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MA in American Studies

Empowered women or murdering mothers?

The abortion dispute in the United States and the conflict of absolutes.

Dissertation submitted in partial fulfilment of the degree of Master of Arts

CONTENTS

INTRODUCTION

Since 1973, the abortion dispute in the United States has largely revolved around the Supreme Court decision in the case of *Roe v. Wade*[1]. In striking down as unconstitutional a Texas statute that severely limited circumstances under which a woman might obtain an abortion, the case created controversy unseen since the *Brown v. Board of Education* decision in 1954[2], but unlike that decision, *Roe* continues to be widely disputed and refuses to recede into history. The *Roe* decision legalised abortion, albeit with qualifications, by building on the right to privacy (supposedly) enshrined in the Constitution. Since that time legal abortion has been attacked by litigation, legislation, and direct action. As a consequence, 84% of counties in the United States now have no abortion providers, and the number of those providers has declined 18% since 1992[3]. This leaves a third of all women of reproductive age without practical local access to abortion services. In contemporary America, abortion is barely legal. Yet there are still almost 1.5 million abortions performed each year, making it the most common surgery[4]. If there is such a need for abortion, then why is it not more available, rather than each operation forcing the pregnant woman to struggle, merely in order to exercise control over her own fertility?

This dissertation seeks to explore the parameters of the abortion dispute in United States. How far are American women able to exercise their right to an abortion, and moreover, should this be a right? Does the child within a woman's womb not have a right-to-life as well? It is also necessary to examine the participants in this dispute, to analyse why these activists hold such extreme and uncompromising positions, and whether there is enough support amongst the general population for either side to "win" (by having their views implemented by government). However, government usually prefers moderation, as borne out by its actions since the *Roe* decision. The Supreme Court may be somewhat excepted from this policy of moderation (having made rulings of momentous impact on American society) but since *Roe* it too has opted not to side fully with either supporters or opponents of legalised abortion. Thus the actual events leading up to and since the *Roe* ruling must also be considered, as they provide the practical framework within which women make their decisions about termination of their pregnancies. In analysing such a vast subject as the status of

abortion in the United States, certain limitations on the scope of the study must be imposed. Although abortion rights are linked with availability of birth control and sexuality education, I do not intend to explore these related subjects in great detail. Also, the dissertation will concentrate upon the relevant issues rather than being an exhaustive survey of the organisations involved. There are so many organisations on each side of the dispute, that to do so would be a dissertation in itself, although I will mention those groups that I feel contribute significantly.

I use the word "dispute" rather than "debate" to describe the situation, as a debate implies some middle ground upon which compromise can be found. There is no such possibility of compromise between abortion activists, as the philosophical bases from which they operate are vastly different. In this sense the dispute is a conflict of absolutes, of reproductive choice against repression, or of murder of unborn children against uncaring women. With such absolutism, terminology becomes crucial. The activists describe themselves as "pro-choice" and "pro-life", being pro-abortion and anti-abortion respectively. The latter terms were used until around the time of the *Roe* decision, when activists realised they needed to promote a more positive image of themselves and began using descriptions that encapsulated their ideals. Furthermore, does a pregnant woman carry a "fetus" or an "unborn child"? The term one uses to describe the being within the womb locates one in the dispute. I have chosen to use the term "fetus" to describe this being from fertilisation to birth - although this is not strictly medically accurate, it is the term that covers the greatest period of the pregnancy. Use of this term, however, indicates my own beliefs about abortion. I am pro-choice, which may lead to some bias, but I have sought to provide a balanced analysis of the contemporary abortion dispute.

The divisive semantics of the abortion issue reveal the deeply-held beliefs that characterise the activists, and indicate why these views are held with such passion. Kristin Luker conducted a detailed study of the people involved and their motivations for her book *Abortion and the Politics of Motherhood*[5]. Although focusing on the dispute in California in the mid-1980s, her findings remain broadly representative of the current situation, in explaining how the social context of the activists helps to explain their moral outlook (and vice versa). Dr. Luker's approach, however, largely ignored the question of the constitutional status of abortion. This was thoroughly examined by Lawrence Tribe in *Abortion - The Clash Of Absolutes*[6], which described how the criminalisation of abortion was a relatively recent occurrence, and also

considered the justifications for including abortion within the right to privacy. He underlined the gulf in understanding between pro-choice and pro-life advocates, presenting the dispute as a clash of absolutes, "...of life against liberty"[7]. This cannot be refuted, and it is one of the main arguments of this dissertation that the abortion dispute will not be advanced, either in favour of the pro-life or pro-choice positions, while there is no room for compromise. Near-stalemate is the current order of the day - but this is a situation that the majority of the American public find acceptable, as according to *Between Two Absolutes - Public Opinion and the Politics of Abortion*[8] , the public favours neither extreme position. More recently, Mark Graber published his argument to advance the dispute, that of "equal choice", in *Rethinking Abortion*[9]. He argues that abortion should remain legal as statutory bans have failed and were discriminatory, but that this "equal choice" only applies to opportunities, not outcome. Abortion, according to Graber's reasoning, can be regulated or restricted, if this does not discriminate. Yet such restrictions do discriminate, and this argument does nothing to placate pro-choice supporters, as it allows for limitations on access and availability to abortion services, or pro-life supporters, as abortion remains legal. It may be, however, that it appeals to the public, or at least those that would be able to afford his "equal" choice.

Chapter One examines the context of abortion in the late twentieth century: the political situation and legality of abortion before and after the critical *Roe* decision, the expansion of the right-to-life and pro-abortion movements, and recent developments, including the disturbing rise in violent incidents against abortion clinics and their staff. In Chapter Two, the centrality of the fetus is discussed, as are differing perceptions of its humanity. These perceptions are shown to influence and be influenced by the activist's moral beliefs and socio-economic situations. Also considered are the opinions of the non-activist public. Finally, Chapter Three is concerned with the question of rights: those of the voice-less fetus, the pregnant woman's relations, the woman herself, and those rights within their constitutional and moral contexts.

ENDNOTES

1. *Jane Roe v. Henry Wade*, 410 U.S. 113 (1973)
2. *Brown v. Board of Education*, 347 U.S. 483 (1954)
3. Quoted on the Refuse and Resist! Reproductive Freedom Index, *available at* http://www.calyx.com/~refuse/ab/index.html
4. Quoted on the Refuse and Resist! Reproductive Freedom Index
5. Luker, Kristin, Abortion and the Politics of Motherhood (University of California Press, London, 1984)
6. Tribe, Lawrence H., Abortion - The Clash of Absolutes (W.W.Norton and Company, London, 1990)
7. Tribe, Abortion, p.3
8. Cook, Elizabeth Adell, Jelen, Ted G. and Wilcox, Clyde, Between Two Absolutes - Public Opinion and the Politics of Abortion (Westview Press, Oxford, 1992)

CHAPTER ONE

The uncertain legality of abortion

"Poor women are going to suffer again"
Norma McCorvey, on hearing the *Webster* ruling[1]

"This is what you get! You should pray the rosary!"
John C. Salvi III, instigator of the Brookline Massacre[2]

This chapter considers the background to and the implications of the *Roe* ruling that legalised abortion, the subsequent Supreme Court decisions on the legality and availability of abortion services, and also the rapid (though not concurrent) rise of pro-life and pro-choice grass-roots activism. It argues that the inability of the avowedly pro-life Reagan and Bush administrations to recriminalise abortion can be related to the rise of blockades and violence against clinics and their staff. It also discusses the actions of the more pro-choice Clinton administration in attempting to stop anti-clinic actions, and the mounting backlash from pro-choice activists who see abortion rights as increasingly fragile, especially in the wake of the Supreme Court rulings on *Webster* and *Casey*.

Until *Roe*

By 1910 abortion had been made illegal at any stage in pregnancy in all states, with exceptions only in cases of rape or incest, or if an abortion was "therapeutic" (necessary to save the woman's life). Yet abortion was still widely practiced. The significant statutory restrictions that had been erected were largely unenforceable, and often unenforced. A 1963 law review article noted that "...our nation's abortion laws have admittedly kept *legal* abortions to a minimum, just as the 18th amendment virtually eliminated the *legal* consumption of liquor"[3] (emphasis already added). The comparison with Prohibition is valid, as it seems that there was large-scale disregard for the law in both instances. The Kinsey Institute found that even "...police and other officials often allow known abortionists to practice since it is felt that there is a need for their services"[4]. Thereby, in some areas abortion was *de facto* legal. But it was officially illegal,

and consequently abortion services were two-tiered and inconsistent, depending on the class, race, age and residence of the woman[5]. Whereas wealthier women pressed physicians for legal abortions, using a "therapeutic" reason as cover, poor and rural women obtained illegal abortions, of varying quality and price (criminal abortionists were obviously not subject to regulations or inspection). Safe and reliable services such as the Chicago women's collective ("Jane"), which at its peak provided up to 300 illegal abortions a week, were rare and limited to urban areas. Racial discrimination was also evident in the granting of legal abortions; in New York City between 1954 and 1962, 94% of all hospital abortions were obtained by white women, whereas 93% of women who died from illegal abortions were black or Puerto Rican. Also, a study in Georgia found that single white women were twenty five times more likely to be granted a "therapeutic" abortion than single black women[6]. Thus many poor, non-white and rural women had no choice but to opt for illegal abortions, which were often unsafe. During the mid-1950s, Los Angeles county hospital admitted over 2,000 women each year for septic abortions, and it has been estimated that 350,000 women per year were injured (some fatally) by criminal abortionists[7].

In this atmosphere of uncertainty surrounding abortion availability, the impetus for reform of the restrictive abortion laws arose. The abortion procedure itself (especially when performed in hospitals) became a relatively safe one in the 1960s[8], and pregnancy was also becoming safer. Advances in medical care from the 1950s reduced the conditions in which life-threatening complications arose, and consequently physicians found it increasingly difficult to justify "therapeutic" abortions. Also, hospitals (ever wary of litigation), became more concerned with the circumstances in which an abortion would be granted. Most hospitals established review boards, increasing scrutiny of both doctors and patients. As a result, opportunities to procure legal abortions declined, forcing more women into having illegal abortions; it has been estimated that during the 1960s, 1.2 million were performed each year[9]. Two other instances caught national attention and promoted reform. Sherri Finkbine, was forced to travel to Sweden in 1962 to abort her fetus, which had been deformed by thalidomide, after her hospital refused her an operation. The rubella epedemic of 1962-5 brought her plight home to many Americans, as like thalidomide, rubella causes birth defects. Fifteen thousand such deformed children were born in these three years.

Thus from the 1960s the medical profession "...mobilised in favour of easing the restrictions on the basis of the belief that abortion in many cases would be less tragic than childbirth"[10]; for example, in 1967 the AMA issued a statement favouring liberalisation of the abortion laws (something of a historical reversal). Reforms were attempted, notably in California, which passed the Therapeutic Abortion Act (the Beilenson Bill) in 1967. This allowed for legal abortion, if performed by a qualified physician in an AMA-certified hospital, and when done to prevent mental or physical damage to the woman. In practice, "mental or physical damage" was widely interpreted, which in effect led to abortion on demand. Twelve other states also passed reform laws by 1970, mostly along the lines of the American Law Institute's 1959 proposed revision of its Moral Penal Code[11]. However, these reforms were not far-reaching enough as they aimed only to make possible exceptions to strict prohibitions, and there was still opposition from many anti-abortion doctors. There were 100,000 illegal abortions per year in California before the passage of the Beilenson Bill, but only 4,000 annually after reform. This left 96,000 women risking illegal abortions, as they cost on average a third of the cost of legal abortions (which were about $800[12]). Also, in Colorado, 19 out of 20 women were denied a legal abortion in the 2 years following reform, as anti-abortion doctors were reluctant to carry out the operation. According to Craig and O'Brien, class and regional differentiations were accentuated from the 1960s, as it became possible for women to travel to other states where abortion was legal[13]. This "abortion tourism" also extended to overseas travel, including Sweden, Britain (after 1968) and Puerto Rico, but only for the relatively well-off. Reform was not very effective, and was limited to a few states; consequently the emphasis shifted to repeal of the abortion laws. This was recommended by the Presidential Advisory Council on the Status of Women, which reported in 1968 that all abortion laws should be repealed. The National Association for the Repeal of Abortion Laws (NARAL)[14] was formed in 1969, which became the main pro-abortion grass-roots lobbying body in the US. The first abrogation of abortion statute, however, came with the repeal of Hawaii's criminal abortion law in 1970, thereby legalising the operation before the 20th week of pregnancy; the law also contained a residency clause. Soon after, Alaska, Washington, New York and the District of Columbia repealed their abortion laws. But this is not to say that abortion was being gradually legalised across the entire nation. Abortion was only legal in 4 states and Washington, D.C., and it had been only narrowly passed in the most liberal of those, New York[15]. Thirteen states allowed abortion to protect a woman's physical or mental health, 1 state allowed it if the woman was raped, and 29 only

allowed abortion to preserve a woman's life. In the states of Louisiana, New Hampshire and Pennsylvania, abortion was completely prohibited.

It was in this climate of limited reform and repeal, but still of overwhelming legal and practical difficulties in obtaining an abortion, that the Supreme Court simultaneously issued its decisions on *Roe v. Wade* and *Doe v. Bolton*[16], on January 22nd, 1973. The *Roe* case was brought on behalf of Norma McCorvey, a 21-year old Texan woman who claimed she had been gang-raped in the summer of 1969[17]. Under the 1857 Texas statute that *Roe* struck down, abortion was only allowed if the woman's life was in danger, which McCorvey's was not. The ruling in *Roe* promulgated the principle that states could not criminalise abortions, thereby invalidating all such legislation across the US, except that of New York, which met the ruling's requirements. The companion case of *Doe v. Bolton* struck down a recent Georgia reform law, far more liberal than the Texas statute, but which required residency and very intrusive regulations, and which also allowed any close relative to sue to prevent an abortion taking place. In effect, this extended *Roe* to include that states could not make abortions unreasonably difficult to obtain. The day that these rulings were issued was also the day following the death of former President Johnson, and on which rumours of an imminent peace in Vietnam were floated. However, the *Roe* ruling still made the front page in most newspapers, and rightly so. Its climactic implications were not ignored, as the decision transformed the abortion dispute and continues to be contentious.

The Court's decision was split 7 to 2, with even most conservative justices backing it[18], and the opinion was delivered by Justice Harry Blackmun, raising most of the questions that inflame the abortion dispute today. Blackmun based the annulment of the Texas statute on the contention that a woman's right to choose whether or not to have an abortion is part of the fundamental "right to privacy", drawn mainly from the Due Process Clause of the Fourteenth Amendment, which previous rulings had upheld. The Court has distinguished certain rights or liberties (as described in the Constitution) as "fundamental", such as free speech, which can only be abridged by government when demonstrably necessary to achieve a "compelling" objective. However, government is free to abridge non-fundamental rights as part of a rational scheme to improve the common good. For example, a non-fundamental right such as driving a car may be abridged by not allowing children under 16 to do so, the compelling interest being the maintenance of safety on the roads[19].

Blackmun wrote that government (in this case, of the state of Texas, but applying to all US governments) could not show compelling interest in abridging a woman's right to choose an abortion, by either claiming that it was on the grounds on promoting maternal care, or in order to preserve the life of the fetus. In deciding that the abortion decision was part of a fundamental right, the Court created a powerful barrier against laws restricting abortion, as it has always proved extremely difficult for US governments to infringe upon these rights[20]. But the *Roe* opinion did not extend an absolute, unqualified right to an abortion without government interference, as compelling interest was found in limiting the scope of a woman's abortion decision. Blackmun utilised the trimester division of a pregnancy[21] to decide compelling interest. During the first trimester, Blackmun stated that government should not be able to interfere with a woman's abortion decision in any way, except to insist that it be performed by a licensed physician. Regulations designed to protect the woman's health were permitted in the second trimester, as Blackmun wrote that this was now a compelling interest, as during the previous trimester abortion was statistically less dangerous than childbirth. The status of the fetus was taken into consideration in the final trimester, as this was considered the point of fetal viability, and therefore a compelling interest. As Blackmun wrote,

> This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother[22].

The opinion also discussed the status of the fetus, in terms of whether or not it was in fact a legal "person". Blackmun found that personhood, as defined by the Constitution, could not be applied prenatally, therefore the fetus could not be granted the same legal rights as a full, postnatal human. However, in allowing restrictions on abortion in the third trimester, he effectively granted limited *de facto* rights to the fetus by removing certain rights from the mother. The question of who actually exercises the right to an abortion decision was also somewhat confused, as the opinion seemed almost to suggest at some points that the decision lay with the doctor, whereas other sections placed the decision-making with the woman[23]. However, the most conservative member of the Court, Justice

William Rehnquist, refuted Blackmun's basis for legalising abortion. His dissenting opinion rejected the majority's extension of the right of privacy, taking a strict constructionist[24] view of the Constitution (Justice White's dissent took a similar line) and of the history surrounding the drafting of the Fourteenth Amendment (namely, that at its adoption in 1868, at least 36 laws existed that limited abortion). Although he conceded that the abortion decision was "a form of liberty", he argued that it should receive no greater protection than any other liberty abridged by routine social and economic legislation. Moreover, he did not see abortion as a fundamental right, and argued that the State did not need a compelling interest in restricting abortion. But this dissent did not lessen the fact that abortion had been legalised.

A Lasting Impact

The *Roe* decision had an immediate and decisive effect on American society. Full legalisation helped many women to have safer and earlier abortions, allowed states to regulate and inspect abortion providers, enabled doctors to improve their techniques, and permitted researchers to develop safer methods of pregnancy termination[25]. Planned Parenthood, NARAL, and others, began to set up abortion clinics nation-wide to provide safe and low-cost services. The death rate from legal abortion fell, and the price of an abortion dropped[26], which was perhaps the most important factor for many poor women in considering an abortion. But in legalising abortion (and legitimising the pro-abortion position), *Roe* galvanised anti-abortionists into action, at the forefront being the Roman Catholic Church. Some clergy called for Blackmun's excommunication (he was the only Catholic on the Court); others called for civil disobedience against the ruling, with the parishes providing a ready-made network through which to mobilise supporters. Moreover, the pro-life lobby sought to erect legislative barriers between women and their newly-acquired right to an abortion, which they have continued to do. Throughout 1973, the Catholic Church in America spent $4 million lobbying Congress[27] to enact anti-*Roe* legislation, such as acts to prevent federal money being used to fund abortion services. This exploited a major loophole in the *Roe* ruling - although the right to choose an abortion had been granted, there was no specification guaranteeing funding, availability or access to abortion facilities. This enabled legislation such as the devastating "conscience clause" bill (passed by Congress in 1973) which allowed individual doctors or entire hospitals to refuse to carry out abortions on moral grounds. This threatened to seriously limit access to abortions in large areas where there was

only one regional hospital[28]. Anti-abortion advocates not only sought to limit the scope of availability, they also attempted to overturn *Roe*, by means of a constitutional amendment asserting either that abortion is illegal or that fetuses are legal persons, thereby making abortion murder; however, there has never been a political consensus concerning an amendment[29]. Finally, the *Roe* ruling was also attacked by means of packing federal judiciaries, including the Supreme Court, with anti-abortion judges. All three of these measures involved politicising the abortion issue by electing local, state and federal officials committed to overturning *Roe*, thereby gradually pushing this single issue to the fore in American politics.

The loophole in the *Roe* ruling concerning funding, availability and access allowed the pro-life movement to seriously limit American womens' choice. By 1975, only 17% of public hospitals and 28% of non-Catholic private hospitals would perform abortions[30], as well as all Catholic-run hospitals and health care centres, which constitute the largest single health care provider in the US; there was also a significant lack of low-cost abortion clinics. It was estimated that half a million women (mainly young, poor and rural) had to travel out of state to obtain an abortion, and that 770,000 women had no practical access at all[31]. Following pro-life pressure, Congress enacted the Hyde Amendment to the fiscal 1977 Medicaid appropriation. This barred the use of federal Medicaid funds for abortion except when the life of the woman would be endangered by carrying the pregnancy to term. This was subject to an injunction until August 1977, when it was vacated[32]; consequently federal Medicaid funding of abortions fell from almost 300,000 to a few thousand per year[33]. The availability of abortion services was further limited in the 1970s by a succession of Supreme Court decisions, which undercut the principle established by *Roe*. It was held, in *Bellotti v. Baird*[34] and *Planned Parenthood of Central Missouri v. Danforth*[35], that minors could be required to obtain parental or judicial consent before having an abortion, and it was also held that prohibiting sales and advertisements of contraceptives to minors was not unconstitutional[36].

The *Roe* decision had a further important, if indirect, impact. Having spurred the pro-life movement into existence and politicising the abortion dispute, the ruling swept Ronald Reagan into office in the 1980 presidential elections. This is not to say that this was a major cause of his victory, but the pro-life voters did figure significantly among his supporters, and they were also a factor in the Republican party gaining control of the Senate. Whereas Carter and

Ford had played down the abortion issue in the 1976 election, Reagan positively embraced pro-life rhetoric during the 1980 campaign, attacking (among other things) the legitimacy of the Supreme Court's rulings[37]. As with *Roe*'s legitimation of the pro-choice position, after Reagan's election the pro-life movement gained its own moral legitimacy and power. During his presidency, Reagan launched a protracted assault on the right to an abortion. The "Great Communicator" continued his hard-line rhetoric, writing a book entitled *Abortion and the Conscience of a Nation*, and making impassioned speeches that presented fetuses as unborn children, and legal abortion as undermining the bases of American society;

> We cannot pretend that America is preserving her first and highest ideal, the belief that each life is sacred, when we've permitted the deaths of 15 million helpless innocents since the Roe v. Wade decision - 15 million children who will never laugh, never sing, never know the joy of human love, will never strive to heal the sick, feed the poor, or make peace among nations...[38]

The Reagan administration put pro-life beliefs into practice, initiating legislation such as the Adolescent Family Life Act (1981), which prevented federal funding of abortion or family planning services for teenagers, and by cutting by 25% of the remaining family planning budget under Title X of the Public Health Service Act of 1970[39]. This was named the "gag rule" as it prevented counselling or referral in clinics receiving Title X funds. In 1984 the "Mexico City policy" was initiated, prohibiting US overseas aid from being spent on abortion or related activities. The administration also supported the anti-abortion Hatch Human Life Federalism Amendment and the Helms Human Life Statute in the Senate, which aimed to allow states to determine the legality of abortion, and to define the fetus as a person, respectively. However, the pro-life Senators were unable to unify behind one of these measures, so both failed.

However, the focus of the Reagan administration's attacks was the Supreme Court. He directed his solicitor-general to pressure the Court into overturning *Roe* (which he was unable to do), and more significantly, explicitly packed the federal bench with those who opposed abortion. The selection of federal judges is, of course, always politically motivated, but Reagan's decision-making was different - his appointments were actively ideologically screened, with particular reference to their views on abortion. Of most importance were the

appointments to the Supreme Court. In 1981 Sandra Day O'Connor replaced Justice Stewart, and Antonin Scalia replaced Chief Justice Burger in 1986 (with Rehnquist filling Burger's position); both were conservative in their outlooks, and Scalia especially so. At the retirement of Justice Powell in 1987, Reagan nominated Judge Robert Bork to replace him. Bork, however, was rejected by the Senate following a nationwide campaign by pro-choice activists. Bork was on the record as arguing that individual rights should be more limited, and that federal courts should exercise more restraint by interfering less frequently with the activities of elected officials[40]. This had obvious potential consequences for anti-abortion legislation, especially at a local and state level. Judge Anthony Kennedy (also a conservative) was eventually appointed, leaving only four justices (Blackmun, Brennan, Marshall and Stevens[41]) who supported abortion rights.

Reagan's legacy in packing the Court was evident in the 1989 ruling on *Webster v. Reproductive Health Services*[42], which split the Bench by 5 votes to 4, although no one opinion was endorsed by a majority of justices[43]. This effectively ended a 16 year period of judicial protection of abortion rights (except for laws concerning parental notification laws), as seen in decisions such as *City of Akron*[44] and *Thornburgh*[45]. The *Webster* ruling upheld the constitutionality of a very restrictive 1986 Missouri law that declared that life begins at conception, and that "unborn children have protectable interest in life, health, and well-being"[46]. It prohibited the use of public facilities for non-therapeutic abortions, and public funds for counselling that suggested abortion as an option (unless necessary to save the woman's life). Most controversially, the law contained a provision for testing for viability, if a doctor believed the woman to be 20 or more weeks pregnant. These tests included examination of fetal lung maturity. However, the only current method of conducting such a test is amniocentesis, which "...is contrary to accepted medical practice until 28 to 30 weeks of gestation, and imposes significant health risks for both the pregnant woman and the fetus"[47]. Although this appears to conflict with *Roe*, it does not, a point which all the justices stressed. *Roe* asserted that the state does not have a compelling interest in prohibiting abortion before the third trimester, but the amniocentesis test has a 4 week margin of error. Therefore, a 20 week old fetus may in fact be 24 weeks old, thereby coming within the purview of the *Roe* ruling. These legalisms aside, it does not disguise the fact that the Court's decision in *Webster* allows harm to be done to a woman and her fetus.

The effect of *Webster* was to promote more attempts to circumvent *Roe* by state legislation, on the grounds that it had overruled *Roe* without actually saying so. This caused some states, such as Louisiana, to attempt re-enactment of old abortion laws. Consequently the ruling persuaded many Americans that a vote for any abortion restrictions was a real threat to the right to choose; as Kate Michelman (director of NARAL) stated, "The Court has left a woman's right to privacy hanging by a thread and passed the scissors to the state legislatures"[48]. The scissors soon came out, with 9 states passing new restrictions by the end of 1991. The US territory of Guam passed the most restrictive legislation, permitting abortion only to save the woman's life, and prohibiting distribution of information on abortion services. A more positive reaction came from four other states, which realised the tenuous nature of *Roe*, and so passed laws liberalising abortion. Connecticut, for example, passed legislation in 1990 that legalised all pre-viability abortions, in effect writing *Roe* into state law. *Webster* had much the same re-invigorating effect on the pro-choice movement as the *Roe* ruling had in 1973, causing memberships and organisational incomes to rise considerably. In 1989, membership of NARAL rose from 150,000 to 400,000 and membership of the National Organisation for Women (NOW) rose from 170,000 to 250,000. Consequently, incomes rose from $4.3 million (1988) to $11.9m (1989), and $5.5m to $10.6m, respectively[49]. Ironically, it was as much the reaction of pro-life advocates, who claimed that abortion would soon be recriminalised following *Webster*, as the ruling itself which aided the pro-choice resurgence. State elections became more focused on the abortion issue; for example, it was, crucial in Virginia's 1989 gubernatorial race, which was won by the pro-choice candidate.

Although *Webster* allowed the states a lot more latitude in deciding abortion law, it did not go far enough for most pro-life supporters, added to which, the Reagan administration had been unable to carry out its anti-abortion promises to any great degree. When Reagan came to office, roughly 30% of pregnancies ended in abortions, of which there were 1.5 million per year[50]. When he left office, the statistics were much the same. Little hope was held out for decisive pro-life measures during the presidency of George Bush (he was often portrayed as "Reagan lite"). Bush did espouse hard-line pro-life rhetoric, such as calling for the criminalisation of abortion, and continued to ideologically screen Court appointees, nominating conservatives David Souter (1990) and Clarence Thomas (1991) to replace Justices Brennan and Marshall. Again, however, it was the Supreme Court that directed the nature of the abortion dispute in

America. The ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[51] appeased no-one involved in abortion activism, but remained true to most Americans' "pro-choice with restrictions" view[54]. It upheld a patronising Pennsylvania law requiring counselling, informed consent, and a 24 hour waiting period before abortions. Patricia Ireland declared that "*Roe* is dead"[52], which was an overstatement, but it did dismantle the 1973 ruling to a large degree. Like *Webster* before it, *Casey* kept abortion legal as the Pennsylvania law did not impose an "undue burden" on access to abortion or ban it in the first trimester. Yet as it did not recriminalise abortion the ruling further angered pro-life activists. By 1992, it seemed that political measures to make abortion illegal had failed, although they did give more latitude to state legislation. By June 1997, 15 states had passed laws banning late-term abortions - the *Webster* and *Casey* rulings did not stop the 1.5 million abortions each year, and with Clinton's victory in the 1992 presidential election, no new anti-*Roe* justices would be appointed to the Supreme Court. Besides, it seemed that Justices O'Connor, Kennedy and Souter had "defected" in upholding *Casey*. Furthermore, Clinton promised to make abortion "legal, safe and rare", and issued several executive orders in January 1993. He overturned the "gag rule" and the Mexico City policy, lifted the ban on fetal tissue research and the RU-486 pill[53] and rescinded the prohibition on privately-financed abortions in overseas military hospitals.

The answer for some pro-life activists, it seemed, lay in more direct action against the abortion providers by blockading clinics to prevent entry, and "sidewalk counselling", persuading women about to have abortions that they should not do so. At the forefront of direct action was Operation Rescue (OR) - the rescue being of mothers and unborn children from "abortuaries" (abortion clinics). This had been set up in 1985 in response to Reagan's lack of action, and by 1989 claimed 35,000 members and over 250 "rescues"[54], and also a demonstration at the 1988 Democratic party National Convention, at which 134 OR members were arrested. Although they usually use passive resistance techniques akin to those of Gandhi and Martin Luther King, the comparison ends there. Whereas King used such methods to bring down injustice, the OR protesters resemble those standing in the doorway to uphold segregation, rather than its opponents. At a recent blockade in Dayton, Ohio (on July 13th-19th 1997), OR activists held "fetal funerals", and also had members circulating the clinic in medical garments, with others in t-shirts marked "Security", which served to confuse and intimidate women wanting to enter the clinic. As one pro-choice organisation noted of this, "While many of the women who wanted to get into the

clinic were successful in doing so, it is difficult to imagine a more difficult and degrading way to access healthcare"[55]. Pro-life activists have also set up their own pregnancy counselling centres, which serve to misinform and dissuade women from having abortions. Another action group, Life-Dynamics, seeks to force abortion clinics out of business by organising malpractice suits, thereby driving up their insurance rates. Other direct action groups include Lambs of Christ, Christians Rescuing Infant Babies (CRIB)[56], and Missionaries to the Pre-Born, whose members routinely pray for the deaths of doctors performing abortions. In response, pro-choice activists established a national "Day of Appreciation" for abortion providers, on October 26th 1996, which is set to become an annual event. To combat blockades, Clinic Defense Task Forces have been organised, using non-violent tactics to aid women in breaching blockades and exercising their constitutional right to choose an abortion. President Clinton recognised this attempt to prevent women entering clinics by enacting the Freedom of Access to Clinic Entrances Act (FACE) in May 1994[57]. This act protects reproductive health service facilities, their staff and patients from violent threats, assault, vandalism, and blockade. Its effectiveness is questionable, however, as according to reports from the latest OR blockade in Dayton, the local police were assisting the pro-life supporters in blockading the clinic.

Direct action also has a more violent aspect, with the first bombings of clinics occurring in 1983. In March 1993, Dr. David Gunn was shot and killed outside a clinic in Pensacola, Florida, victim of a "justifiable homicide". Pro-life activists consider abortion murder, but some extend the reasoning to the belief that killing a doctor who performs abortions is justified since it is, in fact, preventing another murder (that of the fetus). Since Dr. Gunn's murder there have been 4 other such murders, including those at the Brookline clinic, and other violent incidents. By the end of 1996, 13 other murders had been attempted, and there had been 279 death threats, 43 bombings and 109 arson attacks, as well as 644 blockades[58]. The most recent incident was a firebomb attack on clinic in Alabama on 22nd July 1997, which was the action of a lone pro-life activist. Far more ominous was the bombing of a clinic in Atlanta, Georgia, on January 16th, responsibility for which was claimed by the Army of God (AOG). A loose network of AOG activists (or terrorists) exists, whose basic belief is that abortion is an evil in society that should be fought with force, including murder. Such extremists are rare, but their actions colour the abortion dispute with an urgency to find a

resolution, one that is not likely to be forthcoming considering the diametric opposition of the two sides.

ENDNOTES

1. O'Brien, David M., Storm Center - The Supreme Court in American Politics (W.W.Norton and Company, London, 1986), p.59
2. John Salvi shouted this when he killed 2 receptionists and wounded 5 others at Planned Parenthood abortion clinics in Brookline, Massachusetts, on 14th February, 1996; Boston Globe, 15/2/96; quoted on the Refuse and Resist! Reproductive Freedom Index, *available at* http://www.calyx.com/~refuse/ab/index.html
3. Graber, Mark A., Rethinking Abortion - Equal Choice, The Constitution And Reproductive Politics (Princeton University Press, Princeton, NJ, 1996), p.44
4. Kinsey Institute report; quoted in Graber, Rethinking Abortion, p.46
5. Craig, Barbara Hinkson, and O'Brien, David M., Abortion and American Politics (Chatham House Publishers, Chatham, NJ, 1993), p.220
6. Graber, Rethinking Abortion, p.54
7. Graber, Rethinking Abortion, p.43
8. In 1955, 100 in 100,000 legal abortions resulted in the woman's death, whereas by 1972, only 3 in 100,000 legal abortions resulted in the woman's death; quoted in Tribe, Lawrence H., Abortion - The Clash of Absolutes (W.W.Norton and Company, London, 1990), p. 36
9. Tribe, Abortion, p.41
10. Tribe, Abortion, p.37
11. This proposed revision suggested three defences to a charge of criminal abortion:
    (1) That continuation of the pregnancy would gravely impair the physical or mental health of the mother,
    (2) That the child was likely to be born with grave physical or mental defects, or,
    (3) That the pregnancy resulted from rape or incest;
    quoted in Tribe, Abortion, p.36
12. 1968 dollars.
13. Craig and O'Brien, Abortion, p.220
14. In 1973 NARAL changed its name to the National Abortion Rights Action League, as repeal had been achieved and the right to an abortion declared by the Supreme Court. It is now known as the National Abortion and Reproductive Rights Action League.
15. The bill legalising abortion was passed by only 1 vote, and the campaigns for and against its passage were conducted by the now-familiar pro-abortion feminist bloc and the anti-abortion mainly Roman Catholic lobby.
16. 410 U.S. 179 (1973)
17. The case was brought anonymously, and "Jane Roe" only revealed her true identity as Norma McCorvey in 1980. She also admitted that she had not, in fact, been gang-raped; the pregnancy was simply unintended, but she thought at the time that it would make it easier to get an abortion if she claimed rape. In relation to public opinion, this would seem to be the case, but nevertheless, the fact that she felt it necessary to make this claim in no way undermines the

Roe ruling. It is actually a serious indictment of the state of the abortion laws at the time, especially in relation to poor women.

18. The Court members voted thus:

    Delivering the opinion - Justice Blackmun
    Concurring - Chief Justice Burger, Justices Brennan, Douglas, Marshall, Powell and Stewart
    Dissenting - Justices Rehnquist and White

19. Tribe, Abortion, p.10
20. This is generally true, except perhaps in wartime, when fundamental rights have been abridged (often with impunity). The compelling interest is usually national security, as for example, with the internment of Japanese-Americans during World War Two.
21. The stages of pregnancy can be divided into 3 trimesters, indicating general levels of development of the fetus. The first trimester is from 0 to 12 weeks, with pregnancy being dated from the first day of the last menstrual period (thus if a woman is said to be 10 weeks pregnant, 8 weeks have elapsed since fertilisation). The second trimester is from 12 to 24 weeks, and the third trimester is from 24 to 36 weeks. There is currently debate over whether the trimester system is now applicable, following increases in the time that a fetus may be considered viable.
22. Excerpt from Justice Blackmun's opinion of the Court; quoted in Craig and O'Brien, Abortion, p.29
23. On the doctor's prerogative: "...the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgement, the patient's pregnancy should be terminated"; Excerpt from Justice Blackmun's opinion of the Court; quoted in Craig and O'Brien, Abortion, p.29

    On the woman's prerogative, Justice Lewis Powell later wrote for the Court in the opinion of *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419 (1983): "we held in *Roe* that the right of privacy...encompasses a woman's right to decide whether to terminate her pregnancy"; quoted in Tribe, Abortion, p.13
24. Strict constructionists hold that interpretation of the Constitution should be confined to reading the document literally, with an informed sense of historical context and intention.
25. Graber, Rethinking Abortion, p.68
26. William Cates of the Center for Disease Control estimates that the price dropped from a national average of $500 to less than $150; quoted in Graber, Rethinking Abortion, p.67
27. Tribe, Abortion, p.145
28. Tribe, Abortion, p.145
29. Article V of the Constitution only allows an amendment if passed by a two-thirds vote in both the House of Representatives and the Senate, or if a constitutional convention is demanded by the legislatures of two-thirds of the States (which has never happened). The proposed amendment then requires ratification by the legislatures of, or special conventions in, three-quarters of the States. The last amendment prior to *Roe* was the 26th, reducing the voting age from 21 to 18 (ratified on June 30th, 1971).

30. Tribe, Abortion, p.145
31. Tribe, Abortion, p.142
32. It was vacated owing to Supreme Court rulings upholding state limitations on public funding of abortions, in the companion cases of *Maher v. Roe*, 432 U.S. 464 (1977) and *Poelker v. Doe*, 432 U.S. 59 (1977). The constitutionality of the Hyde Amendment itself, which has been enacted every year since 1977, was upheld in *Harris v. McRae*, 448 U.S. 297 (1980) (formerly *McRae v. Mathews*). State versions of the amendment were upheld in *Williams v. Zbaraz*, 448 U.S. 358 (1980).
33. Quoted on the Planned Parenthood www site, "Family Planning in America - The 1970s", *available at* http://www.igc.apc.org/ppfa/fpam-70.html
34. 428 U.S. 132 (1976)
35. 428 U.S. 552 (1976)
36. *Carey v. Population Services International*, 431 U.S. 678 (1977)
37. Reagan claimed they were "...an abuse of power as bad as the transgressions of Watergate [Iran-Contra anyone?] and the bribery on Capitol Hill"; quoted in Congressional Quarterly Weekly Report, 15 (March 1980), pp.733-4; quoted in Craig, Barbara Hinkson, and O'Brien, David M., Abortion and American Politics (Chatham House Publishers, Chatham, NJ, 1993), p.169
38. President Reagan's Remarks at the Annual Convention of National Religious Broadcasters, 30th January 1984; quoted in Craig and O'Brien, Abortion, p.171
39. Upheld as constitutional in *Rust v. Sullivan*, 111 S.Ct. 1759 (1991)
40. Tribe, Abortion, p.19
41. Stevens was appointed by President Ford in 1975.
42. *William Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989)
43. Upholding the Missouri law - Chief Justice Rehnquist, Justices Kennedy, O'Connor, Scalia and White
    Striking down the law - Justices Blackmun, Brennan, Marshall and Stevens
44. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419 (1983)
45. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)
46. Craig and O'Brien, Abortion, p.99
47. Extract from the opinion of the 8th Circuit Court in *Webster*, 851 F.2d 1071 n.5 (8th Cir., 1988)
48. Tribe, Abortion, p.176
49. Craig and O'Brien, Abortion, p.296
50. Craig and O'Brien, Abortion, p.190
51. *Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992)*
    Upholding the Pennsylvania law - Justices Blackmun, O'Connor, Kennedy, Souter and Stevens
    Striking down the law -Chief Justice Rehnquist, Justices Thomas, Scalia and White

52. Ireland is the president of NOW; quoted in Craig and O'Brien, Abortion, p.325
53. This pill is an abortifacient (a method or device that achieves an abortion), which was approved by the Food and Drug Administration in July 1996, despite fears over its safety.
54. Craig and O'Brien, Abortion, p.58
55. Quoted on the Refuse and Resist! Reproductive Freedom Index, *available at* http://www.calyx.com/~refuse/ab/071997dayton.html
56. The Lambs of Christ first appeared in December 1996, blockading a Planned Parenthood clinic in Rochester, NY. CRIB first appeared in January 1997, blockading a clinic in Englewood, NJ.
57. This followed the realisation that existing federal law was inadequate to prevent anti-abortion blockades, after the Supreme Court ruling in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 265 (1993)
58. Quoted on The Abortion Rights Activist www site, *available at* http://www.cais.com/agm/main

CHAPTER TWO

Who shapes the dispute?

"4-8-6-10. Why are all your leaders men?"
Pro-choice chant at Dayton, Ohio

"Because men are the leaders"
Response of Flip Benham, Operation Rescue[1]

This chapter discusses the different world-views and philosophical beliefs underpinning the pro-life and pro-choice movements, and seeks to provide an understanding into the nature and ferocity of words and actions on both sides of the abortion dispute. Central to the dispute is the biological status of the fetus, whether or not it should be considered a full human being. Furthermore, Rosalind Petchesky notes that abortion is "...the fulcrum of a much broader ideological struggle in which the very meanings of the family, the state, motherhood, and young women's sexuality are contested"[2]. Thus of especial importance are the views held by activists on the role of women within the family and society as a whole. Yet in this dispute between fiercely opposite sides, the voice of the majority of the American public is often subsumed. Consequently, this chapter also seeks to discuss the views of the often-ignored non-activist population, and the effect of their views on the current status of abortion in the United States.

Deciding if the fetus is fully human is crucial to defining the dispute, as one's belief of when life begins is crucial to one's views on abortion. Does it begin at conception, when sperm and ovum join? Or is it at implantation of the zygote in the womb? Perhaps humanity is bestowed at (roughly) ten weeks, when the embryo becomes recognisably human and can be described as a fetus. The indicator may be viability, the point at which the fetus could survive outside the womb, albeit with assistance. The current maximum limit to viability is 20-21 weeks, determined by the development of the lungs. Or is a fetus finally human at birth? The biological status of the fetus is ambiguous, its humanity unproven, located somewhere "...in a continuum that stretches from a single sex cell to a newborn human infant"[3]. Dr. John Willke, of the National Right-to-Life

Committee, asserts that the embryo must be a separate human from the moment of conception, since the crucial 46 chromosomes that determine a person's unique individuality are all present in the fertilised egg[4]. However, the subsequent development of the embryo is not pre-determined by these chromosomes. It may turn out to split into two embryos (twins), or two embryos may combine into one. Furthermore, cell development is somewhat random. Even a future person's fingerprint is not genuinely present in some programmed sense in the fertilised ovum, so how can anything as subtle and unique as the human brain or personality be present[5]? Thus at most, what can be established is that the fetus is a potential human life, though not a full one. Consequently the beliefs of the activists in the abortion dispute turn on perceptions, drawing conclusions about the moral status of the fetus.

The central tenet of pro-life doctrine is the belief that abortion is murder. The "unborn child" (the fetus) is viewed as human with all associated rights that post-natal humans expect, not as an abstract "potential human being". One test of pro-life rationale that abortion is murder might be that one cannot do to an embryo or fetus what one would not be willing to do to a baby[6]. Society does not condone infanticide, so it should not condone abortion, as the "pre-born child" should have the same rights as a post-natal baby. This view of the status of the fetus may extend to not allowing abortion in case of genetic defects, as presumably we would not kill a 2 year-old child with such a defect (though a condition such as Tay-Sachs may kill it at this age), or in cases of rape or incest. With such a view of the inviolability of human life, many pro-life advocates are not even willing to permit abortions in order to save the mother's life. Anti-abortion advocates sometimes liken themselves to the anti-slavery abolitionists, in defending helpless persons; as with fetuses, African-Americans were not recognised as full people before the Civil War. Yet it is their belief in the essential humanity of the fetus that has led to its portrayal as a symbol of innocence and hope, mercilessly butchered by uncaring mothers. Medical technologies such as ultrasound scanning have been used to create what has almost become a "cult of the fetus"[7]. This was utilised to great effect in the 1984 film *The Silent Scream*, which used sonography to show that the fetus felt pain during an abortion (which has never been proven). To an extent, the pro-life movement has divorced the mother from the fetus in the abortion dispute, believing them to be separate individuals. Yet even with this focus on the fetus, it is not the only "person" at issue, as views on abortion necessarily encompass views of motherhood, women's sexuality, and the sexual act itself.

Pro-life advocates believe men and women to be intrinsically different, as illustrated by the opening quotes. Men are the leaders, whereas women should fulfil the "appropriate" and "natural" roles of wives and mothers. Or in Kristen Luker's words, "Men are suited to the public world of work, and women are best suited to bear children, manage homes, and love and care for their husbands"[8]. This is not to say that feminist beliefs have not made some small inroads - one female Operation Rescue activist was recently quoted as saying that "We're equal, but we're delicate vessels to be protected"[9]. Yet nonetheless, traditional gender roles are still ascribed to. In the opinion of most pro-life supporters, motherhood is the most fulfilling role that a woman can have, and to have a career outside the home is to diminish that role, as raising children is a full-time, demanding job in itself. Having children is a woman's biological and social destiny, therefore women cannot, and more importantly should not try to "have it all". Legal abortion devalues the status of motherhood, as it becomes an option that some women may forego. The "choice" regarding abortion was made by the woman when she decided to have sex. As Cook *et al* point out, if motherhood is seen as one alternative, then women whose identity is centrally involved in the roles of wife and mother may seem less "worthy" or valuable than women with other resources to offer[10]. Abortion also diminishes men's duty to be sexually responsible and, in a strange twist, may oppress women rather than liberate them. Pro-life exceptions Feminists for Life assert that efforts to establish abortion as a legitimate solution to the problems of being a woman in a male-dominated society surrender women to pregnancy discrimination. They also believe that pro-abortion feminists have corrupted feminism by embracing male standards, which hold that it is permissible to treat "unequals" (fetuses) violently, thus amounting to oppression of the weak (which reinforces male domination)[11]. However, these pro-life activists are at odds with their more usual allies in the feminist pro-choice movement, and also with most of the views of the vast majority of anti-abortion campaigners.

Seen from a gender-role perspective, abortion is also offensive to this pro-life majority as it undermines male decision-making power by allowing women control over their fertility. In doing so, as Luker asserts, it breaks up an intimate set of social relationships between the sexes that has traditionally surrounded (and in the ideal case protected) women and children[12]. But controlling a woman's fertility extends far further than simply controlling abortion, as it encompasses contraception and availability of sexual education and

information. Being a parent (as opposed to "parenting") is seen as a natural state, not something that can be learned or should be "planned" to occur at a set date. Sexual intercourse is generally regarded as sacred, as it is capable of being transcendent (bringing another human life into existence). Therefore, it should be undertaken within marriage in order to procreate, or at least with the knowledge that procreation may take place. The purpose of sexuality is believed to be to have children, and there is no "ideal" family size. Many pro-life supporters feel that there is an anti-child sentiment in US society, expressed in the strong cultural norm that families should have only two children[13]. Cook *et al* note that the strongest predictor of attitudes against abortion is the belief that non-marital and amative sex is immoral[14]; other predictors include opposition to euthanasia and support for the death penalty (although at first this support appears contradictory[15]). Artificial contraception, including abortion, interrupts this natural, procreative aim of sexual intercourse. Included in this argument is the concept that legal abortion encourages sex, as it makes it harder for women to choose not to have sex before marriage. It is, in effect, a get-out clause. Thus many feel that IUDs and the pill are also wrong, as these act as abortifacients, as do other devices such as condoms which serve to prevent conception artificially. Moreover, the availability of contraception and sexuality education is what encourages unmarried persons (especially teenagers) to have sex in the first place. This is the basis of the many parental consent statutes in state laws on sex education and within abortion statutes. Policies of comprehensive sex education and availability of contraception in effect gives children encouragement to engage in activities of which their may parents disapprove[16]. These statutes also reveal a deep pro-life antipathy towards state intrusion into the family and home, which they see as weakening links between parents and child. There is also frequent pro-life opposition to programmes such as child care provision and anti-child abuse measures; the content is not necessarily opposed, but the idea of allowing the state into the sacrosanct territory of the home is resisted. In this the pro-life movement has certain ideological links with the Militia Movement - both are overwhelmingly right-wing and against intrusive state regulations.

The ideological basis of most pro-life doctrine is religious, with Christianity at its centre. There is a belief in the righteousness of His plan for the world, leading to doubts about the ability of individual humans to understand, much less control events such as conception[17]. Abortion breaks a divine law, as does artificial contraception, in making conception a personal decision rather

than a Godly one. That abortion is murder can be construed in Luke 1:40-44, which can be interpreted as establishing the humanity of the fetus[18]. Many pro-life advocates are Catholics, and the Roman Catholic Church itself is deeply involved in the movement. It either supported or quietly ran most right-to-life organisations in the US in the years immediately following the *Roe* decision. In March 1995 Pope John Paul II issued the *Evangelicum Vitae* ("Gospel of Life"), condemning abortion, contraception, and experimentation on human embryos. He declared that "...direct abortion...always constitutes a grave moral disorder since it is the deliberate killing of an innocent human being"[19]. On August 22nd of this year, the Pope visited the grave of Jerôme Lejeune, who organised direct action against abortion clinics in France. Considering that the Catholic Church is a highly hierarchical organisation with the Pope (who is generally regarded as infallible in matters of faith and morals) at its apex, this tacit show of support for direct action can only serve to further aggressive Catholic anti-abortion activism in America. As committed to the pro-life cause are evangelical Protestants (most Baptists, Assemblies of God, Apostolic Pentecostals, etc.), whose individualistic theology lends to a literal interpretation of the Bible. Whereas many "mainline" Protestants (Methodists, Lutherans) often regard abortion as a "tragic necessity", most evangelicals see it as a proscribed evil. Cook *et al* observe that, even among Catholics and evangelicals, there are (in total) more pro-choice supporters than pro-life, but among highly active Catholics and evangelicals, there are more pro-life supporters[20]. Conservative and Reformed Jewish synagogues believe that abortion is mandatory when the life and health of the mother is in danger, but many Orthodox Jews take pro-life positions. Thus increased religiosity indicates a more restrictive position on abortion and birth control, except in mainline Protestants.

The central tenet of pro-choice doctrine is that choice over the abortion decision is crucial to women's reproductive freedom and gender equality. Men and women are seen as essentially equal, with control over reproduction being vital for women to be able to live up to their full potential. If a woman cannot choose whether or not to have a child, then motherhood remains the traditional role to which she can be potentially confined at any time, given society's dominance by males and inadequate support for single mothers. Restrictive abortion and contraceptive policies are therefore seen as upholding this male dominance and the old sexual "double standard". The "choice" regarding reproduction is not one that was made when the woman had sex. The distinction is made between choosing to have sex and choosing to have a child.

Contraception may have failed, or the pregnancy may have resulted from rape or incest. Also, if some pro-life supporters allow an exception for abortions resulting from rape or incest (though most do not) then at issue is not the status of the fetus or the pregnancy itself, but the supposed guilt of the woman in having had illicit sex. Men can have sex and walk away, but women are left to deal with a potential unwanted pregnancy, which may result in parenthood, for which the woman may be emotionally and financially unprepared. Contraception is seen as an essential ingredient of sexual activity, but if this fails, abortion needs to be an option. Multiple abortions, however, are considered by some to be morally wrong, as bringing a fetus into existence when it could have been avoided is irresponsible. This opposition is also, in part, pragmatic, as multiple abortions carry a gradual increase in risk to health. Pro-choice supporters advocate "planned pregnancy" and preparedness for parenting, believing that a child should ideally be born to parents (or a parent) who are financially, socially and emotionally ready to support that child for the next 20-odd years. It is thought to be worse to give birth to a child that one cannot effectively parent than abort a fetus. Pro-choice advocates point out that pro-life supporters are rarely heard asking for better post-natal support for poor mothers or child care services, whose presence would be likely to reduce abortions by making continued pregnancy a more viable option. Many pro-choice supporters believe that for proponents of "pro-life" policies, "Life begins at conception and ends at birth"[21]. Parenting needs to be optional in order to make it more effective, which can be achieved in part by contraception, but if this fails, by abortion.

Pro-choice activists do not consider abortion to be murder, even if it takes a potential human life. They emphasise that an embryo or a fetus is not the same as a post-natal child, and besides, Judeo-Christian theology does not place an absolute value on human life - there are, for example, cogent moral arguments for war. For pro-choice advocates, the embryo does not have full rights from conception, rather, there is a gradualist approach as the pregnancy progresses. The fetus is seen as having the rights of a potential person, but not those of a full person until birth. Abortion is seen as a personal decision that individuals should make, rather than the state or churches. As one pro-choice activist commented:

> ...you can't deny that abortion is ending something that's alive, but we take the position that the decision to bear a child, to raise a

child, is a private decision - an ethical private decision - and the state has no [legitimate] interest in regulating it[22].

Pro-choice activists believe in moral relativism, using one's own judgement rather than obeying a set moral code or absolute standards. Sexual intercourse is seen as an end in itself, rather than necessarily for conception. Pro-choice activists point out that, for much of a lifetime, the main purpose of the sexual act is not to produce children but to give mutual pleasure and intimacy. Luker notes that "the belief in the basically procreative nature of sex leads to an oppressive degree of social regulation of sexual behaviour, particularly the behaviour of women"[23]. Sex can be sacred, in the sense of dissolving the boundaries between partners, and is potentially transcendent when people feel secure and trusting. But gaining this emotional trust requires practice, therefore there is no denigration of sex that falls short of transcendence[24]. They are unconcerned in any moral sense about teenaged or non-marital sex, but do share practical considerations with pro-life activists that teenagers may be unprepared for parenthood. These concerns, however, thereby extend to promoting contraception as a means of preventing teenage pregnancies (and abortion if necessary), rather than denying contraceptive services.

Advocates of pro-choice are overwhelmingly secular and humanist in their outlook, although spirituality is evident in areas in which understanding is not well advanced (such as the origin of the universe or the meaning of life). Intellect, rather than faith in a religious tract, is trusted. Of course, there are exceptions such as the Religious Coalition for Abortion Rights, but like the pro-life exceptions, these are rare. A feminist outlook, rather than a religious one, is the usual core of pro-choice beliefs, with abortion and reproductive rights seen as essential parts of the struggle for equality. Given the ability to alter Nature (which is not sacred), it would be immoral not to do so, especially when those alterations will diminish human pain and suffering. Abortion is a glaring example of this. For pro-choice activists, there is certainly no faith in "His" plan for the world - rather, there is there is more likely to be belief in "her" plan.

The diametric opposition of the activists' beliefs is reflected in their composition. Kristen Luker's study of activists in California[25] found pro-life and pro-choice supporters differed widely in their lifestyles. Over 80% were found to be women, but a disproportionate number of pro-life leaders were male. Their beliefs were shown in their ideas of family life - pro-life women tended to marry

earlier, and have more children at an earlier age than pro-choice women. Religion was also a crucial factor, as over 90% claimed religious faith (80% of whom were Catholics, 9% were Protestant). In contrast, 63% of pro-choice women had no religion, although 22% were "vaguely" Protestant. Overall, pro-life women were found to be worse educated, have lower incomes, and be far less likely to be employed in the labour force than their pro-choice counterparts. Only 63% of pro-life women worked, almost all of whom were unmarried. Of the married pro-life women, only 14% had any personal income not derived from their husbands, who themselves were likely to have lower incomes than husbands of pro-choice women. Mark Graber found that pro-choice views are very strong in the societal "elites"; a survey of 2000 leaders of various professions indicated that 2 in 3 such Americans believed that women should have the right to terminate a pregnancy for any reason[26]. He also points out that these well paid and highly educated Americans happen to dominate in the judiciary, where pro-choice supporters have won their greatest victories.

Yet although the beliefs of the activists shape the dispute, there is a need to consider the views of the vast majority of Americans. Since 1965 the National Opinion Research Center (NORC) has conducted an annual survey of views on abortion, dividing responses into two categories, "hard" and "soft". The "hard" or "medical" reasons category allows for abortion if a woman's health is seriously endangered, if the pregnancy results from a rape, or if there is a strong chance that the child will be deformed. The "soft" or "social" reasons category allows for abortion if a woman is on a low income and cannot afford more children, if the woman is unmarried and does not want to marry the father, or if the woman is married and does not want any more children. Results have consistently shown overwhelming support by the majority of Americans for abortion to be allowed in the "hard" circumstances, whereas support for abortion for "social" reasons has wavered around 50%[27]. The majority of Americans favour legalised abortion, but with restrictions. Only 8% are opposed to any legal abortion, whereas 31% would allow abortion under any circumstances[28]. Therefore neither pro-life nor pro-choice activists can claim that their position encapsulates what the majority think, although the pro-choice movement would appear to have the most (albeit limited) support. However, deviations from the hard-line positions exist among this majority non-activist population. For example, many non-activist pro-life supporters favour state funds being used to support unwanted children, and support contraception and sex education. Also, a quarter of non-activist pro-

choice supporters do not favour contraceptive advice for adults[29]. This implies different motivations for some non-activist supporters on both sides.

Despite public opinion favouring abortion with restrictions, most abortions taking place in the US "...do so for precisely the reasons that most Americans disapprove: financial or psychological reasons or convenience"[30]. Eighty per cent of all legal abortions are carried out on unmarried women, with abortions owing to rape, incest, health risk or possible deformity accounting for only 5% of procedures[31]. The majority of Americans may be unaware of this situation, in which the laws of many states (that only allow for abortions in conditions similar to the NORC's "medical" reasons) are being flouted. But some Americans must be aware of this, as female relations would have obtained abortions for other than the strict "medical" reasons, with the strict wording of these statutes being deliberately ignored by sympathetic physicians. Although abortion is legal, it is not being carried out for the reason that most Americans want it to be - necessity. But considering that a majority of abortions are "unnecessary", this indicates a widespread desire and need for women to be able to control the decision to reproduce.

ENDNOTES

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3. Luker, Kristin, Abortion and the Politics of Motherhood (University of California Press, London, 1984), p.4
4. Tribe, Lawrence H., Abortion - The Clash of Absolutes (W.W.Norton and Company, London, 1990), p.117
5. Tribe, Abortion, p.118
6. Cook, Elizabeth Adell, Jelen, Ted G. and Wilcox, Clyde, Between Two Absolutes - Public Opinion and the Politics of Abortion (Westview Press, Oxford, 1992), p. 87
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9. Report on the Dayton blockade; quoted on the Refuse and Resist! Reproductive Freedom Index www site
10. Cook *et al*, Between Two Absolutes, p.9
11. Quoted on the Feminists for Life www site, *available at* http://copper.ucs.indiana.edu/~ljray/lifelink/FFL.html
12. Luker, Abortion, p.162
13. Luker, Abortion, p.170
14. Amative, as opposed to procreative sex, is intercourse for mutual sensual pleasure and enjoyment.
15. Approval of euthanasia is three times more likely among pro-choice supporters than pro-life supporters; quoted in Cook *et al*, Between Two Absolutes, p.75

    I have found three bases upon which pro-life advocates justify their support for the death penalty:

    (1) It is a deterrent to murder, therefore it is pro-life,

    (2) A death sentence is earned, whereas abortion affects the innocent,

    (3) "To kill" has not been fully translated in the modern Bible.

    On the third point, there are three words used throughout the Hebrew Bible for "kill", just as there are several words used for "love". The three meanings are "to murder" (without justification), "self-defence" (even if pre-emptive) and "ordained by law" (such as an execution). The 5th Commandment uses the first meaning (construed as against abortion), whereas presumably the death penalty falls under the third meaning. Also, perhaps murder of abortion clinic doctors and staff may be "justified" under the second meaning, in defence of fetuses unable to defend themselves.
16. Luker, Abortion, p.173
17. Luker, Abortion, p.186

18. "And it came to pass, that, when Elisabeth heard the salutation of Mary, the babe leaped in her womb, and she spake out with a loud voice. For lo, as soon as the voice of thy salutation sounded in mine ears, the babe leaped in my womb for joy". See also Exodus 21:12 and Psalm 139:13,16; quoted in Cook *et al*, Between Two Absolutes, p.98
19. Quoted in Francis D'Emilio, "Abortion, Euthanasia, Embryo Experiments Always Immoral", on the Yahoo! News Service (30/3/95), *available at* http://www.yahoo.com
20. Cook *et al*, Between Two Absolutes, p.101
21. Luker, Abortion, p.173
22. Luker, Abortion, p.184
23. Luker, Abortion, p.177
24. Luker, Abortion, p.178
25. Luker, Abortion, p.195-6
26. Graber, Mark A., Rethinking Abortion - Equal Choice, The Constitution And Reproductive Politics (Princeton University Press, Princeton, NJ, 1996), p.144
27. Craig, Barbara Hinkson, and O'Brien, David M., Abortion and American Politics (Chatham House Publishers, Chatham, NJ, 1993), p.249-50
28. Anti-abortion statistic from a 1991 survey; quoted in Cook *et al*, Between Two Absolutes, p.140. Pro-abortion statistic from a 1990 survey; quoted in Craig and O'Brien, Abortion, p.265
29. Cook *et al*, Between Two Absolutes, p.139
30. Craig and O'Brien, Abortion, p.253
31. Craig and O'Brien, Abortion, p.253

CHAPTER THREE

The question of rights

"All citizens have a general right...to decide for themselves ethical and personal issues arising from marriage and procreation"
Ronald Dworkin[1]

"Equal rights for unborn women!"
Pro-life rally chant[2]

Most Americans believe that they have certain unalienable rights, derived from the Declaration of Independence and the Constitution, and also from a sense of "natural" (often "God-given") liberties inherent to every individual. Among these rights the right to life must be regarded as the most basic (although it may be forfeited). Yet the perception of one's immutable rights varies - one person's "choice" can be another person's "murder". Thus the language of rights is the language of no compromise. Consequently this chapter focuses on the often absolutist view of the rights of the participants in the abortion dispute - those of the fetus, its father, the pregnant woman's family, and even the central yet increasingly marginalised figure, the woman herself. The status of even more fundamental rights will also be discussed. Is there a right to privacy, or one's own body? And, why is the right not to reproduce (if there is such a thing) seen differently from the right to reproduce, given that both are decisions of the most personal and private nature.

The question of whether a fetus should be accorded legal rights is at the centre of the contemporary abortion dispute. It has been pushed to the fore by extreme fetocentrist lobbying on the part of the pro-life movement, the consequence of which is that fetal images now permeate the American cultural landscape[3]. These images are taken out of social and biological context, inviting us to view woman and fetus as separate individuals throughout the pregnancy. This false separation serves to bolster the movement for "fetal rights", as distinct from those of the woman who carries it. In the wake of the *Webster* ruling, the

increased allowance of individual states to regulate abortion (excepting "undue burdens") has pushed fetal rights legislation forward. Although over half the states subscribe to the "born alive" rule, whereby only fetuses born alive have any legal standing, this leaves the rest with varying levels of rights accorded to the fetus. In the early 1980s a New Hampshire court ruled that a fetus was a "household resident" who could collect on a homeowner's insurance policy[4]. Other states have statutes providing, for example, for manslaughter charges to be brought against the driver of a car if he or she hits a pregnant woman, and as a result the fetus dies. There is also evidence that fetal rights have been regarded as superseding the rights of the mother. In the 1987 case of Angela Carder[5], according rights to her fetus proved fatal to her. A terminal cancer patient with probably less than a month to live, Carder was also twenty-six weeks pregnant. Aware of fetal rights litigation by pro-life activists, her hospital decided to condemn her to death in favour of the fetus. They prolonged her life instead of treating the cancer, fearing that chemotherapy could harm the fetus, despite Carder's protestations that she wanted to live. And also despite medical opinions that a Caesarean would kill her, the decision was finally taken to operate (and sanctioned by the District of Columbus Superior Court) on the premise that the fetus could be viable, and that the mother was going to die anyway. Carder's incredible resilience in fighting her type of cancer (one of only two people to live past childhood with Ewing's sarcoma) was ignored. In the event, the fetus was dead when presented to Carder's parents, and Carder herself died two days later, the Caesarean being the contributing factor. In this clear case, the wishes of a conscious, living woman were ignored in favour of the interests of a fetus that was, even now, only possibly viable.

In this case a Supreme Court ruling was also ignored. As an American Civil Liberties Union (ACLU) lawyer argued to the D.C. Superior Court in Carder's case, "The Supreme Court [has] unequivocally ruled a woman's life and health must always prevail over the fetus's life and health"[6]. But owing to fact that the woman and fetus are physically joined, it may be impossible to define the boundaries of each entity's life and health. Consequently, since the mid-1980s, some of America's largest corporations, such as General Motors and Du Pont, have had "fetal protection" policies which aim to guard against possible fetal defect (thereby preventing costly lawsuits) by limiting the areas in which women can work. In the case of American Cynamid[7], in 1978, fertile women under 50 working in areas with contact with certain industrial toxins were given the "choice" of sterilisation or termination of employment. It was feared these toxins

would case birth defects, although men were not subject to the same "choice", despite studies indicating some of the same toxins could also cause male infertility of defects in sperm. Although compensation for this policy was eventually obtained in 1983, some women were sterilised, as it was the only option in towns where American Cynamid was the main employer and other job opportunities were scarce. Such discrimination was struck down by the Supreme Court in 1991, but before this, "fetal rights" had been practically extended in some instances to include even potential fetuses.

Fetal rights have also been extended to include "fetal endangerment", where some pregnant women have been accused of pre-natal "child abuse". This encompasses drug and alcohol abuse by pregnant women, which may have a detrimental impact on their fetuses. In a recent example, Angela W of Wisconsin was detained at a drug treatment centre for three weeks, as she was a cocaine user and pregnant. By this point, the pregnancy had reached the third trimester, thus the fetus became a "person" in its own right, and so the appeal court ruled that her rights were not violated because only the fetus was detained[8]. The state's compelling interest was in protecting the rights of the fetus, but in doing so it completely overrode the woman's rights by restricting her movement. This policing of motherhood is on the rise, with over 200 such cases throughout 30 states in the past few years, often encouraged by pro-life activists wishing to protect the "unborn child" from the enemy - its own mother. Yet ironically, this criminalisation of motherhood may cause the abortion rate to rise, as drug-addicted mothers may prefer to abort rather than face increasing interference by the "uterus police", or the possibility that the baby might be born addicted. Yet this policy may also extend to those using drugs such alcohol or tobacco. The public, it would appear, is divided over this issue - a Gallup poll found that 50% agreed a pregnant woman should be held legally liable if she drank, smoked or refused obstetrical surgery[9]. But what if America's favourite drug, caffeine, was included, bearing in mind that a recent study has indicated that coffee must be considered a clear risk factor in spontaneous abortion or miscarriage[10]. The policing of pregnancy may even include not following medical advice - in Wisconsin in 1996 a woman who had disclosed her intention of giving birth at home, over a doctor's objection, was held in custody. Thus the ACLU believes that acceptance of the "fetal rights" concept in law could bring about state restrictions and spying on a wide range of private behaviour - having one's privacy invaded would be the price of pregnancy[11].

According rights (and limited legal "personhood") to the fetus necessarily detract from those of the woman. Legally the state cannot compel anyone to use their body to preserve those already born, such as donating bone marrow to save another's life, so why should it force a woman to continue a pregnancy, which may entail risks to her own health? Tribe points out the case of Kitty Genovese who was murdered in New York City in 1964. Although 38 of her neighbours were aware of what was happening, no-one acted[12]. Their actions may be morally indefensible, but they violated no statute; there is no "Good Samaritan" ethic in American legal tradition that compels a person to aid another. Thus even if a fetus is accorded limited personhood, its mother does not necessarily have an obligation to sustain its life. Although pro-life activists have called for "equal rights for unborn women" (neatly turning the feminist credo on its head), this equality is illusory, as the rights in question are part of a zero-sum equation. For the fetus to gain rights is for the woman to lose them.

Whatever the legal status of the fetus, it cannot lobby on its own behalf. Consequently, the right of the mother to decide by herself whether or not to have an abortion has become increasingly questioned, as fathers assert their right to participate in the abortion decision. Admittedly, in genetic terms the fetus is as much a part of the father as it is of the mother, and given that blood ties are of great importance in our society, should they not have an equal say in what happens to a "jointly-owned" fetus? Many "father's rights" lawsuits have been filed in order to prevent abortions, but these forcible attempts to prevent women from exercising their right to choose is grounded in wanting to continue male domination over female sexuality. Eric Conn of Indiana, for example, attempted to prevent his wife from having an abortion, only hours after she had filed for a divorce[13]. Such actions are whole-heartedly supported by the pro-life movement. Pro-life activist John Willke - author of a book entitled *Closed: 99 Ways To Stop Abortion* - asserts that legal abortion assails not only the fetus but the primacy of male control. Pro-choice women "...do violence to marriage..." because they "...remove the right of a husband to protect the life of the child he fathered in his wife's womb"[14]. Aside from the fact that many pregnancies take place outside of marriage, allowing men equality in the abortion decision (like according rights to the fetus) detracts from the rights of the woman. As Janet Hadley points out, the corollary of illegal abortions is not forced fatherhood, but forced motherhood[15]. Furthermore, no-one has suggested that a fetus's father should be able to able to pressure the woman into having an abortion, so why should he be able to pressure a woman into not having an abortion? Another reason that fathers

should not be accorded equality in this decision is that many women choose to raise a child by themselves, with 87% of single women believing that it is acceptable to bear and raise children without getting married[16]. Thus the fathers of the fetuses may be consulted over the abortion decision, but to grant any greater say is to invade a woman's private sphere concerning her pregnancy.

The rights of young women considering an abortion are further encroached upon by parental rights legislation, upheld as constitutional in Supreme Court rulings such as *Hodgson v. Minnesota*[17] and *Ohio v. Akron Center for Reproductive Health*[18]. Parental involvement in a minor's abortion decision is currently enforced in 35 states, requiring either consent or notification. Such legislation gives parents vastly increased control over their children's lives, and particularly jeopardises minors' access to abortion services, as well as sex education, information about sexually transmitted diseases, contraception, pregnancy testing and pre-natal care. Consequently this threatens minors' own constitutional rights, and also their health. Parental rights legislation is unnecessary, as an estimated 61% of the 400,000 women under 18 who have an abortion each year, do so having consulted at least one parent[19]. Also, the younger the minor, the more likely she is to have voluntarily discussed the abortion with a parent. Furthermore, consent and notification laws serve to delay and may prevent an abortion. The parents of a young woman may be pro-life, and may not consent to an abortion, which prevents that woman exercising her fundamental right to choose. This is contradictory when compared to other legislation regarding such personal decisions undertaken by minors, as nearly all states allow minors themselves to consent to medical services relating to these health concerns, particularly services relating to reproduction and sexual activity. Women under 18 may consent to give their child up for adoption in all but four states and the District of Columbia, without parental consent, and may consent to a Caesarean birth (a far more dangerous procedure) in all states, also without parental consent.

Such consent and notification laws may also endanger the young women themselves - the AMA recognises that involving a parent in the abortion decision may bring about emotional or physical harm, especially if incest is involved. In the case of Spring Adams, a 13 year-old Idahoan, it resulted in her death. Adams was on welfare, and by 1989 the state of Idaho had banned Medicaid funding of all except therapeutic abortions. Her father, who had impregnated her, discovered that she was planning to travel to Oregon to have an abortion, and

killed her. The AMA also recognises that the desire to maintain secrecy has been one of the leading reasons for illegal abortion deaths since the *Roe* ruling. The "judicial bypass" option that 18 states include - whereby a minor may request a waiver of parental involvement - undermines this secrecy, especially in small towns where the judge or other court officials may know the woman concerned. Bringing the abortion decision into the courtroom also serves to intimidate and shame many of these young women. Thus doctor-patient confidentiality is especially necessary in the case of minors planning an abortion. These obstructive policies concerning abortion rights may lower rates of legal abortion within the state that enacts the restrictions, but as a whole they are counter-productive. Such limitations typically increase the rates of illegal abortions within that state, and also increase the legal abortion rates in bordering states with more liberal laws. Massachusetts, for example, mandates parental consent in the abortion decision, which causes some minors to travel to Rhode Island or New Hampshire to evade these requirements[20]. Thus instead of increasing parental involvement, this only forces young women who do not want to involve their parents to act in secret, and also raises the total expense of the abortion. Consequently, this also discriminates against poor young women. Again, granting rights in the abortion decision to a person or persons other than the woman herself results in limiting rights and choices for the pregnant woman.

The Supreme Court in the *Roe* ruling found the right to choose an abortion was part of the fundamental privacy right within the Constitution. Yet the ability of individual states to erect these restrictions, whether involving parental or father's rights, allows a partial abrogation of the right to privacy. This right, however, is disputed as it is unenumerated (not specifically mentioned) in the Constitution. The Ninth Amendment states that the naming of certain rights in the Constitution does not mean that other unnamed rights are not "retained by the people"; these unnamed rights include the right to travel, to vote, to marry and the right to privacy. Nowhere in the Constitution are these rights made explicit, but the Supreme Court has articulated various constitutional bases for these liberties, including the First, Fourth, Fifth, Ninth and Fourteenth Amendments. Although unenumerated, these liberties have been interpreted as being implicit in the penumbras of these amendments. In the case of the privacy right, the *Roe* ruling relied heavily on the privacy decisions in *Skinner v. Oklahoma*[21] and *Griswold v. Connecticut*[22]. In the former the Court recognised the right to reproduce without state interference; in the latter it recognised the right of married couples to decide whether to use contraceptives, thereby in effect

acknowledging the right to have sexual intercourse without having a child. In including abortion in the privacy right, Judge Bork believed that *Roe* was "...an assumption of illegitimate judicial power and [an] usurpation of the democratic authority of the American people"[23]. Bork's belief is based on the fact that privacy and abortion are not explicitly mentioned in the Constitution, and that rather than make policy, the Supreme Court should abide with the decisions and legislation of democratically elected representatives. This, however, is contrary to the whole purpose of the Court, in its function as an constitutional arbiter. The Court is able to rule definitively (in many instances) on matters that are too charged for elected politicians to deal with effectively. It was designed to be anti-majoritarian. Furthermore, Bork's strict constructionist attitude ignores the general legality and acceptance of the necessity of abortion at the time of the Constitution's writing; abortion was legal in common law until the "quickening" (the first movement of the fetus), with restrictions only being enacted from 1821. Moreover, if women were held not to have a fundamental liberty interest in controlling their fertility, then not only abortion could be prohibited, but sterilisation could be mandated by the state (as it was in Virginia on the "mentally deficient" until 1972). Partly in response to this, the American Bar Association approved a resolution in February 1990 recognising that "...the fundamental rights of privacy and equality guaranteed by the United States Constitution..." encompass "...the decision to terminate [a] pregnancy"[24]. Also, as the Supreme Court has ruled that the privacy right is fundamental, one must also remember that the Bill of Rights guarantees that fundamental liberties cannot by abrogated by the will of the majority, either by referenda or by statutes passed in the state legislatures. Government, whether local, state or federal, may not restrict fundamental rights, except in very compelling circumstances. Thus contrary to the Court's abortion rulings subsequent to *Roe* that uphold state restrictions (including parental consent and father's rights), these statutes may be unconstitutional in imposing limitations upon an individual woman's privacy in deciding whether or not to have an abortion.

The "general right" that Ronald Dworkin describes has been interpreted by the Supreme Court as being in the right to privacy within the Constitution. But, it is faced with limitations when it concerns perhaps the most important decision arising from procreation, namely, whether or not to continue with a pregnancy. Yet this general right does not extend to a citizen being able to determine how to act fully with his or her bodily person. There is no constitutional right to one's own body, as evident in statutes against prostitution, using proscribed drugs, and

suicide, and also even in such seemingly innocuous provisions as mandatory use of a seatbelt whilst driving a car. These laws could be construed as invading personal decision-making, yet they are still in place; thus the right to privacy is not all-encompassing, and may not be fundamental. Therefore, other constitutional principles must be argued as protecting reproductive choice and rights, even though the Supreme Court has not held so. Laws that restrict or outlaw abortion are necessarily discriminatory against women and their private decision-making, as only women can become pregnant and bear children, therefore only women are directly affected by such laws. Consequently, the abortion decision should be protected by the Fourteenth Amendment's guarantee of equal protection of the laws - equality is an explicit fundamental right that cannot be abrogated. Furthermore, abortion should also be protected under the First Amendment's Free Exercise clause that guarantees freedom of religion. All major religions regard abortion as a theological issue, with some (such as Catholicism) teaching that it is a sin, whereas others (such as Reformed Judaism) teach that it is a necessary act if the woman's life is in danger. Thus, the ACLU asserts that "bans on abortion force all citizens to conform to particular religious beliefs"[25], if it is established in law that the fetus is a person, as with the Missouri statute upheld in *Webster*. This violates the First Amendment prohibition on governmental encroachment on an individual's right to act according to her own beliefs or conscience.

ENDNOTES

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3. Petchesky, Rosalind Pollack, Abortion and Woman's Choice (Northeastern University Press, Boston, MA., 1990), p.xii
4. Faludi, Susan, Backlash (Chattus and Windus Ltd., London, 1992), p.461
5. Faludi, Backlash, pp.468-73
6. This was a direct quote from *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); quoted in Faludi, Backlash, p.472
7. Faludi, Backlash, pp.477-90
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13. Faludi, Backlash, p.440
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16. Statistic from a 1987 Women's View survey; quoted in Faludi, Backlash, p.441
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18. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990)
19. Henshaw, Stanley K. and Kost, Kathryn, "Parental Involvement In Minors' Abortion Decisions," Family Planning Perspectives, 5 (1992), pp.199-200; quoted on the ACLU Reproductive Freedom Project www site
20. Graber, Rethinking Abortion, p.69
21. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942)
22. *Griswold v. Connecticut*, 381 U.S. 479 (1965)
23. Quoted in Tribe, Abortion, p.82
24. Tribe, Abortion, p.82
25. Quoted on the ACLU Reproductive Freedom Project www site
26. Dworkin, Ronald, Life's Dominion (Harper Collins, London, 1993), p.247; quoted in Hadley, Abortion, p.197, note 2
27. Petchesky, Rosalind Pollack, Abortion and Woman's Choice (Northeastern University Press, Boston, MA., 1990), p.387

CONCLUSION

The question of whether abortion should be legal is, at heart, part of the question of whether women should be allowed control over the decision not to reproduce. But why is the decision to not to reproduce not accorded the same moral weight by many as the decision to reproduce, which is considered a fundamental human right? Society supports the latter without question, in providing welfare, education, health care, and so on. As Dworkin notes, deciding to continue a pregnancy is as much a private decision as deciding to have an abortion, so it is illogical for the state to fund care for a woman who chooses one course of action in response to her pregnancy and not another[26]. If one has the right to use government tax revenue in exercising the right to have a child, why should one not be able to use the same revenue in exercising the right not to have a child (also considering that the latter works out as far less expensive)? Therefore, the state should fund either both or neither; yet many who oppose abortion also oppose mass welfare, and with even liberal Democrats proposing "welfare reform" (financial cuts, by any other name), it is unlikely that abortion funding will increase. But abortion, as Petchesky believes, should be funded by government, not because it is a constitutional right but because it is a social necessity. It should be seen as more of a "necessary good" than a "necessary evil", as "the farther a society moves towards transforming the oppressive socioeconomic and cultural conditions that encumber the meaning/experience of abortion, the more will abortion become a genuine tool of freedom rather than an occasion of misery"[27]. In this respect, the mere legality of abortion is not enough. Access is the key, which has been aided by the FACE Act, but this was only went half-way. Abortion needs to be funded by government, and abortion services made available to all those who need it. Perhaps in this respect there should be an Abortion Rights Act akin to the Voting Rights Act of 1965, making reproductive choice a reality for all rather than an interesting feminist theory. Abortion is more than a civil liberty, more than an option available only to those who can afford it, it is a basic need in women's lives.

ENDNOTES

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WEB RESOURCES

Abortion Clinics Online
Available at http://www.gynpages.com/

The Abortion Report
Available at http://www.apn.com/info/abortion/sample.htm

The Abortion Rights Activist
Available at http://www.cais.com/agm/main

American Civil Liberties Union Reproductive Freedom Project
Available at http://www.aclu.org/issues/reproduct/hmrr.html

The Body Politic
Available at http://www.bodypolitic.org/dir/home.htm

California Abortion and Reproductive Rights Action League
Available at http://www.caral.org/

Capitol Area Christian News
Available at http://www.christiangallery.com/bray.html

Christian Coalition
Available at http://www.cc.org/

The Desecration Digest
Available at http://www.christiangallery.com/digest.html

Feminists for Life
Available at http://copper.ucs.indiana.edu/~ljray/lifelink/FFL.html

Findlaw: Internet legal resources
Available at http://www.findlaw.com/index.html

LifeLinks
Available at http://www.sehlat.com/lifelink.html

National Abortion Federation
Available at http://www.prochoice.org/naf

National Abortion and Reproductive Rights Action League
Available at http://www.naral.org/

New York Clinic Defense Task Force
Available at http://www.echnonyc.com/~nycdtf

Operation Rescue National
Available at http://web2.airmail.net/orn

Planned Parenthood Federation of America, Inc.
Available at http://www.igc.apc.org/ppfa

Pro-Life News
Available at http://jupiter.ee.pitt.edu/~frezza/AboutPLN.html

Pro-Life Web Ring Home Page
Available at http://www.gargaro.com/webring

Refuse and Resist! Reproductive Freedom Index
Available at http://www.calyx.com/~refuse/ab/index.html

The Right Side of the Web
Available at http://www.rtside.com/

The Ultimate Pro-Life resource list
Available at http://www.prolife.org/ultimate

Yahoo!
Available at http://www.yahoo.com/