkin suggests that most people feel the same way about human life. Since a foetus has no interests, it cannot have subjective or personal value. However it can and does have intrinsic value. In addition, some things, for example the life of Mozart, can be simultaneously instrumentally, personally, and intrinsically valuable.

“The sacred” includes some things that are incrementally valuable in the sense that it is always better to have more of them, like knowledge, and things which are not, like art and human life. The latter, once they exist, are sacred or inviolable. However, we do not want as much of them as possible. Therefore, rules or norms which promote or enforce childbearing are not morally required and, in fact, may not make moral sense given concerns about overpopulation. In clarifying that quantity of human life is not morally important, Dworkin makes the point that most of us think that some lives, like some artworks, are, of course, more important than others. Thus, we might want more Leonardos, but not more Tintorettos. However, once inferior art is in existence, we treasure it and would be horrified at its destruction. Similarly, although we are especially troubled when “complex and interesting cultures” are destroyed or threatened, this is not because of the excitement of cultural variety but because the destruction of any artistic form developed by humans is a “terrible desecration.” Thus we treasure “some form of primitive art,” traditional crafts, and aspects of popular and industrial culture, not simply because

83. Ibid. at 25.
84. Ibid. at 74.
85. Ibid. at 72.
we think the objects “splendid or beautiful,” but because “it seems a great waste” if these imaginative forms entirely disappear. Dworkin suggests that most of these intuitions about “the sacred” can be rationally explained. He concedes that some things are considered sacred by a culture simply because they have been designated as such, like the American flag. However, he points out that other things become sacred because of the process which brings them into being. Indeed, in Dworkin’s view, the process of generation rather than its result is the “nerve of the sacred.” Furthermore, the importance given to the process of generation is rational because it is grounded in a respect for the investment, natural or human, that has taken place. Art, for example, is sacred because it comes into existence through the process of human creation. There is a human investment at stake. Species, as distinct from individual members of species, are considered sacred because they come into being through the process of evolution. There is a natural investment at stake. It follows logically that the human species is particularly sacred and its survival particularly important because it embodies both processes of generation, human and natural. Its destruction would violate the sanctity of the cultural and artistic products of human creation as well as the extensive investment of nature in the development of a species which is the most evolved of all species.

As I have previously suggested, Dworkin’s refusal to acknowledge any relation between social power and knowledge has resulted in very narrow and sometimes simplified portrayals of both conservative and feminist claims. I have also suggested that the refusal can be explained, at least in part, by his constructive approach to interpretation. The claims of other theorists are given the interpreter’s “best” interpretation in accordance with the principles and practices that are shared within the community. However, in Chapter Three, Dworkin develops his own “best” account of the intricate structure of moral intuitions in a way that uncritically accepts the political neutrality of such categories as “the natural” and “the human.” His suggestion that nature can be regarded as some sort of Investor whose expenditures have created the status quo and are therefore entitled to respect is particularly problematic. It combines the culturally powerful imagery of the market with the equally powerful

86. Ibid.
87. Ibid. at 78.
88. Dworkin explains that the intrinsic value of the human species, however, does not give rise to a commitment to the future existence of particular individuals. Thus, it is inappropriate to speak of the rights of future generations. It does give rise, however, to a commitment to the survival of the species and to leaving a fair share of natural and cultural resources (ibid. at 77).
notion that an ordering principle, immanent in the material universe, gives meaning to and structures the universe of social relations. Thus, principles of economic rationality mirror the divine/natural order which in turn informs social and moral relations. Dworkin makes it clear that it is not necessary to view nature as having conscious intent in order to believe that its processes are sacred. One can base inviolability on the idea that “even unconscious natural processes of creation should be treated as investments worthy of respect.”

Nature is never defined in Dworkin’s discussion but simply posed in opposition to the human, or more specifically, to human consciousness. Human consciousness in this scheme becomes disembodied. Its value lies in its god-like transcendence of nature through the activity of choosing, designing, and planning. The human body is sanctified as part of the natural order which, in turn, can be viewed either as divine in the religious sense or as a set of investments which render the natural order rational simply because they have happened. In addition, to complete the picture, scientific knowledge, which is unmediated by social configurations of power, gives us more and more marvelous information about the natural order. Science reveals nature in much the way holy texts reveal the divine.

This view of the relationship between nature, society, and scientific knowledge has, up until this point, provided the unexplored background for Dworkin’s essay. It gets left out of, or skipped over, in his discussion of feminist theory and conservative politics because it does not fit with a constructive interpretation of the abortion debate. For example, in order to show that feminists and conservatives share a large area of agreement with respect to the sanctity of foetal life, Dworkin must downplay or avoid mention of the way in which the conservative discourse of foetal personhood and the medical discourse of foetal patienthood inform and reinforce each other, and, furthermore, how both discourses render the subordination of women in the area of reproduction an obvious and inevitable feature of the natural order. In Chapter Three, Dworkin’s seeming obliviousness to the ideological underpinnings of distinctions like natural versus human, mind versus body, and primitive versus complex cultures, is thrust into the foreground. His presentation of the order of creation as both divine and rational is especially troubling because the boundary between the natural and the human has traditionally been drawn in ways which are starkly ideological. Women, members of racialized groups, and the poor have typically been placed on the nature

89. Ibid. at 79.
side of the divide because of what is portrayed as their natural deficiencies or inferiority, or their biological destinies.90

In particular, the depiction of human reproduction as a wholly natural, biological, and essentially female process has often served to obscure its political meanings. As Virginia Held has written in her analysis of the differential and gendered construction of birth and death within political theory: "That women give birth is said to make them "essentially” close to nature, resembling other mammals in this important and possibly dominant aspect of their lives."91 The identification of women with nature, the body, and reproduction is invoked to legitimize conceptions of political organization within which women are naturally relegated to the private sphere of the household and to the task of species reproduction while “[i]n the male realm of the polis, it is thought, men risk death for the sake of human progress."92 However, the concept of nature also serves to conceal theoretical contradictions. For example, under slavery, the private task of species reproduction referred to by Held becomes the public task for enslaved women of “replenish[ing] the master’s capital assets.”93 Similarly, within contemporary liberalism, the ideal of private female domesticity and motherhood obscures the experiences of women who are members of racialized groups and poor women who disproportionately have their children appropriated for a white, middle class

90. R. Williams, supra note 74, describes the way in which nineteenth century natural historians generated a set of oppositions including culture versus nature, civil versus savage which “legitimated race as a meaningful categorization of our species” and “provided a foundation for modern racism” (ibid. at 145). L.C. Ikemoto, “The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law” (1992) 53 Ohio St. L.J. 1205, describes motherhood as “color-coded, class-coded, and culture-coded” (ibid. at 1207). See also M. Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 Queen’s L.J. 306 [hereinafter "Ideology of Motherhood"].
92. Ibid.
market in babies\textsuperscript{94} and gestational services.\textsuperscript{95} In these contexts, the legitimizing authority of the concept of nature is invoked, on the one hand, to “resolve the contradiction between slavery and liberty”\textsuperscript{96} by reference to the natural superiority of the white race and, on the other hand, to suppress the racial sub-text of the “gender mythology”\textsuperscript{97} of a natural separation between the private sphere of family and the public sphere of the market. Rather than confronting the complex ideological uses and political meanings of the concept of nature within moral and political theory, Dworkin presents us with another symbolic vocabulary, “Nature as Investor” and “the sacred” as a calculus of the value of investments. Furthermore, the overlay of the natural and the divine with the market imagery of investment does not simply add to the available cultural imagery of reproduction. Rather, it, in itself, functions ideologically by suggesting that the relations of power which shape the human experience of birth and reproduction are analogous to the interactions and outcomes of freely negotiated exchange relations. Thus the social structures that organize reproduction become simultaneously natural, free, and rational.

There is a final refinement which Dworkin wishes to add to his map of “the sacred” before turning to the specific issue of the value of the foetus,

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\textsuperscript{95} D. Roberts writes that “gestational surrogacy invokes the possibility that white middle-class couples will use women of color to gestate their babies. Since contracting couples need not be concerned about the surrogate’s genetic qualities (most importantly, her race), they may favor hiring the most economically vulnerable women in order to secure the lowest price for their services” (\textit{supra} note 93 at 85).

\textsuperscript{96} \textit{Ibid.} at 26. Roberts writes: “Racial ideology explained domination by one group over another as the manner in which societies were naturally organized. Blacks were biologically destined to be slaves and whites destined to be their masters. Whites created the hereditary trait of race and endowed it with the concept of racial superiority and inferiority in order to resolve the contradiction between slavery and liberty” (\textit{ibid.}).

\textsuperscript{97} Williams, \textit{supra} note 74 at 152. In this regard, Williams states:

Thus the animating economy/family dualism anchors gender, but in a racialized fashion. The animating gender mythology of public vs. private spheres suppresses the ideological and material racialization of gender. For most of [the United State’s] history, institutionalized and personally violent white racism has truncated the private sphere of black family life in particular and that of people of color more generally. For Native American and Puerto Rican communities, state welfare and judicial policies have historically threatened rather than supported the creation of autonomous private life.” (\textit{ibid.})

See also “Ideology of Motherhood,” \textit{supra} note 90.
nearly the idea that there are degrees of “the sacred.” Siberian tigers are more valuable than exotic birds. Pit vipers and sharks are very low on the scale. Bellini is clearly above minor Renaissance artists. Some things are completely off the chart, like insects (even benign insects), and viruses and cars and coal and cows. Dworkin concedes that these hierarchies of “the sacred” may be entirely superstitious. However, he believes that they reveal in an important way a structure of thought which we can apply to the difficult moral question of abortion. In other words, although the actual hierarchies may be fanciful, the idea of hierarchy is significant and pertinent. Again, Dworkin’s confidence in the reasonableness of what are increasingly questionable assertions about the sacred order of nature precludes any exploration of the way in which such views frequently emerge as justifications for hierarchies of privilege based on “natural” differences such as race, gender, sexuality, and ability.

The groundwork has now been laid for Dworkin’s discussion of abortion. In his view, abortion raises the question of the sanctity of individual human lives. Dworkin suggests that each individual human life is sacred for the same reasons that the survival of the human species is important and sacred. Each human being is the result of both a natural creative process and a human creative process. Dworkin goes out of his way to show why, on both counts, the natural and the human, the process which creates individual humans is different from the process that creates individual members of other species. First of all, the natural process is different because if one is religious, one believes that humans are made in the image of God. Thus each person is a representation of the divine. The secular version of this belief is that humans are the pinnacle of creation. Dworkin suggests that it follows that individual members of the human species are sacred. The inference, based on the investment imagery, is that so much more is invested in the human species than any other species that each human individual acquires value.

Another consequence, in Dworkin’s view, of the natural basis of the inviolability of human individuals is that the chronological marker for that sacredness is the point at which the human embryo acquires a genetic identity. Unfortunately this claim is not developed. I would guess that Dworkin considers it too obvious to explain. However, I think that it is worth exploring what might underlie the assumption that genetic differ-

98.  *Life’s Dominion*, supra note 1 at 80.
100.  *Ibid.* at 83.
entiation between cells is so unquestionably important. One might infer from Dworkin's preceding discussion that this is the point at which the human cells begin to resemble God or, for the non-religious, take on the characteristics of the pinnacle of creation. I would like to suggest that an equally plausible explanation is provided by what R.C. Lewontin has called "genomania" whereby "[e]very physical, psychic, or social ill, every perturbation of the body corporeal or politic is said to be genetic."101

The scientific, philosophical, and legal importance given to genetic characteristics has been the subject of a number of critiques which are particularly germane to any discussion of the social meaning of abortion and human reproduction. These critiques are interesting both on their own and in terms of the contradictions they reveal, when taken together, in the uses of the concept of the genetic individual. For example, R.C. Lewontin suggests that, generally, "much of the 'evidence' for basic biological differences determining differential abilities and roles turns out to confuse observations with their causes and explanations."102 An example is Mary O'Brien's argument that the observed genetic link between fathers and their children has been used as the causal explanation for the political concept of paternity and to legitimize a wide range of social practices, including marriage and the social isolation of women from the society of men, in order to ensure security for paternal claims.103 O'Brien points out that because, from the male perspective, the genetic tie is for the most part an idea, men have the choice of acknowledging it or not.104

Dorothy Roberts' work completes O'Brien's account by revealing the historical and social specificity of the link between the genetic tie and paternity. In Roberts' view, the social importance given to "the value of the genetic tie is rooted in scientific racism, which understands racial variation as an important, biological human distinction that determines superiority and inferiority."105 Furthermore, the "choice" of whether or not to acknowledge paternity becomes irrelevant in the context of slavery, given a set of social rules that reverses the usual meaning of the

102. Lewontin, ibid. at 34.
104. Ibid. at 52.
105. Roberts, supra note 93 at 24.
genetic tie. Instead of "the patriarchal tenet that the social status of the child must follow the male line," under slavery the children of white men and their female slaves automatically took on the slave status of their mothers.106 In sum, interpretations of genetic characteristics provide an example of the way descriptive information about nature is deployed in often contradictory ways by patriarchal and white supremacist norms. By presenting as self explanatory the notion that genetic differentiation between cells is morally significant, Dworkin's discussion further submerges rather than interrogates the connections between scientific information about the genetic basis of human life and political and social domination.

Dworkin's analysis of the human investment in the human individual raises additional problems. As noted above, Dworkin postulates that nature's investment in pregnancy begins when genetic individuation in the cell matter that makes up the embryo occurs. He pinpoints this at roughly fourteen days after conception.107 The human investment, it turns out, takes the form of planning to become a parent—not the embodied work of pregnancy—but rather the disembodied act of choosing and making a decision. Dworkin describes the creative aspect of reproductive choice as follows: "The second form of sacred creation, the human as distinct from the natural investment, is also immediate when pregnancy is planned, because a deliberate decision of parents to have and bear a child is of course a creative one."108 Although articulated in gender neutral language, this creative human activity of planning parenthood turns out to be implicitly male. The female "choice" seems to flow from being pregnant, rather than from deciding to be pregnant. Furthermore, given that the human for Dworkin is defined in opposition to nature and to the body, it is unclear whether being pregnant, as opposed to deciding to be pregnant, fits within the human or the natural side of the investment account. Dworkin describes pregnancy as "an intense physical and emotional investment... unlike that which any other person, even its father, has."109 Indeed, Dworkin makes much of pregnancy's specialness, but in a way that implies the need for significant control and monitoring of female procreative autonomy.110

106. Ibid. at 22.
107. Life's Dominion, supra note 1 at 89.
108. Ibid. at 83.
109. Ibid. at 55.
110. See the discussion of Dworkin's critique of feminism, supra notes 77–82 and accompanying text.
The female creative choice in the sense that Dworkin understands human creativity—namely in terms of transcending nature and biology and autonomously planning a life that does or does not include children—if it occurs at all in Dworkin’s scheme, does so at the point of heterosexual intercourse. Once pregnant, or at least fourteen days after conception, women’s procreative autonomy is complicated by the external investments in the foetal life she carries. Liberals according to Dworkin will nevertheless respect the choices of women to terminate their pregnancies until the later months of pregnancy. However, even within the liberal vision, the compounding investments of nature plus any investment that the father chooses to make together act as a sacred constraint on women’s choices, inevitably casting them as morally suspect and irrational squanderers of the fortunes of others. Admittedly, Dworkin strains to think of reasons, such as career goals or family responsibilities, that might explain the decision to terminate a pregnancy as the rational outcome of a kind of moral cost-benefit calculation. However, the assumed opposition between women and their foetuses remains definitive, and at a certain point in time, it is the other investments that are more important and that explain and give moral authority to Roe v. Wade’s trimester framework.

This leaves heterosexual intercourse as the only point in Dworkin’s scheme where women are as fully human, on Dworkin’s terms, as men with regard to the pursuit of procreative happiness. Dworkin comes closest to examining the way in which the politics of heterosexual intercourse might compromise women’s reproductive autonomy in his discussion of MacKinnon. There he describes as “arresting” the feminist argument that abortion cannot be treated as simply about the “intrinsic importance of a new human life” because “pregnancy is too often the result not of creative achievement but of uncreative subordination, and because the costs of pregnancy and child-rearing are so unfairly distributed, falling so heavily and disproportionately on [women].” However, Dworkin concludes that this argument “may be overstated” because, among other things, “[it] takes no notice of the creative function of the father.” Thus, in Dworkin’s overall analysis, the nature of the female creative investment remains vague and ambiguous at best.

Dworkin continues his account of the creative human choices that constitute the human investment in individuals in terms of the myriad individual choices that shape the cultural and social context into which a

111. Ibid. at 56.
112. Ibid.
113. Ibid.
114. Ibid.
child is born, as well as the child’s own choices and decisions. Again, the work of child care does not figure in Dworkin’s map of the sacred. Rather, the story of the human investment turns out to be a paean to the transcendence of the human spirit which soars above the daily work of care, and the closest analogue of which is the notion of artistic genius. The material supports for that transcendence are nowhere to be seen. The result is that individuals are like paintings, or, as Dworkin puts it, “[a] mature woman . . . [is] something like a work of art.”

Having established, at least to his own satisfaction, that foetal life is sacred, Dworkin now embarks on the difficult task of analysing how we should view abortion. First he reminds us that not only do liberals and conservatives agree that abortion is morally problematic, but they also agree that it is worse in some circumstances than in others. The key to calibrating the degrees of awfulness turns out to be the idea of the frustration of an investment. Because the investments are made by nature, the persons themselves, and other persons, the calculation of frustration with respect to each individual life is far from straightforward. The premature death of a young woman in a plane crash seems much more tragic than the premature death of an old man because the latter has, by and large, realized on his own and society’s investment. The former has not. However, it also makes sense to treat a late term abortion as morally worse than a early term abortion because as soon as genetic individuation occurs, “the natural investment that would be wasted in an abortion grows steadily larger and more significant.” Dworkin suggests that “[m]ost people’s sense of that tragedy, if it were rendered as a graph relating the degree of tragedy to the age at which death occurs, would slope upward from birth to some point in late childhood or early adolescence, then follow a flat line until at least very early middle age, and then slope down again toward extreme old age.”

The concern about wasting an investment is another area of commonality between liberals and conservatives. The commonality breaks down around the question of whether annihilation or death is the most serious waste of any investment in human life (the conservative view) or whether, in some circumstances, other kinds of frustration such as poverty or physical disability are worse (the liberal view). The divergence, Dworkin explains, reflects the conservative emphasis on the natural mode of

115. Ibid. at 82. Dworkin clarifies that he does not mean that individuals are literally like paintings. Individuals have moral rather than aesthetic value (ibid.).
116. Ibid. at 86.
117. Ibid. at 89.
118. Ibid. at 87.
creative investment and the liberal emphasis on the human mode. The most extreme conservative position is that abortion is never justified, that the frustration of the natural investment always outweighs the frustration of the human investment. A more moderate and typical conservative position is that in cases where the life of the pregnant woman is endangered or where the pregnancy is the result of rape, the human investment outweighs the natural investment.

Dworkin's discussion of the rape exception is worth further investigation as yet another instance of the way his interpretive approach tends to avoid rather than directly engage with competing analyses of an issue. The rape exception, according to Dworkin, is endorsed by "every prominent religion" because it is a "deliberate frustration of God's investment in life." To this effect, Dworkin quotes from Rabbi David Feldman's account of Jewish law as follows: "Abortion for rape victims would be allowed, using a field and seed analogy: involuntary implantation of the seed imposes no duty to nourish the alien seed." Dworkin has evidently read Rabbi Feldman's field and alien seed parable as an indicator of the moral importance given to women's autonomy by prominent religions. God in this story is somehow making His investments through the choices of women. However, the parable more easily lends itself to the traditional view of rape, namely that it is male ownership of the field that has been violated by rape, not the field's autonomy. After all, any seeds are "alien" from the field's perspective. Only from the planter's perspective is there a distinction between one's own and alien seeds. The question for the field is whether the seed is invited or not. Indeed, characterizing women as fields seems to make it clear that they have neither perspectives, choices, nor questions. None of this is remarked upon by Dworkin who simply presents the religious view as one of the many cultural modes within which the sacredness of foetal life is recognised and calculated in investment terms.

The liberal exceptions to the prohibition against abortion are much more extensive than those of conservatives because of the greater importance given to human investments in life, both the life of the potential child and the mother's life. Thus, a potential life that will have to deal with extreme poverty or severe disabilities is a life that is, according to many liberals, so frustrated that it is "intrinsically a bad

119. Ibid. at 91.
120. Ibid. at 95.
121. Ibid. at 96.
thing." Dworkin denies that this view has any connection to eugenics because, at the stage of gestation when abortion takes place, one is not dealing with a rights-bearing person. In other words, this stance does not translate into a policy that persons who are extremely poor or have severe disabilities would be better dead.

Again, Dworkin’s confidence in the objective coherence of notions of personhood and rights ignores the ideological function of eugenic theories and the way they inform expectations of genetically perfect babies as well as socially perfect communities. Dorothy Roberts suggests that the “chief danger” of eugenic policies is “not the physical annihilation of a race or social class; it is the legitimation of an oppressive social hierarchy.” In this regard, she writes:

Researchers claim to have discovered not only the genetic origins of medical conditions, but also biological explanations for social conditions. Policymakers increasingly enlist biology to explain human problems that result from social inequalities and to dismiss the need for social change. The Bush Administration, for example, embarked on a “violence initiative” engaged in biological research on crime, premised on the theory that criminality has a biochemical or genetic cause. The research project was to find a genetic marker that would identify children at high risk of becoming criminals and then deter their criminal behaviour through pharmacological treatment and other therapies.

Dworkin describes liberal exceptions to the abortion prohibition that are comparatively generous and flexible. However, the exceptions are calculated in accordance with a measure of value that takes as given the background conditions of inequality and which may, itself, perpetuate the notion that those conditions are “natural” misfortunes which can be scientifically avoided or cured. Indeed, the same observation pertains more generally to Dworkin’s map of “the sacred.” While it carefully and usefully plots out the ways in which members of liberal societies tend to think about intrinsic value, it assumes that those conceptions, as well as their incorporation into legal and constitutional structures, are unmediated by social and political expectations, experiences, and interests.

123. Dworkin, ibid. at 98.
124. Ibid.
125. Roberts, supra note 93 at 41–42.
126. Ibid. at 22–23.
IV. Placing Roe v. Wade on the Map of the Sacred

One of the purposes of Dworkin’s careful charting of the sacred is to explain why the U.S. Supreme Court’s restrictive interpretation of reproductive rights makes good liberal sense. The majority in Roe v. Wade held that states may prohibit abortion after the second trimester of pregnancy unless abortion is necessary to preserve the mother’s life or health. In Chapter Four, Dworkin explains that Roe v. Wade’s holding that the state has a compelling interest in third trimester pregnancies is not derived from the notion that the foetus is a person with rights. Dworkin proceeds by claiming that foetal personhood, the basis of a derivative responsibility, is inconsistent with both general principles of legal practice and established moral views. This is ground that has for the most part already been covered in the chapters on the intellectual confusion of conservatives. It is no surprise to find that, in Dworkin’s view, the U.S. Supreme Court agrees that a foetus has no rights.

Chapter Five returns to his assertion at the start of Chapter Four that the majority in Roe v. Wade correctly found that women do indeed have reproductive rights, and correctly based that finding on a constitutional privacy interest. Dworkin also uses this chapter as an occasion to critique arguments, in particular those of Robert Bork, that the U.S. Bill of Rights should be interpreted in a way which is consistent with the original intent of its specific historical authors. On this originalist view, Roe v. Wade is wrong because the authors of the due process clause did not intend to create a right of privacy. The liberal alternative to originalism is to treat the Constitution not as a collection of specific historical views but as a set of abstract moral standards to which judges and statesmen must give the best meaning in concrete circumstances. The choice between interpretive approaches, Dworkin tells us, is between a constitution of principle and a constitution of detail. The former is exhilarating, noble, and inevitably controversial; the latter is a safer “postage-stamp collection” approach to the “most striking and original feature” of the “oldest and most stable structure of government in the world.”

It is not difficult to guess what the right answer is. Dworkin concedes that the postage stamp collection approach is touted as more democratic and less reliant on a powerful judiciary. However, Dworkin asserts that because legal analysis supports the principled noble view, it must be viewed as “law” and all other claims as based on “politics.” Furthermore,

127. Life’s Dominion, supra note 1 at 119.
128. Ibid. at 122.
129. Ibid. at 118.
history and the imitation of the U.S. constitutional model "in Paris and Bonn and Rome, in New Delhi and Strasbourg and Ottawa, even, perhaps, in the Palace of Westminster"\textsuperscript{130} demonstrates that a constitution of principle is a "precondition of legitimate democracy."\textsuperscript{131} Dworkin exhorts Americans, and presumably their imitators, to embrace the constitution of principle and place limits on the power of judges by insisting that judges subject themselves to the intellectual discipline of integrity. Dworkin identifies three components of integrity for Supreme Court judges in the context of U.S. constitutional adjudication as follows: reliance on principle rather than political compromise, consistency with "principles embedded in Supreme Court precedent and with the main structures of [American] constitutional arrangement,"\textsuperscript{132} and consistency with the principles endorsed in the judge’s decisions in other cases.\textsuperscript{133}

The upshot of Chapter Five is that Justice Blackmun's finding in \textit{Roe} v. \textit{Wade} that women have constitutional rights of privacy is supported by the best interpretation possible of the abstract guarantee of due process consistent with requirements of integrity. Finally, the reader understands Dworkin's persistently flat and oversimplified analysis of MacKinnon's critique of privacy doctrine. The best or most constructive interpretation possible of Supreme Court cases entails the worst—in the sense of the most restrictive—reading possible of any of the critics of "the principles embedded in Supreme Court precedent and the main structures of [American] constitutional arrangements."\textsuperscript{134}

Chapter Six deals with the more difficult questions for liberal justification of why, notwithstanding women’s personhood and rights of procreative autonomy, it is constitutionally permissible for states to significantly compromise and, at a certain point, prevent women's access to abortion. In particular, the post-\textit{Roe} v. \textit{Wade} decisions by the Supreme Court of the United States have allowed states to impose waiting periods on women seeking abortions\textsuperscript{135} and to subsidize the cost for poor women of pregnancy while refusing to subsidize the cost of an abortion.\textsuperscript{136} Furthermore, \textit{Roe} v. \textit{Wade} itself held that states have a compelling interest in women’s pregnancies which permits states to forbid abortions in the third trimester of pregnancy.

\textsuperscript{130} Ibid. at 123.
\textsuperscript{131} Ibid.
\textsuperscript{132} Ibid. at 146.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid.
\textsuperscript{135} Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992) [hereinafter \textit{Casey}].
\textsuperscript{136} Harris v. McRae, supra note 75.
The starting point for Dworkin’s justification is the state’s “detached” responsibility for human life. Indeed, he suggests that “detached” responsibility for intrinsic value justifies a wide range of liberal state action to protect art, culture, and the environment.\(^\text{137}\) However, state action to protect foetal life is different. The key difference is that our views on abortion are more fundamental to our moral personalities than our views on cultural survival, protecting habitats, or preserving endangered species. Abortion, for Dworkin, is about the horror of our own insignificance.\(^\text{138}\) In this way, beliefs about abortion are essentially religious beliefs, even for those who are not religious believers, because religion is a traditional way of answering existential questions about the meaning of human life. The fundamentally moral character of the abortion debate provides an additional justification for state intervention, namely the traditional role of the American state in protecting the “public moral space.”\(^\text{139}\) This added reason is important because, unlike most state action to protect the environment or art, state action in this regard is going to significantly limit the fundamental constitutional rights of women. So, finally, we get to the crux of the matter, namely tradition versus women’s freedom, or more particularly, moral and political traditions versus free but immoral women. Tradition wins.

Dworkin endeavours to carefully limit and constrain the way the state in its role as guardian of morals may interfere with reproductive freedom. For example, he suggests that because the sanctity of foetal life is a highly contested value, the state’s traditional role as moral guardian is most appropriately conceived of in terms of a state goal of ensuring that its citizens act in morally responsible ways rather than a state goal of moral conformity, namely imposing a particular moral view on citizens. Otherwise, one would have to concede that a state might justifiably coerce abortion as the appropriate way to respect the human investment, for example in the case of severely deformed foetuses.\(^\text{140}\) However, in Dworkin’s view, the guardianship role does permit the state to impose conditions on access to abortion which are aimed at ensuring that pregnant women take their moral responsibilities toward foetal life seriously. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,\(^\text{141}\) the U.S. Supreme Court upheld a state requirement that at least twenty-four hours before performing an abortion, physicians provide

\(^\text{137}\) *Life’s Dominion*, supra note 1 at 149.  
\(^\text{138}\) *Ibid*. at 156.  
\(^\text{139}\) *Ibid*. at 150.  
\(^\text{140}\) *Ibid*. at 159.  
\(^\text{141}\) *Supra* note 135.
women with extensive prescribed information about the procedure and
the status of the foetus. Dworkin argues that *Casey's* holding should be
understood in terms of the state's moral guardianship. Although he
suggests that the Pennsylvania requirements, in fact, did not meet the
criterion formulated by the *Casey* majority, namely whether the require-
ment constitutes an "undue burden" by posing "substantial obstacles" to
abortion for women,\textsuperscript{142} he is otherwise supportive of the test and its
underlying principle.\textsuperscript{143}

The final, and perhaps most difficult, question for liberal justification
concerns the specific features of *Roe v. Wade's* trimester framework for
limiting access to abortion. Dworkin has established that the claim that
women have a constitutional right to procreative autonomy is supported
by U.S. constitutional law and the principle of integrity. He has also
established that the state has a traditional, albeit specially formulated,
interest in limiting procreative autonomy in the name of sanctity of life
and guarding the public moral space. The remaining issue is whether *Roe
v. Wade*'s trimester framework correctly balances these two commit-
ments, both in terms of liberal moral principles and in terms of U.S.
constitutional principles and practices.

Dworkin offers three reasons why *Roe v. Wade* is correct. First,
science reveals that the end of the sixth month of gestation is the
approximate point when foetal sentience develops.\textsuperscript{144} Thus at this stage,
foetuses, although they do not have rights, have interests in much the way
animals do. *Roe v. Wade* mistakenly identified foetal viability as the
morally significant biological event. Fortunately, foetal sentience can be
substituted without disrupting the trimester framework and, perhaps,
linking it to a more stable marker than viability, given that medical
technology continues to shift viability back into the earlier months of
pregnancy. Secondly, after six months, the natural and human invest-
ments in the pregnancy have compounded.\textsuperscript{145} Evidently, the human
investment, since it is opposed to that of the mother, is that of the father-
creator. Alternatively, women are being called to account because of their
own investments.\textsuperscript{146} Thirdly, women have had plenty of time to weigh the
various investments in their lives and bodies and make up their minds.\textsuperscript{147}

\textsuperscript{142} *Ibid.* at 2820.
\textsuperscript{143} *Life's Dominion*, supra note 1 at 153–54, 172–76.
\textsuperscript{144} *Ibid.* at 169.
\textsuperscript{145} *Ibid.* at 170.
\textsuperscript{146} See the discussion of human creative investment in foetal life in terms of what I suggest
is the implicitly gendered notion of planning parenthood, *supra* notes 107–14 and accompa-
nying text.
\textsuperscript{147} *Life's Dominion*, supra note 1 at 169–70.
Thus, once more, science, morality and the U.S. Constitution all support the *Roe v. Wade* trimester framework. Admittedly, most women who seek abortions do so well before the third trimester. However, *Roe v. Wade*’s trimester framework has significant and widespread implications as the justification for state regulation of the behaviour and activities of pregnant women. The most extreme example is the use of *Roe v. Wade* to justify the unconsented to surgery which may have hastened Angela Carder’s death in the interests of “fetal survival.” More typically, the notion of a state interest in foetal life provides the justification for the detention or surveillance of pregnant women whose behaviour or lifestyle is thought to endanger the health of the foetus, as well as for the imposition of medical procedures in less extreme situations than that of Carder.

V. Conclusion

*Life’s Dominion* provides a useful guide to the way in which abortion is understood within liberal democratic societies and within the constitutional law and public discourse of both Canada and the United States. In addition, Dworkin’s analysis gives tremendous authority to *Roe v. Wade* at a time when its holding that women have a large measure of reproductive autonomy in the first six months of pregnancy is under siege from both pro-life groups and judicial interpretations of the extent of that autonomy. However, apart from the authority which Dworkin, at the same time, gives to the limits imposed on women’s autonomy by *Roe v. Wade*’s trimester framework and, to a certain extent, by the post-*Roe v. Wade* cases, his discussion presents a number of problems for feminist analyses and political goals in the area of reproduction.

At the most fundamental level, his refusal to acknowledge that intuitions about what is intrinsically valuable are in any way shaped by social power inevitably leaves out the perspectives of those who seriously lack social power. In particular, he presents notions such as human freedom and “the sacred” outside the context of stratified and politically

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149. *In re A.C.* (D.C. 1987), *supra* note 16 at 613. See also *supra* notes 16-32 and accompanying text.
complex social relations. Second, his uncomplicated acceptance of the authority of scientific knowledge is especially of concern in the area of reproduction. As Ruth Berman has written:

Science does not stand above the world, or apart from its conflicts; it is rather the science of a given society. Its communal practice reflects the needs of the dominant sector, and its way of thinking increasingly reflects the dominant ideology. ¹⁵²

R.C. Lewontin describes some of the ways in which scientific language reflects a gendered and imperialist world view as follows:

The metaphors of science are, indeed, filled with the violence, voyeurism, and tumescence of male adolescent fantasy. Scientists "wrestle" with an always female nature, to "wrest from her the truth," or to "reveal her hidden secrets." They make "war" on diseases and "conquer" them. Good science is "hard" science; bad science (like that refuge of so many women, psychology) is "soft" science, and molecular biology, like physics, is characterized by "hard inference." The method of science is largely reductionist, taking Descartes’s clock metaphor as a basis for tearing the complex world into small bits and pieces to understand it, much as the archetypical small boy takes apart the real clock to see what makes it tick. ¹⁵³

Dworkin presents scientific claims as devoid of interpretive difficulty or political meaning. Indeed, he analogizes his own reasoning about "the sacred," presumably to give it more authority, to that of astronomers who postulated the existence of Neptune, at the time an undiscovered and unknown planet, as the only explanation for the movements of Uranus, a known planet. ¹⁵⁴ His discussion absorbs the biological construction of women and of reproduction as well as the medical assumption of foetal patienthood without comment or question. Because the natural order, in his scheme, has a rationality that is given moral significance and value, women who ultimately resist what seems like their natural and embodied dedication to reproduction are automatically portrayed as unreasonable and morally dangerous. Finally, Dworkin’s assumption that the "olympian gene" ¹⁵⁵ has presumptive moral and constitutional importance ignores the

¹⁵³ Lewontin, supra note 101 at 34–35.
¹⁵⁴ Life’s Dominion, supra note 1 at 68. In Law’s Empire, Dworkin employs the same device, stating “integrity is our Neptune” in the course of his justification for the claim that integrity, along with fairness, justice, and procedural due process, is a distinct political ideal (Law’s Empire, supra note 32 at 183).
¹⁵⁵ Berman, supra note 152 at 237.
social and ideological contexts within which such causal and “natural” primacy has historically been asserted. The “best interpretation possible” of the abortion debate cannot succeed by ignoring the potentially complex and powerful symbolism of nature and the role the idea of natural hierarchy has played in our social and political relations.