Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom

Ruth Colker†

In this article, Professor Colker explores the relationship between theology and feminism, and demonstrates how each can help us realize the aspirations of love, compassion, and wisdom. She concludes that constitutional interpretation informed by feminist-theological aspirational thinking is the best way to enhance legislative and judicial dialogue on the abortion issue and protect the well-being of women.

INTRODUCTION

What we need in the United States is not hatred. What we need in the United States is not violence and lawlessness, but is love and wisdom and compassion toward one another.

—Robert F. Kennedy¹

In this essay, I explore what it would mean for feminist theory to consider insights from certain branches of theology² and for theology to consider insights from certain branches of feminist theory.³ I argue that

† Professor of Law, Tulane University; Visiting Professor of Law, University of Toronto (Spring 1990). A.B. 1978, Harvard-Radcliffe College; J.D. 1981, Harvard Law School. I thank the following individuals and institutions who commented on drafts of this essay: the students in my seminars at Tulane Law School and the University of Toronto Law School; the participants at the University of Toronto Legal Theory & Feminist Theory Workshops; Celebration 35 at Harvard Law School; the South Central Women's Studies Association; the International Conference on the United States Constitution held in Taiwan; and Mary Coombs, Richard Delgado, Emily Fowler Hartigan, Connie Mui, Michael Perry, John Stick, Cathy Wessinger, and Ann Wooldridge. I would also like to thank Jan Dyër for her diligent research assistance and personal support. Finally, I would like to thank Tulane Law School for being supportive of my project no matter how unusual my research requests.

1. Quoted by Roger Rosenblatt on the *MacNeil-Lehrer Newshour* (PBS television broadcast, July 4, 1988) (*Newshour* transcript available from Strictly Business, Overland Park, Kan.).

2. My discussion of theology will principally refer to selected Buddhist authors as well as some Catholic writers who seem sympathetic to liberation theology or Buddhism. For an excellent survey of Buddhism, see N. ROSS, *BUDDHISM: A WAY OF LIFE AND THOUGHT* (1980). I will also briefly consider the work of one Jewish writer, Martin Buber. I make no attempt to survey all of theology; rather, I examine the work of religious writers whom I believe can contribute to feminist theory.

3. I principally focus on radical feminist theory because it is more concerned with the problems of consciousness and sexual objectification than are other branches of feminist theory. However, the distinctions between the branches of feminist theory are diminishing, and increasingly

both feminist theory and theology can help people discover and experience their authentic selves.⁴ Specifically, feminist theory explains how women's unawareness of their own oppression (the "problem of consciousness") and women's experience of nonmutual love ("sexual objectification") create barriers against discovery of the authentic self. Theology describes aspirations, such as love, compassion, and wisdom,⁵ which we should try to embed in our authentic self, thereby helping us overcome the problems of consciousness and sexual objectification. I contend that feminist-theological dialogue could enhance this journey because feminist theory provides an excellent explanation of the barriers to that journey and theology provides an excellent source of aspirations for that journey.

I focus on the topic of abortion because it presents difficult issues relating to the problems of consciousness and sexual objectification. In addition, because abortion is a particularly divisive moral problem, it challenges our ability to implement the aspirations of love, compassion, and wisdom. Finally, our understanding of abortion issues has suffered from a lack of meaningful feminist-theological dialogue. Instead, the abortion debate has often been characterized by exchanges of political rhetoric by religious fundamentalists and pro-choice feminists.⁶ I contend that by learning to engage in true dialogue on the topic of abortion we can make significant progress toward realizing the aspirations of love, compassion, and wisdom.

In Part I of this article, I explain how the disciplines of both femi-

one finds feminist writers outside radical feminism who also consider these issues. For a survey of feminist theory, see A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

By discussing feminist theory and theology as separate categories, I am not suggesting that one cannot adhere to both traditions. Indeed, I will refer to work by religious feminists extensively in this essay because it is often exceptionally insightful.

4. Throughout this essay, I refer to the "authentic self." This is a Buddhist conception in which the self is momentary, fleeting, dynamic, connected to others, and aspirational. It assumes that we have control over how the self changes so that we can facilitate its movements toward our aspirations. I explain this conception more fully in Part II. It is important here for the reader to understand that this conception of the self is *not* the static, fixed, isolated, or universal self often described in western philosophy.

5. Love and compassion are not entirely distinct concepts, but I will refer to them separately throughout this essay because they emerge from somewhat different theological traditions. Although there are exceptions to the general pattern, western theology discusses love more often and eastern theology discusses compassion more often.

6. In this essay, I refer to "pro-choice" and "pro-life" advocates on the abortion issue. Based on the principle of compassion, I have chosen to use the label that these individuals use for themselves. In addition, my reading of their arguments suggests that the strongest pro-choice argument is about the value of choice and the strongest pro-life argument is about the value of life. Therefore, I see no reason to discard the labels that these individuals have chosen for themselves. Finally, effective dialogue between pro-choice and pro-life advocates may only be possible if we stop perceiving their positions as polar opposites. Because effective dialogue is my goal, I have chosen labels that might facilitate that dialogue.

nism and theology could benefit from mutual dialogue. In Part II, I defend the importance of speaking aspirationally. I then articulate what it means to move toward our authentic selves—toward our aspirations of love, compassion, and wisdom. In Part III, I describe the traditional feminist critiques of the problems of consciousness and sexual objectification and try to enhance these critiques by more explicitly considering our aspirations for our authentic selves.

In the final part of this essay, I probe the consequences of my analysis for constitutional theory. I defend non-originalist rules of interpretation from a feminist-theological perspective, but I question whether such a perspective can absolutely endorse judicial activism. From a non-originalist perspective, I contend that the aspirations of love, compassion, and wisdom can be used to interpret the liberty-due process clause and the equal protection clause. I then apply this theory of constitutional interpretation to the abortion controversy. Although I ultimately defend the Supreme Court's decision in *Roe v. Wade*⁷ that the challenged Texas legislation was unconstitutional, I contend that a feminist-theological perspective cannot support the absolute position that no state regulation of abortion in the first trimester is permissible.

I

THE NEED FOR A FEMINIST-THEOLOGICAL DIALOGUE

When I deliver this essay at conferences, listeners often ask me: "Why would anyone want to combine feminism and theology?" and "Why would I, as a feminist, want to discuss theology, given religion's role in keeping women subservient?" Let me briefly answer these questions.

Feminism and theology both try to guide people to the discovery and experience of their authentic self. They both offer a critique of society and articulate aspirations for a better society, although their respective emphases are different. While feminism emphasizes its critique, theology emphasizes its aspirations. Accordingly, both disciplines could benefit from a dialogue in which feminism shares its critique and theology shares its aspirations.

Feminist theory emphasizes its critique insofar as it focuses on the subordination,⁸ weakness, and invisibility⁹ of women as part of a gender-

7. 410 U.S. 113 (1973).

8. See generally C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 21-77 (1987) (discussing the basis of gender inequality).

9. See generally ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (G. Hull, P. Scott & B. Smith eds. 1982) (raising the issue of silence in Black women's studies); T. OLSEN, *SILENCES* (1978) (examining the historical silence of women in society); A. RICH, *ON LIES, SECRETS, AND SILENCE* (1979) (exposing the silence of women in literature).

based society.¹⁰ Feminism (as contrasted with theology¹¹ and some forms of "humanism") argues that a critique of gender socialization must begin from the perspective of women because general analyses of the human condition have tended to overlook women's conditions.¹² Theology also has a critique. Its aspirational focus reflects a recognition that our present society suffers from fundamental problems. Certain theological traditions such as liberation theology generate a critique by focusing on these problems.¹³

Still, in contrast to feminist theory, aspirations are more important

10. The focus on gender-based socialization has been strongly influenced by what is usually labeled "liberal feminism." See generally A. JAGGAR, *supra* note 3 (surveying liberal feminism).

11. Some feminists have criticized theology for focusing on men's needs rather than all people's needs. See, e.g., M. DALY, *BEYOND GOD THE FATHER: TOWARDS A PHILOSOPHY OF WOMEN'S LIBERATION* (1973) (attacking the antifeminism in the Judeo-Christian heritage). Nevertheless, theology aspires to consider how all people can move closer to discovering and experiencing their authentic selves. Similarly, some people have criticized feminists for focusing only on problems facing white middle-class women. See, e.g., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE, *supra* note 9, at xv-xxi (calling for scholarship and teaching in Black Women's Studies, to address this neglected area); HOME GIRLS: A BLACK FEMINIST ANTHOLOGY at xxix (B. Smith ed. 1982) (recognizing but dismissing as myth the criticism that women's issues are narrow and apolitical). Nevertheless, feminism aspires to consider the problems of all women. I am, therefore, describing feminism and theology at their best.

12. For a survey of feminist views of human nature, see A. JAGGAR, *supra* note 3. However, Jaggar's survey is incomplete in that it consciously omits existential and theological feminism. See *infra* text accompanying note 20.

Because I am writing this essay from a feminist perspective, I have chosen to focus on the implications of feminism and theology on women's movement to authenticity. I suspect that many, if not all, of my observations would apply with equal force to men. At this time, however, I have not attempted to speak more generally, because the gender context of women's and men's lives often differs. One crucial difference between feminism and theology is that feminism is embedded in a discussion of women's human nature and theology is embedded in a discussion of all people's human nature. By focusing on women, I have therefore allowed feminism's perspective to dominate the feminist-theological dialogue. A theologian might properly choose the opposite emphasis. As we participate in a feminist-theological dialogue, we may be able to achieve a more balanced discussion which equally respects both traditions.

13. Two male theologians who are challenging the Roman Catholic Church to take a more critical stance on issues of love and sexuality are James Nelson and Dick Westley. See *infra* notes 22, 40, 96-98 and accompanying text. In addition, many religious feminists, such as Christine Gudorf, Rosemary Radford Ruether, and Beverly Wildung Harrison, have been challenging the Church for decades to challenge more critically its understanding of love and sexuality, especially as they apply to women's lives. See generally ABORTION & CATHOLICISM: THE AMERICAN DEBATE (P. Jung & T. Shannon eds. 1988) (collection of essays representing attempts to create a feminist-theological perspective); B. HARRISON, *OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION* (1983) (seeking to defend women's procreative rights within a feminist revision of Christian theology which includes a new understanding of women's sexuality); WEAVING THE VISIONS: NEW PATTERNS IN FEMINIST SPIRITUALITY (J. Plaskow & C. Christ eds. 1989) (essays criticizing western patriarchal religion, and establishing scholarly and experimental foundations for a feminist theology); WOMEN'S CONSCIOUSNESS, WOMEN'S CONSCIENCE: A READER IN FEMINIST ETHICS (B. Andolsen, C. Gudorf & M. Pellauer eds. 1985) [hereinafter *WOMEN'S CONSCIOUSNESS*] (analyzing feminist ethics in the contexts of social assessments and religious options). For an approach to the ethic of love, similar to Ruether's, see *infra* text accompanying note 54.

than critique within the sphere of spirituality¹⁴ and theology.¹⁵ Certain radical feminists, to be sure, do focus more on aspirations than do other types of feminists¹⁶ and there is even an emerging tradition of "religious feminists" who consider both critique and aspirations in a balanced way.¹⁷ Nevertheless, it is fair to generalize that feminist theory has a relatively more sophisticated critique than set of aspirations and theology has a relatively more sophisticated set of aspirations than critique.¹⁸

I am disappointed by the hostility toward and ignorance of theology I find in feminist theory. Although it is now considered unacceptable (or "politically incorrect") to disregard feminist writing by women of color or lesbians,¹⁹ it is apparently still acceptable for feminists to disregard

14. Some feminists prefer the noun "spirituality" to "theology." See Yates, *Spirituality and the American Feminist Experience*, 9 SIGNS: J. WOMEN CULTURE & SOC'Y 59, 60 (1983) (preferring "spirituality" to "religion" because the term religion has been associated with historically oppressive institutionalized forms). Feminists sometimes object to the label "theology" because it connotes a belief in God or the Ultimate rather than simply a spiritual sensibility, and because it refers to a distinct, male-dominated tradition. In fact, not everyone agrees that theology requires a belief in God. Buddhism, for example, is generally defined as a theology although it does not subscribe to a belief in God. I have deliberately retained the label "theology" because I believe that we can learn from traditional theology, although we may need to view it through feminist lenses. In recognition of feminists who do prefer the label "spirituality," however, I sometimes use that phrase as well.

15. As the authors of a collection of essays in feminism and theology explain:

Feminist spirituality, whether it is an extension of traditional western religions or a revival of Goddess religion, provides a 'ground' in which feminists can root their visions of justice for women and a source of energy to struggle for that future. . . . We feminists do not yet have a common language to describe divine being, but we are beginning to mold new images. So, too, feminist ethicists are just beginning the task of describing those actions and habits of life (virtues) which are consistent with our new visions of the Ultimate.

WOMEN'S CONSCIOUSNESS, *supra* note 13, xxiii.

16. The label "radical feminism" describes a large and diverse community of feminists. Poets, such as Adrienne Rich and Audre Lorde, speak aspirationally. In addition, Sonia Johnson encourages women to explore their visions and speak aspirationally. On the other hand, Catharine MacKinnon, who is often described as a radical feminist, disdains aspirational discourse. There is therefore no consensus among radical feminists on the utility of aspirational discourse. For further discussion of these authors, see *infra* notes 26-30, 46-51 and accompanying text.

17. See *infra* note 24 and accompanying text.

18. See generally TOWARD A UNIVERSAL THEOLOGY OF RELIGION (L. Swidler ed. 1987) (collection of essays attempting to synthesize religious faith and ideologies into a universal theology). By offering this comparison, I do not mean to suggest that theology or feminism are either monolithic or entirely distinct. Both traditions are quite varied and may often overlap. Nevertheless, one can draw certain generalizations about both traditions. In this essay, I will attempt to show that a complete inquiry into human nature requires both a theological and a feminist sensibility.

19. Adrienne Rich was instrumental in challenging the erasure of lesbian existence from scholarly feminist literature. See Rich, *Compulsory Heterosexuality and Lesbian Existence*, in WOMEN, SEX AND SEXUALITY 62 (C. Stimpson & E. Person eds. 1980). Rich interweaves stories of women of color into her scholarship. See A. RICH, OF WOMAN BORN at ix-xxxv (10th anniv. ed. 1986). Interestingly, Rich has also considered the role of religion in her life as a Jew, and seems familiar with writings by women interested in theology. See, e.g., A. RICH, *A Vision*, in A WILD PATIENCE HAS TAKEN ME THIS FAR: POEMS 1978-1981, at 50 (1981) (dedicating poem to Simone Weil, a religious writer and activist). And her poem *Integrity* probes the authentic self in a way that

writing by religious feminists. For example, Alison Jaggar deliberately disregards that tradition in her survey of feminist theory:

Among the most obvious omissions from this book are religious and existential conceptions of women's liberation. . . . I have omitted religious and existentialist conceptions primarily because I find them implausible. They are outside the mainstream of contemporary feminist theorizing, and they have little direct connection with socialist feminism, the version of feminist theory that I consider the most plausible.²⁰

Jaggar's failure to include religious feminists probably reflects her ignorance of that branch of feminist theory. Religious-feminist writings present a wide range of views, and any survey of feminist theory that dismisses them merely because they are "implausible" and outside the mainstream of contemporary feminist theory is less helpful than it could be. Theology is one of the oldest and most deeply held philosophical traditions in western culture.²¹ This historical status alone justifies a fuller examination of theology's insights on feminism than Jaggar allows.

Similarly, many theologians, even progressive theologians, fail to consider feminist sources. Recently, some theologians have begun to publish articles and books about love and sexuality that challenge the traditional Catholic Church's understanding of sexuality.²² Although these works often are compatible with feminist theory, they rarely refer to feminist works or recognize the special problems that women may face in experiencing mutual love.²³

Nevertheless, a literature that reflects both feminist and theological insights, "religious feminism," is beginning to emerge.²⁴ This literature

is compatible with the work of feminist theologians. A. RICH, *Integrity*, in *A WILD PATIENCE HAS TAKEN ME THIS FAR: POEMS 1978-1981*, *supra*, at 8. Adrienne Rich's work therefore seems to be an exception to the pattern within secular feminism of ignoring writings by religious feminists.

20. A. JAGGAR, *supra* note 3, at 10.

21. While theology is not rendered "true" simply by being old and widely shared, its prominence throughout history should make us inquire whether it can offer us insight today.

22. See, e.g., J. NELSON, *BETWEEN TWO GARDENS: REFLECTIONS ON SEXUALITY AND RELIGIOUS EXPERIENCE* (1983) (seeking a compatible role within Christian spirituality for the human sexual experience); J. NELSON, *EMBODIMENT: AN APPROACH TO SEXUALITY AND CHRISTIAN THEOLOGY* (1978) (investigating human sexuality from the standpoint of a Christian understanding of God); D. WESTLEY, *MORALITY AND ITS BEYOND* (1984) (advocating an understanding and loving approach to morality); D. WESTLEY, *REDEMPITIVE INTIMACY* 11 (1981) (developing a theology of "redemptive intimacy").

23. I use the adjective "mutual" to describe a particular kind of love—a love that facilitates women's well-being and meets the highest aspirations that women want to establish for the love in their lives. I discuss the aspiration of love more fully in Part II of this essay. See *infra* notes 39-51 and accompanying text.

24. See, e.g., C. KELLER, *FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF* 29-43 (1986) (discussing de Beauvoir, other existentialists, and other religious writers); A. LORDE, *A Woman Speaks*, in *THE BLACK UNICORN* 4 (1978) (probing issues of self and authenticity); A. RICH, *OF WOMAN BORN*, *supra* note 19, at 56-127 (tracing the role of motherhood as viewed in matriarchal and patriarchal belief systems throughout human history); *THE POLITICS OF WOMEN'S SPIRITUALITY: ESSAYS ON THE RISE OF SPIRITUAL POWER WITHIN THE FEMINIST MOVEMENT*

probes how women can overcome the problems of consciousness and sexual objectification and come closer to experiencing their authentic selves. Although little known to feminist jurisprudence, these writings can contribute substantially to our understanding of the relationship between feminist theory and law. For example, feminist theory sometimes assumes a highly activist judicial framework without addressing whether judicial activism is consistent with feminism.²⁵ However, the aspirations of love, compassion, and wisdom should make us pause to consider whether judicial activism is consistent with such ideals. Accordingly, this essay seeks to bring this feminist-theological perspective to feminist jurisprudence.

II

ASPIRATIONS: WHAT IS AN AUTHENTIC SELF EMBEDDED IN LOVE, COMPASSION, AND WISDOM?

As discussed above, one of the strengths of theology is its attempt to speak aspirationally. Feminist theory on the other hand, generally lacks such an aspirational quality. In this Part, I argue that speaking aspirationally would improve feminist theory. I also describe how the authentic self—because it denies the separation between the self and others—can help us move toward our aspirations. Finally I discuss the aspira-

(C. Spretnak ed. 1982) (focusing on feminist spirituality); *WEAVING THE VISIONS*, *supra* note 13, at 1-13; *WOMEN'S CONSCIOUSNESS*, *supra* note 13, at xxiii (Judeo-Christian perspective); Gross, *Feminism from the Perspective of Buddhist Practice*, in *FEMINISM AND BUDDHIST PRACTICE* 73 (1981) (discussing implications of Buddhism for feminist theory); *Buddhist Views on Abortion*, 6 *SPRING WIND—BUDDHIST CULTURAL F.* 166 (1986) (reviewing Buddhist positions on the abortion issue).

Michael Perry also asks fundamental questions about human nature, interweaving law, feminism, and theology. See M. PERRY, *MORALITY, POLITICS AND LAW* 183 (1988) (noting that feminist theory represents an effort to understand what it means to be authentically human).

25. For instance MacKinnon's attempt to develop a feminist theory of the state from a radical feminist perspective, see MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS: J. WOMEN CULTURE & SOC'Y* 515 (1982), reprinted in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 1 (N. Keohane, M. Rosaldo & B. Gelpi eds. 1982) [hereinafter MacKinnon, *An Agenda for Theory*]; MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS: J. WOMEN CULTURE & SOC'Y* 635 (1983), fails to examine the traditional liberal premise that the courts should adopt an activist perspective.

Martha Minow and Mary Ann Glendon offer a more informed critique of judicial activism. Minow consciously writes from a feminist perspective and hints at principles within feminist theory that might cause us to favor a more deferential judiciary. See, e.g., Minow, *Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10, 70-95 (1987) (advocating that, rather than maintain the status quo, courts should be more open to other perspectives). Glendon refers to women's issues when discussing the topic of abortion and argues for judicial self-restraint. See M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 50-52 (1987).

As I argue in Part IV, see *infra* text accompanying notes 107-220, I am not entirely satisfied with either Minow's or Glendon's perspectives, but I do believe that they provide an important beginning for examining the relationship between feminist theory and judicial activism.

tions of love, compassion, and wisdom, explaining why these aspirations are most suitable for the authentic self.

A. The Importance of Aspirational Thinking

Not all feminists agree that we need to speak aspirationally. For example, Catharine MacKinnon rejects the need for feminists to discuss and share their visions, claiming that such aspirational thinking often supplants more productive political work. In addition, she argues that aspirational thinking often reflects the mistaken assumption that we can change reality through our imagination alone. For example, she writes:

Audiences want to hear about the design of life after male supremacy. Or, after all this negative, what do I have to say positive. This requests a construction of a future in which the present does not exist, under existing conditions. It dreams that the mind were free and could, like Milton, make a heaven out of hell, or a hell of heaven. The procedure is: imagine the future you want, construct actions or legal rules or social practices *as if* we were already there, and that will get us from here to there. This magical approach to social change . . . is not sufficiently grounded in . . . reality to do anything about it.²⁶

Sonia Johnson, on the other hand, has a different perspective on the role of aspirational thinking in effecting change:

[S]ince reality is only what we give the energy of our belief to, what we feel as real, all systems are *internal* systems: patriarchy does not have a separate existence outside us; it exists only inside us and we project it onto our external screen. It follows, then, that the instant patriarchy ceases to exist inside our hearts and minds, it dies everywhere.

. . . When we seize power in our inner world, the outer world will have to change.²⁷

Johnson's statement reflects exactly the kind of thinking that MacKinnon disdains. Johnson suggests that we are changing external reality when we move our internal selves closer to our aspirations for our self. MacKinnon dislikes that kind of statement because to her it suggests that we can change reality through imagination alone.

But that is not what Johnson means. Johnson rejects the distinction between self and other. She accepts a Buddhist-feminist conception of the self—a self that is connected with others and is ever-changing.²⁸ If we view the self as connected and ever-changing, then we see that we can change external reality by making changes in our selves. We move the external world closer to our aspirations as we move our selves closer to our aspirations because the internal and the external are inexorably con-

26. C. MACKINNON, *supra* note 8, at 219 (emphasis in original).

27. S. JOHNSON, GOING OUT OF OUR MINDS: THE METAPHYSICS OF LIBERATION 320-21 (1987) (emphasis in original).

28. See *infra* notes 31-38 and accompanying text.

nected. Aspirational thinking is important, then, because it affects, and may change, external reality.²⁹

Aspirational thinking is important for another reason. Until we articulate our goals, we cannot expect society to change in ways that reflect our desires.³⁰ By articulating their visions and seeking a common ground, feminists might be able to move beyond their differences and work together toward goals upon which all feminists can agree. Accordingly, I have chosen to share my aspirations with the reader in the hope that we can begin to discuss them and try to determine how best to move toward them.

B. *The Authentic Self*

Feminists and theologians seem to agree that we should try to discover and experience our authentic selves, yet they rarely define the "authentic self." What follows is a description of the "authentic self" that I find compatible with Buddhism and feminism.³¹ First, because we

29. Of course, MacKinnon is correct to observe that neither our internal reality nor our external reality change through our imagination alone. However, since a part of our selves is our mind, it makes sense to suggest, as does Johnson, that our lives change as we make changes in our consciousness.

30. For example, MacKinnon's work might be stronger if she articulated her vision more clearly. Many feminists are reluctant to accept MacKinnon's critique of sexuality because they are not sure where she is trying to lead the feminist community. See, e.g., Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1565-70 (1987) (arguing that MacKinnon fails to provide a vision for a feminist world); Taub, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Book Review), 80 COLUM. L. REV. 1686, 1691 (1980) (noting that application of MacKinnon's inequality doctrine may perpetuate "benign" discrimination and with it the attitudes that have historically justified sex-based distinctions). Is MacKinnon saying that sexual relationships between men and women are impossible, undesirable, and ultimately not in the interest of women's well-being? Or is she saying that we need to move toward more authentic expressions of our love, which might include sexual relationships between women and men? These are not trivial questions; they are questions that might affect whether women are willing to identify with feminist theory and join the struggle to move toward its vision for society.

31. The self that I will sketch has been formulated largely through my experience of meditation and my discussions with others who have also experienced meditation. For a good discussion of Buddhism that may help the reader to experience meditation, see S. SUZUKI, *ZEN MIND, BEGINNER'S MIND* (1970). Thomas Merton's work has deepened my understanding of meditation. See, e.g., T. MERTON, *NEW SEEDS OF CONTEMPLATION* (1961) (reflections on the nature of self, God and being; a guide to Christian mysticism). Merton's work demonstrates that an emphasis on contemplation can be consistent with Christianity although it does not always receive emphasis within Christianity. See also E. LERNER, *JOURNEY OF INSIGHT MEDITATION: A PERSONAL EXPERIENCE OF THE BUDDHA'S WAY* (1977) (describing Lerner's personal experience with meditation).

The "authentic self" I am going to describe is not, however, limited to a Buddhist or feminist perspective. For example, western writers, outside of Buddhism and feminism, sometimes rely on a similar conception of the authentic self. See, e.g., 3 I. SINGER, *THE NATURE OF LOVE* 331-32 (1987) (describing Jaspers' and Merleau-Ponty's conceptions of the authentic self); R. UNGER, *PASSION:*

are social beings, the self is deeply connected to others.³² Thus, the distinction between self and other is illusory.³³ Second, the self is ever-changing; it is not a static entity. Because the self is ever-changing and under our control, we seek to move it toward our aspirations for it.³⁴ Finally, as we move toward experiencing our aspirations for our selves, we approach authenticity—we begin to realize our authentic selves.³⁵

This latter aspect of the authentic self—its relation to our aspirations—is the most important. Because the self is dynamic, it permits us to move toward our aspirations for our selves. In addition, because the authentic self does not embrace a separation between it and others, it permits us to develop those aspirations through our connectedness with both our selves and others. This concept of self is compatible with the idea of developing aspirations through both meditation (communication with our self) and dialogue (communication with others).

Although I consider my description of the authentic self to be both

AN ESSAY ON PERSONALITY 11-12 (1984) (describing the process of being defined by contexts while changing those contexts).

Nevertheless, feminist writings dealing with religion or spirituality rarely include contributions from Buddhists and therefore rarely explore a Buddhist-feminist conception of the self.

32. Feminist theory has recently emphasized women's relations to others in describing women's selves. Several descriptions of the self, which are rooted in an understanding of women's relationships to others, appear in *WEAVING THE VISIONS: NEW PATTERNS IN FEMINIST SPIRITUALITY*, *supra* note 13, at 171-266. Martha Minow's work also assumes a relational self. See Minow, *supra* note 25, at 34-38 (criticizing the assumption that difference is intrinsic, not relational).

33. Some Buddhists say that it does not make sense even to talk about the "self," since there is no real distinction between self and other. See, e.g., D. CARMODY & J. CARMODY, *EASTERN WAYS TO THE CENTER: AN INTRODUCTION TO ASIAN RELIGIONS* 106-10 (1981). Other Buddhists, like Nancy Wilson Ross, say that it is meaningful to talk about the self; we simply have to be careful to recognize that self and other are deeply connected. I have chosen to adopt Ross' description and try to talk about the self while recognizing the importance in Buddhism of speaking of the "no-self." As Nancy Wilson Ross explains:

In Buddhism the idea of the separate self, an "ego," is considered a mere intellectual invention, not a reality but simply a convenient term for designating an ever-changing combination, or bundle, of attributes known as *skandhas*.

Skandhas, in Buddhist thought, consist of forms, feelings, perceptions, mental formulations (ideas, wishes, dreams) and consciousness. The constant interplay and interconnection among the *skandhas* has the effect of giving a false sense of personal identity and continuity—whereas in truth there is no definite "I" existing by itself, independent of the ever shifting relation among psychic and physical forces.

N. ROSS, *supra* note 2, at 28.

34. Adrienne Rich's poem *Integrity* provides one of the best descriptions of the journey toward the authentic self that I have found. See A. RICH, *Integrity*, *supra* note 19 (reflecting on the notion of an ever-changing self).

35. Nel Noddings explains both the dynamic and aspirational aspects of the self. She says, "The ethical self is an active relation between my actual self and a vision of my ideal self as one-caring and cared-for. It is born of the fundamental recognition of relatedness; that which connects me naturally to the other, reconnects me through the other to myself." N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 49 (1984).

Notice that, as I have defined it above, our authentic selves really are our aspirational selves. Thus, when I use the phrase "move toward experiencing our aspirations for our selves," I could just as easily say, "move toward experiencing our authentic selves."

feminist and Buddhist, many feminists have suggested that my conception of the self is incompatible with two aspects of feminist theory. First, feminist theory relies on group-based theory to describe how women have been treated as a class. Second, it relies on social construction theory to show how women have been artificially gendered female. I contend, however, that feminist theory need not abandon its social construction or group-based premises in order to embrace my conception of the authentic self. To the contrary, embracing my conception of the authentic self provides a tentative resolution to the feminist paradox of how we can be a socially constructed self and yet move beyond dominant social norms that contribute to our oppression.

The authentic self, as I have defined it, is both a group-based and an individual-based concept since it recognizes our connectedness to others as humans, as well as the meaningfulness of the concept of a separate "self." The group-based aspect of experiencing the authentic self should be easy for feminists to incorporate into their theoretical framework. Feminists acknowledge that women may come to understand their situation of subordination by sharing their experiences with other women. Women will realize that they are not alone, and that their experience has the name of subordination.³⁶

Yet, moving toward one's authentic self through consciousness-raising also has an individualistic aspect. Not every woman's story is identical. Each woman must decide for herself which life experiences have been predominantly shaped by her sex and gender and which life experiences may have been shaped by other influences. For example, challenges by women of color have forced feminists to acknowledge that not all life experiences can be fully described in sex-based terms, but rather that women's experiences are both particular and universal.³⁷ The particularity of women's experiences challenges feminism, and my conception of the authentic self strengthens feminist theory by making it better equipped to respond to this challenge.

In addition, my conception of the authentic self is consistent with

36. This is the description of consciousness-raising found in Catharine MacKinnon's work. See MacKinnon, *An Agenda for Theory*, *supra* note 25, at 23 ("[t]hrough consciousness raising, women grasp the collective reality of women's condition from within the perspective of that experience, not from outside it").

37. See, e.g., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE, *supra* note 9; HOME GIRLS: A BLACK FEMINIST ANTHOLOGY, *supra* note 11 (defining "simultaneity of oppression" as the crux of what Black feminist politics must combat, and as the factor which differentiates Black feminist politics from feminist politics in general). Martha Minow has probed this dilemma within feminist theory in her work on sameness and difference. See, e.g., Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987) (emphasizing relationships between people so that a focus on differences, rather than on "different people," will not lead to legal exclusion of those considered "abnormal").

the understanding that we are socially constructed. It recognizes that we are, in part, defined by our society's dominant patriarchal norms. However, by being more meditative and reflective we can gain control over that social construction and move toward our aspirational self. As I will demonstrate, feminists who advocate consciousness-raising as a tool whereby women become more conscious of their selves and work to shape those selves more authentically seem to endorse a conception of the self that is similar to the one I have sketched.³⁸

C. What Does it Mean for the Authentic Self to be Embedded in Love, Compassion, and Wisdom?

Because the authentic self is a dynamic, ever-changing concept, we can control the aspirations toward which we would like it to move. I suggest three aspirations for the authentic self: love, compassion, and wisdom.

1. Love

When I refer to love, I am referring to the experience of intimate connectedness, including but not limited to sexual love or "eros."³⁹ I use the term to include sexual expressions which are "self-liberating, other-enriching, honest, faithful, socially responsible, life-serving and joyous."⁴⁰

Theology speaks aspirationally about love. For example, the Bible says:

I give you a new commandment:
love one another;
you must love one another
just as I have loved you.
It is by your love for one another,
that everyone will recognise you

38. Ruth Smith, a Christian feminist theologian, also shows how a dynamic conception of the authentic self is compatible with feminist theory's emphasis on consciousness-raising. See Smith, *Feminism and the Moral Subject*, in *WOMEN'S CONSCIOUSNESS*, *supra* note 15, at 235, 249-50 (recognizing that our ability to move our selves toward a more authentic self moves us closer to our feminist vision).

39. There are generally four types or qualities of love: libido, philia, agape, and eros. See, e.g., P. TILICH, *LOVE, POWER AND JUSTICE* 5 (1954). By providing a definition of love that includes sexual love, I do not mean to overemphasize physical intimacy. Nevertheless, it is important for me to use a definition of love that includes physical intimacy because feminist literature has extensively discussed the inauthenticity that women experience through physical intimacy. For an excellent survey of conceptions of love throughout history, see 1-3 I. SINGER, *THE NATURE OF LOVE* (1984-1987).

40. Nelson, *Reuniting Sexuality and Spirituality*, 104 *CHRISTIAN CENTURY* 187, 189 (1987) (citing A. KOSNIK, W. CARROLL, A. CUNNINGHAM, R. MODRAS & J. SCHULTE, *HUMAN SEXUALITY: NEW DIRECTIONS IN AMERICAN CATHOLIC THOUGHT* 92-95 (1977)).

as my disciples.⁴¹

This biblical love of neighbor is present in other religious traditions⁴² and has been used as the foundation for political-religious movements such as liberation theology.⁴³ However, the challenge within theology is to translate this aspiration of love into human reality.⁴⁴ For despite the Bible's vision of love, what society labels "love" has not always been a positive force in women's lives. Accordingly, many feminists are reluctant to embrace the aspiration of love, especially sexual love, because they recognize that what has been called "love" has not served women's well-being.⁴⁵

Catharine MacKinnon's work exemplifies the feminist position that is skeptical of love. She is reluctant to consider the positive potential of love for fear that women will then disregard the radical feminist critique of existing sexual arrangements. She observes that the mere experience of sexual pleasure or intimacy does not make sex empowering for women.⁴⁶

MacKinnon is correct to note that women's reported pleasure in sexual love does not make that kind of love empowering. The problem of consciousness must make us skeptical of women's claims of empowerment within sexual expressiveness. To say that sexual expressiveness has been problematic for women, however, is not to say that it has no positive potential. An instrument of oppression can also be an instrument of liberation. Theories of female love must consider love as both a creative and a destructive aspect of women's lives.

41. *John* 13:34-35 (New Jerusalem Bible).

42. For example, this conception of love can also be found in Judaism. See, e.g., P. LAPIDE, *THE SERMON ON THE MOUNT: UTOPIA OR PROGRAM FOR ACTION?* (A. Swidler trans. 1986) (investigating the Sermon on the Mount from the standpoint of Jesus' Jewishness and the fundamentally Hebraic quality of his ethical teaching).

43. See B. HARRISON, *supra* note 13, at 91-93. For a general discussion of liberation theology, see G. GUTIÉRREZ, *A THEOLOGY OF LIBERATION* at xiii-xiv, 174 (rev. ed. 1988) (discussing liberation theology as the means with which to address the problems of oppression in Latin America); see also Jacobsen, *Liberation Theology as a Revolutionary Doctrine in Latin America*, 10 *FLETCHER FORUM* 317, 318 (1986) (Liberation theology "posits that the poor, long victimized by the rich, must translate Catholic teaching into action, in order to change the social system and bring justice to this world, rather than leaving it to the province of heaven.").

44. See generally May, *Four Mischievous Theories of Sex: Demonic, Divine, Casual, and Nuisance*, in *PASSIONATE ATTACHMENTS: THINKING ABOUT LOVE* 27, 38-39 (W. Gaylin & E. Person eds. 1988) (arguing that people can condemn and torture themselves by trying to make love divine).

45. For example, Celia Kitzinger has surveyed this reluctance to embrace the aspiration of love and concluded that "[t]he various feminist critiques of romantic love present it as an objectifying and individualistic construction of the patriarchy which functions as a means whereby men have justified their dominance over women." C. KITZINGER, *THE SOCIAL CONSTRUCTION OF LESBIANISM* 117 (1987). As Kitzinger notes, however, other feminists insist upon the importance of "ardent" and "fervent" love, claiming that it is essential to healthy functioning. *Id.* at 118 (citing Rootsong, *Love and Courtship*, in *OUR RIGHT TO LOVE: A LESBIAN RESOURCE BOOK* (G. Vida ed. 1978)).

46. C. MACKINNON, *supra* note 8, at 218.

Feminists who recognize this dual aspect of love and have explored the positive and deeply spiritual role of love and compassion in women's lives include Audre Lorde and Adrienne Rich. Lorde discusses the concept of the "erotic"⁴⁷ and asserts that it is an intrinsically dynamic force within women's lives:

The very word *erotic* comes from the Greek word *eros*, the personification of love in all its aspects—born of Chaos, and personifying creative power and harmony. When I speak of the erotic, then, I speak of it as an assertion of the life force of women; of that creative energy empowered, the knowledge and use of which we are now reclaiming in our language, our history, our dancing, our loving, our work, our lives.⁴⁸

Lorde therefore acclaims the importance of women discovering and experiencing the erotic within their lives.

Adrienne Rich has explored the role of love and compassion within women's lives in a variety of contexts. She connects authentic expressions of love and compassion through motherhood to movement toward full personhood, or what I call the authentic self. Like Lorde, she recognizes both the destructive and life-building possibilities of women's love.⁴⁹

In defining their vision, feminists are justifiably skeptical of the possibility of mutual love in a woman's life because being loving has been defined as a feminine trait and in that sense has contributed to women's subordination. The feminist theologian, Rosemary Ruether, challenges feminists to find the common ideals for both men and women in love.⁵⁰

47. In discussing the erotic as power, Lorde observes:

We have been taught to suspect this resource [the erotic], [which has been] vilified, abused, and devalued within western society. On the one hand, the superficially erotic has been encouraged as a sign of female inferiority; on the other hand, women have been made to suffer and to feel both contemptible and suspect by virtue of its existence.

A. LORDE, *Uses of the Erotic: The Erotic as Power*, in *SISTER OUTSIDER* 53, 53 (1984).

48. *Id.* at 55 (emphasis in original).

49. For example, in her introduction to the tenth anniversary edition of *OF WOMAN BORN*, Rich describes the balance that she tried to strike between exploring the negative and positive aspects of motherhood:

I never wished this book to lend itself to the sentimentalization of women or of women's nurturant or spiritual capacity. . . . But what I wrote in 1976 I believed: *Theories of female power and female ascendancy must reckon fully with the ambiguities of our being, and with the continuum of our consciousness, the potentialities for both creative and destructive energy in each of us.*

A. RICH, *OF WOMAN BORN*, *supra* note 19, at xxxiv-xxxv (emphasis in original). Lorde also recognizes the dual aspects of love. See A. LORDE, *supra* note 47 (probing the power of the erotic while recognizing how the erotic has been abused in women's lives).

50. Ruether states:

True nonviolence must be based, first of all, on a secure sense of one's own value as a human being. . . .

. . . .

. . . Conversion to a new sense of self that wills the good of others in a community of life must transform traditional women as well as traditional men.

Ruether, *Feminism and Peace*, in *WOMEN'S CONSCIOUSNESS*, *supra* note 15, at 63, 72-73.

Ruether searches for ways that women can build a better world through an ethic of love, without being limited to feminine stereotypes. She believes that love that is embedded in women's self-esteem could be politically transformative rather than passively feminine.⁵¹

Simply recognizing the positive potential of love, of course, is not going to make the problem of sexual objectification disappear tomorrow. Women's consideration of their highest aspirations for love might lead them away from sexual relationships with men because the reality of their current relationships may be far removed from their aspirations. Rejecting particular relationships because they do not meet one's aspirations for love, however, is far different from rejecting entirely the possibility of heterosexual, loving relationships in one's life. Therefore, I suggest that feminist theory needs to express openly its aspiration for love between all people in society (including men and women) while acknowledging how far present reality deviates from that aspiration. With this combination of aspiration and critique, women may be more willing to come together and work for their shared aspirations.

2. Compassion

Feminists might reject love as an appropriate aspiration out of their distrust of sexual love, without recognizing the many positive dimensions of other kinds of love.⁵² I suspect that many feminists substitute aspirations that contain many of the strengths of love without the confusing sexual dimension. These other aspirations include what has often been termed "caring,"⁵³ or what I prefer to call "compassion."

Compassion requires a fully empathetic attitude by which we try to understand another person's life from *her* perspective. Buddhism is based on the aspiration of universal compassion.⁵⁴ Theravada Bud-

51. *Id.* at 71-73. Similarly, Catherine Keller agrees that women should attempt to build their love positively rather than reject the possibility of authentic love in their lives. Keller says that love is able to "release and refine an unlimited strength of interconnection" or able to shrink a woman's "fabric of relations and so her self to a domestic minimum." C. KELLER, *supra* note 24, at 17. Rather than reject mutual love as a possibility for women, Keller seeks to understand how women can positively embed love within their lives.

52. One confusing aspect of the aspiration of love is that there are so many kinds of love, including, but not limited to, sexual or erotic love. Because sex has been a troubling experience for women, it is important to specify the particular aspect of love to which we are referring.

53. Nel Noddings has described the importance of an ethic of caring. Her description of caring is quite similar to my description of compassion. *See infra* notes 54-65 and accompanying text. She emphasizes that a caring relationship does not involve our asking how we would feel in another's situation. Instead, she suggests that a caring attitude requires us to "receive the other into myself . . . become a duality. I am not thus caused to see or to feel—that is, to exhibit certain behavioral signs interpreted as seeing and feeling—for I am committed to the receptivity that permits me to see and to feel in this way." N. NODDINGS, *supra* note 35, at 30.

54. A central Buddha in Tibetan Buddhism is the Buddha of compassion, Avalokiteshvara. *See* A. HARVEY, *JOURNEY IN LADAKH* 71 (1983) (describing author's study of Buddhism in Tibetan

dhism, for example, includes an exercise called "metta" in which one suffuses one's whole being with active love and benevolence. One creates that state of being and sends it forth from one's innermost center with concern and loving-kindness.⁵⁵ The strength of this conception of compassion is that it connects the self to the other and makes it clear that compassion is an activity, not just an intellectual state.

Various western descriptions of the aspiration of compassion are similar to the Buddhist conception. For example, Simone Weil argues that a compassionate attitude is good for both our selves and others. It is a rare and special gift: "The capacity to give one's attention to a sufferer is a very rare and difficult thing; it is almost a miracle; it *is* a miracle. Nearly all those who think they have this capacity do not possess it. Warmth of heart, impulsiveness, pity are not enough."⁵⁶

Weil believes that we become a better society as we learn to have a more compassionate attitude toward others. It is not only for the *other* that we need to learn to be more compassionate; it is also for *our selves*. As an ethical principle, compassion therefore helps move us toward our aspirations for our selves and others as persons.

In contrast to a fully empathetic attitude, feminist conceptions of caring or responsibility often seem to suggest that we should be compassionate only to those to whom we are close and whom we can readily understand.⁵⁷ The conception of compassion that I have sketched takes a very different approach. It insists that we should aspire to understand the life of anyone, no matter how different he or she appears to be. This conception of compassion is inconsistent with the claim that men, for example, cannot understand what it means to give birth or have an abortion.⁵⁸ Instead, the aspiration of compassion insists that we should strive to make a society in which we can understand each other despite our differences.⁵⁹

Buddhist country). For an excellent attempt at interweaving feminist and Buddhist conceptions of compassion, see Klein, *Gain or Drain? Buddhist and Feminist Views on Compassion*, 6 SPRING WIND—BUDDHIST CULTURAL F. 105 (1986):

55. See N. ROSS, *supra* note 2, at 89.

56. THE SIMONE WEIL READER 51 (G. Panichas ed. 1977) (emphasis in original).

57. See N. NODDINGS, *supra* note 35, at 4-5 (describing a caring relationship as a special one, implying a level of intimacy which may exclude strangers or mere acquaintances); Stack, *The Culture of Gender: Women and Men of Color*, 11 SIGNS: J. WOMEN CULTURE & SOC'Y 321 (1986) (responding to anthropological studies of the 1970s which concluded that women tend to form self-images based on private relationships and caring for others, while men forge identities in relation to the outside world).

58. I frequently get this argument from my students when I ask them why a woman does not have to consult with her sexual partner before having an abortion. Martha Minow generally describes (and rejects) this perspective: "A pessimistic view suggests that we can never glimpse another's world, because our self-absorption limits our own self-knowledge." Minow, *supra* note 25, at 79.

59. The fact that we aspire to understand each other despite our differences does not, of course,

Andreas Teuber, relying on Weil's work, explains the concept of compassion and ties it to the concepts of equality and respect.⁶⁰ He argues:

Compassion sees the rights of others from the "inside," as it were, and takes the interests others have in their rights to heart. Although it does not in itself define any rights, compassion does this much: conveying certain attitudes without which we would lose sight of the values expressed by these rights. It is not a very strong claim but we can see in it at least the value of cultivating this sense of equality. Compassion works in relationship to the obligations and rights we already have in much the same way self-acceptance works for an individual who is punished by a law he has broken. . . . If we lose sight of the human interest and values that a right is designed to secure and protect, we shall see that right only as a barrier which insulates and isolates others from us. A compassionate attitude "sees" a person on the other side of this boundary with a definite interest in the values which the right is designed to protect. Rights are not just abstract creations; they have a context. In this sense, compassion urges us to respect . . . this particular person who (among other things) has these rights. To regard this particular person who (among other things) has these rights, it is necessary to look "behind" his interests to the interests of his they are designed to secure and protect. Indeed, without the cultivation of such an attitude, a system of rights is unlikely to be very effective.⁶¹

Rather than consider equality as a right that we can demand from others, Teuber considers equality to be a right to which others have a claim. We need to understand a person's right to equality in the context of her basic needs and interests.

This notion of equality is at odds with our traditional reliance on courts to resolve competing claims and determine who has a "right" to act in a particular way. Equality based on compassion suggests that individuals should be able to work out their differences by better understanding the needs and interests of others. When we resort to courts to resolve disputes we have necessarily failed to attain the aspiration of compassion.

mean that we will succeed. However, we may create a better society through our efforts to understand each other across our differences even if our efforts are not entirely successful. Thus, although Minow takes the position that "we cannot really know what another sees," *id.* at 82, she also rejects the position that "we can never glimpse another's world," *id.* at 79. So long as we reject the pessimistic view that we can never even glimpse another's world, it is worthwhile to attempt to know others despite differences.

60. Compassion or respect emphasizes our need to understand others' life conditions when we respond to them. Thus, a man would have to try to understand the conditions that may constrain a woman's actions before he responds to her actions. He could not simply respond to her *as if she were him* and meet the criteria of compassion and respect. Rather, he needs to respond to her as she is in her life conditions, a part of which is her gender.

61. Teuber, *Simone Weil: Equality as Compassion*, 43 *PHIL. & PHENOMENOLOGICAL RES.* 221, 235-36 (1982).

Professor Lynne Henderson recognizes the apparent inconsistency between compassion (or what she refers to as "empathy") and legal analysis, but she concludes that empathy and legality are not mutually exclusive concepts.⁶² She argues that we should try to couch legal arguments in empathetic terms and thus enable the decisionmaker to "see other 'right' answers, or a continuum of answers, or simply make the decisionmaker aware that what once seemed like no choice or a clear choice is instead a tragic one."⁶³

According to Henderson's perspective, a litigant would not have to argue that her opponent is incorrect. Instead, she would have to argue only that her own position represents the preferred outcome. She may have to acknowledge, however, that her own position is a tragic one. Although I find it commonplace in personal discussions about abortion for feminists to acknowledge that abortion is a tragic choice, I have never found empathy to be a part of the legal arguments constructed by feminists on the abortion issue.⁶⁴ As Kathleen McDonnell has observed, based on her experience in the Canadian legal-political system, the feminists' lack of consideration of the values represented by the pro-life position often makes pro-life advocates appear to stand on the higher moral ground.⁶⁵ For example, feminists often respond to the emotional images of fetal life presented by pro-life advocates with silence. They do not say why we as a society must regretfully terminate the life of the fetus to protect women's well-being. They talk about women's well-being as if the audience is not struggling with the question of how to protect the value of prenatal life. In the legal context, however, if the court were not struggling with that question, then there would not be a legal controversy. A more empathetic perspective, one that recognizes the tragic nature of the abortion decision, may therefore be a more convincing argument to those people who are struggling with how to protect the values presented by both the pro-life and pro-choice movements.

Consideration of the aspiration of compassion should therefore make us pause and consider how empathy or compassion could enhance our legal arguments. Rather than be compromised by a legal system that seems to prefer arguments that see issues in black-and-white terms, feminist legal arguments should try to reflect an openness and consideration of the other side's concerns even if we must reluctantly ask the courts to step in and protect our well-being.

62. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

63. *Id.* at 1653.

64. For example, the various feminist briefs in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605), show no empathy with the values presented by the pro-life position. For further discussion of the feminist briefs in *Webster*, see Colker, *Feminist Litigation: An Oxymoron?*, 13 HARV. WOMEN'S L.J. (forthcoming 1990).

65. K. McDONNELL, NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION (1984).

3. *Wisdom*

There are (at least) two ways to think about the aspiration of wisdom. One way is to think that there are "right" answers to difficult moral questions on which all reasonable people could agree. Another view is that there are answers for each of us that are consistent with our authentic selves, but that those answers are not necessarily the same for each of us, and may change for any of us at different points in our lives. This latter approach is the one that I take in this essay. It is a Buddhist conception of wisdom.

The key elements to a Buddhist conception of wisdom are that self-knowledge is under our control, ever-changing, and subject to close examination.⁶⁶ Self-knowledge is the path to wisdom, and meditation is the process by which Buddhists attain self-knowledge. Although some people may consider meditation to be a passive experience, it is actually an active exercise that can "drastically change an individual's life."⁶⁷ Accordingly, we should dedicate our lives to close examination of our selves. By understanding our selves, we help move our selves closer to our authentic selves.

The Buddhist practice of using meditation to attain wisdom is similar to the feminist practice of using consciousness-raising to improve women's consciousness of their existence. Feminist theory would benefit from some of the insights that Buddhists have attained through the practice of meditation. For example, feminist theory often seems embedded in the assumption that consciousness-raising is successful when it leads to political work.⁶⁸ Feminists do not sufficiently address the need to return again and again to consciousness-raising or other forms of meditative practice while they participate in political work. Buddhists, by contrast, emphasize the need to make meditation a way of life. Rather than move beyond meditative work, feminists need to find ways to embed meditative

66. Nancy Ross provides a good summary of the role of wisdom in Buddhism:

In Buddhism it is ignorance, not sin, that gives man his difficulties, and ignorance can, by specific *teachable* techniques, be modified, even overcome. One has only to make the right effort! This is a key point worth repeating. Blame and guilt play no part in Buddhism; shame, however, over personal inadequacies can be a significant aspect of an individual's transformation.

Self-knowledge is the one sure, indisputable path by which we can extricate ourselves from the branches of conditioned life. The Dhammapada states: "All that we are is made up of our thoughts." From this it would follow that since thoughts are subject to control, it is quite possible to alter one's attitude, an alteration that can drastically change an individual's life. This whole process is, however, much less simple than the mere exercise of mind over matter

N. Ross, *supra* note 2, at 62 (emphasis in original).

67. *Id.*

68. See, e.g., C. MACKINNON, *supra* note 8, at 81-213 (arguing for political action against pornography).

work in their everyday life and politics.⁶⁹

III

THE FEMINIST CRITIQUE

I now examine two aspects of the feminist critique—the problem of consciousness and the problem of sexual objectification. I first describe the traditional feminist explanation of the problem of consciousness, showing how aspirational techniques such as dialogue and meditation can enhance feminist methods of raising consciousness. I also discuss the lack of a significant account of consciousness in feminist theory. Then I address the problem of sexual objectification, arguing that the aspiration of compassion helps us to understand it better than existing feminist explanations, which overemphasize male domination and abandon universal norms.

A. The Problem of Consciousness

Because women are often unaware of their sex-based oppression, they sometimes make decisions that they believe to be in their best interest, but that actually detract from their well-being. Simone de Beauvoir recognized this phenomenon and asked:

Why is it that women do not dispute male sovereignty? No subject will readily volunteer to become the object, the inessential; it is not the Other who, in defining himself [or herself] as the Other, establishes the One. The Other is posed as such by the One in defining himself [or herself] as the One.⁷⁰

Similarly, Catharine MacKinnon claims that the problem of consciousness results in women believing that they are consenting to sexual relations, when in fact they are contributing to their own subordination.⁷¹ But what does it mean to say that women do not always act in their own best interest or, more generally, have a problem of consciousness? Does it mean that women do not feel the conditions of their own existence? Does it mean that women perceive their oppression but are unable or afraid to describe it? Or does it mean that they are simply afraid to act upon their feelings authentically? How can we confidently “know” that a woman has not acted in her own best interest when she would evaluate her best interest differently than we would?

69. This discussion of wisdom may seem too passive for some feminists because, as MacKinnon warns, it suggests that we can change reality through our mind alone. See *supra* note 26 and accompanying text. But if we consider the Buddhist view that there is no separation of self and other, we can see that self-knowledge, and thereby wisdom, is attained through perceiving how we live our lives and connect with others. The process of attaining self-knowledge through meditation is neither a passive nor an isolated activity.

70. S. DE BEAUVOIR, *THE SECOND SEX* at xxi (H. Parshley trans. 1952).

71. C. MACKINNON, *supra* note 8, at 216.

We can gather some preliminary answers to these questions by listening to the stories of individual women's lives. For example, studies of battered women and victims of incest show that many victimized women suppress their feelings of pain.⁷² Moreover, women often have difficulty outwardly expressing their anger.⁷³ Stories of women who regret their prior abortion decisions⁷⁴ also illustrate some women's inability to act on their feelings and support the observation that certain "wrong" decisions may have resulted from a troubled conscience.

Thus, the problem of consciousness may be a combination of several problems: their difficulty in perceiving their own feelings; their inability to articulate fully the negative feelings that they do recognize; their inability to act on the feelings that they recognize; and their experience of sometimes making decisions that, with hindsight, they can evaluate as "wrong."⁷⁵

Feminists often treat the problem of consciousness as being relevant only to explain why not all women are feminists and why some women do not actively fight their subordination. In this essay, however, I do not want to limit myself to that aspect of the problem of consciousness. The problem of consciousness results in women not authentically or truly consenting to some of the most basic and important decisions in their lives—such as decisions surrounding their sexual relations—and it arises each time a woman makes a difficult, fundamental life decision.

1. *Consciousness-Raising*

The feminist solution to the problem of consciousness is consciousness-raising.⁷⁶ However, despite the widespread acceptance of "consciousness-raising" within feminist theory, there are few, if any, systematic discussions in the feminist literature of its effectiveness. Consciousness-raising has clearly played a significant role in women's lives, yet it also has been criticized for being potentially manipulative as group norms can be imposed on the participants. For example, three co-authors have remarked:

We have some doubt that [consciousness-raising] can be utilised to artic-

72. See, e.g., L. WALKER, *THE BATTERED WOMAN* (1979).

73. See, e.g., M. KOLBENSCHLAG, *KISS SLEEPING BEAUTY GOOD-BYE: BREAKING THE SPELL OF FEMININE MYTHS AND MODELS* 135, 177 (1979).

74. See, e.g., D. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987) (relating the stories of women who had abortions under varying circumstances, and later came to regret their decisions).

75. Elsewhere, I have described this problem as one of women not being able to experience their authentic selves, emphasizing that it is not enough merely to be able to glimpse the authentic self. Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry Into the Politics of Authenticity* (Review Essay), 68 B.U.L. REV. 217 (1988). Women must also be able to act upon that glimpsed reality.

76. See, e.g., *RADICAL FEMINISM* 271-99 (A. Koedt, E. Levine & A. Rapone eds. 1973) (essays describing women's involvement in consciousness-raising).

ulate the entire individual experience. Some women have argued that the group itself can be oppressive, in the sense that one orthodoxy, the orthodoxy of patriarchy, may well be replaced by another. This in its turn goes on to impose limits upon the revelation and authentication of experience. This suggests to us the problem we have already recognised in the process of transforming authorised normalities. The orthodoxy that emerges within the group may well be as much reflexive as reflective; that is to say, it may emerge equally in the guise of committed individualism as in the form of a considered "feminist morality."⁷⁷

But the claim that consciousness-raising may engender a feminist "morality" is no reason to dismiss its usefulness. The more important question is whether that ethic allows the individual to reach a reflective, as opposed to a coerced, decision. When consciousness-raising is coercive it does not help an individual to experience her authentic self. The value and success of consciousness-raising turns on the techniques used and the methodology for determining the legitimacy of one's conclusions.

a. Techniques for Raising Consciousness

Insights from theologians concerning the aspiration of wisdom can contribute to our understanding of raising consciousness. Strategies often suggested by theologians for attaining wisdom include dialogue and meditation or contemplation. Each of these techniques could be used effectively in feminist consciousness-raising sessions.

Leonard Swidler, a theologian, emphasizes the importance of dialogue. He defines and explains the importance of dialogue in developing relational understandings of our role in society:

I learn by dialogue—that is, not only by being open to, receptive of, in a passive sense, extramental reality, but by having a dialogue with extramental reality. I not only "hear," receive, reality, but I also—and I think, first of all—"speak" to reality. That is, I ask it questions, I stimulate it to speak back to me, to answer my questions. Furthermore, I give reality the specific categories, language, with which, in which, to speak, to respond to me. It can "speak" to me—really communicate to my mind—only in a language, in categories, that I understand. When the speaking, the responding, becomes more and more ununderstandable to me, I slowly begin to become aware that there is a new language being developed here and that I must learn it if I am to make sense out of what reality is saying to me. This is a *dialogic* view of truth, whose very name reflects its *relationality*.⁷⁸

77. Bottomley, Gibson & Meteyard, *Dworkin: Which Dworkin? Taking Feminism Seriously*, 14 J.L. & Soc'y 47, 56 (1987) (footnote omitted).

78. Swidler, *Interreligious and Interideological Dialogue: The Matrix for All Systematic Reflection Today*, in TOWARD A UNIVERSAL THEOLOGY OF RELIGION, *supra* note 18, at 10 (emphasis in original). Swidler's discussion of the importance of dialogue to achieve consciousness or wisdom parallels many feminist observations. First, he explains how the importance of

Swidler's description of dialogue provides insight into how methods to raise consciousness could be more effective. He emphasizes that dialogue is a process of being open to others. Rather than entering dialogue to persuade others, we should enter dialogue to listen truly to others and empathize with them. Through such openness, we can use dialogue to modify or reflect on our original perspective. If everyone entered consciousness-raising with such openness, we might be less fearful of others trying to indoctrinate us with "right" answers. No one would enter the process thinking that she had the right answers; we each would enter the process intending to listen and consider the experiences and perspectives of others.

Nevertheless, Swidler may have insufficiently considered the potential for manipulation. If women generally have lower self-esteem than men, they may be more susceptible to manipulation than Swidler's universal description of how to engage in true dialogue assumes.

Perhaps dialogue could be combined with other methods to stem this potential for manipulation. Eastern theologians advocate meditation or contemplation, which departs from feminist tradition in its lack of a group dynamic. Merton, a Roman Catholic theologian who studied Zen Buddhism, describes the essence of contemplation:

[C]ontemplation is beyond aesthetic intuition, beyond art, beyond poetry. Indeed, it is also beyond philosophy, beyond speculative theology. It resumes, transcends and fulfills them all, and yet at the same time it seems, in a certain way, to supersede and to deny them all. Contemplation is always beyond our own knowledge, beyond our own light, beyond systems, beyond explanations, beyond discourse, beyond dialogue, beyond our own self.⁷⁹

Further exploration of the contemplative tradition may help feminists to understand better the problem of consciousness. Meditation is an even more internal process than consciousness-raising as traditionally defined by feminists, and it may thereby avert the problem of manipulation.

The rhetorical quality of some feminist theory, however, poses a problem with trying to integrate meditation, contemplation, and dialogue with feminist consciousness-raising. Catharine MacKinnon's work, in particular, is sometimes thought to be quite rhetorical.⁸⁰ The methodol-

consciousness is not simply a problem for women; it is a problem for all people. Second, he affirms the importance of noncognitive and relational methodologies to achieving consciousness. Feminists often value intuition but have not been able to provide a full explanation of why intuition can be feminist (rather than simply feminine). Swidler helps explain the powerful dimension of some traditionally feminine traits like intuition because they fit nicely into the spiritual dimension. Finally, his emphasis on the importance of relational dialogue fits well with the connected aspect of our authentic self.

79. T. MERTON, *supra* note 31, at 2.

80. As Cass Sunstein has said, "*Feminism Unmodified* will be hard for skeptics to take; parts of it will appear polemical, one-sided, insufficiently empirical, and at times conclusory." Sunstein,

ogies or techniques discussed above, however, are not compatible with a rhetorical style.

Buddhists, for example, disdain rhetoric. Rita Gross, a Buddhist-feminist, describes the rhetorical or hard edge of feminist theory as "a protective shell preserving one from immediate contact with situations."⁸¹ She suggests that this kind of hard edge is bad for society because it prevents people from having a truly compassionate and open attitude to others and themselves.

Although some feminists contend that rhetoric is necessary to critique—that one is too accepting of the status quo without rhetoric—Gross challenges feminists to abandon some of their rhetoric:

[S]ome middle way between ideology and mindless acquiescence to anything whatever is in order. This non-dualistic, non-fixated allegiance to "neither this nor that" seems to be the hardest aspect of Indian spirituality to teach to Westerners in classrooms and it also seems to be the hardest actually to grasp. But it seems the only way to maneuver between the ideology of the radical and ideology of the conventional.⁸²

Meditation may make feminists uncomfortable by forcing them to abandon some of their unexamined premises or to be more open to others' views. Ultimately, however, feminism would benefit by truly embracing a dialogue with the self and others that is gentle rather than argumentative and rhetorical.

Aside from meditation, feminists might also benefit from enhancing existing consciousness-raising activities. Sonia Johnson, a feminist interested in spirituality, has explored a technique of consciousness-raising which she calls "Hearing into Being."⁸³ It involves each woman in a group having a certain amount of time to talk uninterrupted and without evaluation. It enables women to break their silence without being limited by others' views or judgments. The experience of "[b]eing seriously and completely listened to, being genuinely heard" was an extremely powerful experience for many women in Johnson's group.⁸⁴

An interesting question is whether consciousness-raising would be more effective than meditation in assisting women to experience their authentic selves. With meditation there is no danger that women may be speaking to receive affirmation from others since they are speaking to themselves. But meditation does not provide women with the opportunity to hear voices of others. Consciousness-raising, however, focuses on

Feminism and Legal Theory (Book Review), 101 HARV. L. REV. 826, 848 (1988). Sunstein does not necessarily find MacKinnon's work rhetorical, but he acknowledges that others often do. My experience in teaching MacKinnon's work confirms this observation.

81. Gross, *supra* note 24, at 78.

82. *Id.* at 78-79.

83. S. JOHNSON, *supra* note 27, at 130.

84. *Id.*

women breaking their silence. Women are already conditioned to accept others' perspectives; they may not need to struggle with techniques that emphasize openness.⁸⁵ But women may need to develop techniques that help them break their silence. There is no reason to pick one technique to the exclusion of another; women could pursue both techniques.

b. The Need for an Account of Consciousness

Having described the problem of consciousness and suggested some aspirational techniques that may enhance the raising of women's consciousness, I will now consider a major weakness of the feminist description of this problem. Notwithstanding the effectiveness of consciousness-raising techniques, feminist theory suffers from the problem of not having a mechanism to evaluate which perceptions about women's well-being should be credited. The only way to evaluate feminist observations would be to have a theory of consciousness that could explain which perceptions women should believe and which they should distrust in creating their account of the world. Without such an account of consciousness, feminist theory has difficulty in guiding women to experiences that will promote their well-being.

This problem is illustrated by MacKinnon's pornography analysis. MacKinnon argues that pornography is an act of sex discrimination; it perpetuates men's subordination of women.⁸⁶ She engages in an experiential discourse to support this observation.⁸⁷ She reports the story of Linda Lovelace, a woman who was enslaved and brutalized by the pornography industry.⁸⁸ But MacKinnon's experiential discourse is highly selective. She discounts the stories of women who have consented to working within the pornography industry and report finding the work relatively satisfying. Their satisfaction appears unimportant because other women have participated in pornography under conditions of coercion.

Obviously, MacKinnon is correct in that women should not be coerced to participate in pornography. But what about the women who report voluntariness and even satisfaction? MacKinnon does not explain whether we should insist that their consciousness is false or incomplete.

85. For an excellent description of how women's identity is based on the needs and perspectives of others, see C. KELLER, *supra* note 24, at 7-46.

86. See, e.g., C. MACKINNON, *supra* note 8, at 127-213.

87. In general, MacKinnon's methodology is confusing. On the one hand, she embraces experiential discourse suggesting that women need to turn to their own varying subjectivity to understand their experiences. On the other hand, her writing is full of broad generalizations about women's experiences which do not explicitly reflect an experiential discourse. For a critique of MacKinnon's methodology, see Ring, *Saving Objectivity for Feminism: MacKinnon, Marx, and Other Possibilities*, 49 REV. POL. 467 (1987) (arguing that a feminist critique of objectivity should be less one-dimensional).

88. For further discussion, see L. LOVELACE & M. MCGRADY, ORDEAL (1980).

Most importantly, she does not explain how eliminating the opportunity to work within the pornography industry, as she advocates, would change these women's consciousness of their existence. MacKinnon suggests external strategies to deal with the problem of pornography—legal restrictions—but ignores the internal aspect of the problem of consciousness.

Other feminists argue that pornography is an act of political speech that should be protected.⁸⁹ Unlike MacKinnon, they recognize that pornography may be liberating and educational.⁹⁰ But these feminists may discount the stories of degradation and subordination that come from some women within the industry. Even if some women are coerced to participate in pornography, these feminists would not suppress sexually explicit speech in order to prevent such coercion.

Neither the view favoring restriction of women's freedom to participate in pornography nor the view favoring protection of it facilitates the journey toward the authentic self. Neither view seeks to empower women to see for themselves the meaning of pornography in their own lives.⁹¹ Feminists need to be more open to discussions about the *process* used to reach various conclusions. By evaluating the process by which women reach their conclusions, we could more readily evaluate whether those conclusions are consistent with women's well-being. If we have evidence that a woman made her decision after she listened to her inner voice and considered a variety of social messages, we would presumptively credit her observations as authentic. In contrast, if we have evidence that she unreflectively accepted the dominant social message, we would be more skeptical that her decision was authentic.

B. The Problem of Sexual Objectification or Nonmutual Love

Feminists often refer to the problem of sexuality as a problem of "sexual objectification." They define sexual objectification as men's treatment of women as objects rather than as full human beings with their own needs and desires. Sexual objectification takes many forms. An

89. See Brief Amici Curiae for Feminist Anti-Censorship Taskforce in Support of the American Booksellers Association, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), *aff'd*, 475 U.S. 1001 (1986), *reprinted in* 21 U. MICH. J.L. REF. 76 (1988).

90. *Id.* at 30. See generally PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (C. Vance, ed. 1984) (essays exploring the tension between sexual danger and sexual pleasure).

91. Robin West focuses on the need to consider all women's voices in evaluating the problem of pornography. See West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681. In addition, I have suggested in a previous work that it is important for law to respond to problems of race and sex discrimination from the perspective of the subordinated group. See Colker, *The Anti-Subordination Principle: Applications*, 3 WIS. WOMEN'S L.J. 59 (1987); see also West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (emphasizing the importance of listening to women's voices).

obvious example is when a man makes an obscene comment to a woman as she walks down the street. The woman's reaction is probably two-fold: she may feel threatened by the possibility of physical violence, and she may feel that she was viewed one-dimensionally as an object for his pleasure.

It is hard to separate the problem of sexual objectification from the problem of violence against women. Because women fear sexual violence, they often respond with fear to casual comments about their appearance on the street during daylight hours. The problem of sexual objectification, however, is not only a reflection of a woman's fear of sexual violence. It is also a reflection of her distaste for being viewed as an object rather than as a subject (or, in Buber's language,⁹² as an It rather than a Thou).

One popular response to the feminist critique of sexual objectification is the assertion that the woman may consent to or take pleasure in the man's conduct. This claim may be more convincing if, rather than make an obscene comment, the man whistles at her. I will assume for this discussion that some women may enjoy a whistle from a man; it may make them feel attractive or sexy. Other women, however, may feel abused and insulted by such a whistle.

I contend that a man who whistles at a woman as she walks down the street has objectified her sexually *even if she takes pleasure from the whistle*. I reach this conclusion by applying the aspiration of compassion. A whistle is objectionable under this aspiration because a man who respected women generally would not whistle at an individual woman and thereby risk inflicting pain and fear on her. A man enlightened by compassion would understand the life conditions which make it frightening and unpleasant for some women to be whistled at on a city street. A compassionate man would accordingly find a way to express his attraction to the woman in a more sensitive and less threatening way. Compassion teaches us that sexual expression may be universally objectifying even when it is not universally unwelcome.

One criticism of the feminist description of sexual objectification is that it may put too much emphasis on the problem of male domination. For example, Catharine MacKinnon implies that women are unable to experience their own sexuality because it has always been defined from the perspective of men's needs and desires.⁹³ Explaining the problem of

92. See *infra* note 95.

93. For example, MacKinnon states:

If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it *is* its own lack, then there is no such thing as a woman as such, there are only walking embodiments of men's projected needs. For feminism, asking whether there is, socially, a female sexuality is the same as asking whether women exist.

sexuality as a consequence of male dominance seems to imply that men have defined sexuality to meet their own needs and have experienced their sexuality in a way that facilitates their well-being.

Writings by men in feminist theory suggest, however, that the process of male socialization inhibits an experience of male sexuality that fosters the well-being of men.⁹⁴ Present sexual arrangements may keep some men in an economically superior position, but present sexual arrangements do not bring them closer to their authentic selves. Although male domination has certainly contributed to the problem of sexual objectification, the problem extends beyond male domination and blocks the path to the authentic self for both men and women alike.⁹⁵

Dick Westley, a theologian whose work has helped people move toward their authentic selves through sexuality, emphasizes that we have the power to bring meaning to sex, as we have the power to bring meaning to life.⁹⁶ His understanding of sexuality is compatible with the feminist observation that women should make choices in their lives that make their sexuality more meaningful.⁹⁷ For example, some feminists suggest

MacKinnon, *An Agenda for Theory*, *supra* note 25, at 534. This passage is cleverly ambiguous—MacKinnon never says that women are socially defined so that they cannot know their own sexual needs; she leaves the reader wondering if that is her perspective.

94. Men have only recently begun to write in feminist theory. However, literature by and about gay men reflects on the ways in which men's sexuality has been rendered inauthentic. *See, e.g., Owens, Outlaws: Gay Men in Feminism*, in *MEN IN FEMINISM* 219 (A. Jardine & P. Smith eds. 1987); *BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE* 81-192 (M. Kaufman ed. 1987).

95. Irving Singer's work can help us see how the problem of sexual objectification is not limited to the problem of domination. Singer uses the concept of objectification, for example, to explain Martin Buber's views on love:

When two people reciprocally communicate with one another as an I and a Thou, they respond as persons to the personhood in each. On the other hand, they enter into an I-It situation when they treat each other as objects or instrumentalities, things to be manipulated in the material world. Buber would seem to believe that virtually everything, whether or not it is a person, can be experienced as either an It or Thou. But only when we undergo an I-Thou relationship, Buber says, do we penetrate to the foundation of being.

3 I. SINGER, *supra* note 31, at 332. *See generally* M. BUBER, *I AND THOU* (R. Smith trans. 1958) (theological discourse on man's relationship to other men). Feminists have contextualized this description of objectification by explaining its implications in women's lives.

96. Westley observes:

Some have interpreted the fact that sexuality can be endowed with many different meanings as evidence that sexuality itself is multilayered, like an onion. On that account, we choose how to value and give meaning to sexuality by how deeply we penetrate its reality, how close we come to its core or center. I have no real quarrel with talking that way, but I don't think sexuality is like an onion, so much as we are. Were sexuality like an onion, then its meanings would be merely discovered and not created or freely chosen by persons. Because we are incarnate spirits, we are multilayered and hence capable of investing sexuality with a wide variety of different human meanings. The question is not so much what meanings sexuality has. Rather, the questions are: What meanings do we human beings choose to give to our sexuality? and Which are the ones that our experience teaches us offer the best chance at greater freedom, greater hope, and greater humanness?

D. WESTLEY, *MORALITY AND ITS BEYOND*, *supra* note 22, at 182.

97. Westley's treatment of sexuality falls short when he discusses homosexuality. He is

that women should seek a lesbian existence to make their lives more satisfying or meaningful.⁹⁸ Irrespective of whether feminists accept that position, they generally agree that women should try to construct their sexuality so as to facilitate their movement toward their authentic selves. Thus, by asking how we can add meaning to sexuality (rather than assuming that the meaning of sexuality is a given), Westley makes an observation compatible with the feminist critique of sexuality.

A final problem with the feminist critique of sexual objectification is its capacity to expand to include a critique of objectivity generally.⁹⁹ Observing that norms, values, and customs have often been constructed from a perspective that benefits men or speaks only to men's needs, feminists have often expressed skepticism regarding our ability to speak from an objective or universal perspective.

Although I generally agree with the feminist critique of the problem of sexual objectification, I do not agree that this critique forces us to abandon our aspirations for objective or universal norms. Clearly, society's and the legal system's attempts to create objective norms have been a disaster. As Martha Minow has argued, when judges purport to speak from an objective perspective, they often rely on the norms of white, male, Christian, able-bodied society.¹⁰⁰ Minow responds to this observation by suggesting that we need to acknowledge our own partiality and "strive for the standpoint of someone who is committed to the moral relevance of contingent particulars."¹⁰¹ Concretely, she suggests that we "must acknowledge and struggle against [our] partiality by making an

relatively untroubled about the ability of "inherently" homosexual persons to engage in meaningful sexual activity. However, if there is ambiguity concerning a person's sexual orientation, Westley advocates that the person be counseled against "choosing" homosexuality. D. WESTLEY, *MORALITY AND ITS BEYOND*, *supra* note 22, at 226-27. Westley supports his general observations about homosexuality by providing an example of a woman who chose lesbianism due to previous bad sexual experiences with men. Westley suggests that she should be counseled against homosexuality because she was not "inherently" a homosexual. His discussion ignores the extensive lesbian literature on the value of women *choosing* to be lesbians as an act of political resistance. See, e.g., C. KITZINGER, *supra* note 45; Rich, *supra* note 19. It is hard to imagine conduct that could add more meaning to life than to embed one's sexuality in one's political movement toward fuller humanness. The lesbian lifestyle, as an act of political resistance, is meaningful *because* it is not innately determined, *because* it is an act of conscious choice.

98. See, e.g., Rich, *supra* note 19. Rather than define lesbianism in traditional sexual terms, Rich defines lesbianism in political terms and argues that it can be an act of political resistance against patriarchy. For further discussion of the role of lesbianism in women's authentic sexuality, see Colker, *supra* note 75, at 255-60.

99. This link is explicit in Catharine MacKinnon's work. She claims that "[t]he male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality Woman through male eyes is sex object, that by which man knows himself at once as man and as subject." MacKinnon, *An Agenda for Theory*, *supra* note 25, at 23-24.

100. Minow, *supra* note 25, at 38-45.

101. *Id.* at 76.

effort to understand [others'] realit[ies] and what [they] mean[] for [our] own."¹⁰² Rather than "adopt and cling to some new standpoint" we ought to "strive to become and remain open to perspectives and claims that challenge our own."¹⁰³ Minow argues that this exercise and others would discourage judges from seeking "an illusory universality and objectivity."¹⁰⁴

Minow seems to suggest in her concluding remarks that there is no such thing as nonillusory universality and objectivity; we can hold only a partial, nonuniversal perspective. Yet, her own work, like other feminist work,¹⁰⁵ is necessarily embedded in certain universal ethical principles.¹⁰⁶ But this is not surprising. If we have no system of ethics, then we have no aspirations by which to evaluate present society. In addition, a system of ethics provides the basic content of the legal conception of justice according to which we resolve competing claims.

Although there are some ethical norms to which we can aspire, we should not assume that they are numerous, wide-ranging, or even constant over time. The feminist critique of the problem of consciousness should make us acutely aware of how difficult it is to generalize. The theological aspiration of wisdom through contemplation and dialogue should also caution us against expecting ourselves to be able to attain universal principles easily. In Part IV of this essay, I therefore seek to develop minimalist norms within law that recognize our limited capacity to speak in universalities.

IV

CONSTITUTIONAL LAW: A CASE STUDY IN ABORTION

In this Part, I demonstrate the relevance of the previous discussion to constitutional theory, focusing specifically on the topic of abortion. A constitutional theory usually has two elements: a theory of constitutional interpretation, and an evaluation of judicial activism.¹⁰⁷ The two traditional positions on constitutional interpretation are originalism and nonoriginalism.¹⁰⁸ The two traditional views on judicial activism are

102. *Id.*

103. *Id.*

104. *See id.* at 95.

105. *See, e.g.,* N. ROSS *supra* note 2, at 62 ("Self-knowledge is the one sure, indisputable path by which we can extricate ourselves from the brambles of conditioned life.").

106. One obvious principle is what Minow calls "equal respect." *See id.* at 77 ("The plea for judges to engage with perspectives that challenge their own is not a call for sympathy or empathy, nor a hope that judges will be 'good' people. Sympathy, the human emotion, must be distinguished from equal respect, the legal command.").

107. For an excellent description of constitutional theory, see M. PERRY, *supra* note 24, at 121-79; *see also* J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

108. Although these are the labels often used in describing theories of judicial interpretation, they are not entirely satisfactory because they suggest that there are only two views, and that those

activism and restraint.¹⁰⁹ To present a feminist-theological theory of constitutional interpretation, I must take a position on both the originalism/nonoriginalism and the activism/restraint debates.

The abortion issue has been a central forum for the debate about originalism/nonoriginalism and activism/restraint. The *Roe v. Wade*¹¹⁰ decision is considered an example of the Supreme Court's using a highly activist and nonoriginalist perspective to overturn state legislation. Thus, the *Roe* decision is a useful vehicle for illustrating the practical consequences of my constitutional theory.

A. *An Aspirational Theory of Constitutional Interpretation*

The feminist-theological challenge is to find a way to utilize constitutional law to protect women's well-being while remaining true to the aspirations of love, compassion, and wisdom. I will argue that adopting nonoriginalist rules of interpretation combined with cautious reliance on judicial activism best meets this goal.

1. *Originalism/Nonoriginalism*

A feminist-theological theory of constitutional interpretation must arise from a nonoriginalist perspective because it is only through consideration of contemporary aspirations that we can hope to use the Constitution to protect women's well-being.¹¹¹ A judicial accounting of our contemporary aspirations requires an extrapolation from the constitu-

views are bipolar. In addition, these terms present an unfavorable impression of nonoriginalists by defining their philosophy in a negative way, by reference to what it is not. I prefer to view both theories of interpretation as being part originalist and part aspirational, with each theory using both tools of interpretation to varying degrees. It is unlikely that a "nonoriginalist" judge ignores original intent, or that an "originalist" judge ignores contemporary aspirations for a constitutional text. The difference between an originalist and a nonoriginalist is probably a matter of emphasis—originalist judges tend to rely more heavily on original intent and nonoriginalist judges tend to rely more heavily on contemporary aspirations. Despite my reservations about the nonoriginalist label, I use it in this discussion because of its widespread use in the existing literature.

109. These terms are used differently in different contexts. Sometimes activism is used as if it were a synonym for nonoriginalism, or simply an adjective describing the behavior of nonoriginalist judges. I use the term judicial activism to describe the degree to which judges defer to legislative decisions and processes generally, particularly when the issues addressed involve the assessment of fundamental societal aspirations and values. In contrast, I use the related concept of nonoriginalism in a more narrow sense, as pertaining to the process of constitutional interpretation.

110. 410 U.S. 113 (1973).

111. I have adopted Michael Perry's description of nonoriginalism. Perry's view is not the only nonoriginalist perspective but I have found it to be the perspective that is most compatible with a feminist-theological perspective. Perry persuasively argues that our constitutional doctrine should embody our contemporary aspirations for society as well as principles that can be derived from the language and history of the Constitution. See M. PERRY, *supra* note 24, at 121-79. For further discussion of other nonoriginalist perspectives, see *id.* (canvassing and rejecting other nonoriginalist—as well as originalist—perspectives).

tional text beyond that which originalism generally permits.¹¹² In addition, a nonoriginalist perspective is necessary to challenge us to stop and examine our contemporary aspirations for particular constitutional provisions. What do we *want* to mean when we insist upon the right to enjoy equal protection or the right to enjoy liberty and due process of law? I believe it is good for a community to attempt to speak aspirationally because such dialogue may enable us to overcome short-term disagreements and move toward our common goals.¹¹³

In order to incorporate my aspirations into a constitutional framework, I need to show that these aspirations are embedded in the Constitution. I do not need, however, to prove that these are the only aspirations embedded in the Constitution, nor do I need to show that we would all agree that these aspirations are embedded in the Constitution. I need only to show that a judge, in good faith, could discern these aspirations in the constitutional text.¹¹⁴

Within the constitutional text, I find two sources for the aspirations of love, compassion, and wisdom—the liberty-due process clause and the equal protection clause. The Constitution does not define either of these provisions. As I argue in another work,¹¹⁵ one can view the liberty-due process clause as protecting our ability to fulfill our basic aspirations for our authentic selves. The Supreme Court has found that the due process clause protects rights which are “fundamental” or “implicit in the concept of ordered liberty.”¹¹⁶ Although there is no simple formula for determining which rights are fundamental or implicit in the concept of ordered liberty, it is plausible that the aspirations of love, compassion, and wisdom, which pervade many religious traditions, are constitutionally protected under this principle.¹¹⁷

Similarly, one can reasonably argue that the equal protection clause embodies the notion of equality as a right whose meaning ought to be discerned within a context of compassion or respect.¹¹⁸ Under such an understanding, we would define equality from the perspective of the needs of others rather than the needs of ourselves. In addition, we would

112. *But see* Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988) (authored by Nina Morais) (arguing that an originalist under a general intent theory could conclude that the ratifiers of the fourteenth amendment intended § 1 to include sex discrimination claims).

113. *See supra* note 30 and accompanying text.

114. *See* M. PERRY, *supra* note 24, at 121-79.

115. *See* Colker, *supra* note 75, at 261-64 (recognizing that substantive due process might protect a person's right to make authentic sexual choices).

116. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

117. For a provocative discussion of the role of religion in interpreting constitutional texts, see Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions*, 6 J.L. & RELIGION 225 (1988).

118. *See supra* text accompanying notes 52-65.

seek to respect the lives of others as we would respect our own lives; we would not impose burdens on others that we are not willing to impose on ourselves. Finally, we would need to consider fully the claims made on both sides of an equality issue; we should try to find ways to make arguments that reflect our consideration of the importance of the values articulated by our opponent.

In the abortion context, both the liberty-due process and equal protection clauses can be used to understand the claims of female plaintiffs seeking to overturn restrictive abortion legislation. Since the claims made in abortion cases are fundamentally about women's rights, as women, to full and equal respect in society, the equal protection analysis is preferable because it requires less extrapolation from the constitutional text. Nevertheless, in the discussion that follows I consider both equal protection and liberty-due process claims for two reasons. First, the courts have already used the liberty clause when considering the abortion issue.¹¹⁹ Thus, a liberty discussion fits nicely into the existing constitutional jurisprudence. Second, using the equal protection doctrine in abortion cases presents substantial doctrinal difficulties. As articulated by the Court in *Personnel Administrator v. Feeney*,¹²⁰ classifications that adversely affect one sex are not subject to heightened judicial scrutiny unless the classification itself is sex-based, or the adverse effect reflects "purposeful discrimination."¹²¹ Because pregnancy-based classifications have been found not to be explicitly sex-based,¹²² it is likely that abortion-based classifications would also be found not to be explicitly sex-based and therefore would be invalidated only upon a showing of purposeful discrimination. The *Feeney* Court defined the discriminatory purpose test for cases of nonexplicit sex discrimination: Discriminatory purpose implies that the institution "selected or reaffirmed a particular course of action at least in part 'because,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹²³ Courts have invalidated few sex-based classifications under this impact-intent test.¹²⁴

The "but for" causation requirement articulated in *Feeney*, which requires a court to find a desire to cause harm, is unrealistic and does not adequately take account of women's well-being. Unlike discrimination on account of race, where harm is likely to be explicitly intended, harm is

119. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

120. 442 U.S. 256 (1979).

121. *Id.* at 274.

122. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (concluding that pregnancy-based distinctions do not constitute sex-based classifications).

123. *Feeney*, 442 U.S. at 279.

124. For an excellent critique of this test, see Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376 (1979) (authored by Bruce E. Rosenblum).

unlikely to be intended in the sex discrimination context. Legislatures are more likely to act on the basis of patronizing stereotypes about women's best interests than on the basis of a desire to harm women.¹²⁵ Alternatively, legislatures are free to ignore women's interests altogether and thereby preserve the status quo of unequal opportunity between men and women. An *unthinking* attitude can be as harmful to women as direct animus because it serves to keep women's interest in society invisible. By requiring a finding of a desire to cause harm before overturning a statute that is discriminatory on the basis of sex, *Feeney* permits legislatures to pass discriminatory legislation while remaining silent about women's interests. However, the equal protection clause should not be construed as a sanction for legislative silence. A full and considered (compassionate) legislative debate should be the goal of equal protection doctrine. The intent test therefore fails to meet the standard of compassion by permitting legislatures to be unthinking about women's liberty interests.

Ideally, the courts would abandon the discriminatory purpose test and ask instead whether a legislature would have passed the legislation if it respected women's well-being. If a legislature failed this compassion-respect test, the courts would conclude that the legislature had engaged in unconstitutional discrimination irrespective of whether the legislation was framed in explicitly sex-specific terms, or whether there was other evidence of an intent to discriminate. But since it is unlikely that the courts will change the definition of sex-based inequality, and I have available another constitutional framework that does not impose a similarly difficult burden, I choose to frame my constitutional argument in both liberty-due process and equal protection terms.

2. *Activism/Restraint*

While the originalism/nonoriginalism debate centers on the interpretation of constitutional text, the issue of judicial activism entails a socio-political judgment about the appropriate role for judges in our society. Although feminists traditionally advocate judicial activism,¹²⁶ feminist jurisprudence must be cautious about judges' competence to render

125. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1972) (recognizing that sex discrimination has traditionally been rationalized on the basis of paternalistic stereotypes).

126. One exception to this pattern is Martha Minow. Although she does not use the term "judicial activism," her work suggests that feminists can endorse judicial activism only reluctantly because an activist judiciary that purports to have "right answers" seems to disregard the feminist critique of universality and objectivity. See Minow, *supra* note 27, at 93 ("Thus, choices from among competing commitments do not end after the Court announces its judgment. Continuing skepticism about the reality endorsed by the Court—or any source of governmental power—is the only guard against tyranny.").

generally applicable "right answers" to difficult moral problems.¹²⁷ To the extent that we question the existence of universally "correct" answers, we should hesitate before deferring to the judiciary on controversial social issues.

Although feminists routinely disclaim any interest in developing universal norms, their work, on close examination, reflects certain minimal universal aspirations. For example, Martha Minow criticizes our ability to speak from universal norms, yet she argues for the pursuit of the universal norm of compassion or respect when she encourages us to try to understand the world from the multiple perspectives of those who have been subordinated.¹²⁸ I call such attempts to define universal norms "minimalist" because they tentatively seek to attain universality but reflect the insight that norms may need to change as we gain greater wisdom. Under a Buddhist-feminist view, a minimalist conception of universality recognizes that, despite their differences, there is a fragile and subtle strand that connects all women to one another. By articulating certain minimalist aspirations such as love, compassion, and wisdom, feminist theory could have a confident, although often changing perspective.

Feminist theory can sometimes support claims for judicial activism because feminist theory is consistent with the idea that sometimes there are "right answers" to difficult moral issues. Universal norms are possible, although not plentiful. However, the fact that there may be, on occasion, correct answers to difficult moral issues does not mean that judicial activism is always appropriate. Rather, we only turn reluctantly to the courts to resolve disputes, recognizing that we are a long way from attaining the aspirations of love, compassion, and wisdom in our daily social lives. Thus, a fundamental question to address in determining whether judicial activism is appropriate is whether it will help us to achieve our aspirations for a better society.

Because I believe there are some universal ethical principles that shape our notion of justice, I believe judicial intervention can lead us closer to our aspiration of wisdom. Specifically, we must ask how judicial activism can further our goal to attain wisdom. Dialogue and contemplation, not rhetoric, are the vehicles by which we seek wisdom.¹²⁹ Judicial activism, however, is often criticized for being an imperial or rhetorical stance which does not promote dialogue throughout society. This observation should make us pause and evaluate the possible dangers

127. The variety of feminist analyses of issues such as prostitution and pornography should make us pause and realize how difficult it is to resolve moral issues even from a feminist perspective. See *supra* text accompanying notes 86-91.

128. See *supra* notes 100-05 and accompanying text.

129. See *supra* notes 78-85 and accompanying text.

to society from judicial activism. However, as we see in the abortion context, judicial activism can sometimes promote rather than deter dialogue.

B. *The Abortion Problem*

Although I consider myself a pro-choice feminist, I am troubled by two common pro-choice arguments. First, pro-choice advocates often deny or ignore that for some women the decision to have an abortion can be troubling and may even have adverse psychological consequences.¹³⁰ Second, pro-choice arguments often seem disrespectful of the seriousness of the pro-life position.¹³¹

Similarly, there are two significant problems with the pro-life position. First, pro-life advocates are often willing to use the criminal law to regulate abortion.¹³² Second, pro-life advocates are often unwilling to provide public funding for abortions for poor women even when the pregnancy substantially threatens their health or well-being.¹³³

130. The public debate concerning the request by President Reagan that C. Everett Koop, the Surgeon General of the United States, provide him with a report on the health effects that abortion has on women brought this perspective to the surface. See generally *Koop Challenged on Abortion Data*, N.Y. Times, Jan. 15, 1989, at A1, col. 1 (reporting that feminist groups strongly objected to the President's request).

131. Rosalind Petchesky's work reflects this problem. See, e.g., Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263 (1987). Petchesky rightly argues that pro-life advocates often present distorted portrayals of fetuses. But in making that argument, she wrongly suggests that fetal representations have no objective meaning. See *id.* at 272, 286-87. The fact that the meaning of fetal images must be viewed in context should not cause us to disregard that fetuses are life. As I will argue in Section 2, the important issue for pro-choice and pro-life advocates to confront is the meaning or significance of fetal life to the abortion issue.

132. Examples of cases that have considered and rejected legislation criminalizing abortion except in very narrow circumstances include *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional a statute that criminalized all abortions except those for the purpose of saving the mother's life); *Doe v. Bolton*, 410 U.S. 179 (1973) (holding unconstitutional a statute that criminalized all abortions except for those performed in three situations); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975) (holding unconstitutional a statute that prohibited all abortions except those for the purpose of saving the life of the mother); *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (unconstitutional to impose criminal penalties on first trimester abortions); *Leigh v. Olsen*, 385 F. Supp. 255 (D.N.D. 1974) (holding unconstitutional a statute that criminalized the killing and destruction of a "quick child" and the procurement and soliciting of a "miscarriage"); *Rosen v. Louisiana State Board of Medical Examiners*, 380 F. Supp. 875 (E.D. La. 1974) (holding unconstitutional a statute that restricted all abortions except those done for relief of woman whose life appeared in peril), *aff'd mem.*, 419 U.S. 1098 (1975); *Montalvo v. Colon*, 377 F. Supp. 1332 (D.P.R. 1974) (holding unconstitutional a statute that criminalized abortion unless performed to save the life of the mother).

133. Examples of cases considering legislation restricting public funding of abortions include *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (upholding Missouri law prohibiting public funding of abortion unless woman's life endangered); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding law prohibiting federal reimbursement for abortions under Medicaid program unless the woman's life was endangered or the pregnancy was the result of rape or incest); *D.R. v. Mitchell*, 645 F.2d 852 (10th Cir. 1981) (constitutional to provide no public assistance for medical expenditures to otherwise eligible persons for the performance of an abortion unless the life of the

I contend that greater sensitivity to the aspirations of love, compassion, and wisdom would require pro-choice and pro-life advocates to modify their positions. Pro-choice advocates would have to consider counseling requirements more seriously, and pro-life advocates would have to consider non-criminal means to regulate abortion that resulted in more equitable class-based treatment.

Both sides of the pro-life/pro-choice debate fail to discuss adequately our aspirations in their work. The theologian, Stanley Hauerwas, chides the pro-life movement for not speaking more aspirationally:

How the moral description and evaluation of abortion depends on more profound assumptions about the kind of people we ought to be was . . . not even recognized by ourselves, much less by those who do not share our convictions. As a result, Christian arguments about abortion have failed. They have not merely failed to convince: they have failed to suggest the kind of "reorientation" necessary if we are to be the kind of people and society that make abortion unthinkable.¹³⁴

I suggest that the pro-choice movement has made the same mistake. Taking Hauerwas' advice, I approach the abortion cases from the perspective of the kind of people and society that we want to be. In the previous parts of this essay I have articulated the aspirations toward which I believe we should work. I now consider how the Court can play a more constructive role of facilitating progress toward those aspirations in the abortion context.

There are three general issues that have arisen or should have arisen in the case law concerning the abortion problem: (1) whether states can constitutionally respond to the abortion problem with criminal legislation; (2) what steps a state can take to preserve the interest in fetal life; and, (3) whether the courts should be activist in dictating the parameters of constitutional abortion legislation. I will address each of these issues in turn.

1. *The Appropriateness of Criminal Legislation*

The question whether states can constitutionally use the criminal laws to regulate abortion was raised in *Roe v. Wade*.¹³⁵ Before consider-

mother would be endangered); *Hodgson v. Board of County Commissioners*, 614 F.2d 601 (8th Cir. 1980) (holding that state law conflicted with the federal Medicaid Act, where state law provided Medicaid payments for only those abortions necessary to prevent pregnancy resulting from rape or incest); *Frieman v. Walsh*, 481 F. Supp. 137 (W.D. Mo. 1979) (holding that state law conflicted with federal Medicaid Act, where state law prohibited funding abortions under Medicaid unless the mother's life was endangered); *Planned Parenthood Affiliates of Ohio v. Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979) (unconstitutional to limit use of public funds for medically necessary abortions).

134. Hauerwas, *Abortion: Why the Arguments Fail*, in *ABORTION PARLEY* 323, 327 (J. Burtchaell ed. 1980).

135. 410 U.S. 113 (1973).

ing *Roe* itself, I would like to consider generally the impact of criminal abortion sanctions on women's lives.¹³⁶

a. Impact on Women of Criminal Abortion Sanctions

To understand how criminal abortion legislation affects women's lives, it is helpful to consider how pregnancies that require an abortion decision result. Unintended pregnancy results either from unprotected sexual activity or birth control failure. Considering the aspirations of love and compassion, the relevant questions are: (1) Does the pregnancy reflect love and compassion (or respect) between the sexual partners? and, (2) What is the appropriate social response to the pregnancy? The answers to these questions will guide our determination of whether or not criminal legislation is an appropriate response to the problem of unintended pregnancy.

I focus on the situation where sexual activity occurs without contraceptives although both sexual partners (or at least the woman) wish to avoid pregnancy.¹³⁷ Arguably, sexual intercourse under these circumstances is inconsistent with mutual love and compassion. Even though she understands the substantial cost of an unwanted pregnancy to her, a combination of social pressures and expectations can often keep a woman from making sure that she or her partner uses contraceptives.¹³⁸ In this social context, a man who understands that his partner does not want to become pregnant yet fails to ensure that birth control is being used is not acting with love and compassion. A compassionate man would consider the enormous consequences to a woman of an unintended pregnancy. Although ultimately the decision to act responsibly cannot be placed on either partner alone, in a society where women are more readily subject to social and sexual coercion and simultaneously are forced to bear virtually all of the costs of an unwanted pregnancy, the male partner must accept substantial responsibility. Thus, I contend that an unintended pregnancy is quite possibly a sign of nonmutual love between a woman and her sexual partner.

An appropriate social response to these unwanted pregnancies would be to enact measures designed to reduce the likelihood that such

136. I focus on criminal sanctions because they were the issue in *Roe v. Wade*. However, the principles that underlie this discussion are also relevant in considering the appropriateness of civil actions as sanctions against ending unwanted pregnancies.

137. My critique of the partners' sexual interactions does not apply when pregnancy results from birth control failure. The problem in that scenario is the fallability of available birth control options.

138. See C. MacKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 185-86 (1989) (arguing that the social meaning of birth control use, as establishing a presumption of sexual availability, creates a social context in which sex is not meaningfully voluntary for women and that risking an unwanted pregnancy is "normatively less costly" than protecting oneself in advance).

pregnancies will occur. Notwithstanding the legality of abortion, women who do not desire pregnancy already face strong deterrents against unprotected sexual activity. They know that if sexual activity results in pregnancy, they then must experience the unwanted pregnancy, face the physical danger of abortion or childbirth, and deal with the lifelong emotional and physical consequences of a reproduction decision. Men, however, have fewer incentives to use contraceptives when a partner does not desire pregnancy, because men face few of the burdens of an unwanted pregnancy. In order to achieve the aspiration of love and compassion, we should create greater incentives for men to respect women's wishes with regard to pregnancy. We should also eradicate the sexual stereotypes and sexist expectations that contribute to the high incidence of unprotected intercourse.

The above analysis applies only to situations where a contraceptive device is not used. Even when sexual partners make the responsible decision to use a method of birth control, however, contraceptive failure may still result in an unwanted pregnancy. More societal resources therefore should be invested in the development of safer and more effective methods of birth control. At the same time, efforts must be made to educate women (and men) regarding the proper use of already available contraceptives. Criminalizing abortion, however, contributes little to these societal objectives and has virtually no effect on the male partner who should be forced to bear more responsibility for the unwanted pregnancy.¹³⁹

I suspect that an examination of the harshness of criminal solutions would cause even some pro-life advocates to agree that criminalizing abortion is not an appropriate means to engender love and compassion. Pro-life advocates, however, seldom seem to consider this aspect of the abortion debate. Indeed, the impact on women's lives of statutes criminalizing abortion is so little discussed in the pro-life movement that

139. The recent Canadian case, *Tremblay v. Daigle*, 59 D.L.R.4th 609 (Que. C.A.) *rev'd*, 2 S.C.R. 530 (Can. 1989), illustrates the potential unfairness of a law that enables a man to force his sexual partner to carry their child to term, but imposes no responsibility on him for raising it. The trial court granted Jean Guy Tremblay an interlocutory injunction preventing Chantall Daigle, his former girlfriend, from obtaining a second trimester abortion.

Tremblay accepted little responsibility for his actions. Although he originally maintained in the press that he wanted to raise the child, he soon decided against keeping it, stating that "you don't take a newborn from its mother." *Toronto Star*, July 27, 1989, § A, at 1, col. 2. He never told the trial court that he wanted to raise the child. Instead, he offered to help the mother financially. *Id.*

The primary burden of Tremblay's actions fell on Daigle who faced potential imprisonment when she defied the court's injunction and had an abortion in the United States. Although the Canadian Supreme Court ultimately overturned the court of appeals' decision, it did not act quickly enough for Daigle. Tremblay's coercive and selfish actions therefore caused her to face the possibility of both criminal and civil contempt charges. His actions make me wonder whether men who say they want to prevent their sexual partners from having an abortion are acting out of a genuine concern for life or out of a coercive desire to control or harm their sexual partners.

a question about it caught George Bush off guard during the 1988 presidential campaign.¹⁴⁰

Although I believe that the criminalization of abortion is inappropriate under the aspirations of love and compassion, my defense of women's ability to choose to have an abortion is not absolute. It is contingent upon existing social circumstances; it is *not* embedded in the argument that a woman has the right to control her body under any circumstances. From the perspective of love and compassion, I accept the argument that women have responsibilities in this world to nurture love and life. Since we are connected selves, we have no claim to act in ways to protect our bodily integrity in isolation from society. However, society must allocate the responsibilities of its members compassionately and respectfully. A woman, in my view, has the right to seek an abortion to protect the value of her life in a society that disproportionately imposes the burdens of pregnancy and child care on women¹⁴¹ and does not sufficiently sponsor the development and use of safe, effective contraceptives.

b. Aspirational Thinking Applied to Roe

The legislation at issue in *Roe v. Wade* made it a crime to procure or to attempt an abortion except for the purpose of saving the life of the mother.¹⁴² The penalty for violating the statute was two to five years imprisonment.¹⁴³ The state provided no alternative means to procure an abortion lawfully.

The plaintiff in *Roe* had become pregnant allegedly as the result of a rape.¹⁴⁴ She had already lost custody of one child because she was not able to take care of her. Although she was unable to take care of another

140. Bush first responded that he did not have a position and then responded, after overnight reflection, that he did not favor criminal sanctions against the pregnant woman. Bush's spokesperson said, "Frankly, he thinks that a woman in a situation like that [unwanted pregnancy] would be more properly considered an additional victim, perhaps the second victim. That she would need help and love and not punishment." N.Y. Times, Sept. 27, 1988, at A1, col. 4 & B7, col. 4. Because Bush has an extensive record of responding favorably to the concerns of pro-life advocates, it is reasonable to assume that he has been briefed throughout his career on the appropriate responses to anticipated abortion questions. In this light, the fact that Bush was caught entirely off guard by a question about statutes that criminalize abortion is a telling sign of how seldom pro-choice advocates seriously consider how such policies affect women's well-being.

141. See Jaggar, *Abortion and a Woman's Right to Decide*, 5 PHIL. F. 347 (1973-1974) (arguing that a woman's right to decide to have an abortion is contingent on our present social-political arrangements under which women have the major responsibility for raising children).

142. 410 U.S. 113, 117-18 (1973).

143. *Id.* at 117 n.1.

144. See M. FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 8 (1988). The plaintiff has since recanted her story that she was raped. *Id.* at 328.

child, the Texas statute prohibited her from obtaining an abortion because her life was not endangered by her pregnancy.

I contend that the criminal legislation at issue in *Roe* was unconstitutional because it violated both the liberty interests and equal protection interests of women. It violated women's liberty interests by paying insufficient attention to their life circumstances. It violated their equal protection interests by failing to show adequate compassion for their well-being.

The judiciary has developed a two-step analysis to assess the constitutionality of a statute. First, the court determines whether the statute has infringed a constitutional right of the plaintiff. Second, if it finds a constitutional right has been infringed, it determines whether the state's conduct was justified. If the infringed right is fundamental, then the state must show a compelling justification for its action and must use only those means necessary to achieve its goal.¹⁴⁵

To determine whether a plaintiff's rights have been infringed, one must understand fully how the legislation burdens the plaintiff. This is how the Court described the burden of the Texas legislation at issue in *Roe*:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.¹⁴⁶

This abstract description of the burdens of the legislation is inadequate because it pays insufficient attention to the life of this particular plaintiff.¹⁴⁷ It is removed from the reality of the plaintiff's actual life and thereby fails to meet the aspiration of compassion. It is hard to imagine how our judicial system can meet the aspiration of compassion through an abstract discourse that ignores that the plaintiff claimed to have become pregnant as the result of a rape and that she was a poor woman who had already lost custody of one child. Because we want judges to consider the plaintiff's liberty interests from the perspective of the plain-

145. See, e.g., *Roe v. Wade*, 410 U.S. at 155.

146. *Id.* at 153.

147. For a similar discussion of the importance of judicial attention to the individual facts of plaintiffs' lives, see Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363, 1377-79 (1989).

tiff's life (rather than from some imagined sense of the plaintiff's life), such plaintiff-specific facts need to be in front of the courts.

The *Roe* decision is not unique in describing inadequately how challenged legislation injured a plaintiff. In another major liberty or "privacy"¹⁴⁸ case, *Bowers v. Hardwick*,¹⁴⁹ the same deficiency emerged. The Court tried to determine whether the plaintiff had the right to engage in "homosexual sodomy" without examining how a policeman could justify standing outside the plaintiff's door to watch the sexual activity or asking what the full consequences of the state's sodomy statute on the plaintiff's life were. Infringement of liberty cases, like other civil rights cases, need facts so that the courts can understand the full burdens of the legislation on the plaintiff. We cannot expect to meet the aspiration of compassion unless the plaintiffs' lives are presented to the Court.¹⁵⁰

Despite the inadequate consideration of plaintiff-specific facts, the plaintiff in *Roe* prevailed. However, liberal commentators have not always been convinced that the Court described an injury to *Roe*'s liberty interest that was of constitutional magnitude. For example, John Hart Ely has written:

Of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word—with a permissible governmental goal.¹⁵¹

But even if, as Ely suggests, the liberty clause requires some kind of procedural due process violation, a full consideration of the implications to Jane *Roe* of the statute reveals that such a violation was present in *Roe*. The statute gave a woman absolutely no opportunity to procure an abortion lawfully unless her very life was endangered. Furthermore, the

148. I do not use the label "privacy" to describe these cases, because I do not think the constitutional claims should have been based on an argument that the challenged activity was constitutionally protected only so far as it occurred in the private sphere, outside the sight of society. I would want an abortion argument to be made in a structure that would impose responsibility on the state to fund abortions, thereby bringing them into the public sphere. Similarly, I would want a sodomy argument to be made in a structure that would require the state to recognize homosexual relationships through marriage, thereby bringing them into the public sphere.

149. 478 U.S. 186 (1986).

150. It is interesting to note, by contrast, that the Irish sodomy case, *Norris v. Attorney Gen.*, 1984 I.R. 36, 50 (Ir. S.C. 1983), included extensive facts about the impact of that country's sodomy laws on the individual plaintiff. The European Court of Human Rights subsequently overruled the Supreme Court of Ireland's holding that laws making homosexual conduct criminal are permitted by the Irish Constitution. The Irish decision was held to violate article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which Ireland had ratified. *Norris Case*, 142 Eur. Ct. H.R. (ser. A) (1988).

151. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973) (footnotes omitted).

sanction imposed for violating the statute was the strictest permissible—imprisonment. To require a woman who has been forcefully raped to serve a prison sentence because she does not feel capable of carrying her fetus to term would result in a very serious infringement on her liberty for conditions that are not in her control. It is hard to see how the unqualified use of criminal sanctions, especially in circumstances of rape and extreme poverty, could be “procedurally fair.”

An even stronger argument that the Texas statute unconstitutionally infringed the plaintiff’s rights can be made under an equal protection analysis. Ely does not conceive of the constitutional interest at stake in *Roe* to be a constitutionally protected equality interest, because the case does not involve women being treated as a powerless minority.¹⁵² Although he acknowledges that, as compared with men, women may be a powerless minority, Ely argues that women are not powerless as compared with fetuses. Because he conceives of *Roe* as involving a contest between women and fetuses, he argues that there is no reason to use heightened scrutiny under existing equality doctrine.

Commentator Michael Perry better understands the equal protection implications of Texas’ abortion legislation. He concludes that a legislature which valued the well-being of women would not enact abortion legislation that only permitted an abortion when the woman’s life was in danger.¹⁵³ The Texas legislation, Perry concludes, reflected a discriminatory discounting of the well-being of women.¹⁵⁴

Nevertheless, even Perry fails to understand fully the implications of abortion legislation for women’s well-being. Perry argues that if a state’s abortion statute permitted abortion under only three circumstances—when the pregnancy was due to rape or incest, when it posed a significant threat of serious damage to the woman’s health, or when the fetus would live a short and painful life¹⁵⁵—the statute would be constitutional. However, the companion case to *Roe*, *Doe v. Bolton*,¹⁵⁶ which contained vivid facts of a poor woman who had already lost two children to foster homes, had been recently abandoned by and reconciled with her husband, and had been a mental patient at the state hospital but could not get the public hospital to certify that another pregnancy would significantly affect her health, demonstrates the inadequacy of Perry’s conclusion. The consequences of unwanted pregnancies in women’s lives are dramatic and difficult to define through legislative categorization. More-

152. *Id.* at 933-35.

153. M. PERRY, *supra* note 24, at 172-78.

154. Perry argues that “[g]overnment may not, consistently with the principle of equal protection, count the well-being of one person or group as worth less, by virtue of race or gender, than the value of the well-being of another person or group.” *Id.* at 176 (footnote omitted).

155. *Id.* at 175.

156. 410 U.S. 179 (1973).

over, such categorization is likely to leave unprotected the poor women of our society who, like Doe, cannot afford a private physician who will certify that they meet the statutorily mandated categories. A minimum prison sentence of one year, the penalty prescribed by the statute reviewed in *Doe v. Bolton*, hardly seems like a compassionate response to Doe's unfortunate life conditions.¹⁵⁷ This discriminatory discounting of Doe's well-being, and the well-being of similarly situated women, is incompatible with the principle of equal protection informed by the aspiration of compassion.¹⁵⁸

A fundamental problem with the legislation in both *Doe* and *Roe* was its failure to take account of the specific factual situations in which abortion questions arise. The legislature accordingly decided in the abstract that a woman like Doe was not entitled to an abortion. Without facts, the legislature's absolute decisions were doomed to reflect a lack of consideration for the well-being of women. At a minimum, we would expect the due process clause, even under Ely's framework, to entitle a woman to demonstrate the significant impact that a reproductive decision would have in her life; by not permitting that opportunity the Georgia legislature unconstitutionally discounted the importance of her well-being. Moreover, as I have suggested above, it is hard to see how the criminal laws would ever be an appropriate response to the abortion issue.

2. *The Fetal Life/Viability Distinction as Justification*

A finding that legislation infringes a woman's liberty interest does not end the analysis. The next question is whether the state is justified in infringing that interest. In *Roe*, the state argued that it was justified in infringing the woman's liberty interest because it wanted to protect life after conception. However, in the Court's view, the state's asserted interest did not become compelling until the third trimester when the fetus became viable. Only at that point was the state allowed to regulate abortion to preserve the life of the fetus.¹⁵⁹

a. *The Fetal Life/Viability Distinction Generally*

The purpose of regulating abortion is to increase our valuation of

157. In addition, the punishment seems inappropriately harsh in gender terms. Her husband was able to abandon her and provide no support for the existing children and face no criminal sanctions; nevertheless, she faces potential criminal sanctions for life conditions that are, in part, created by him. Even if pro-life advocates can convince us that criminal sanctions are necessary and appropriate in dealing with the abortion issue, we still need to consider the problem of gender equity. I contend that, by imposing all of the criminal burdens of unprotected sexual activity on women, states violate women's right to equal protection.

158. See *supra* notes 52-65 and accompanying text.

159. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

life generally and fetal life specifically.¹⁶⁰ Accordingly, an assessment of the appropriateness of abortion regulation entails a consideration of how abortion prohibitions affect a pregnant woman's valuation of life.

The experiential literature suggests that the abortion decision is rarely easy for a woman. Often the decision involves the conflict between her desire to protect her own life by not carrying a pregnancy to term and her desire to bring a life into the world.¹⁶¹ I contend that the abortion decision represents a decision to terminate a pregnancy, not to terminate a life—that the termination of fetal life should be considered an unfortunate consequence of a woman's decision to value her own life.

A hypothetical situation may illuminate this observation further. Suppose that medical technology could permit a woman to abort her pregnancy during the first trimester and also save the life of the fetus. If that were true, I would argue that a woman has a moral right to abort her pregnancy but no moral right to insist that the life of the fetus be terminated. This follows because a woman never has a moral right to insist, as an end in itself, that a fetus's life be terminated. Her right to control her pregnancy is bounded by considerations of her own well-being. Her justification for a decision to terminate the pregnancy cannot be grounded in disrespect or disregard for the life of the fetus.¹⁶²

160. Some may argue that abortion regulations seek to protect fetal life, not to increase our valuation of fetal life. I describe the purpose as increasing our valuation of fetal life because that is the broadest principle underlying abortion regulations. I view the goal of protecting fetal life as a specific way in which we protect the valuation of life generally. I recognize, however, that protecting fetal life may jeopardize the well-being of another life—that of the pregnant woman. Accordingly, I argue that we must consider the protection of fetal life in the overall context of the many ways in which we demonstrate our valuation of life generally. We need to consider ways to demonstrate our valuation of fetal life while also demonstrating our valuation of the lives of pregnant women. When we cast the issue as how can we preserve fetal life at any cost, we lose sight of the interconnectedness of the many lives which comprise our society.

A similar description of the values underlying abortion regulations often appears in Holocaust-based defenses of abortion regulations. See, e.g., J. BURTCHALL, *Die Buben sind unser Unglück! The Holocaust and Abortion*, in RACHEL WEeping AND OTHER ESSAYS ON ABORTION 141 (1982).

161. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT, 70-103, 109-26 (1982) (discerning female modes of thought about self and relationships to others by examining women's responses to the moral conflicts presented by the abortion decision); D. REARDON, *supra* note 74, at 179-84 (relating women's accounts of the conflicts they felt in deciding to have abortions).

162. The recent controversy between a woman and her ex-husband in Tennessee illustrates this argument. In *Davis v. Davis*, No. E-14496 (Blount County, Tenn. Cir. Ct. Sept. 21, 1989) (Westlaw, 1989 WL 140495), a married couple had frozen nine of their embryos. After the couple divorced, the man sought to have the remaining embryos destroyed. The women wanted to preserve the embryos and have them implanted in herself. In such a situation, neither individual should have the right to insist that the embryos be destroyed: whichever individual wants to sustain the life of the embryos would have the superior moral claim.

Further, it is now medically possible to transfer embryos from a pregnant woman who does not desire to continue the pregnancy to another woman who desires to become pregnant. At present, this technology is not widely available, because it must take place within a short time after the pregnancy took place in order to be successful. But there may be a time when technology will allow

This observation raises a question as to the moral significance of viability. From a pregnant woman's perspective, a fetus is always "viable" if she chooses to serve as its incubator for nine months. However, the term viability, as used in the abortion literature, refers to the point at which the fetus has a statistically significant chance of surviving outside the womb with the assistance of medical intervention. These observations suggest that the viability concept derives its moral content, if it has any, from the current state of medical technology.¹⁶³

States currently use the viability distinction to impose a responsibility on a woman not to have an abortion after a certain period in her pregnancy. Because medical science *could* preserve the fetus' life outside the womb, states impose on the pregnant woman the responsibility to preserve the fetus' life inside her womb. However, it makes no sense to compel a woman to carry a fetus to term because medical science could sustain it if she chose not to. Since viability is defined from the perspective of what medical science can do, then it can determine only what medical science should do. A woman has the capability of bringing a fetus to term from the moment of conception; it does not make sense for her moral responsibility to increase because an outside agent acquires that capability but prefers not to exercise it.

The more appropriate response to viability would be to require the woman to cooperate with a physician so that the fetus' life could be preserved if the woman terminates the pregnancy.¹⁶⁴ Since, once again, it is not fair to impose all of the burdens on the woman,¹⁶⁵ the state would

us more frequently to separate the issue of aborting the fetus from the issue of destroying its life. For general discussions of the embryo transfer procedure, see Robertson, *Ethical and Legal Issues in Human Egg Donation*, 52 FERTILITY & STERILITY 353, 354 (1989); Henriksen, Abyholm, Tanbo & Magnus, *Pregnancies After Intrafallopian Transfer of Embryos*, 5 J. IN VITRO FERTILIZATION & EMBRYO TRANSFER 296 (1988).

163. Alastair Campbell makes a related argument. See Campbell, *Viability and the Moral Status of the Fetus*, in ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS 228 (R. Porter & M. O'Connor eds. 1985). Campbell argues that the concept of viability tells us whether we can readily save the life of the fetus. It does not tell us whether we are justified in wishing to terminate the life of the fetus. *Id.* at 231. Too often we confuse the viability issue with the justification issue. See also C. OVERALL, *ETHICS AND HUMAN REPRODUCTION* 68-87 (1987) (arguing that the abortion issue does not involve a woman's right to kill the fetus; the issue is at what point the fetus has the right to impose an obligation on the pregnant woman to carry the pregnancy to term).

164. Several states have tried to require that physicians take extraordinary efforts to save the life of the fetus, even before viability. These efforts have largely been found to be unconstitutional. See, e.g., *Colautti v. Franklin*, 439 U.S. 379 (1979) (statute requiring same care to preserve life of viable aborted fetus as would be required for live birth held unconstitutionally vague); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984) (state statute making it a felony to fail to use same care in aborting viable fetus as in bringing viable fetus to live birth held unconstitutionally vague); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980) (requirement that doctor use the abortion method most likely to preserve the fetus held unconstitutionally vague). But see *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (requirement that physicians seek to preserve life and health of fetus held constitutional).

165. See *supra* text accompanying notes 137-41.

have to assume the costs of preserving the fetus' life. But if a woman refused to cooperate in preserving the fetus' life, then we could prohibit the abortion. By desiring to terminate the fetus' life for reasons beyond consideration of her own well-being, the woman sacrifices her right to control her pregnancy.

b. Viability Analysis Applied to Roe

The *Roe* Court's use of "viability" as a basis for distinguishing permissible abortion regulations from impermissible abortion regulations is similarly misplaced. In *Roe*, the Court concluded that fetuses are not persons for constitutional purposes¹⁶⁶ and prior to the point of viability are not entitled to protection by the state.¹⁶⁷ However, deciding that fetuses are not "persons," and subsequently using viability as a benchmark for protecting fetal life does not resolve whether the state may infringe a woman's liberty interest in order to increase our valuation of fetal life.

An infant, for example, is not a full "person" for constitutional purposes. It cannot vote, hold office, or even claim most of the protections contained in the fourteenth amendment. Nevertheless, we can readily agree that a state can "infringe" a woman's liberty by criminalizing the killing of an infant. Similarly, although adults are "persons" for constitutional purposes, the courts have held that white adults' employment opportunities can be limited through affirmative action programs in order to protect the liberty interests of black adults.¹⁶⁸ The personhood of white adults does not prevent the state from infringing their liberties because of its strong interest in protecting the liberties of another group of persons.

Thus, whether fetuses are constitutionally recognized as persons may affect whether fetuses can serve as *parties* in abortion cases (or have other legal rights) but does not necessarily determine the strength of the state's interest in protecting their interests. By improperly focusing on the personhood and "viability" questions, the Court failed to recognize the value of the interest in fetal life. This misconstruction of the issue prevented the Court from engaging in respectful dialogue about the interests implicated by its decision. It also prevented dialogue on that interest in future cases by failing to lay a foundation for its consideration.

166. *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

167. *Id.* at 163.

168. *See United States v. Paradise*, 480 U.S. 149, 182-83 (1987) (upholding a court-ordered desegregation plan for a state police department which imposed on white officers a ceiling of 50% of available promotions); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 479-80 (1986) (upholding court-ordered desegregation plan for labor union establishing a numeric goal for nonwhite membership, the effect of which would be to exclude some white workers).

Although commentators such as John Hart Ely have noted that the *Roe* decision is not sufficiently respectful of the state's interest in preserving fetal life,¹⁶⁹ I do not think they understand the real strength of the fetal life argument. In Hauerwas' terms, the argument is about what kind of society we want. Many pro-life advocates use Holocaust imagery and love-based theology to argue that it is critical that we value all life, including all potential life, in order to avoid creating another Nazi Germany.¹⁷⁰ They fear the slippery slope of terminating any life, even potential life, because it may move us toward a society that is callous toward life. The Court has never addressed that issue. It has not told us why we can feel secure that we are not moving toward a callous view of life. The Court's silence neither promotes dialogue nor provides reassurance on that issue.

Under existing constitutional doctrine, the Court should have probed in *Roe* whether the state had a compelling interest in increasing our valuation of fetal life, and whether the state's criminal abortion legislation was a necessary means to achieve that goal. The Court struck down the Texas legislation on the grounds that the state's interest in valuing fetal life could not be compelling in the first trimester. The more appropriate route, which would have been more respectful of the value of life, would have been to recognize that the state has a compelling interest in ensuring the valuation of fetal life, but that criminalizing abortion is not a necessary means to achieving that end.

The Texas legislation would have failed the necessary means test because it was unlikely to cause pregnant women to value life more highly. A woman who chooses an abortion may still value fetal life. For example, it is apparently not uncommon for women who have had abortions to note mentally when the baby would have been born and to experience special sadness on the anniversary of that date.¹⁷¹ These women may value fetal life but also hold other values which lead them to choose an abortion.

Roe was a case about a woman wanting to be able to decide whether

169. Ely recognizes the weakness of the Court's assessment of the interest in fetal life. He argues:

[T]he argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.

Ely, *supra* note 151, at 926 (emphasis in original) (footnotes omitted).

170. J. BURTCHALL, *supra* note 160, at 141.

171. See D. REARDON, *supra* note 74, at 23 (describing the psychological difficulties experienced by some women following abortion).

to have an abortion. From the woman's perspective, it was not fundamentally an anti-fetal life issue. A woman who chooses an abortion does not necessarily want to have the fetus' life terminated. Although a current decision to have an abortion will almost always result in the termination of the life of the fetus, we can imagine a time when the fetus' fate will be independent of the woman's decision not to carry it to term. Some women might still object to extraordinary measures being taken to preserve the life of the aborted fetus, but they probably could not object to the effect preserving its life has on their own well-being (assuming they were not asked to pay for the cost of preserving fetal life). A woman's well-being is affected by her decision not to continue with the pregnancy; it is not affected (strongly) by her decision about what medical treatment should be given to the fetus.

Even a woman who has an abortion to destroy the life of a particular fetus may still value fetal life. Many women, for example, choose abortions to defer child-birth. They do not bear a child now in order to bear a child later. It is *because* of their love and concern for the value of potential fetal life that they choose to defer child birth. For example, one woman described the following life experience in a letter to the National Abortion Rights Action League (NARAL):

I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and, three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them.¹⁷²

Such women want to have a child when they can best love and care for it. I understand that there are people who, in good faith, believe that such an action is unjustified murder or not in a woman's best interest. Nevertheless, even these people should understand that the woman has not articulated an anti-fetal life perspective. She does value and care for fetal life, but she would make a different decision about this particular fetus than would someone with a strict pro-life perspective.

So far, I have argued that the state is not justified in criminalizing abortion in order to protect our valuation of fetal life. Even if protection of fetal life represents a compelling state interest, criminal regulation of the woman's conduct is not a necessary means to achieve that end. The statute in *Roe*, moreover, not only criminalized the woman's conduct, it

172. Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3, 21 (1986).

also criminalized the conduct of the physician who performed the abortion.

Although I contend that legislation criminalizing the conduct of physicians who perform abortions does not cause them to place a greater value on fetal life and is thus impermissible, I do think that the state has a valid interest in ensuring that health care workers value life when they perform repeated abortions. It may be hard for health care workers to maintain an awareness that they are terminating a valuable entity—potential life—when they must perform a large number of abortions.

In general, health care workers who deal with death on a regular basis probably have to develop a callousness toward death in order to perform their jobs. For example, health care workers who deal with AIDS patients must live with the reality that the lives of their patients will generally be short. Acceptance of this reality may lead workers to develop a callous attitude about death. However, we would never suggest that health care workers not deal with AIDS patients. Yet, we might worry about the strain on the health care workers and try to develop programs to help them deal with this situation. Similarly, we might want to consider the effect on health care workers who perform numerous abortions¹⁷³ and try to ensure that their work does not cause them to devalue life.

Although criminal legislation would not be an appropriate means to ensure that health care workers properly value fetal life,¹⁷⁴ alternative legislation designed to address this legitimate goal would be an appropriate means. Thus, I suggest that the *Roe* Court should have considered the ways that a state may legitimately demonstrate its concern for the valuation of life. Rather than reject all regulations of abortion before the third trimester to preserve our concern for life, it should have focused on the possibility of noncriminal regulations that would result in increased valuation of life without adding coercion to the lives of women.

3. *Dialogue: The Court's Activism*

In *Roe*, the Court did not simply hold that the Texas statute was unconstitutional. It also took the highly activist step of dictating the parameters of a constitutional abortion statute. By doing so, the Court arguably preempted much of the dialogue and consideration of the abor-

173. For one description of the strain on health care workers of performing abortions, see B. NATHANSON & R. OSTLING, *ABORTING AMERICA* 141 (1979) (describing the emotional turmoil experienced by some doctors after performing multiple abortions).

174. Since I have already concluded that the state may not constitutionally criminalize the woman's conduct, it would not make sense to punish the physician, who is morally culpable in only a secondary sense. More fundamentally, however, the woman's liberty interest as defined above would be substantially implicated by criminalization of the physician's conduct. A state may not do indirectly what it cannot do directly.

tion issue that might otherwise have occurred in legislatures and among the general public. Traditionally, when scholars discuss judicial activism, they focus on its consequences for democracy or legislative dialogue. However, I take a slightly different approach in considering the implications of judicial activism on society, assessing its consequences for women's deliberations about abortion as well as its impact on the possibility for a legislative-judicial dialogue.

a. Impact on Women's Deliberations About Abortion

The *Roe* decision is usually applauded as protecting the right of women to choose abortion by curtailing any state regulation of the woman's deliberative process during the first trimester. I contend, however, that this aspect of the Court's decision was too activist; that the Court should have left states with some ability to regulate constitutionally the abortion decisionmaking process in the first trimester.

The restrictive effect of the Court's activism in *Roe* is seen vividly in *City of Akron v. Akron Center for Reproductive Health*,¹⁷⁵ where the Court considered the constitutionality of laws regulating the abortion decisionmaking process. One issue in *Akron* was the informed consent requirement, which required the physician to impart certain information to the woman prior to performing an abortion.¹⁷⁶ The Supreme Court

175. 462 U.S. 416 (1983).

176. As part of the informed consent provision, a physician was required to inform the woman (and her parent or guardian if under age 15, absent a court order):

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure that can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her

found this provision to be unconstitutional.¹⁷⁷

The Supreme Court struck down this informed consent provision because, "it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."¹⁷⁸ In rejecting the informed consent requirement, the Court implied that a physician may be required only to impart *medical* information about the possible adverse consequences to a woman's health;¹⁷⁹ it assumed that only medical consequences affected a woman's well-being. Thus, the Court's analysis of the informed consent issue in *Akron*¹⁸⁰ paralleled the analysis in *Roe* by limiting itself to a discussion of how abortion decisions implicate women's physical well-being generally.

However, a state should be concerned about far more than the possible physical consequences of abortion. It should also be concerned about the conflicting emotional and moral issues that a woman must resolve in deciding whether to have an abortion. The Constitution should permit a state to protect those aspects of a woman's well-being.

The *Akron* Court's activism in ruling out the possibility of any regulations of the abortion decisionmaking process did not serve women's liberty interests. The Court should have recognized that a state does have an interest in women making carefully considered abortion decisions. Rather than insist that the state abdicate its role in this area, the Court should have delineated the appropriate role for the state. A court that respected women's liberty interests would care how she reaches the abortion decision, because such a court would want her to make a decision that best contributes to her well-being.

Considering the process by which a woman makes abortion deci-

physician will provide her with a list of such agencies and the services available if she so requests.

Id. at 423-24 n.5 (quotation marks omitted).

177. *Id.* at 444-45.

178. *Id.* at 444. The Court was especially troubled by requirements 3 and 5, quoted *supra* note 176. See *Akron*, 462 U.S. at 444.

179. See *Akron*, 462 U.S. at 446-47. Although the *Roe* Court concluded that no first trimester regulations of abortion were permissible, *Roe v. Wade*, 410 U.S. 113, 163 (1973), the decision in *Akron* contains dicta that might support first trimester regulations designed to enhance the decisionmaking process. *Akron*, 462 U.S. at 443, 445 (emphasizing the importance of the woman understanding the emotional as well as physical consequences of an abortion before making her decision).

180. One problem with the legislation at issue in *Akron* was that it uses the wrong language in its attempt to encourage abortion dialogue. It refers to abortion restrictions in terms of "informed consent" requirements. Informed consent is a doctrine relating to the *medical information* that is disseminated before a medical procedure occurs. There is no reason to believe that physicians and nurses fail to provide adequate medical information before performing abortions. The problem is a lack of *ethical* discussions concerning abortion. Accordingly, we should consider how we can facilitate more discussion concerning the ethics of abortion without using coercive criminal laws that take the final decision away from the pregnant woman.

sions will illustrate how state regulation of that decision could enhance women's liberty interests. In view of the aspiration of wisdom, we want to enable women to make an abortion decision that will move them toward their aspirations for their authentic selves. Feminists often seem reluctant to permit the state to impose any requirements on how women make abortion decisions because many of these requirements have been coercive and have not facilitated real dialogue. Yet, it is important to keep in mind our aspirations when analyzing these measures. The abortion decision may be very difficult, and a wrong decision may create significant psychological trauma in some women.¹⁸¹ Rather than simply acquiescing to any abortion decision made by a woman, we might want to consider how we can improve her qualitative judgment.

Many women face a problem of consciousness when they make an abortion decision.¹⁸² Since the feminist position is "pro-choice" rather than "pro-abortion," feminists do not purport to know the correct decision for each individual woman facing an abortion decision. The problem of consciousness may make it difficult for any individual woman to make a decision that is compatible with her authentic self. The problem of consciousness can plague any woman, whether she is a feminist or not, at any time.

A study of women who have changed their minds regarding an abortion decision illustrates the problem of consciousness many face when contemplating an abortion.¹⁸³ The theologian, David Reardon, has explored that phenomenon in his study of women who had abortions but now regret their decisions, and belong to the pro-life religious organization WEBA (Women Exploited by Abortion).¹⁸⁴ Reardon collects and edits stories in which these women describe the conditions under which they made their original abortion decisions and how they later came to regret those decisions.¹⁸⁵ Some of these women describe themselves as feminists; others do not.

Two questions which should be of central concern to feminists in understanding the problem of consciousness as it relates to abortion are:

181. See, e.g., A. Speckhard, *The Psycho-Social Aspects of Stress Following Abortion* (1985) (unpublished doctoral dissertation) (available from University Microfilms International, Ann Arbor, Mich.).

182. See *supra* text accompanying notes 70-91.

183. I engage in a similar analysis in examining Michael Perry's work from a feminist perspective. See Colker, *supra* note 147, at 1394-97.

184. Women join WEBA because they feel exploited by their previous decision to have an abortion.

185. D. REARDON, *supra* note 74. Although Reardon's book advocates a strict pro-life viewpoint, it may still be of help in understanding the problem of consciousness. Reardon's intended message should not prevent feminists from learning more about abortion decisions by listening to these women's stories. Disagreement with their pro-life perspective does not validate disregard for their voices.

(1) *Why* did these women make two different abortion decisions; and (2) *How* did these women come to change their minds? Statistics from WEBA provide insight on these two questions.¹⁸⁶ WEBA surveyed approximately 250 of its members about their abortion decisions. The survey results suggest that the original decision was often made with considerable ambivalence, with only 24% of the women reporting (in retrospect) that they were happy with their initial decisions.¹⁸⁷ More than half of the women indicated that they were dissatisfied with their initial decisions at the time.¹⁸⁸ These statistics suggest that at least some women experienced a problem of consciousness at the time of making the abortion decision.

Reardon subtitled his book "Silent No More" to emphasize the importance of women discussing their abortion experiences. One of the themes in Reardon's book is that the women did not discuss their abortion decisions with many people. They often did what their parents, boy-friends, or social workers told them to do. Rarely did the women feel that their own voices were heard and considered by themselves or others. Thus, they failed to consider their own inner voices and relied entirely on a dominant social message for their decision. They failed to take steps, such as engaging in thoughtful dialogue, to establish aspirations for themselves. Thus, they could not make informed decisions because they did not develop a consciousness of what an abortion would mean to them.

Pro-choice writings also support the conclusion that there needs to be greater discussion about the abortion decision. For example, Lynn Paltrow wrote a powerful brief for the National Abortion Rights Action League (NARAL) in *Thornburgh v. American College of Obstetricians and Gynecologists*¹⁸⁹ in which she used letters from people describing why they or people they knew chose to have abortions.¹⁹⁰ The national campaign for this project was entitled "Abortion Rights: Silent No More." The strategy underlying both the campaign and the amicus brief was to help people to understand how abortion decisions profoundly affect women. Rather than allow the Court to view abortion as an abstract issue, Paltrow attempted to make it concrete. Underlying her work, then, is the notion that increased dialogue about abortion may not only help women struggle with their individual consciences when making abortion decisions, but may also help courts or legislators decide what is the best legal response to the issue.

186. *Id.* at 1-26.

187. *Id.* at 15.

188. *Id.*

189. 476 U.S. 747 (1986).

190. See Paltrow, *supra* note 172.

As to the question of *how* women come to change their minds, Reardon's work again provides important information. He recognizes that women reach different conclusions as a result of changes in their life conditions. He observes that their changes in consciousness come after they have attained an "inner peace" as the result of self-examination.¹⁹¹ Most of the stories Reardon relates describe women who were at a very troubled period in their lives when they had an abortion. A period of drug or alcohol abuse, a marriage break-up, or wild promiscuity often followed their abortions. It was only after their lives became more stable and peaceful that they came to regret their abortions.¹⁹² But attainment of inner peace may also validate a prior decision to have an abortion.¹⁹³

Although useful, Reardon's work does not help us resolve the problem of consciousness or determine which abortion decision is "correct." Reardon, like MacKinnon, chooses voices selectively. He only provides us with stories of women who claim that they were wrong to choose abortion. He gives us little insight into how and why they changed their minds, making it difficult for us to assess whether the change was the result of reflection. He briefly considers the small group of women whom he perceives not to be troubled or harmed by the decision to have an abortion. He describes these women in quite unflattering terms (self-con-

191. D. REARDON, *supra* note 74, at 25-26. Reardon assumes that the only "correct" decision made during a period of inner peace would be to bear the child rather than have an abortion. We can be skeptical of that conclusion, yet learn from his observation about the importance of inner peace.

192. Religion was often an important aspect of movement toward peacefulness in their lives. Listen to the movement toward peacefulness in the story of the founder of WEBA, Nancyjo Mann:

About nine months after leaving the hospital, I finally started to face the abortion I had tried so hard to bury. It was a very, very painful process. The wounds of abortion run deep, especially when they have been pushed down for so long. I nearly went through an emotional breakdown. I had to relive it all, to sort it all out. But this time the Lord was with me offering support and forgiveness. Step by step we went. But He was patient. It took three years, but finally I was able to forgive myself. That's the hardest part. God's forgiveness is ready and waiting. It's forgiving yourself that's hard.

By 1981, I had not only found peace with my abortion experience but felt drawn to help other women to overcome their pain and hurt. I knew that if I had hurt so much, surely there must be at least one other woman who felt the same. In early 1982 I founded Women Exploited by Abortion (WEBA) to minister to the needs of aborted women, to help them heal their pains.

Id. at xxii.

193. For example, consider a story from Paltrow's brief:

Having an abortion seemed to be the most thoughtful and loving decision we could make, in fact, it seemed to be the only decision we could make which would still maintain our life goals and plans in helping serve others as we had hoped. I was a Christian then, as I am now, and constant prayer asking for guidance through peace is how I was able to feel that God guided me toward that decision, also. Since the abortion in 1977, I have helped hundreds of emotionally disturbed children, counseled twice as many parents about the loving ways of parenting, become known as the expert in the field of counseling children and families traumatized by sexual abuse, and in 1979 I married a Pediatrician who has been a wonderful husband and father to our four year old boy and our seven month old boy in utero (due in August). God has given me blessings and much peace since 1977.

Paltrow, *supra* note 172, at 22.

suming, aggressive, psychically crippled), and dismisses the significance of the possibility that their lives might have been enhanced by having had an abortion.¹⁹⁴

In reading Reardon's book, I was skeptical of the women's decisions to have abortions and their later regret, because neither process seemed very reflective. The decision to abort was often made under conditions of coercion; the later regret often arose after a religious conversion. In both cases, the women appeared to rely on a dominating culture or an Other—a parent, boyfriend, social worker, or later, the Church. I found myself wondering when these women would decide *for themselves* which decision would best contribute to their well-being and the well-being of society. They often changed their minds because the dominant social message in their environment changed, not because they became more reflective. There is therefore no evidence that they moved toward their aspirations for their authentic selves.

The issue then becomes which social conditions will best facilitate a considered rather than a reflexive judgment. Will women make more authentic judgments in a social system in which there are fewer restrictions on abortion, because their lives will be subject to less coercion, or are regulations necessary to ensure that women will not make an abortion decision based on misinformation?

The experiential literature points to the need for women to be confronted with conflicting opinions about the abortion decision and to have a safe space in which to consider them. I oppose a complete prohibition of abortion regulations, because it would prevent the state from developing mechanisms to encourage women to consult other people. I would support legislation requiring hospitals and clinics that perform abortions to make available group counseling sessions, perhaps modeled on Johnson's "Hearing into Being" consciousness-raising groups,¹⁹⁵ for all pregnant women so that they can be exposed to competing viewpoints in a safe space.

At a minimum, if we recognize the importance of increased dialogue, then we should be open to states requiring that abortion-providers make available group counseling sessions to all pregnant women. Rather than insist that states have no role in the abortion decision, we should understand that the state does have an appropriate role in improving the quality of abortion deliberations. Requirements that counseling be available to women seeking abortions would not necessarily infringe women's liberty interests.

The obvious problem with such counseling programs is the lack of

194. D. REARDON, *supra* note 74, at 138-41.

195. See *supra* text accompanying notes 83-84. In addition, sex education classes in high school could be modeled after Johnson's technique.

time available for them. Most people agree that it is best for a woman to have an abortion in the first trimester, if she is going to have one at all. Since women usually do not determine that they are pregnant until the second month of pregnancy, there is not much time for group interaction. It is also troubling to single out women seeking abortion for group interaction when women facing other reproductive decisions, such as whether to get pregnant, may be equally in need of group counseling.¹⁹⁶

What then is the appropriate judicial response to cases like *Akron*? Rather than rule out any regulation of the abortion decisionmaking process, the Court should encourage states to develop programs that could improve a woman's deliberative process about abortion. As an example, the Court might suggest that states require that all health care providers offer counseling sessions to pregnant women and their partners (irrespective of whether they are considering an abortion) to discuss the quality of their own lives, the implications of raising a child or having an abortion, and the meaning or value of the fetus' life.

These counseling sessions could be run by trained ethicists, not physicians, and should be voluntary. They should be voluntary for two reasons. First, women are unlikely to benefit from counseling if it is coerced. Second, the fact that it is voluntary will give hospitals and clinics an incentive to make the counseling as balanced as possible in order to encourage women to take advantage of it. If the sessions were mandatory, it would be difficult to protect women from professionals who intend to persuade rather than to counsel. The Court should insist that the state bear the costs of these counseling sessions to avoid burdening women with reproductive regulations. Finally, the Court should suggest that states create programs to help health care workers deal with issues of life and death in all contexts, including performing abortions. Again, such programs should not endorse a particular point of view about when life begins but should encourage health care workers to wrestle with difficult ethical issues.

In considering the constitutional scope of regulations to improve the quality of a woman's deliberations about abortion, a difficult issue is whether a state could constitutionally insist that a woman discuss the

196. A story may reinforce this latter point. When I was in law school, a classmate of mine decided to get sterilized. She had decided that she did not want to bear children or risk an unwanted pregnancy; sterilization seemed the best alternative. She had been married and divorced and had chosen not to have children during her marriage. The university physician refused to allow her to be sterilized unless she agreed to go to several sessions with a psychiatrist. She went to those sessions unwillingly and was then sterilized. Why did not the university physician make a similar request of women who said that they did want to bear a child? Both the decision to be sterilized and to bear a child are essentially irreversible; they affect the woman for much of her adult lifetime. The physician's actions reflect the dominant social message—that a healthy (white) woman should want to bear a child. By suggesting that women who are considering whether or not to have an abortion should undergo group interaction, I therefore do not want to reinforce that social message.

abortion decision with her spouse or sexual partner¹⁹⁷ (assuming they have a relationship at the time of her decision). Giving the other partner the power to veto the woman's decision to have an abortion or bear the child may appear to infringe her liberty interest. But what if the state only requires her to discuss the issue with him? It seems difficult to expect sexual partners to develop a mutual, loving relationship if one of them does not even discuss a problem that has arisen due to the expression of that love. Although requiring or encouraging discussion might destroy their possibly fragile relationship, one must wonder how strong a relationship is when the partners cannot discuss such an important issue. I contend that a pregnant woman's liberty interest is not necessarily infringed if the state requires her to discuss the abortion decision with her sexual partner if and only if it makes an exception when such discussions would threaten her well-being.

Perhaps the strongest argument for a notification or discussion requirement can be made for cases in which the sexual partners are married. To determine whether a spousal notification requirement infringes a woman's liberty interest, we would have to consider how that requirement would affect her life. A woman who becomes pregnant during a healthy marriage probably does not need encouragement from the state to discuss an abortion decision with her husband. The key issue is what requirements should be imposed on a relationship in which communication between the partners is strained. A woman in this situation may wish not to discuss the abortion decision with her husband for reasons which may include a power imbalance in the relationship or fear of physical or emotional abuse.

Spousal notification requirements should, therefore, be sensitive to the life conditions of pregnant women and include broad exceptions for the woman whose life situation would be endangered or worsened by compliance. Ironically, the courts have upheld the spousal notification statutes with the fewest exceptions and invalidated the spousal notification statute with the broadest exceptions.¹⁹⁸ In addition, a court has

197. See, e.g., Mattinson, *The Effects of Abortion on a Marriage*, in ABORTION: MEDICAL PROGRESS AND SOCIAL IMPLICATIONS, *supra* note 163, at 165. Mattinson emphasizes that it is important that counseling be available for both the woman and man involved if they are in a stable relationship, because of the effects each partner's actions have on the other. *Id.* at 172.

198. The Supreme Court has not ruled on this issue. In *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976), it found a spousal *consent* requirement to be unconstitutional; it noted that a spousal consent requirement "does much more than insure that the husband participate in the decision whether his wife should have an abortion," *id.* at 70 n.11, but seemingly left open the issue of a spousal notification requirement.

The lower courts are divided on whether a spousal notification requirement would be constitutional. Compare *Jones v. Smith*, 474 F. Supp. 1160 (S.D. Fla. 1979) (denying preliminary injunction against enforcement of statute requiring physician to notify husband of pregnant woman unless they were separated or estranged) and *Roe v. Rampton*, 394 F. Supp. 677 (D. Utah 1975)

upheld spousal notification requirements in one of the most distressing circumstances possible—where a woman was separated from her husband, seeking a divorce, and allegedly had become pregnant by another man.¹⁹⁹ Rather than reflect love and compassion, the courts' decisions reflect an extreme insensitivity to the conditions of women's lives.

Thus, I conclude that *Roe* overstepped appropriate constitutional boundaries when it precluded state regulation during the first trimester. Judicial scrutiny of regulations such as abortion counseling and spousal notification should be guided by an assessment of whether the regulation is designed to contribute to the woman's well-being in making a fully deliberative abortion decision.

The Supreme Court's recent decision in *Webster v. Reproductive Health Services*²⁰⁰ has opened the door to increased state regulation of abortion. Nevertheless, I do not applaud this decision because the Court still seems inattentive to the well-being of women. Although the Court has given the states more latitude to regulate abortions throughout a pregnancy, it has not required that those regulations enhance a woman's abortion decisionmaking process. In effect, the Court has ignored the impact of abortion regulations on women's well-being.

For example, in *Webster* the Court approved various requirements that would substantially increase the cost of second trimester abortions without addressing the impact such regulations would have on the lives of indigent women. Raising the cost of a legal abortion sends more of these women to illegal practitioners with the attendant increased risk to their health.²⁰¹ As in *Harris v. McRae*,²⁰² the Court failed to respect the health and well-being of poor women, permitting states to administer

(denying preliminary and permanent injunction against enforcement of statute requiring physician to notify pregnant woman's husband prior to performing an abortion), *aff'd*, 535 F.2d 1219 (10th Cir. 1976) with *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984) (statute requiring spousal notification except in two circumstances unconstitutional) and *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625 (D. R.I. 1984) (statute requiring physician to notify, if reasonably possible, woman's husband of proposed abortion before it is performed unless one of four circumstances exists unconstitutional) and *Doe v. Deschamps*, 461 F. Supp. 682 (D. Mont. 1976) (statute requiring written notice to woman's husband unless he was voluntarily separated from her unconstitutionally vague).

199. *Roe v. Rampton*, 394 F. Supp. 677 (D. Utah 1975).

200. 109 S. Ct. 3040 (1989).

201. See Brief Amici Curiae for the National Council of Negro Women, Inc., National Urban League, Inc., et al., in Support of Appellees at 13-14, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605). For example, in New York in 1965 before abortion became legal, there were four abortion deaths for every 100,000 live births for white women, 56 abortion deaths for every 100,000 live births for non-white women, and 61 abortion deaths for every 100,000 live births for Puerto Rican women. *Id.* at 17-18. Abortion regulations which cause some women to turn to illegal abortion practitioners therefore disproportionately hurt the poor women in our society, largely black and Hispanic women.

202. 448 U.S. 297 (1980) (state has no obligation to pay for medically necessary abortions if federal reimbursement is unavailable).

regulations that will disproportionately and unavoidably harm indigent women. *Webster* therefore represents a step away from the equality-as-compassion approach. The Court should defer to state legislatures' judgment in regulating the abortion decision only if the regulations are founded on the fundamental premise that women's well-being must be dearly valued.

A result similar to the one I suggest—that regulations designed to enhance a woman's deliberative process *are* permissible—has been reached through legal-legislative compromise in France. The French resolution of the abortion problem recognizes the need for abortions, but regulates the woman's decisionmaking process. Under the French system, a woman has the right to choose an abortion during the first ten weeks of pregnancy if she says she is in "distress." Her claim of distress is not subject to review. The physician who receives the woman's initial request for an abortion must furnish her with a brochure that contains information about the public benefits and programs that are guaranteed to mothers and children, the possibilities for adoption, and a list of government organizations capable of providing her with assistance. In addition, the woman must attend an interview with a government-approved counseling service, which will furnish her with assistance and advice that will enable her to carry the fetus to term. At least one week must elapse between the time she initially requests an abortion and the performance of the procedure, unless the delay would place her beyond the ten-week period permitted for elective abortions.²⁰³ Because the state funds medical care, women in France do not encounter the same cost pressures as indigent American women. Glendon argues that this compromise between pro-life and pro-choice proponents protects the values held on both sides of the abortion debate without taking the abortion decision out of the hands of women.²⁰⁴

One criticism often leveled against the French model is that it should not insist that women say they are in "distress." Some people suggest that "distress" makes women sound hysterical. While "distress" may not be the ideal noun, we should pick a noun that captures the idea that women and their partners ought to grieve about the need to have an abortion. Grieving is important for two reasons. First, the psychological literature suggests that women who grieve about their need to have an abortion may experience less post-abortion trauma.²⁰⁵ Second, our respect for life and our aspiration to be loving and compassionate should

203. See M. GLENDON, *supra* note 25, at 16-17.

204. *Id.* at 18-20.

205. See Mattinson, *supra* note 197, at 169 ("[m]y view that the grievors may be the ones who will be better off in the long run and be less likely to appear again in an abortion or some other type of clinic has implications for counselling services in abortion clinics").

lead us to grieve about terminating life.²⁰⁶ Just as it is offensive when society celebrates the use of capital punishment, it is troubling when society fails to encourage women and their partners to be troubled by their decision to terminate fetal life. In fact, we should all be troubled by the need for abortion to the extent that it signifies our failure to alleviate the societal circumstances which result in unwanted pregnancy.²⁰⁷ Thus, we need to create societal mechanisms that will encourage us all to grieve about the need for abortion. The French model takes a step in that direction.

b. Impact of the Court's Activism on Legislative Dialogue

To the extent that courts and commentators have considered the importance of dialogue in the abortion context, they have focused on legislative dialogue. Thus, in *Webster v. Reproductive Health Services*, the Acting Solicitor General argued that *Roe* should be overturned to allow for a "constructive dialogue" on the abortion question in the state legislatures.²⁰⁸ He argued that the Court's activist involvement in the abortion issue had "undermined the accountability of legislative bodies" and caused them to enact "inflammatory" abortion legislation rather than considered, responsible legislation.²⁰⁹

Various commentators have also argued the Solicitor General's position. Michael Perry, for example, argues that with difficult moral issues—such as abortion—the Court should not preempt discourse, but rather should act to enhance it.²¹⁰ He concludes that the *Roe* Court should have been less activist in dictating the parameters of constitutional abortion legislation. Perry argues that by holding that states may never restrict pre-viability abortions to preserve fetal life, the Court prevented further judicial-legislative dialogue on abortion and acted "imperially."²¹¹ Mary Ann Glendon similarly criticizes the *Roe* decision for cutting off legislative dialogue about abortion.²¹²

Although I agree with Perry and Glendon that the Court should encourage legislative dialogue on the abortion issue, I disagree with the assertion that the *Roe* decision reduced such dialogue. On the contrary,

206. Some Buddhists therefore argue that women should be allowed to choose an abortion but that they should engage in a period of prayer and meditation concerning the abortion to maintain their respect for life. See *Buddhist Views on Abortion*, *supra* note 24, at 170-71.

207. See *supra* notes 137-41 and accompanying text.

208. Brief Amicus Curiae for the United States in Support of Appellants at 21 & n.15, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

209. *Id.*

210. M. PERRY, *supra* note 24, at 177.

211. See *id.* at 175-77.

212. Glendon says that supporters of social dialogue "should be opposed to the court's participating in such a way as to close off discussion once it has spoken." M. GLENDON, *supra* note 25, at 44 (footnote omitted).

as I argue elsewhere,²¹³ a comparison of the abortion cases in which the Court took an activist role to those in which it exercised judicial restraint suggests that judicial activism has sometimes stimulated legislative debate, and judicial deference has sometimes had the opposite effect. Thus, the states have been quite active in passing abortion regulations after the activist *Roe* decision, but Congress has been relatively silent in removing abortion restrictions after the restrained *Harris v. McRae*²¹⁴ decision.

Although I argue that only a government that fails to consider adequately women's well-being could refuse to fund abortions for women whose health would be substantially harmed by continuing a pregnancy, such is the position of the United States. The United States stands virtually alone in the world in failing to fund medically necessary and legal abortions for poor women.²¹⁵ The opportunity for legislative dialogue in the Congress has provided no protection for the poor women who face unwanted pregnancies. It is therefore hard to feel optimistic about the benefits of judicial restraint on the abortion issue at the local or national levels.

Judicial intervention is sometimes necessary to protect the rights of unrepresented minorities. If effective dialogue existed in the legislatures then we would not need an activist judiciary. Typically, groups that are underrepresented in the legislative process are economically impoverished, poorly educated, and subject to various forms of oppression by the status quo. The fate of poor women and teenagers graphically illustrates this type of power imbalance. The high teenage pregnancy rate among poor women undoubtedly perpetuates the cycle of poverty. These women's very lives depend upon safe, effective birth control as well as safe, affordable abortions. Before abortions were made legal and accessible to juveniles, a large proportion of teenage girls who attempted or succeeded in suicide were, or thought they were, pregnant.²¹⁶ Furthermore, the mortality rates from continued pregnancy and childbearing are much higher for teenagers than for women aged twenty to twenty-

213. See Colker, *supra* note 147, at 1382-91.

214. 448 U.S. 297 (1980).

215. The United States stands apart from the rest of the western world in its treatment of the abortion-funding issue. Numerous western countries have decided that it is appropriate for the government to fund broad categories of "legally indicated" abortions for poor women. These countries include Australia, Austria, Britain, Canada, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and Switzerland. See Brief Amici Curiae for International Women's Health Organizations in Support of Appellees at 14 n.50, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

216. Brief Amici Curiae for Center for Population Options, The Society for Adolescent Medicine, the Juvenile Law Center, and the Judicial Consent for Minors Referral Panel in Support of Appellees at 9, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

four.²¹⁷ Yet these women are the most likely to be denied access to safe, affordable abortion services if the Court cuts back further on *Roe*.²¹⁸ In Louisiana—a state with one of the highest unemployment rates and some of the worst public health care benefits in the United States—the dramatic impact of criminal abortion laws on the lives of poor teenage girls seems all too evident. Attempts to reinstate Louisiana's criminal abortion statute with its ten-year sentence at hard labor for individuals who assist in the procurement of an abortion seriously jeopardize the well-being of these poor teenage girls.

One elected official, the Parish of Orleans District Attorney, has asked the federal district court, in light of *Webster*, to lift its fifteen-year-old injunction against the enforcement of the Louisiana abortion statute.²¹⁹ The Louisiana legislature has put its stamp of approval on this lawsuit, leaving the federal court system as the only recourse for the women of Louisiana. Thus, judicial intervention to protect the lives and well-being of women in Louisiana seems as important today as it has ever been. And, although Louisiana may provide the most notorious example of legislative disregard for women's well-being, it does not stand alone. Even before *Webster* was decided, five state legislatures enacted legislation indicating that they would criminalize abortion if *Roe* were overturned.²²⁰

This pattern of legislative behavior should leave us skeptical of fully entrusting the legislative process with the responsibility of protecting women's well-being. Those advocating judicial restraint in the abortion context must first demonstrate that criminal anti-abortion legislation can be the product of *successful* legislative dialogue (that is, dialogue that carefully addresses women's well-being). I am frightened by the prospect of tinkering with women's lives by eliminating the abortion option in certain cases in order to test an abstract thesis about judicial activism and legislative dialogue.

Although the Solicitor General asked the Supreme Court to overturn *Roe* and leave to the states the abortion issue to further "construc-

217. *Id.* at 7.

218. The Supreme Court has granted certiorari on two abortion cases that involve the rights of juveniles to have abortions: *Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989) and *Hodgson v. Minnesota*, 109 S. Ct. 3240 (1989).

219. See Defendants' Memorandum in Support of Motion Under Federal Rule [Civ. P.] 60(B)(5), *Weeks v. Connick*, Nos. 73-469, 74-2425, 74-3197, 75-474 (consolidated civil actions) (E.D. La. filed July 10, 1989); see also LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1989) (requiring enforcement of former Louisiana law prohibiting abortions if Supreme Court decisions so permit); LA. REV. STAT. ANN. § 14:87 (West 1986) (providing for 1-10 years imprisonment at hard labor for performance of abortion); *Prosecutors' Representatives Asking Revival of Louisiana Ban on Abortion*, N.Y. Times, Oct. 7, 1989, at 7, col. 4.

220. These states are Idaho, Kentucky, Louisiana, Illinois, and South Dakota. See Brief for Appellees at 18 n.30, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (No. 88-605).

tive dialogue," the Court has not yet accepted his invitation. I hope that the Court will closely follow the post-*Webster* performance of the state legislatures to see if judicial restraint has enhanced legislative dialogue. Rather than assume abstractly that judicial restraint will contribute to legislative dialogue on all divisive moral issues, courts and commentators should examine carefully our legislative experience with the abortion issue. That experience continues to show that women still need the assistance of the courts to prevent legislators from discounting their well-being.

CONCLUSION

In this essay, I have examined how a feminist-theological dialogue may assist us in achieving our aspirations for our authentic selves. I have discussed feminist theory's views on how the problems of consciousness and sexual objectification impede women's movement toward their aspirations for their authentic selves. Similarly, I have outlined theology's focus on the positive potential of love, compassion, and respect in bringing people closer to their aspirations for their authentic selves. I have suggested that the movement toward the authentic self requires *both* a feminist critique and a theological vision. Moreover, I have suggested that the feminist critique would benefit from considering some observations from theology, and that theology's aspirations would benefit from consideration of the feminist critique.

Finally, I have tentatively probed the implications of a feminist-theological dialogue for resolving feminist-legal disputes, such as the issue of abortion. I have suggested that we must give more credence both to arguments about how women's well-being is affected by abortion legislation and to arguments about how our valuation of life is affected by abortion policy. Rather than respond to the abortion issue rhetorically, I have tried to help us understand more fully the arguments of both the pro-choice and pro-life advocates.

This inquiry represents only a beginning in constructing a feminist-theological dialogue. It leaves unanswered how consciousness-raising and contemplation can be combined most effectively to reach greater consciousness. It also leaves insufficiently developed the ethical framework that feminists should use as part of their consciousness-raising. Although I have suggested that women can move toward their aspirations for their authentic self through dialogue embedded in compassion, love, and wisdom, I have not fully sketched the meaning of any of those aspirations.

This has been a difficult essay to write, in part because I fear that my pro-choice colleagues will think that I am being disrespectful to women by crediting some pro-life arguments and that my pro-life colleagues will

think that I have credited their arguments in only a superficial way. I also fear that people will judge the value of feminist-theological dialogue by my ability to provide insight on the abortion issue. My argument in favor of engaging in feminist-theological dialogue, however, should stand independently of my ability to provide insight on the abortion issue. I chose the abortion area as an example because it is one of the most difficult areas in which to engender real dialogue. At a minimum, I hope I have encouraged us to think about how we can engage in more effective dialogue on this issue, even if my attempt at dialogue has not provided satisfactory answers. In the words of the Bible, we can aspire to be more compassionate and loving in administering justice, both through the way we engage in dialogue and the way we choose our aspirations:

You will not be unjust in administering justice. You will neither be partial to the poor nor overawed by the great, but will administer justice to your fellow-citizen justly. You will not go about slandering your own family, nor will you put your neighbour's life in jeopardy. . . . You will not harbour hatred for your brother. You will reprove your fellow-countryman firmly and thus avoid burdening yourself with a sin. You will not exact vengeance on, or bear any sort of grudge against, the members of your race, but will love your neighbour as yourself.²²¹

221. *Leviticus* 19:15-18 (New Jerusalem Bible).