

THE TREE OF LIFE
AND THE ABORTION QUESTION
(An Abortion Midrash)

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Our strongly conflicting political views of the proper role of the state in regulating abortion reflect deeper divisions in the way we view humanity and value human life. By means of a midrash, or parable, on the biblical story of the tree of knowledge of good and evil,¹ I hope to elucidate two – inevitably caricatured, ideal type – views of humanity.

I. Genesis.

The story of the apple² in the book of Genesis divides the account of the origins of humanity into two radically different parts. The beginnings of the biblical story³ tell how man and woman were created from the dust of the earth and the spirit of God. But it is the spirit of God that seems to predominate--the description of life in Eden seems most unearthly. In the Garden of Eden, it is not man but God who works: God plants the Garden, God irrigates it, and God makes food grow on trees.⁴ The first man and woman apparently live without labor, without needs, and without wants. They are unconscious of sexuality or of the differences between the sexes.⁵ They do not live by laws, because nothing, or almost nothing, is forbidden them. In any event, they would have no need for law, since nothing is lacking them.⁶ As far as we are told, they do not work, play, create, destroy, love, hate, pray, or have sex. They do not even have individual names or identities: Adam is referred to as "the man" and Eve as "the woman" until after the apple.⁷

¹ See Genesis 2:17, 3:1-24.

² I follow a Christian literary tradition in referring to the fruit of the tree of knowledge as an apple, despite the clear error of this identification. The text does not name the fruit; apples as we know them require frost and therefore would not grow in gardens where humans as we know them could walk around naked. In any event, the modern sort of apple does not give moral knowledge. The Talmud quotes R. Hisda's tradition (which also defies biology) that the fruit was grapes--not because grapes do give knowledge of a sort, but because "nothing but wine brings woe to man." TALMUD BAVLI, Sanhedrin 70a-b, translated in THE BABYLONIAN TALMUD (I. Epstein ed., Salis Diches & H. Freedman trans., Soncino Press 1961) (hereinafter SONCINO), 3 Seder Nezikin 478. But see id. at 476 ("Raba said, 'wine and spices made me wise.'"). Others speculated that the fruit was wheat, because children have no knowledge until after they eat wheat. Id. at 478.

³ Genesis 2:7, 2:22.

⁴ Id. 2:8-10. But see id. 2:15 ("God put the man into the Garden to work (or worship) it and keep it."). Whatever this task involved, it must have been significantly different from Adam's post-Eden earning of bread by the sweat of his brow.

⁵ See id. 2:25 ("And they were both naked, the man and his wife, and were not ashamed.").

⁶ JOHN RAWLS, A THEORY OF JUSTICE § 22, at 126-28 (1971) (maintaining that justice is not a relevant notion except in conditions of scarcity).

⁷ Compare Genesis 3:8-9 with id. 3:10-21. The Hebrew term for the man, *ha'adam*, has the ambiguity inherent in the English word "man": it can mean one man, or all mankind (including women), or a generic individual human being (male or female). In addition, it is Adam's proper name--the only difference is the presence of the definite article *ha*. 1 AVRAHAM EVEN-SHOSHAN, HAMILON HEHADASH 25 (1966).

Indeed, the text suggests that Adam and Eve are immortal. God tells the man that on the day he eats the fruit of the tree of knowledge he will die,⁸ yet Adam lives for several hundred years after the apple incident⁹. Thus, unless God's threat was empty, the curse must have been not that Adam would drop dead on that day, but that he would become mortal on that day.¹⁰

After the apple, all this changes. Now mortal, Adam and Eve are forbidden for the first time to eat the fruit of the tree of life.¹¹ They are exiled from Eden and forced to work for a living.¹² Instead of eating the fruit of trees planted and tended by God, they must eat the produce of the earth, which until then had been barren for lack of a man to work it.¹³ Adam, now with a proper name and not merely "the man," must earn his bread by the sweat of his brow; Eve will give birth in agony.¹⁴ Their eyes open, and they see that they are naked – knowledge of sex, embarrassment, and fear appear for the first time.¹⁵ In short, Adam and Eve, now knowing mortality and morality, begin to acquire the status – so clearly important to the biblical author – of neither God nor animal, a status fully achieved only after the Flood, when laws are first introduced.¹⁶ Eating the apple makes them into humans.

II. Exile v. As One of Us: Was the Apple the Fall or the Rise of Humankind?

The biblical story suggests at least two different views of what makes humans human, of what happened when man and woman ate the apple. One view is probably more familiar to those who learned Christian Bible stories as children. While it may be implicit in the Jewish sources, this view is fully developed only through the Christian concept of original sin.¹⁷ The apple of knowledge, by this view, marks the fall of man. Man started out God-like, but by eating the apple, sinned and ceased to be God-like. The sin is a matter of some difficulty: It is not clear how God-like creatures could sin, and even if they could, why

⁸ Id. 2:17.

⁹ Id. 5:3-5.

¹⁰ See ZOHAR, Bereshith 57b, translated in 1 THE ZOHAR 184-6 (Harry Sperling & Maurice Simon trans., 1949) (telling a midrash that assumes that human mortality is the fault of Adam).

¹¹ Genesis 3:22.

¹² Id. 3:23.

¹³ Id. 2:5.

¹⁴ Id. 3:16-19.

¹⁵ Id. 3:7-10.

¹⁶ See id. 9:1-17 (describing the giving of the Noachide laws).

¹⁷ See FREDERIC R. TENNANT, THE ORIGIN AND PROPAGATION OF SIN 4-5 (1902) (crediting St. Augustine with elaborating the ecclesiastical dogma of original sin); see also PIET SCHOONENBERG, MAN AND SIN 157-68 (1965) (tracing the doctrinal roots of the concept of original sin).

choosing mortality and morality over unquestioning obedience to authority would be sinful. In any event, the result of sin was knowledge, the knowledge that they were naked and had sinned. By eating the apple, Adam and Eve lost their innocence and lost their godliness.

This view suggests that the valuable part of humanity is whatever remains of Eden. We should aspire to be like the man and woman before the fall, when they were still godly and apparently without law, love, knowledge, lust, moral responsibility, or sin. Those parts of us that are most like Adam and Eve in their days of innocence are the parts most worthy of respect and protection.

There is a radically different interpretation at least equally implicit in the biblical text, and it too is familiar to students of Western philosophy, although not often studied in the context of Genesis. I will refer to it as the humanist view.¹⁸

In the humanist analysis, as well, eating the fruit of the tree of knowledge is what makes Adam and Eve into humans. The essence of humanness, however, is not sin, but self-knowledge; eating the apple separates us not from God, but from the other creatures.¹⁹ In short, the understanding that we are naked²⁰ differentiates humans from the other creatures and makes us worthy of special consideration. Indeed, knowledge leads God to fear that Adam and Eve, if they were to regain their immortality, would be gods themselves.²¹ Similarly, on this view, creative work is not merely the result of our fall and exile from God in Eden; rather it is another way that we, after eating the apple, become like God, the first Creator.

Both views agree, then, that only after Adam and Eve attain self-knowledge are they fully human; but according to the humanist view, in sharp contrast to the apple-as-fall view, being fully human is good, not bad. We have been exiled from Eden not because we are fallen, but because we have risen frighteningly close to the level of gods ourselves. One way to view the distinction might be that the first interpretation sees knowledge as causing the fall of man – as separating man from God – while the second view sees knowledge as making humans unique and worthy – both as separating humans from the other animals and as constituting the God-like component of humanity. On the first view, knowledge leads to

¹⁸ Bruce Ackerman suggested this terminology to me.

¹⁹ Prior to the apple, God had thought that any of His creatures might be a proper spouse for the man, thus suggesting man was not significantly different from the other creatures. See Genesis 2:18-19. The full distinction between humans and beasts does not come until after the Flood when humans first begin to eat other creatures (and other creatures begin to eat meat, as well). Compare id. 1:29-30 (explaining that humans, birds, and animals were created vegetarian) with id. 9:3-4 (permitting humans to eat all creatures, so long as the meat is blood-free).

²⁰ Socrates expressed a similar thought in his repeated affirmations of the value of knowing that we know nothing. PLATO, APOLOGY *23a-c; PLATO, MENO *84.

²¹ Genesis 3:22.

mortality and exile from God's Eden; on the second, it is knowledge that makes us truly "as one with God, knowing good and evil."²²

The two views lead to two fundamentally different understandings of the worth of human beings. Implicit in the notion of the fall is that the worth of the human is the breath of life, the spirit of God that makes the dust of the earth into a man. The soul is what we must treat with respect, for all the rest is just earth.²³ Indeed, on a strong version of this view, the spirit of God is the very antithesis of knowledge; after all, knowledge of morality originates in sin. On the humanist view of the apple as the rise of man, in contrast, knowledge is what makes us distinctly human, and it is knowledge – and particularly the knowledge of good and evil – that we must honor and value. It is wisdom, not innocence, to which we should aspire.

Furthermore, the two views give rise to radically different views of God. The first God is the authoritarian known from some Christian readings of the Old Testament. The second God, alienated from man precisely because He is like man, has the more complex relationship with His creatures (or creators) implicit in the biblical story of Abraham trying to convince God to behave like a mensch at Sodom or its Hasidic and modern variants, such as Rabbi Levi-Yitzhak of Berdichev's tailor who should have refused to forgive God on the Day of Atonement until justice was done, or Amos Oz's story of a Jewish refugee arguing with and losing God on the way to Palestine.²⁴ In this Essay, however, I do not wish to further enter that thicket.

III. The Fall of Man and the Abortion Question.

Both views of humanity are powerful influences in Western thought, and each of us, no doubt, accepts parts and implications of each one. Nonetheless, examining them separately

²² Id. 3:22. Thus, it is moral knowledge, or wisdom, rather than scientific knowledge, that is at issue here.

²³ Oddly, however, in the original Hebrew, human (*adam*) is just earth (*adamah*) with God (*h'*) removed. See Genesis 2:7; 3:23.

²⁴ See Genesis 18:23-33 (describing Abraham trying to convince God to behave like a mensch at Sodom); Genesis 32:25-33 (recounting Jacob's wrestling with God); THE HASIDIC ANTHOLOGY 57 (Louis I. Newman ed., 1968) (retelling the Levi-Yitzhak story); AMOS OZ, BLACKBOX 153 (1987). For another version of the tale of Levi-Yitzhak, see GATES TO THE OLD CITY 729 (Raphael Patai ed. & trans., 1988). Levi-Yitzhak, who surely epitomizes the humanist believer, once stood at the bima (pulpit) from morning to night, refusing to pray, and explained, "If You refuse to answer our prayers, I shall refuse to go on saying them." ELIE WIESEL, SOULSON FIRE 108 (1982). It is also said that after Levi-Yitzhak died the angels had to use force to push him into paradise; he refused to enter, saying, "I shall annoy and go on annoying the Judge of all judges... I shall tell Him what his duties are toward His children, who are less stubborn than He." Id. at 140-41. For similar stories, see id. at 158 (relating how the Rhiziner questioned God's wisdom in waiting to send the Messiah); id. at 165-66 (relating how Mashe of Ujhely chided God for His delay in sending the Messiah). As the proverb has it, "Thou hast chosen us from among the nations--why did You have to pick on the Jews?" YIDDISH PROVERBS 31 (Hanan J. Ayalti ed., 1963). Other modern classics in this genre include YEHUDA AMICHAJ, EL Malei Rahamim [God Full of Mercy], in SHIRIM 1948-1962, at 69-70 (1967); Chaim N. Bialik, *Levadi [Alone]*, in THE MODERN HEBREW POEM ITSELF 25-27 (Stanley Burnshaw et al. eds. & trans., 1965).

may help to elucidate some of the more difficult philosophical questions we face today. One case in which the two stories lead to opposed results is a abortion.

In the first view, humans after the fall have two essences: a good and valuable one, which is the spirit of God that Adam and Eve had in their innocence, and a bad and deplorable one, namely, the sin they acquired with knowledge. Simple arithmetic shows that the "innocent children," in this view, are the most valuable humans of us all. They have the full God-like component – a soul, or the dose of breath of God that gives them life – while they are still lacking in knowledge, and thus in the capacity for moral responsibility. Like Adam and Eve before the apple, they do not know good and evil. Children are thus closer to God and more worthy than normal adults.²⁵ This theory leads further to placing a high value on innocents of all varieties, even the unborn, once they are determined to be living humans (and thus possessed of the spirit of God).

It is the soul that is uniquely valuable and that makes us of God and not merely the dust of the earth. It seems to follow, then, that the most valuable human is the one with the most soul. The Jewish and Christian traditions, however, generally have insisted that all humans, but no nonhumans, have a soul and that all souls are equal.²⁶ The only variable between individuals, then, is the negative side of the balance, knowledge and sin. It follows inexorably that the most innocent and the least responsible, that is, those with the least knowledge and the least ability to sin, will have the most positive balance and be the most valuable. Because the worth of a human is in the God-like part, the less human one is, the better.

Clearly, then, this system puts a great deal of weight on the boundary between human and nonhuman or, in its own terms, on determining who has a soul and who does not. Any creature that has a soul but does not have the postfall human capacity of self-knowledge and responsibility is innocent of sin and thus more valuable than all postfall self-aware humans. Under this view, the most valuable creature will often be the one who – on any other view – is the least human because least capable of post-apple work, love, desire, or knowledge.

The response to a abortion by those who see eating the apple as the fall, then, will focus on one key issue: When does a fetus enter the category "human" – when does it have a soul?

²⁵ Cf. Matthew 18:3 (King James) ("Except . . . ye be converted, and become as little children, ye shall not enter into the kingdom of heaven.")

²⁶ See, e.g., MISHNAH, Sanhedrin 4:5, translated in THE MISHNAH Sanhedrin § 4.5 (Herbert Danby trans., 1933); TALMUD BAVLI Sanhedrin 38a, translated in SONCINO, supra note 2,3 Seder Nezikin 239-40 ("Why was man created unitary (i.e., only one Adam)? So that no one might say my father was greater than yours."). This theological point is made in a secular fashion in our Declaration of Independence: "We hold these Truths to be self-evident, that all Men are created equal..." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Of course, I do not mean to suggest that all Jews and Christians have always believed in this fundamental form of equality. See infra note 32.

We can now explain President Ronald Reagan's otherwise nonsensical comment that he would support a right to abortion only if it were proven that embryos are not "alive."²⁷ Clearly, whether embryos are alive is in itself irrelevant, because, in this society at least, almost no one believes that all life (cockroaches, for instance) has such great value that it outweighs all the claims of a pregnant woman and her already existing family. If President Reagan believes the soul enters the human with the beginning of life itself, however, then his concern begins to make sense.

The misconception that the answer to the abortion problem depends on when life begins is not President Reagan's alone. The Court in *Roe v. Wade*²⁸ incomprehensibly stated, "There has always been strong support for the view that life does not begin until live birth."²⁹ To the contrary, ordinary scientific definitions of life clearly include not only embryos but unfertilized egg cells (which probably are not considered to be humans by anyone) and human skin cells (which, unlike the egg, at least contain a full set of human genes).³⁰ The question is not the factual one of whether embryos are alive, but the legal and moral one of whether they are "persons":³¹ independent, full, human lives; children; members of the family; and

²⁷ See RONALD REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 21 (1984) ("If you don't know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for all of us to insist on protecting the unborn.")

²⁸ 410 U.S. 113 (1973).

²⁹ *Id.* at 161. As I have demonstrated elsewhere, this argument is fallacious. See Daniel Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life And the Abortion Question*, 72 TEXAS L. REV. 559 (1994), section II(B)(2). Even if the fetus is a person, not all abortions are necessarily murder. However, to the extent there is a serious argument that abortion is murder, a collective judgment regarding its permissible limits must be made; we cannot leave the definition of murder to each individual's conscience. Still, other legal and moral systems would disagree. See, e.g., Judges 21:25 (advocating that each person should follow the law as determined by his or her own conscience, not as determined by governmental authority); TALMUD BAVLI, Bava Metzia 83b, translated in SONCINO, *supra* note 2, 1 Seder Nezikin 473-77, discussed in J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZOL. REV. 829, 836-37 (1991) (explicating the view that only God may enforce the criminal law with the aphorism, "Let the Owner of the vineyard come and eradicate His thorns" (author's translation)).

³⁰ See, e.g., THOMAS L. STEDMAN, STEDMAN'S MEDICAL DICTIONARY 865 (William R. Hensyl et al. eds., 25th ed. 1990) (defining life as simply "the state of existence characterized by active metabolism").

³¹ Outside the abortion debate, "persons" include corporations: organizations that generally are viewed as having no moral claims whatsoever, but that do have certain legal rights. The term "persons" may, therefore, be a useful reminder that the issue is whether the law shall deem this entity, whatever it is, worthy of legal protection – much as the underlying moral debate is over when familial responsibility to children attaches to this particular fetus. The apple-as-fall view has certain resemblances to the Supreme Court's approach toward the rights of corporations. In each case, a formalistic approach to a conclusory label turns the analysis upside down. Thus, the apple-as-fall view states that responsibility attaches when the soul enters the conceptus, or when the fetus becomes a "person" – but the explanation adds nothing. The question still remains, in the absence of clear and unique directions from a silent God: When should we consider the fetus a person and why? Similarly, the Supreme Court's classic decisions regarding the constitutional rights of corporations have focused on the label "person" rather than on the underlying issue of how the rights in question apply to this situation. See, e.g., *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886) (stating without discussion that corporations are entitled to protection equal to the protections afforded humans); *First Nat'l Bank* (continued...)

beings for whom we have accepted a responsibility to care or for whom we are morally obliged to accept that responsibility.

Of course, nothing in the concept of a soul dictates that the soul must enter at conception, birth, bar mitzvah, or age thirty-five (when one may become President), or even that all biological humans have souls and no nonhumans have them. Christian slave owners on occasion sought to exclude their slaves from the consideration due to humans by deciding that the slaves lacked souls;³² dog owners on occasion act as if they believe dogs do have souls.³³

Some theory of who does and who does not have a soul, however, is essential. If the soul entered a child only at birth, the fetus would be of no importance. It would be simply dust of the earth, with no claim on our consciences at all. But if the soul enters at conception, the fetus is more valuable than its mother. By hypothesis each has the same valuable element, the soul, but the fetus, unlike the mother, is innocent and without responsibility for its situation. The decision as to how to value these two creatures if their interests conflict is clear under either view – clear, but radically different.

This view of humans as fallen gods, combined with a second theory that the soul enters a human embryo at conception, underpins the equation of abortion with murder. Indeed, if applied consistently, this theory must lead to the conclusion that abortion is a particularly heinous kind of murder – a murder of a fully innocent, more godly, pre-human, still in Eden. For a consistent holder of this vision,³⁴ the problem of abortion can have only one solution: The rights of the fetus must be paramount, even at the cost of the mother's life. For how could we have the right to sacrifice an innocent person to save a less innocent one?³⁵

The position that animal rights theorists like Tom Regan have taken also follows directly from this view. Regan postulates a group of creatures, including various humans and a dog, on a raft; all will drown unless one is thrown overboard. He asks whether one should

³¹(...continued)

v. *Bellotti*, 435 U.S. 765, 777 (1978) (holding that corporate speech is entitled to essentially identical protection as individual speech without considering who is actually speaking).

³² For an example of this strain of extraordinary racism, see, for Example, BUCKNER H. PAYNE, *THE NEGRO: WHAT IS HIS ETHNOLOGICAL STATUS?* 22 (1867), reprinted in 5 *ANTI-BLACK THOUGHT 1863-1925*, at 1, 22 (John D. Smith ed., 1993) (arguing that "the Negro" is not a descendant of Adam but rather of a beast created on the fifth day without a soul and not in the image of God).

³³ See *La Toya Jackson, She's an Animal Lover*, N.Y. *NEWSDAY*, Aug. 25, 1991, at 35 ("As a pet owner, my heart went out to these people [whose pets had died] and to the souls of their pets").

³⁴ People may hold inconsistent views, however. See Greenwood, *supra* n. 29 at section II(B)(1).

³⁵ But see Greenwood, *supra* n. 29 at subpart II(B) (discussing some ways one might conclude there is such a right).

be sacrificed and if so, which one.³⁶ One might consider the relative responsibility of each one for the predicament that they are in. Those who are more responsible should have to suffer the consequences of their actions before those who were less able to influence the outcome or who less freely chose to put themselves in the predicament (perhaps this is the logic behind the ancient seafaring principles that the captain should be the last to leave the sinking ship or "women and children first").

It should be clear that if you consider the dog to be a full moral subject, that is, if you conclude a dog has a soul, the dog is going to have the strongest right to be saved of the whole group. A dog, like a fetus, is not capable of making a moral decision. It, unlike the humans, did not choose to purchase a ticket on the boat or to live in a house by the flooded river. Unlike the humans, the dog has no responsibility for its situation. Thus, only the dog is innocent; it has not eaten of the apple and thus cannot have sinned. Because it has the least responsibility, if the dog also has a soul, it has the strongest claim to be saved.³⁷

IV. The Rise of Humanity and the Abortion Question.

The interpretation that views the eating of the apple as the beginning of wisdom differs dramatically. Here, humanity and godliness are not contradictory. Experience, knowledge, productivity, and *menschlichkeit*,³⁸ not innocence, are our valuable qualities. According to this view, humanity does not simply come on receipt of a soul; rather, the more one has eaten of the apple, the more self-knowledge and responsibility one has, the more one is truly human, the closer one is to God, and the more one is created in God's image.³⁹

³⁶ TOM REGAN, THE CASE FOR ANIMAL RIGHTS 324-25 (1983).

³⁷ Regan concludes the dog should be thrown overboard, but only because he assumes that the humans are equally lacking in responsibility for their fate. Id. at 324-28. When he lifts that strained assumption, he concludes by the logic outlined above that it is wrong to use animals in research experiments that will save human lives. Id. at 378-85.

³⁸ The mentality of a mensch. Mensch, in its Yiddish (and Yiddish-influenced English) rather than German usage, is a morally laden term meaning not merely an adult, but an adult who has accepted the responsibilities of adulthood and who acts in a way adults should act. See SAMUEL ROSENBAUM, A YIDDISH WORD BOOK FOR ENGLISH-SPEAKING PEOPLE 49 (1978) (defining "mentsh" as a "person, human being; a decent person"); SOL STEINMETZ, YIDDISH AND ENGLISH: A CENTURY OF YIDDISH IN AMERICA 133 (1986) (defining "mentsh" as a "decent person; good human being"); cf. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 67 (1987) ("[T]o be one who acts out of obligation is the closest thing there is to a Jewish definition of completion as a person within the community."). Some republican usages of "citizen" may have a similar flavor. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (defining "citizenship" as "participation as an equal in public affairs, in pursuit of a Common Good").

³⁹ Several readers of this Essay have resisted the notion of a gradual entry into personhood, arguing that one either is, or is not, a person. In their view and my terms, when one has eaten enough of the apple, one suddenly becomes a person. This reading of the humanist view would bring it closer to the apple-as-fall view of ensoulment, because again there would be a sharp, if sometimes difficult to identify, boundary between person and nonperson. However, the characteristics to which the humanist looks are all continua rather than black-or-white, on-or-off switches. Thus, for example, there is no precise moment at which a fetus becomes self-aware. Rather, a fetus developing into a child and then into an adult becomes more aware of self and the distinction

(continued...)

The ability to know right from wrong and the accompanying responsibility to act rightly make Adam and Eve moral subjects and therefore moral objects. Since responsibility and knowledge are the essence of humanity and being human is a good thing, acquiring self-knowledge is not the fall of man but the origin of humanity.

This view clearly leads to a different analysis of boundary problems such as those in the debates surrounding abortion and terminally comatose patients, which the first view sees primarily as problems of determining who is or is not human. For those who view the apple as the rise of humanity, moral worth is not the result of a definitional category with a sharp, if difficult to defend, boundary. Rather, because responsibility, productivity, and knowledge of good and evil are what make us God-like humans, groups such as fetuses, the terminally comatose, and dogs all present only minimal claims for treatment as full human beings. Indeed, embryos and fetuses are valuable primarily as potential responsible humans, not as full-fledged bearers of the essential human value.⁴⁰ Similarly, the terminally comatose command respect because they were full humans, not because they have returned to Eden's innocence.

Thus, this view may result in a gradualistic approach--no rights at conception, many at quickening, and a full right to life equal to that of others only at viability or birth.⁴¹ As the

³⁹(...continued)

between self and others as it grows older. The psychiatric profession is predicated on the belief that even adults still have trouble separating themselves from their parents. Humanists likewise should see eating the apple as a lifelong enterprise. The humanist view, then, more naturally thinks of personhood as something into which one grows, rather than a sudden moment of ensoulment. The boundary between fetus and person is like the boundary between acorn and oak. The acorn is not an oak tree; yet how to classify a sapling, which is neither an acorn nor an oak tree, will depend on our purpose. For purposes of the abortion debate, the distinction within the humanist view between the gradualist view I present in this Essay, in which a fetus becomes more and more like a human, finally reaching full "manhood" only after childhood, and the view that there is a moment of secularized ensoulment at which the fetus (or child, in Ackerman's version) becomes a human person, is probably unimportant. Under almost any variant of the humanist view, the fetus, especially at early stages of development most relevant to the abortion debate, see Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 51-52, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), has not developed enough to count as a human person for purposes of a right to life. A fetus, like the man and the woman in Eden, does not love or create, nor does it acknowledge the distinction between self and others. Thus, regardless of whether the transition from the pre-human fetus to the full person is instantaneous or gradual, the fetus is clearly pre-human.

⁴⁰ Those who perceive personhood as an either/or proposition and who reject the notion that potential humans should be treated differently because of that potential will take a different view. They will give the fetus no consideration at all, because it clearly is not yet a human. See, Jed Rubenfeld, *On the Legal Status of the Proposition that Life Begins at Conception*, 43 STAN. L. REV. 599, 611-613 (arguing that there can be no justification for limiting a woman's right to an abortion if a fetus is only a "potential" human being).

⁴¹ Similarly, adults who immigrate to a new political community may be given an intermediate status in which they are neither fully aliens nor fully citizens, but something in between. Once the immigrant is part of the community, however, this intermediate status becomes morally indefensible: Germany's practice of denying citizenship to third-generation *Gastarbeiter* ("guest" workers) is comparable to retaining the right to abortion even well after birth. See Gerald L. Neuman, *"We Are the* (continued...)

fetus comes closer to birth, it becomes more human, the potential that it will become fully human and a responsible moral being becomes greater, and the fetus must be given greater consideration as a potential future member of the community.⁴²

Similarly, even after birth, when infants obviously are sufficiently human to have a full right to life, children will acquire more rights as they become more responsible and thus more fully human. Full civil rights (which we often refer to as human rights) come only at age eighteen. By this reasoning, the question of voting age is an extension of, not completely separate from, the problem of abortion. Each is a question of determining when a biological human has eaten enough of the apple to be enough of a mensch to merit this particular right of humanity.

Regarding abortion, the humanist view gives dramatically different answers from the apple-as-fall view. The mother is a fully responsible human, and the fetus is merely a potential human. Thus, when a choice must be made between the life of one or the other there can be no question of sacrificing the mother. A human life must be worth more than a nonhuman one, even if the nonhuman is potentially human.⁴³

The humanist view offers no easy answer, though, for abortions in non-life-threatening situations. The balance in these cases must depend on the value given to the parents' reason for the abortion and the value given to the life of a potential responsible human. Determining these values is a problem to which this view gives no clear answer--only that the value of the potential life is more than zero and less than that of a full human who has eaten of the apple.⁴⁴

Unlike the first view, which presumes there is a specific moment when dust is transformed into a human and which gives clear answers on either side of the human/nonhuman boundary, the humanist view must make difficult choices between

⁴¹(...continued)

People": Alien Suffrage in German and American Perspective, 13 MICH. J. INT'L L. 259, 334-35 (1992) (discussing the problem of "[d]iscrimination against aliens as a class," which occurs in the context of inherited alien status); see also MICHAEL WALZER, SPHERES OF JUSTICE 58 (criticizing the guest worker system).

⁴² If abortion is an option, an unwanted fetus has no potential to become a full human being. I assume this is part of why many humanists simultaneously believe in a right to abortion and in the duty of parents to protect their (wanted) unborn children. See Greenwood, *supra* n. 29, text accompanying note 224. Roe's reasoning, to the extent it is based on a postulated state interest in protecting potential life, see *Roe v. Wade*, 410 U.S. 113, 153-154 (1973), is flawed for a similar reason. See Rubinfeld, *supra* note 40, at 599.

⁴³ This suggests an alternative way to characterize the contrast between the humanist view and the apple-as-fall view. If the fetus is not human, it does not matter whether it is innocent and the mother is not: A "guilty" human is worth more than an "innocent" potential human.

⁴⁴ However, if the fetus is not yet human, the abortion decision need not be based on any consideration at all of the fetus's interests and rights. Rather, the central issue may be the responsibilities of the existing human beings. See Greenwood, *supra* n. 29, at subparts III(D),(E).

competing interests, when the stakes become higher (and more troubling) as more and more apple is eaten. Indeed, it may lead even those who value the potential humanity of the embryo most highly to conclude that the particularized, fact-dependent balancing necessary to solve the dilemma is too difficult for the clumsy apparatus of the law and therefore should be left to individuals and their consciences.⁴⁵

V. Learning from the Tree of Knowledge.

On a broader view, the two understandings of the tree of knowledge of good and evil point to two fundamentally different views of man. By the logic of both views, however, God only began the process of creating what we call humans. In each case, by eating the apple, by discovering self-knowledge, morality, and their nakedness, Adam and Eve took a basic step in finishing the job. The most basic characteristics of the human condition, both views agree, are the result of human, not heavenly, actions: scarcity of resources, human production, sex, envy, aspirations, work, and play – all exist only after the fateful decision to acquire knowledge.

The two views differ, though, in their evaluations of the entrance into the world of humanity as we know it. On one view, people are fallen gods, valuable only because they still retain traces of something that this view itself identifies as essentially inhuman. What is good in man comes from God; it is only evil, knowledge, and sin that we have created for ourselves. On the other view, humanity is celebrated precisely because, like God, it has taken into its own hands the capacity for creating itself and the responsibility for the consequences. Humanity is celebrated precisely because we collectively have eaten the apple and because each one of us, in growing up, eats the apple.

I doubt that philosophic techniques could persuade all of us to choose one of these views. To me, celebrating humans because they are human is clearly more attractive than celebrating them because they are not, but I do not know how to persuade those who disagree. For the foreseeable future, however, one thing is clear: We, as Americans, will have to live with both views. The task before us is to find a way to live with each other despite such different views of the nature of humanity – and the first step must be understanding the depth of the chasm between us.

On the abortion issue specifically, three conclusions follow. First, for those who accept that knowledge, rationality, loving relationships, work, or similar attributes of humanity are the reasons we value humans, the issue of abortion will be too complex to leave

⁴⁵ Similarly, on the responsibility-centered view outlined in Greenwood, *supra* n.29, subparts III(D) and (E), the state can never have a role. The question of how a family should balance the competing claims on its finite capacities is far too fact-specific to permit sensible legislation, even were it not offensively intrusive.

to the clumsy hands of the law. The law's role should be simply to defer to the consciences of the women and families involved. The balancing and weighing that must be made in any decision to abort or to bear an unexpected child are simply too important and too complex to be left to the Supreme Court or the state legislature.

We (those who deny the fetus full personhood) must accept that abortion is an issue of conscience that must be left to the conscience. After excluding the law from this area, our task as neighbors and fellow citizens is to seek to inform those consciences. We should discuss openly when and under what circumstances abortion is right or wrong – not just when it should be legal or illegal. We should also consider the other issue, one about which we are too often silent: When is it wrong to give birth to a child because no one has made (or is able to make) the necessary commitment to help it to eat the fruit of the tree of knowledge? The law, to be sure, has no place regulating such decisions, but morality has something to say nonetheless.

Second, we must understand that freedom of conscience will seem wrong, radically wrong, to those who truly believe that humanity is inherently bad. We should not, it seems to me, pretend that freedom of conscience is a neutral position to which others would agree were they only less anxious to impose their particular moral code on us.⁴⁶ Unless we can convince them that the soul does not enter at conception, or that humanness has value even apart from the breath of God, or that the knowledge of good and evil is something to be celebrated, they cannot accept our position. If, as they claim, the fetus has all that is valuable in humanity, they must try to prevent us from following our different consciences, whatever the cost in the lives of the parents and families of unwanted fetuses. Let us all, instead, acknowledge that abortion is an issue on which a perfect compromise is impossible. We cannot satisfy everyone.

Finally, if no neutral solution is possible, we must choose between two alternatives. One is the Kulturkampf:⁴⁷ We, or they, may conclude that we are right and they are wrong, period. The resulting political battle is a bitter one, in which the losers surely will feel they

⁴⁶ This is what Dworkin has done. After asserting that no one could possibly believe that a fetus is entitled to be treated as equal to a human being, he proceeds to claim that the "actual" beliefs of Roe's opponents are merely opposite ends of a common spectrum of concern over how best to sanctify (born) human life. RONALD DWORKIN, *LIFE'S DOMINION* 150 (1993). Because this issue is intensely personal, he argues, the state should stay out of it and simply allow abortion. *Id.* at 154-55. But if, as I have argued here, his premise is wrong and Roe's opponents actually do mean that fetuses are humans (in the morally relevant sense), his conclusion cannot stand. Freedom of conscience does not extend to matters of homicide.

⁴⁷ The term Kulturkampf, or "culturewar," first appeared in Germany in the 1870s as a description of the political battle between the National Liberal Party of Germany and the Catholic Church. Philip Rief, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions*, 3 *YALE J.L. & HUMAN.* 315, 326-27 (1991).

have been wronged and seek to struggle on, while the winners will try by every means available to suppress the minority view.

The alternative solution is toleration, but a more limited form of toleration than the image of a neutral solution suggests. We have no choice as a society but to either ban or permit abortion—there is no neutral path. On that issue, then, we must debate and decide by the usual political means: constitutional adjudication, electoral campaigns, and polemic articles. Ultimately, the majority's view—as filtered through our decidedly nonmajoritarian political system—should prevail.⁴⁸ But respect for the dissidents demands that we allow them to continue their struggle to insist that we are wrong.

So, if the apple-as-knowledge view wins there can be no possibility of a legislative ban on abortion. Those of the apple-as-fall view must be allowed, however, to try to convince us that we are wrong. And if their view prevails, legislatures may restrict abortion, but only in a way, if such a way is possible, that respects the rights of others to have other views.⁴⁹ In any case, fully consistent principle should give way to the deeper necessity of real citizens' continuing to live with each other.

VI. Conclusion

Prophecy is over, God is silent, and detailed moral truths are not, contrary to our Declaration of Independence, self-evident.⁵⁰ Even after reflection, too many moral truths evidence themselves (like the prophecies) differently to different people (and even the same person). Collectively and individually, we reach not a reflective equilibrium, but chaotic disequilibria.⁵¹ The efforts of liberal and social contract theory from Hobbes to Dworkin to

⁴⁸ I do not mean to suggest that the Court is wrong in finding that the Constitution decides the question. The Constitution is part of the political system, and constitutional adjudication is part of the political debate. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1042 (1984) (distinguishing ordinary politics from rare constitutional politics in which Americans "mean to present themselves to one another as citizens" (emphasis in original)); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5-10 (1979) (endorsing the primary role of the judiciary in the debate regarding the meaning of our common values and constitutional principles).

⁴⁹ Ireland might serve as an example of this type of limited toleration of those who believe that abortion is sometimes warranted. Ireland has perhaps the most restrictive abortion law in the West, but it freely allows travel to nearby England for abortions. In 1983, the abortion ban was made part of the Irish Constitution following a referendum in which it received 67 support. See Jeffrey A. Weinstein, Note, "An Irish Solution to an Irish Problem": *Ireland's Struggle with Abortion Law*, 10 ARIZ. J. INT'L & COMP. L. 165, 173 (1993). Less than a decade later, following a highly controversial decision of the Irish Supreme Court permitting a 14-year-old rape victim to travel to England for an abortion only because she threatened suicide, voters approved—again by large majorities—two amendments to the constitution permitting travel abroad for abortion and domestic dissemination of information regarding the availability of abortion abroad. See *id.* at 190-96 (discussing *Attorney General v. X*, 1992 I.L.R.M. 401 (Ir. S.C.)). Alternatively, the Irish compromise may simply be internally inconsistent, another example of how unrealistic the notion of reflective equilibrium is. See Greenwood, *supra* note 29 at note 77 and accompanying text.

⁵⁰ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵¹ See *supra* note 49 and accompanying text.

articulate the argument to allow constitutional law to replace politics seems futile. Constitutions must be interpreted in accordance with philosophic norms, but we cannot agree on the content of these norms.

However, the impossibility of a theory of rights does not lessen our need for one. Majority approval (even leaving aside public choice theory problems)⁵² cannot suffice to make a sufficiently immoral law legitimate, at least absent a convincing explanation of why oppression by a majority is morally different from oppression by a minority. Surely, thus, the minority status of African-Americans in the United States did not by itself make Jim Crow less oppressive than its equivalent in South Africa, where Blacks are a majority.⁵³ Accordingly, we must have some theory of rights limiting majority rule, and we must have a constitution embodying those limitations. In short, the paradox underlying the failure of one of our greatest philosophers in his attempt to apply his theories to one of our most pressing issues is this: While there must be "rights," we have no "right" answer for how to determine them. We have no satisfactory account of which rights can stand in the face of the majority or when.

The distinction between law as the realm of right and majoritarianism as the realm of will, then, has broken down. The right is created, at least in part, by our collective will: We have not found a base for political philosophy that does not require near unanimous consent. Since that consent does not (in fact) exist, it must be created; we must engage in politics, not merely imagine it, to create the right.⁵⁴ Correspondingly, the majority's will, if it is to have

⁵² Public choice theorists including Kenneth Arrow, E.E. Schattschneider, and Mancur Olson have suggested that the notion of majority will is incoherent. The results of a majoritarian political process, even assuming that each individual has an internally consistent set of beliefs, will depend on the order in which questions are presented and the effects of problems of collective action, free riders, and capture. As a result, the same issue may be resolved differently by the same group, with no change of individual opinions, in chaotic fluctuations that do not approach any equilibrium. For a recent law journal discussion of some of these issues, see generally Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-40 (1990) (discussing the implications of public choice theory for majoritarian systems).

⁵³ On the American system of apartheid, see Justice Douglas's opinion in *Bell v. Maryland*, 378 U.S. 226, 254-55 (1963) (Douglas, J., concurring). On the issue of the need for a constitution, see Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U.L. REV. 417, 427 (1981) (arguing that oppression by a majority is still oppression).

⁵⁴ Liberal theory has often claimed that imaginary politics could eliminate the need for actual discourse. For a sampling of imaginary agreements, consider JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., student ed. 1988) (3d ed. 1968) (debating governmental structure based on an imaginary social contract); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (arguing for a limited role of government based on an imaginary sequence of voluntary contracts); RAWLS, *supra* note 6 (basing a concept of justice on imaginary debates behind the veil of ignorance); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (basing politics on imaginary dialogues instead of actual ones).

any right to govern, must be an educated will, engaged in the struggle to hear the words of a silent God. Neither rights nor majoritarianism can stand without the other.

If there is any lesson to be learned, it must be at least that the abortion debate is too important to be left to lawyers and the Supreme Court. It should return to the mainstream of politics. The abortion controversy ultimately should not be resolved in the Court or even in Congress, but in the public forum by a great debate, an exchange of arguments, and ultimately a compromise. This compromise, I imagine, in substance will look much like the suggestion of Roe, adopted not because it is the only correct analysis of our constitutional texts, but because it is the only compromise that offers any promise for mutual respect in a political community – respect for the women and men who must rear the next generation, for the children who will be born (and hopefully reared, educated, and loved into full human beings), and for the many and various religious and nonreligious traditions to which the American people are the proud heirs.

The debate must take seriously the arguments of proponents of state intervention: abortion is a form of murder; the time for choice has already passed; a fetus – sentient or not--is at least as worthy of governmental protection as an endangered species, for it is in the relevant sense a human, and perhaps even an especially worthy (because innocent) human.⁵⁵ It must take seriously the counter-arguments of opponents of state intervention: the responsibility of rearing a child is too great to force women to take it on involuntarily; in the modern era (with safe and fairly effective birth control), it is ludicrous to equate having sex with a choice to have a child; it is immoral to bring a child into the world if you are not capable of or willing to bring it up lovingly; and – underpinning of all these arguments – the fetus is not yet a child or a member of the family in the relevant moral sense.⁵⁶

Ultimately, the debate centers on the status of the fetus. If we care enough about the fetus to view it as having absolute rights, or as being the object of responsibilities that may not be denied, or as being irreplaceable and unique, then we must see abortion as, at a minimum, a great moral tragedy that cries out for state intervention. If, in contrast, we see the fetus as no more than a potential – realizable only with great effort, resources, and luck – or as a fungible mass of genetic material not yet developed enough to qualify for our concern, then we have no choice but to focus on our obligations to the already living and breathing adults and children who will suffer the consequences of obstacles to legal abortion. Because we hold both of these opinions and many more, the controversy must – and should – continue.

⁵⁵ See Greenwood, *supra* note 29, at notes 91-103 and accompanying text.

⁵⁶ See Greenwood, *supra* note 29, at notes 132-46 and accompanying text.

Dworkin has claimed that if this is the debate, if it is about whether a fetus is a person, then "argument is irrelevant and accommodation impossible."⁵⁷ I disagree. First, this is the debate, and pretending it is not will not make the issues before us any less difficult. More important, argument is far from irrelevant. If our values are right, they may also be persuasive. At least, one hopes so. Those who believe in state abstention must explain why morality requires seeing shades of gray, not the false dichotomy of those who would regulate. They must explain why difficult decisions must be made in life, why giving birth to children is not enough, and why rights should not begin at conception and end at birth. They must explain that conflicts between moral values exist, that life and morality are not as regulationists see it, and that the other side's simplistic vision of "bad girls" willfully making babies in sin so they can cold-bloodedly and heartlessly murder them has little to do with the true decisions facing American families. They must explain the effects on society of a law that flies in the face of the moral beliefs and needs of the majority, or even a large minority, and they must remind people of the weakness of the law when it attempts that type of social reform. Let them remind people, who are now used to abortions safer than childbirth, of the old days when entire hospital wards were devoted to repairing botched abortions and of myriads of women maimed and killed by the pre-Roe system. And let them explain, as Dworkin does, how strange it is to think of a potential human as if it were human already. These explanations are not "irrelevant"; they are the essential beginnings of a conversation.

In the meantime, the debate no doubt will continue, at least until RU 486⁵⁸ or its successor makes abortion easy, safe, and private enough to put early abortions into the same category as birth control and eliminate the need for most later ones. But even in the absence of an agreement, accommodation is possible. In a country like the United States, where the majority believes in the need to love children and not just bear them, the accommodation would require the state both to allow abortion and allow reasonable attempts at persuasion (but not intimidation) by opponents. If abortion opponents have a persuasive argument for

⁵⁷ DWORKIN, *supra* n. 46, at 24.

⁵⁸ RU 486 is an orally administered, synthetic 19-Norsteroid that interacts strongly with the progesterone receptor and serves as a progesterone antagonist. Progesterone is essential for the maintenance of pregnancy, and its withdrawal causes interruption of gestation. See generally Beatrice Couzinet et al., *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 NEW ENG. J. MED. 1565 (1986). Critically, it appears to allow safe abortions to be performed without surgery and without special clinics. Thus, its commercial advent will further blur the distinction, if there is any, between contraception (generally accepted by American law and public opinion) and early abortion.

why needlessly adding to the misery and hatred in the world will make us a better people, let them articulate it. If it is convincing, there will be little need for abortion regulation anyway.⁵⁹

Were the majority to conclude that the choice must always be to have a child regardless of the circumstances, I believe that regulation would be required. Nonetheless, accommodation is still possible: Ban abortion, but allow those who disagree to opt out (by traveling out of the jurisdiction, for instance).⁶⁰

These are majoritarian solutions. They depend for their legitimacy primarily on a lively debate and on the willingness of the majority to listen to and understand the arguments of the minority, and to attempt to persuade, not merely dominate, the minority. It is that debate that Dworkin, in the classic manner of the rights tradition, characterizes as "irrelevant."⁶¹

These solutions depend, too, on a shared understanding among all the participants that this is not the sort of issue over which we are prepared to split the country. At the center of the debate are matters of principle: deeply conflicting principle. But for the sake of peace, principles must sometimes give way. That is the true lesson of the liberal tradition.

⁵⁹If the pro-regulation position were persuasive, induced abortions would be rare indeed – far rarer than homicide, since it is hard to imagine killing a fetus in the heat of passion.

⁶⁰For discussion of Ireland's example of this type of limited toleration, see *supra* note 49. It is, of course, a very limited and unsatisfactory accommodation, especially for those of limited financial means. But were a majority to conclude that abortion is fundamentally immoral, I see no alternative. I leave aside the issue of the appropriate jurisdiction to make the decision, for I see no clear a priori reason why abortion must be regulated at the state, rather than the federal or local, level. I also leave aside the interesting issue of hypocrisy, or in my terms, individual disequilibrium: it is at least possible that the Irish compromise is not an accommodation of a minority position, but an attempt to make a public statement of the evil of abortion while keeping it available in the event of necessity. This is a common educational use of the law and as a general rule not an unsound one; in the abortion context, however, the human misery created by this seemingly symbolic obeisance to half-forgotten moral imperatives could only be justifiable if we truly believed the fetus to be human.

⁶¹ See *supra* text accompanying note 57.