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**Symposium: Michael J. Perry's Morality, Politics, and Law**  
**\*1363 ABORTION AND DIALOGUE**  
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I think it would be fair to say that I did not engage in any real dialogues about abortion until 1987. Until that time, I readily accepted the feminist pro-choice perspective and did not see the reasonableness of any of the pro-life arguments. Moreover, I assumed that all pro-life advocates shared a fundamental disrespect for women's well-being. Given my deep-seated commitment to feminism, I did not see how the disagreements between pro-life and pro-choice advocates were "good faith" [\[FN1\]](#) disagreements; \*1364 therefore I could not see how I could even engage in, or would want to engage in, real dialogue with a pro-life advocate.

In 1987, I had my first real discussion about abortion with a feminist pro-life advocate. For the first time, I realized that there are people who both respect women and favor imposing restrictions on the availability of abortion because of a respect for the value of prenatal life. In particular, the suggestion that the Holocaust may have started with fetal surgery and experimentation [\[FN2\]](#) made me pause, as a Jew, and wonder if my feminist pro-choice perspective sufficiently respected the value of preserving life. My opportunity to engage in abortion dialogue did not cause me to abandon my pro-choice perspective; however, it made me more open to considering ways that pro-choice advocates can better accommodate the values respected by pro-life advocates. [\[FN3\]](#) I began to see that I did not have to think of pro-choice and pro-life positions in bipolar terms—that just as pro-life advocates could have a genuine concern about the value of life.

At about the same time, I began to read a draft of Michael Perry's *Morality, Politics, and Law*. [\[FN4\]](#) One of the fundamental questions raised by Perry's book is how we can facilitate deliberative, transformative dialogue on divisive moral issues, [\[FN5\]](#) such as abortion. As much as I admired Perry's task, I found myself deeply disturbed by some of the book's conclusions, including Perry's application of his theory to the legal-political realm and particularly the application of his theory to the abortion issue. Nevertheless, I agreed with Perry's assumption that it is good for us to engage in what Perry calls "deliberative, transformative dialogue" on moral issues. [\[FN6\]](#) I therefore decided to examine his \*1365 book quite closely from a feminist perspective to see what I could learn about how to facilitate dialogue on divisive moral issues, such as abortion.

Given that background, I will use this Essay to ask two questions: (1) Can we engage in such dialogue in our morally pluralistic society; and (2) will judicial restraint facilitate such dialogue?

Perry acknowledges that we cannot always be confident that moral dialogue is possible on a particular issue, yet he suggests that there is no harm in trying to create mechanisms to facilitate such dialogue. As much as I share his aspiration of dialogue, I am not sure that trying to facilitate dialogue is so cost-free. Such a determination depends, in part, on whether the mechanisms created to foster dialogue will cause other sorts of problems or will (in addition or instead) facilitate real dialogue. Before deciding to create specific mechanisms that might advance dialogue, we should evaluate the potential harm of these mechanisms, whether or not we believe that they facilitate real dialogue.

In addition, I am reluctant to endorse Perry's method of engaging in such dialogue within our legal-political system. Perry en-

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dorses the mechanism of nonoriginalist constitutional interpretation, coupled with self-restraint to resolve constitutional moral issues and to facilitate dialogue. In other words, he argues that judges should interpret the Constitution by reference to the aspirations that they believe are signified in the text, but should proceed with caution in imposing that interpretation on our society, especially when there is good faith disagreement about the resolution of a moral issue. The purpose of this caution is to facilitate dialogue on difficult moral issues within the legislatures rather than to have judges "imperially" resolve such moral issues. [FN7] I agree with Perry's use of nonoriginalist tools of interpretation, but disagree with his theory of self-restraint.

Perry uses the example of abortion to demonstrate the implications of nonoriginalism coupled with self-restraint. In this Essay, I closely examine his abortion example and conclude \*1366 that judicial restraint does not necessarily facilitate legislative dialogue when there is good faith disagreement. In addition, I examine the possibility of dialogue more broadly and consider how we can foster public dialogue on divisive moral issues like abortion.

## I. THE ASPIRATION--DELIBERATIVE, TRANSFORMATIVE DIALOGUE

A central question in Morality, Politics, and Law is whether we can engage in deliberative, transformative dialogue about difficult moral issues in our morally pluralistic society. [FN8] The premise behind this question is that we should engage in deliberative, transformative dialogue--that we are a better society to the extent that we engage in real dialogue on moral issues.

Why does Perry believe that we should engage in such dialogue? His belief in the importance of dialogue stems, in part, from his conviction that we should share agape or love of neighbor. For Perry, deliberative, transformative dialogue, which is embedded in discussions of the particular, is a natural outgrowth of agape. Perry writes:

Any moral community for which love of neighbor (agape) is a constitutive ideal--and surely that includes many moral/religious communities in the United States--should understand that ecumenical openness to the Other in discourse facilitates (as well as expresses) such love: I can hardly love the Other--the real, particular Other--unless I listen to her and, in listening, gain in knowledge of her. [FN9]

Perry's articulation of the shared "constitutive ideal" of agape demonstrates that his initial inquiry is not quite as general as he might have suggested. Perry is not asking whether we should try to engage in dialogue in any morally pluralistic society. Instead, he is asking whether we should try to engage in moral dialogue in this society, a society that he believes is morally pluralistic yet shares the aspiration [FN10] of agape.

Perry's explicit articulation of the aspiration of agape is \*1367 both a strength and a weakness in his work. Its strength is that it inspires us to think aspirationally about law and politics. As I have argued elsewhere, [FN11] feminist theory is often embedded in criticism and is unwilling to engage in aspirational discussions. The failure to engage in aspirational discussions is a weakness in feminist theory because aspirational discussions are quite powerful and important; they can help us strengthen our critique and decide how to move towards a better society. As feminist theory, a type of moral theory, could benefit from more aspirational discussions, moral theory generally could also benefit from such discussions. Rather than criticize Perry for having a theory that is embedded in certain aspirations, I admire Perry for articulating his aspirations so that we can examine them and try to move toward common aspirations.

Not only am I pleased that Perry has articulated his aspirations, but I am pleased with his choice of the aspiration of agape. As I argue elsewhere, [FN12] I believe that feminist theory and constitutional law need to be embedded in the aspirations of love, compassion, and wisdom. I endorse those aspirations because I think that they can help us understand how to help women overcome the problems of sexual objectification (that is, experiencing inauthentic [FN13] sexuality) and the problem of consciousness (that is, not understanding the conditions of their well-being and subordination). Perry's articulation of the as-

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piration of agape, as including the aspiration of real dialogue, overlaps substantially with my aspirations of love, compassion, and wisdom. As I understand his argument, it is through real dialogue (what I would call attempts to gain wisdom) that we strengthen our love of neighbor (what I would call love and compassion). Although I think his argument might be clearer if he talked about two aspirations (love and dialogue) rather than one aspiration of agape and a subaspiration of dialogue, I agree with his basic argument.

\*1368 Nevertheless, his articulation of the aspirations of agape and dialogue demonstrates a weakness in his work. Real dialogue only works when individuals share an "ecumenical openness" to "the real, particular other." [FN14] Real dialogue must be embedded in love of neighbor. Yet feminist theory is, in part, based upon the observation that individuals rarely understand women in their particularity and that individuals rarely treat women with real love. [FN15] Moreover, feminist theory has shown that women often experience nonmutual, even battering, sexual relations, yet continue to participate in these sexual relationships because of their lack of power to leave them. [FN16] Thus, the aspiration that Perry articulates is powerful and beautiful when achieved, yet oppressive and subordinating for women [FN17] when unthinkingly assumed to exist. Rather than assume that the aspiration of agape is shared by others, feminist theory insists that women keep close watch on the presence and absence of that aspiration. Moreover, feminist theory emphasizes that we must consider the relationship between aspirations and actions. [FN18] It is not enough for us to hold aspirations; our actions must be consistent with our aspirations in order to move closer to our aspirations. As I will argue, Perry's application of the aspiration of agape does not seem sufficiently embedded in that kind of wary watchfulness.

## II. CAN WE ENGAGE IN MORAL DIALOGUE?

Perry acknowledges that it may be difficult to engage in real moral dialogue. One solution that he offers is to encourage us to engage in moral dialogue at the level of the particular rather than the general. Liberal political philosophy, he argues, has made the mistake of assuming that we can achieve shared understandings at quite general levels. [FN19] Using a naturalist perspective, Perry suggests that the liberal political ambition is \*1369 misguided. Instead of seeking shared understandings at a general level, he suggests that we seek shared understandings at the level of the particular. [FN20]

I agree with Perry about the importance of focusing on the particular. Feminist theory has demonstrated the importance of making contextualized rather than general arguments. [FN21] Perry's assertion that we should engage in moral dialogue on the level of the particular is consistent with that feminist claim.

Despite the importance of focusing on the particular, Perry recognizes that we need to share some basic moral beliefs in order to engage in productive dialogue. He asserts that we share a sufficient set of moral beliefs to engage in dialogue. Perry's defense of that claim is:

The facts that human beings are members of a single species, that they have at least some basic interests in common as members of the same species, and that they inhabit the same planetary environment explain why there are beliefs common to all human beings.... Second, "[a] fully individuable culture [or moral community] is at best a rare thing. Cultures, subcultures, fragments of cultures, constantly meet one another and exchange or modify practices and attitudes." [FN22]

Perry is making a minimalist, but plausible, claim about our commonality. He suggests that human beings, as members of a single species and members of interrelated communities, do share some common moral beliefs. The moral belief that he articulates is agape--love of neighbor or community. Perry seems to believe that the only plausible response to the fact that we do live in interrelated communities is to develop a moral base that will permit those communities to flourish. The aspiration of agape would contribute to that flourishing.

Perry's assertion that we share the aspiration of agape is deceptively simple. On closer examination, it is riddled with assump-

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tions about human nature. It assumes that people experience common life situations and respond to those common experiences by developing a common moral belief system. However, feminist theory demonstrates that women respond to the common life experience of patriarchy with much variety. For \*1370 example, not all women respond by condemning patriarchy as invidious. [FN23] Although it might make sense for us to respond to our human interdependence with love and cooperation, it is unfortunately all too obvious that this is not always our human response. If men do not universally respond to their wives in a loving way, it is hard to assume that they respond to their neighbors in a loving way. A world that lives in fear of imminent nuclear annihilation hardly seems to be a world embedded in love of neighbor, even on an aspirational level.

Assuming that Perry is correct that many people in our society share the aspiration of agape, it does not necessarily follow that we can engage in real moral dialogue on any issue. Our aspirations are not singular. [FN24] We may share many and conflicting aspirations. A particular experience may evoke a response based on one aspiration; another experience may evoke a response based on another aspiration. We need to consider which kinds of situations may cause us, and our partner in dialogue, to respond with agape rather than assume that all situations cause a response of agape. Only when both parties in dialogue are inclined to respond to a particular situation with agape can we expect real dialogue to occur.

For example, I suspect that it would be easier to engage in productive moral dialogue about whether we should provide more resources for educating poor people than to discuss whether we should provide more resources for funding abortions for poor people. People may come to the first issue with more shared understandings than the second issue, thereby facilitating them to be open to others while engaging in discussion.

But even when two people come to a discussion with the aspiration of agape, it does not mean that a full dialogue will take place. In the above example, there is a risk of incomplete dialogue if the discussion is to take place in the political sector because poor people--who presumably would have a great deal to offer to our understanding of the issue--have few political or economic resources that permit them to engage in public dialogue. Only when we have worked with an issue at the level of the particular can we assess its workability for real dialogue.

\*1371 Perry acknowledges that he cannot prove our ability to engage in moral dialogue. Nevertheless, he argues that we should try to engage in moral dialogue because "[t]here is surely nothing to be gained in underestimating the possibility of productive moral discourse." [FN25]

It is at this point that I think Perry is tragically wrong. Putting the issue somewhat differently, I would say that we can be quite confident that, in some situations, insisting upon trying to engage in productive moral dialogue can be damaging or harmful to our well-being in society. If attempts to engage in moral dialogue can be damaging to our well-being, then there is something to be gained in proceeding with caution and underestimating the possibility of productive moral discourse.

Perry's attempt to apply his theory to constitutional adjudication and, in particular, *Roe v. Wade*, [FN26] demonstrates the importance of making some assessment about the possibility of moral dialogue before creating mechanisms that will try to facilitate that dialogue. By creating mechanisms that can facilitate moral dialogue, we may be doing much more than that. We may be creating mechanisms that perpetuate women's oppression or subordination irrespective of whether they encourage real dialogue. We should not create mechanisms to facilitate dialogue with our eyes closed; we should create them upon close examination of the ways that they may help move us toward our aspirations for our society.

Thus, there are two major questions that we need to ask when considering whether real dialogue is possible on a particular issue. First, is the aspiration of agape sufficiently shared so that dialogue can even occur? Second, how can action be embedded in the aspiration of agape? Does the particular moral issue lend itself to dialogue given the range of views that exist on the issue and the resources available to people with varying perspectives on the issue?

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### III. DOES JUDICIAL RESTRAINT FACILITATE MORAL DIALOGUE?

The heart of Morality, Politics, and Law is Perry's attempt in Chapter Six to apply his theory of moral discourse to law. In this chapter, Perry asks the central question: "On what moral \*1372 beliefs ought a person to rely, in her capacity as judge, in deciding whether public policy regarding some matter is constitutionally valid?" [\[FN27\]](#) Perry's answer to this question comes in two parts.

First, he argues that judges ought to use nonoriginalist rules of interpretation when deciding constitutional issues. [\[FN28\]](#) He suggests that we want judges to play a prophetic role in our society by considering what aspirations the constitutional text signifies to them; by giving judges that role, we can have a transformative rather than static moral base. [\[FN29\]](#) The originalist versus nonoriginalist arguments have been recited extensively elsewhere, and I do not need to repeat them here. [\[FN30\]](#) Briefly, I agree with Perry's argument because, as I have said above, I think it is crucial for us to be part of discussions that are premised on articulations of our aspirations.

It is the second part of Perry's argument--when he develops a theory of judicial restraint--that is of greater concern to me. This is Perry's explanation of his theory of judicial self-restraint:

According to the nonoriginalist theory I'm presenting, a necessary condition of legitimate judicial invalidation of a policy choice is that the choice be ruled out by the relevant aspiration.

A necessary condition, but not a sufficient one. I haven't argued that if a judge believes a choice to be ruled out, she should invalidate it.... There are other conditions that must be satisfied, according to my nonoriginalist theory, before a judge may invalidate a policy choice.

The judge must be confident of her position that the policy choice is ruled out by the relevant aspiration(s). She must humbly acknowledge the limits of her personal, and the court's, institutional competence with respect to the issue or sort of issue in question and face the possibility that she may be wrong.... If the issue is one about which other public officials-- including not merely other judges, but also legislative and executive officials--have truly deliberated, and if, after deliberation, they have concluded that the policy choice is not ruled out by the relevant aspiration, the judge must face the possibility that they are right. To the degree that possibility \*1373 seems to her a realistic one, to that degree she should hesitate to invalidate the policy choice.

That general caution must be heeded especially when the issue is particularly complex and seems to defy confident resolution one way or another. (Isn't abortion such an issue?) ... The caution must be heeded especially, too, when the consequences of resolving the issue the way the judge is inclined to resolve it are difficult to foresee and may be quite problematic.

....

... The basic point is that even a judge who pursues a nonoriginalist approach to constitutional adjudication, rather than an originalist approach, can and should appreciate the importance of acting moderately rather than imperially or precipitously in deciding whether a policy choice regarding some matter is to be invalidated. [\[FN31\]](#)

Although Perry tries to delineate the factors that a judge should consider in deciding whether to act with restraint, he does not spend much time justifying a theory of judicial restraint. His justification seems to be that it is bad to have judges act "imperially or precipitously."

Assuming that we want the judiciary (and the legislature) to play a role that will enhance deliberative, transformative dialogue in the legislature on issues over which there is good faith disagreement, I am not sure that judicial restraint will accomplish that objective. The inappropriate assumptions about how activist judges deter moral dialogue and about how real dialogue takes place in the legislature become more evident when Perry applies his theory of nonoriginalism and judicial restraint to the topic of abortion.

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Let us examine his abortion analysis. [\[FN32\]](#) Under Perry's theory of nonoriginalism and self-restraint, the judge should engage in a two-step process when deciding *Roe*. First, she should determine if application of any constitutional principle can support the conclusion that the state acted unconstitutionally when criminalizing nearly all abortions. She must determine whether the protection of prenatal life is a value of sufficient importance \*1374 to permit the state to infringe a woman's liberty interest in being able to procure an abortion. If she determines that the state violated the Constitution, she must then decide how activist a judgment to render. It is at this second step that she is supposed to be conscious of her role as a judge in facilitating dialogue about issues on which there is good faith disagreement.

Perry uses his nonoriginalist methodology to conclude that the Texas legislation at issue in *Roe v. Wade* did substantially implicate a constitutional principle--the liberty interest protected by the due process clause. The aspiration that he found to be embedded in this clause was "that government may not deprive us of our precious liberty to shape our lives unless government must do so in order to secure some overriding good." [\[FN33\]](#) Because the Texas legislation at issue deprived women of their right to shape their lives, it implicated a constitutional principle. Under Perry's articulation of the aspiration contained within the liberty-due process clause, the constitutional question becomes whether the state's interest in protecting fetal life is an "overriding good" that can be used to limit a woman's liberty interest. [\[FN34\]](#)

The state of Texas argued that it could resolve that question by concluding that, so long as a woman's life was not threatened, it could restrict her liberty interest by protecting prenatal life (that is, by criminalizing abortion). [\[FN35\]](#) The question for the judge is whether the state acted constitutionally in drawing that conclusion.

Perry argues that the judge can readily conclude that the state of Texas acted unconstitutionally in criminalizing nearly all abortions. By not providing for exceptions, such as abortions for the purpose of protecting the physical health of the mother from a significant threat of serious damage, Perry argues that the state discriminatorily disregarded or at least discounted the "importance, \*1375 the value, of the well-being of the women affected." [\[FN36\]](#)

Given that conclusion at step one of the analysis, the question becomes how activist the Court should be in imposing that judgment on the legislature. Perry suggests that the judge should rule that the Texas statute is unconstitutional but not entirely substitute her views for that of the legislature. Instead, she should tell the Texas legislature that it is violating the Constitution if it fails to provide for three exceptions in its statute criminalizing abortion. These exceptions are:

[F]irst, abortions for the purpose of protecting the physical health of the mother from a significant threat of serious damage; second, previability abortions for the purpose of terminating a pregnancy caused by rape or incest; and, third, abortions for the purpose of terminating a pregnancy that would result in the birth of a genetically defective child whose life would be short and painful. [\[FN37\]](#)

Other than those three exceptions, the judge would defer to the legislature's judgment about regulating abortion. If the judge tried to give more guidance to the legislature (as the Court did in *Roe*), then she would be acting "imperialy."

Perry concludes that a judge would be acting imperialy if she told the legislature that there were no circumstances, before viability, under which it could restrict a woman's liberty interests in order to protect prenatal life. A judge should not go so far as to impose that conclusion on the legislature, even if that is her reading of the constitutional text, because the value of preserving prenatal life [\[FN38\]](#) is widely contested in American society and is an issue about which "people of good will and high intelligence \*1376 (among others) seem irresolvably to disagree." [\[FN39\]](#)

Perry's argument for a narrower holding in *Roe* is inconsistent with his general framework. He seems to conflate step one (interpreting the text) and step two (applying principles of self-restraint). I will try to break down his argument into two discrete steps.

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First, the issue for the judge is whether the state has acted unconstitutionally in criminalizing nearly all abortions. Perry provides one possible answer to that question--the state violated a woman's liberty interest by discriminatorily discounting her well-being in not providing for at least three exceptions to the no-abortion principle.

Perry's general theory of nonoriginalism, however, reflects that judges can have many different interpretations of the application of the constitutional text to a particular issue. As I will argue in the next section, a broader holding is also available to the judge. She may conclude that the state's use of the criminal laws to deal with the abortion issue reflects a discriminatory discounting of women's well-being.

Irrespective of whether the judge reaches Perry's conclusion or my conclusion at step one, she must then turn to step two under Perry's framework. At step two, she must decide whether to apply self-restraint in resolving the constitutional issue. Yet Perry does not seem to wait until step two to apply his theory of self-restraint. It was a part of the constitutional interpretation provided at step one. Perry was confident that the state had discriminatorily discounted women's well-being by failing to provide for three exceptions in its abortion statute because the American Bar Association and the American Law Institute had endorsed such exceptions. Rather than apply a new principle of \*1377 self-restraint at step two, Perry reiterated his conclusion from step one--that the Court should state that abortion laws that fail to provide for at least three exceptions are unconstitutional. Because that conclusion would not be controversial, there was no need to apply further restraint.

Perry criticizes a broader holding because the value of preserving prenatal life is an issue over which people of good faith disagree. Nevertheless, that observation should not inhibit a judge in interpreting the text at step one, because, under Perry's framework, she is permitted to apply her interpretation of the text at step one rather than the generally accepted interpretation of the text. The observation about good-faith disagreement might be relevant at step two as part of her determination about whether to apply self-restraint. If the judge engaged in the step-by-step process, I will argue in the next section that she would conclude that judicial restraint would not be appropriate in the abortion area because it would not serve the public interest.

## 1. Nonoriginalism and Self-Restraint in *Roe v. Wade*

### a. Respecting Women's Well-Being

Perry argues that a judge can conclude that the state of Texas acted unconstitutionally because it discriminatorily discounted women's well-being by not providing for at least three exceptions in its criminal abortion legislation. I agree that this is one possible interpretation of the constitutional text. In this section, I will argue that another conclusion is also possible at step one--that the state's decision to use the criminal laws to respond to the abortion issue reflects a discriminatory discounting of women's well-being.

By using the criminal law, the Texas legislature said that a woman did not have the right to wrestle with her conscience to determine whether to have an abortion because, in its view, meaningful life begins at conception. The Texas legislature used the most coercive tools available--the criminal laws--to enforce its moral perspective.

Because *Roe v. Wade* has few facts, it is hard to learn about the impact that the Texas legislation had on the plaintiff's life from the Court's decision. *Roe*'s companion case, *Doe v. Bolton*, [FN40] does have extensive facts that show how the legislature can stifle women's dialogue on abortion. The challenged Georgia \*1378 statute in *Doe* made it a crime to administer any drugs with the intent to produce a miscarriage or abortion. Further, it provided that a person convicted of that crime would be punished by imprisonment for not less than one nor more than ten years. The statute contained three exceptions (similar to those suggested by Perry) that would have allowed an abortion when a physician's best medical judgment determines that:

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- "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or  
(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or  
(3) The pregnancy resulted from forcible or statutory rape." [\[FN41\]](#)

The statute also contained nine restrictions on how the abortion decision could be made and where an abortion could take place, including a hospital accreditation requirement, committee approval requirement, two-doctor concurrence, and residency requirement.

The plaintiff, Mary Doe, had not been able to obtain an abortion under the Georgia statute. This is her story, as recited by the Court:

- (1) She was a 22-year old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become reconciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.  
(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under [the Georgia statute]. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not \*1379 one described in [the Georgia statute]. [\[FN42\]](#)

The state of Georgia used the criminal laws to influence dramatically Doe's decision whether to have an abortion. Because Doe did not fit into the three areas of exceptions, the state gave her no opportunity to demonstrate how her well-being was being affected by her inability to procure an abortion; moreover, the state subjected her to possible criminal sanctions as an accessory to a crime if she were to procure an abortion. A prison sentence is a very harsh and coercive response to an already troubled life. In addition, such a potential prison sentence seems inappropriately harsh in gender terms. Her husband was able to abandon her, provide no support for the existing children, and face no criminal sanctions; nevertheless, she faced potential criminal sanctions for life conditions that were, in part, created by him. [\[FN43\]](#)

The harshness seems especially inappropriate when we consider the impact on poor women. The reason that Doe wanted to get an abortion at Grady Memorial Hospital was that Grady would have given her a free abortion. Apparently, a private hospital had approved her for an abortion but would have made her pay for it. [\[FN44\]](#) This inequity shows an additional problem with statutes like the Georgia statute and Perry's suggested holding in Roe. It gives nonindigent women more liberty protections because nonindigent women are more likely to be able to find a physician who will interpret the statute liberally to permit an abortion in her case. We should find that result troubling, because it means that abortion regulations act more coercively in the lives of poor women than in the lives of middle-class women. I will return to that problem later.

The criminal law is an inappropriate way to deal with the abortion issue if we respect all women's well-being. That \*1380 approach results in our imposing enormous penalties on a pregnant woman without dealing with the fundamental conditions under which that pregnancy may have occurred. That lack of respect becomes clear when we consider the statute in gender terms. The abortion statute subjects the pregnant woman to criminal sanctions and leaves the man who was involved in the pregnancy untouched by the criminal or civil laws. If the state is interested in inducing people to value prenatal life more dearly, I doubt that criminalizing the pregnant woman's behavior will achieve that result.

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Let me be clear that my argument concerning the inappropriateness of the criminal laws is not based on a traditional privacy theory concerning a woman's right to bodily autonomy. Instead, it is an argument about the present social and historical circumstances in which women find themselves pregnant. Women do not engage in sexual intercourse to produce an unwanted pregnancy. That unwanted pregnancy often occurs due to inadequate safe contraception and coercive sexual relations. Similarly, women do not choose to be pregnant in a society that fails to protect the life and health of the pregnant woman and the prenatal life that she is carrying. That lack of protection of life and health is a larger social problem. Women also do not choose to carry a pregnancy to term in a society that does not provide for their medical needs and the life and health of the children that are born, and that does not provide adequate day care for these children. Again, that lack of care is a larger social problem. Finally, women do not have abortions because they want to "kill" prenatal life. Rather, women reluctantly choose abortions as the only available means to protect their own well-being. A respectful and considered response to the life conditions that cause women to "choose" abortion would not include use of the criminal laws to add further coercion to a woman's life. [\[FN45\]](#)

I have not found pro-life literature that discusses the appropriate sanctions for dealing with the pregnant woman who seeks an abortion. That issue, however, was raised in the presidential debate between former Vice President George Bush and Governor Michael Dukakis on September 25, 1988. Interestingly, \*1381 Bush responded (after overnight reflection) that he is not in favor of criminal sanctions against the woman who has an abortion, although he is in favor of criminal sanctions against the physician. [\[FN46\]](#) His explanation for this position purported to stem from the aspiration of agape. [\[FN47\]](#) My argument about the inappropriateness of criminal sanctions against the woman may therefore be acceptable to many pro-life advocates who endorse the aspiration of agape.

My constitutional argument under step one is quite similar to Perry's constitutional argument; I simply extend his argument further. Perry argues that it is a constitutional principle that the legislature must act in a way that reflects respect for women's well-being. When the legislature fails to provide for at least three exceptions to its criminal abortion statute (rape, endangerment of the woman's life or health, and a fetus who would live a short and painful life), he argues that the legislature has not met that minimal level of respect.

My argument also starts from the premise that the legislature must act in a way that demonstrates respect for women's well-being. Given that we live in a society in which women often become pregnant without choosing that pregnancy and then are faced with the entire social responsibility for dealing with that pregnancy, I argue that it is disrespectful to respond to that social reality through the criminal laws. It is not respectful to respond to women's coercive life situation of pregnancy, childbirth, and child rearing with the force of the criminal laws. Until we can change the social conditions under which women become pregnant, bear children, and raise children, then I suggest that a judge is constitutionally justified in overruling a legislature that tries to impose a categorical moral imperative on a pregnant woman.

Admittedly, such a judicial judgment would be a close call. It requires a judge to construe liberally how the Constitution protects a woman's well-being. I would not expect all judges, even all judges who are sympathetic to feminist concerns, to agree with me. But I do not need to establish consensus at step one of Perry's nonoriginalist constitutional analysis. All I have \*1382 to show is that one possible interpretation of the constitutional text is that a state has acted unconstitutionally if it tries to use the criminal laws to respond to the abortion problem.

#### b. Self-Restraint

Regardless of what conclusion the judge reaches at step one, Perry argues for judicial self-restraint at step two. He suggests that the abortion dialogue in the state legislatures would have been more productive had the United States Supreme Court in-

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sisted that Texas provide three exceptions to its criminal abortion statute rather than insist that Texas permit all abortions in the first trimester. How does Perry know that the quality of the dialogue would be better if the Court had acted with more caution by declaring only those three exceptions to be constitutionally required? His argument is that a ruling that the exceptions enumerated above are constitutionally required, and the Texas statute (and similar statutes) therefore constitutionally infirm, would have shifted the burden of legislative inertia from those opposing criminal laws against abortion to those supporting such laws, thus helping insure that the various considerations against criminalizing previability abortions, including the considerations supporting exceptions beyond those enumerated above, were given due consideration in the legislative process. [\[FN48\]](#)

The footnote of the above quoted passage provided:

The burden of legislative inertia--of capturing the attention of a sufficient number of legislators, of surviving various institutional hurdles (such as committee votes), of winning the support of a majority of legislators, etc.--is borne by those who want either to put a law on the books or to take a law off the books. There tends to be a presumption in favor of the status quo: The parties who want to change it, in this instance the parties who want to put a criminal law against abortion on the books, have to overcome that presumption, which, in the form of the burden of legislative inertia, has a certain institutional force. In carrying that burden they likely have to attend to competing considerations in a way they probably would not were they merely protecting the status quo. [\[FN49\]](#)

Thus, Perry argues that the Court in *Roe* should have struck down the Texas legislation but he provides only very minimal \*1383 guidance concerning under what circumstances a woman is entitled to an abortion. The Court's guidance would help shape but not determine the ensuing legislative debate.

Let us try to apply Perry's argument to the abortion issue. The status quo has two components to it after a Perry version of the *Roe* decision is issued. There is no longer any abortion legislation on the books. But the state knows that it can criminalize abortion (as it did in the past) so long as it provides for the three exceptions. The state is not required to criminalize any category of abortion, but it has the Supreme Court's stamp of approval if it decides to criminalize abortion in all but those three categories.

Perry suggests in his footnote, quoted above, that if his *Roe* decision were issued, the burden of overcoming [\[FN50\]](#) legislative inertia would be on the side of those people who wanted to introduce legislation that would criminalize abortion, because no legislation would be on the books. Although he may be right in a literal sense, practically, I doubt that he is right. Given the political composition of the Texas legislature, it would be fair to assume that the Texas legislature would immediately pass legislation along the outline suggested by the Supreme Court--continue to criminalize abortion but permit the three exceptions. As soon as it took that step, the burden of overcoming legislative inertia would be on the pro-choice side to argue for further exceptions. [\[FN51\]](#)

\*1384 Returning to *Doe v. Bolton*, we do have evidence about the possible effect of Perry's suggested *Roe* ruling on dialogue in legislatures outside of Texas. Before *Roe* was decided, pro-choice advocates in Georgia convinced the legislature to add Perry's three suggested abortion exceptions, which were the American Law Institute's suggested exceptions, to their criminal abortion statute. One-fourth of the states adopted these three exceptions to their criminal abortion statutes. If Perry's suggested ruling had occurred, then these states would have been permitted to maintain these statutes, assuming that their additional process restrictions were not unconstitutional. Rather than the Court's decision in *Roe* facilitating further dialogue, the Court would have put its stamp of approval on the status quo. Outside of the state of Texas, we can be confident that Perry's suggested *Roe* ruling would have had no impact on the abortion dialogue except to keep it dormant in the many states that had already created exceptions at least as broad as suggested by Perry.

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I sense, however, that Perry's argument is not dependent on how one describes the process of overcoming legislative inertia. His point is that there should be dialogue in the legislature and that Roe has prevented that dialogue altogether. His subpoint seems to be that it would be good for pro-life forces to have to justify why they want to criminalize abortion. I assume that if I were right about where legislative inertia would lie after his Roe decision were issued, he would respond that it would be good for pro-choice forces to have to justify further exceptions to the no-abortion principle. The bottom line is, according to Perry, "No conversation is likely to be productive if one of the interlocutors assumes an arrogant stance, pontificating rather than listening patiently and patiently searching for common ground." [FN52] He thinks that the Supreme Court in Roe pontificated and therefore made it difficult or impossible for abortion discussions to be productive. By point of contrast, Perry thinks that the public abortion debate would have been more productive had the Court \*1385 insisted that abortions be available in three circumstances but left the rest of the issue up to the legislature.

I have argued that Perry's suggested Roe ruling would not have facilitated further legislative dialogue in Texas or in much of the rest of the United States. The other side of the question is whether Roe stifled legislative dialogue, as suggested by Perry. We do have some available evidence on this issue. We know how much legislative debate has occurred since Roe. State legislators have debated many issues, for example, licensing requirements, consent requirements, parental notification requirements, spousal veto and notification requirements, and fetal disposal requirements. More than one hundred cases have filtered through the United States court system involving these various regulations of abortion. [FN53] This legislation was considered and passed in an environment in which pro-life forces had the burden of overcoming legislative inertia. They often succeeded in overcoming that inertia, presumably making arguments about the wisdom of these measures. If the Court had truly acted imperially, then this lively debate should not have occurred.

To the extent that we criticize the Supreme Court as having acted imperially in the abortion area, we should probably focus on the post-Roe cases rather than Roe itself. Roe arguably left room for states to pass statutes that protected women's interests in the first trimester, yet the post-Roe cases have struck down nearly every attempt to regulate abortion without suggesting guidelines for constitutional process-oriented legislation. The Supreme Court could have maintained the Roe trimester analysis and permitted the states some latitude to regulate the process by which women come to the abortion decision. Roe itself does not prevent legislative debate; it is fifteen years of broad interpretations of Roe that has possibly deterred legislative debate.

The Court's decision in *Doe v. Bolton* could have been an opportunity to provide guidance on restrictions concerning the decisionmaking process because the challenged statute contained various restrictions on the decisionmaking process, such as potentially requiring six doctors to approve an abortion decision. These restrictions were struck down because, in the words of Chief Justice Burger, they were "unduly burdensome." [FN54] Rather than simply strike down these restrictions, the Court could have \*1386 provided guidance on reasonable restrictions that would improve the abortion decision making process.

Perry might reply that Roe did foreclose legislative debate on the issue of protecting the interest in prenatal life before viability. But I am not sure that argument is quite accurate. A state can act to protect prenatal life before viability so long as it does not interfere with a woman's liberty interest. Only when the interest in prenatal life conflicts with the woman's liberty interest is a state prohibited from acting. Therefore, one could argue that Roe gave legislators an incentive to engage in deliberative, transformative dialogue by finding regulations that could both protect the interest in preserving prenatal life and protect the woman's well-being. As I have suggested above, regulations that try to improve the quality of the woman's deliberative process might serve both of those purposes.

We also have some available evidence about the role of the courts in facilitating dialogue in the Medicaid context. The Supreme Court ruled in *Harris v. McRae* [FN55] that the federal government was not required to fund abortions under Medi-

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caid. It left the issue up to the state and federal legislatures to determine what abortion-health-care benefits to provide to poor women. The Court put the burden of overcoming legislative inertia on pro-choice forces to argue for exceptions to the no-funding requirement in Congress or in their individual state legislatures. The result has been that the pro-choice forces have not even been able to hold their ground on the federal level. At the time that *Harris v. McRae* was decided, federally funded abortions were available when the woman had become pregnant due to rape or incest or when her life was endangered. After *Harris v. McRae*, the pro-life advocates were able to persuade Congress to repeal the rape or incest exceptions. On September 30, 1988, Congress took the extraordinary step of passing legislation dictating that the District of Columbia could not voluntarily choose to fund abortions for poor women. [FN56] Thus, pro-choice advocates have not been able to overcome the burden of federal legislative inertia to create exceptions to the no-abortion principle.

These facts lead me to the conclusion that the post-*Harris v. McRae* federal legislative dialogue does not meet Perry's standard for real legislative dialogue. The result of this dialogue has \*1387 been that poor women cannot get the federal government to help pay for an abortion when their health is seriously endangered, when they have been the victims of rape or incest, or when the fetus would live a short and painful life. Perry argues in Chapter Six that a legislature that does not permit an abortion in those three cases has not shown a minimal respect for the value of women's lives. An extension of this argument would be that the federal government cannot make the policy choice that abortions in these three cases are per se morally objectionable when it decides which types of abortions to finance. Perry makes that argument convincingly elsewhere. [FN57]

Finally, we have some evidence from Canada on the judicial role in facilitating dialogue. Canada had a federal statute on the books for twenty years that criminalized abortion unless a committee of physicians approved the abortion. In 1977, a report commissioned by the Canadian Parliament, the Report of the Committee on the Operation of the Abortion Law (the Badgley Report) "revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks." [FN58] Although the report indicated that this lengthy delay posed serious health risks for women who had abortions, Parliament did not revise its criminal abortion statute in response to the report. Recently, the Canadian Supreme Court overturned the legislation and concluded, in part, that the process was too arbitrary to serve as the method by which such an important decision was made. [FN59] But the Court acted cautiously by not dictating the contours of new legislation. A lively debate is now ensuing in Canada, but no new federal criminal legislation has been forthcoming. [FN60] Despite the Badgley Report, the debate did not begin until the courts got involved in the abortion issue.

\*1388 The question that these three examples raise is whether judicial activism has affected legislative dialogue, and if so, how. In Canada, it is easy to see that the Canadian Supreme Court acted as a catalyst for debate. By striking federal legislation that had been on the books for some time and that imposed dangers on the woman's health, the Court prompted the public debate to begin anew. It prompted that debate by acting in a cautious way--it invalidated legislation but said little about the outline of constitutional legislation. Ironically, it may be the case that the caution of the Canadian Court better facilitates dialogue than the Perry-suggested middle ground for the United States Supreme Court. By leaving the parameters of abortion legislation relatively open, the Canadian Supreme Court might be facilitating dialogue across the entire political spectrum. By suggesting three exceptions to the criminal abortion statute, the United States Supreme Court might impose a heavy hand on the outcome of the ensuing dialogue.

In the United States, however, contrary to Perry's assertions, the *Roe* decision also acted as a catalyst for debate. By ruling out certain kinds of abortion restrictions, it got the public to consider other ways to regulate abortion. It got that debate started by acting in an activist way--it invalidated legislation and said quite a bit about the outline of constitutional legislation.

The real, and often forgotten, story in the United States is the history of the Medicaid abortion statute. In that case, the Court upheld legislation and left the state and federal legislatures with much room to debate the funding issue. The result has been

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no real federal legislative debate that is embedded in respect for the lives of poor women, despite the Court's extreme caution.

We therefore have two examples of active legislative debate and one example of no legislative debate. The explanation for these different scenarios does not seem to be the judiciary's caution or activism. The explanation seems to be the power of the groups arguing for exceptions to the no-abortion principle. Poor women have not had the political power on the federal level in the United States to lobby for changes in the Medicaid regulations regarding abortion funding to protect their well-being. Their interests have not been protected because of the Court's failure to act on their behalf. With that point in mind, it is interesting to re-examine the Canadian experience. In Canada, the \*1389 funding issue and the right to abortion issue have been considered together, because Canada has universal health insurance. When the federal legislature in Canada makes abortion unavailable for some women, it makes it unavailable for all women. Similarly, when the federal legislature in Canada makes abortion available for some women, it makes it available for all women. [\[FN61\]](#)

This observation returns me to my earlier question about the cost of legislative dialogue. In the United States, we have had legislative dialogue about abortion, but that dialogue has not protected poor women's well-being. Middle-class women have the privilege of deciding whether to have an abortion and actualizing that decision; poor women have great difficulty being able to actualize a decision to have an abortion. The price of dialogue about the abortion funding issue has, in my opinion, been too costly for poor women. It has shown that we as a society do not minimally respect the value of poor women's lives. Irrespective of whether we call that dialogue "real dialogue," it does not seem to move us towards an aspiration of agape that must include respect for the well-being of all women.

In Canada, by contrast, it may be more possible to talk about real legislative dialogue on abortion because the federal legislature is creating rules by which all women, not just middle-class women, must abide. It is unlikely that the Canadian legislature could pass legislation that is as disrespectful of all women's lives as that which the United States legislature can pass concerning poor women. Real dialogue may be more possible in Canada than in the United States, because the women who are affected by the federal legislation have more political \*1390 resources than in the United States and because the aspiration of agape is more fundamentally embedded in Canadian society than in the United States. The fact that Canada has universal health insurance demonstrates that it has a greater concern for the well-being of all of its people than does the United States. [\[FN62\]](#) In the United States, one might argue that until the federal government demonstrates its concern for the well-being of all people through the development of universal health insurance, we should be reluctant to give the federal government wide discretion to protect the well-being of poor women.

Nevertheless, I do not mean to appear overly optimistic about the Canadian situation. A year has passed since the Morgentaler decision was rendered, and it is clear that no new federal legislation is forthcoming. Although Canada may have a stronger base of communitarian values than the United States, those values may not be strong enough to engage in real dialogue about abortion. Canadian theorists often speak proudly of the communitarian values that underlie Canadian society, [\[FN63\]](#) Canada's response to the Morgentaler decision may test those claims.

Thus, I think that Perry overemphasizes the issue of the Court's activism and ignores the implications of the underlying societal values and political resources in facilitating dialogue. His optimism about the possibility of real dialogue about abortion in the legislature for all women in the United States is naive given our individualistic value structure and disrespect of the lives of women, especially poor women. If the aspiration of agape truly exists in a society, then it may be possible to talk about the judiciary acting cautiously to facilitate dialogue in the legislature. However, if it appears quite possible that the legislature does not have a genuine concern for the well-being of all \*1391 women, then we should be reluctant to give the legislature the power to impose categorical moral imperatives on women's lives.

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As a final observation, I would like to emphasize a point that has been central to Perry's scholarship. Perry is not an Ely-like process theorist. He thinks that the courts have an important substantive role in making sure that we do not proceed down the slippery slope towards the Holocaust. [\[FN64\]](#) He does not want us to ask only whether groups have access to the political process; he wants us to ask whether the legislature's substantive decisions reflect disrespect for a particular societal group. Thus, he wants the courts to play a prophetic role in helping our society move towards its aspirations. His argument for judicial restraint is not meant to protect the political process because of the intrinsic value of protecting that process. His argument for judicial restraint is meant to assist us in moving towards our aspiration of agape. Evidence that judicial restraint may, on occasion and with respect to certain issues, place women at risk of not having their well-being minimally respected should lead Perry to pause and re-think the generality of his theory of judicial restraint. I think the evidence on that issue is sufficiently strong that the argument for judicial restraint in the United States over the abortion issue needs to be made with more caution. The argument might work better in Canada because of the more pervasive acceptance of the aspiration of agape.

## 2. Dialogue in the Public at Large

So far I have discussed the abortion issue in the context of legislative dialogue. I have argued that judicial self-restraint will not necessarily facilitate legislative dialogue. I now would like to consider a different but related issue--how can we facilitate dialogue about abortion in the public at large?

Perry talks about legislative dialogue. He does not consider the effect of legislative dialogue on dialogue in the public at large. Others focus primarily on public dialogue; they see the ultimate role of the legislature being to promote dialogue among the people themselves when the legislature is faced with a divisive moral issue over which people of good faith can disagree. For example, theologian Daniel Callahan shares Perry's aspiration of agape and agrees that the moral issues concerning abortion \*1392 are close questions, but he argues for legislative rather than judicial restraint on the abortion issue. Such legislative restraint, he believes, can promote dialogue in the public at large. Callahan writes:

Suffice it to say that I believe abortion can be justified morally in some circumstances and that an outlawing of abortion would not and could not command sufficient support to make it a viable public policy. When a moral issue is doubtful and ambiguous, considerable discretion ought to be left to the individual (not because in this particular case she is a woman, but only because she is a human being); and a public policy that would not command strong political support would not be good policy. [\[FN65\]](#)

Callahan uses many of the same considerations as Perry to determine whether restraint is appropriate--ambiguity, widespread political disagreement, etc.-- but applies this principle of restraint to a different institution. He argues that the legislature should give the individual the opportunity to resolve difficult moral issues. Whereas Perry insists that the judiciary defer to the conscience of the legislature, Callahan insists that the legislature defer to the conscience of the individual. Presumably, the judiciary, under Callahan's theory, would make sure that the legislature left the issue up to the individual.

Given Perry's overall framework, he should also be concerned about how we can promote greater dialogue in the public at large. Fundamental to Perry's project seems to be the aspiration that we build and build on agape throughout society. For example, Perry concludes in his book:

Like Putnam, I am a partisan of "Jerusalem-based" morality. Given my particular convictions about what it means to be fully human--given the bedrock where I now stand--for me the fundamental political inquiry is the question of the relation of love to power. As a Catholic, one of my principal moral texts is the Last Supper scene in John's Gospel, in which Jesus, on the eve of his execution, says to those gathered \*1393 with him to share a Passover seder: "I give you a new commandment: love one another; you must love one another as I have loved you."

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Love and power. That is a subject--an even larger subject than the one I've addressed here--for another day. The inquiry I've begun in this book, but not begun to complete, is merely prologue to that inquiry. [\[FN66\]](#)

The question becomes how can we become a society that "loves one another as I have loved you"? By examining the impact of criminal abortion laws on women's lives, I suggest that we are unlikely to achieve greater love by permitting the legislature to act coercively in the area of abortion. The power of the legislature can be stifling to women's lives and well-being.

As I argue above, Perry's framework requires a judge to consider at step two the impact of her ruling on legislative dialogue. I suggest that a further question that she should consider is her ruling's impact on dialogue in the public at large.

It seems clear to me that judicial self-restraint in the abortion area will not facilitate dialogue in the public at large, because that restraint will permit the legislature to impose categorical moral imperatives on women's lives through the criminal law. Such a response does not encourage considered judgment or dialogue. A woman who already feels disempowered through the social conditions that created an unwanted pregnancy is unlikely to respond favorably to a further coercive action (the use of the criminal laws) in her life.

That I reject the use of the criminal laws to facilitate dialogue on the abortion issue does not mean that I oppose all mechanisms to facilitate dialogue. I have said above that, if we conclude that the aspiration of agape is minimally shared, then we can consider developing mechanisms to facilitate agape. In concluding what mechanisms we should use to facilitate dialogue, we need to evaluate the total consequences of imposing those mechanisms on society. Consideration of that question leads me to believe that we should not respond to the abortion issue with criminal sanctions; instead, we should use the civil law to encourage discussions between a woman and people who are trained to discuss moral, ethical decisions.

Before defending these particular mechanisms, I must establish that the aspiration of agape is sufficiently shared to **\*1394** make it reasonable to consider developing mechanisms to facilitate agape. Based on the experiential literature on pregnancy and abortion, which I will discuss below, I sense that many women would like to engage in real dialogue concerning the ethical dilemmas involved in having an abortion as well as the social consequences of bearing a child before reaching a decision about whether to have an abortion. The problem of silence about abortion is extensively discussed in both the pro-life and pro-choice literature. So long as reproduction conversations are not forced on women who are uninterested in engaging in dialogue, we may benefit by creating mechanisms to facilitate dialogue for women who are pregnant and would like to discuss their pregnancy with others. Because a significant number of women have expressed an interest and willingness to engage in such conversations, it would seem that we have a base aspiration of agape to work with those women productively.

My conclusion that some pregnant women want more dialogue about their reproductive choices stems, in part, from the book *Aborted Women*, [\[FN67\]](#) by pro-life advocate David Reardon. He documents that some women have an abortion without ever having real dialogue about that decision. They often did what they were told by parents, boyfriends, or social workers. Rarely did they feel that their own voices were heard and considered by themselves or others. Thus, the women failed to consider their own inner voices, and they relied entirely on a dominant social message for their decisions. They had not taken any steps to evaluate their consciences for themselves. Thus, Reardon subtitled his book "silent no more" to emphasize the importance of women discussing their abortion decisions and experiences with others.

For example, Donna Merrick states in Reardon's book:

I feel that women are being deceived when they go in to have an abortion because they aren't being shown pictures of what their child looks like. Women are being deceived before they get to that place in that they're being sheltered from this truth. Women are being deceived about the procedure they will undergo.... They should know that there may be as much as a twenty-five percent chance of her never having another child. Can she live with that? That should be included in the counsel-

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ing. Without it, that's deception; women aren't being allowed to make a truly informed decision about their \*1395 abortion. [\[FN68\]](#)

The conclusion that there needs to be greater discussion about the abortion decision is also supported by pro-choice writings. For example, Lynn Paltrow wrote a powerful brief for the National Abortion Rights Action League in *Thornburgh v. American College of Obstetricians and Gynecologists* [\[FN69\]](#) in which she used letters from people describing why they or people they knew chose to have abortions. [\[FN70\]](#) The national campaign for this project was entitled "Abortion Rights: Silent No More." The theory behind this campaign, or more specifically, putting these letters into an amicus brief, was that many people in our society do not understand how abortion decisions profoundly affect women. Rather than leaving abortion as an abstract issue before the Court, Paltrow attempted to make it concrete. Her work, therefore, suggests that increased dialogue about abortion may not only help women struggle with their individual consciences when making abortion decisions, but it may help courts or legislators more appropriately decide what is the best legal response to the issue. Paltrow tries to empower women to make their voices heard so that the legislatures and courts might be aware of women's abortion experiences.

Another pro-choice advocate who has focused on the role of dialogue in dealing with the issue of abortion is Rosalind Pollack Petchesky. Petchesky argues that the pro-life movement has attempted to coerce women into not having abortions by presenting distorted images of the fetus as a miniature adult that lives independently outside a woman's body. She claims that these distorted images have become a part of our culture and our consciousness. She argues that women cannot be given inaccurate information about fetal development that portrays the fetus as independent from the woman if they are to make authentic abortion decisions. [\[FN71\]](#)

Petchesky and Merrick obviously disagree about the significance of what prenatal life looks like. If they were both shown photographs of prenatal life, they would most likely reach different conclusions about how "human" that entity looks and what \*1396 the significance of that portrayal is to the abortion decision. Their work suggests, however, that women should be given an opportunity to examine the reality of abortion and determine, for themselves, what value should be given to prenatal life. What is often forgotten in abortion discussions is that prenatal life does not have an intrinsic "meaning;" it has the meaning that we choose to attribute to it. By providing women with full access to the varieties of meanings that people attribute to prenatal life, we can give them the opportunity to make a more deliberative judgment about the meaning of the prenatal life to them.

Thus, the pro-choice movement as well as the pro-life movement increasingly recognize the importance of breaking the silence in order to increase the consciousness of women and society at large about abortion. Both movements are concerned that women may not currently make a fully reflective abortion decision because they are not given enough information before they make the decision or because the information they receive is too one-sided or too coercively communicated. Pro-life advocates believe that there would be fewer abortions if women were better informed; some pro-choice advocates believe that there would be more abortions if women were better informed. Irrespective of whose predictions are correct, more open discussion and information about abortion would seem to be a good idea.

Numerous studies have shown that the "wrong" abortion decision can dramatically affect a woman's psychological health. [\[FN72\]](#) Feminist theory informs us that some women have a problem of consciousness--they have trouble deciding what is in their best interest. Recent literature suggests that some women make abortion decisions that cause them great trauma and that they later regret. [\[FN73\]](#) Moreover, if we shared the aspiration of agape, we would want a woman to reach an abortion decision in the context of deciding what is best both for herself and the \*1397 community. [\[FN74\]](#)

In talking about the importance of increasing abortion dialogue, I need to clarify the kind of discussion I am considering. I

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am not talking about more physician-patient medical dialogue. [\[FN75\]](#) That dialogue is already covered by our informed consent jurisprudence for medical procedures. Although some pro-life advocates criticize the medical information that is disseminated to the pregnant woman, there is no consensus that there is a problem with that information. I am talking about more moral, ethical dialogue about the meaning and value of life, including the pregnant woman's life, the life of the family and the community, the prenatal life, and the consequences for the woman of having an abortion or bearing a child. There is no correct medical resolution of the meaning and value of those various interests. Probing moral discussions may help many women resolve those issues for themselves. By being silent about the abortion issue, we make it difficult for those discussions to occur.

Consideration of the importance of dialogue throughout society, and in the conscience of the individual woman, does not necessarily lead us to the conclusion that the state has no right to regulate abortions in the first trimester. Rather, consideration of this aspiration should lead us to be open to the possibility that the state might try to find ways to assist a woman in examining her conscience before making any reproductive decision. [\[FN76\]](#) I am **\*1398** troubled that Roe and its progeny seem to close this possibility.

Having concluded that many pro-life and pro-choice advocates desire more real dialogue about abortion, thereby minimally sharing the aspiration of agape, the question becomes what mechanisms might facilitate that dialogue. I suggest that hospitals and clinics should be required to provide mechanisms for social and ethical discussions about abortion and child bearing for all pregnant women.

In determining how to encourage abortion dialogue, we obviously have to be sensitive to the situation of poor women. In *Akron v. Akron Center for Reproductive Health, Inc.*, [\[FN77\]](#) the Supreme Court observed that a twenty-four-hour waiting period requirement, for example, would increase the cost of abortion. From that observation, it concluded that a waiting period requirement was unconstitutional. I suggest that we can take another route. We can insist that the state pay for the mechanisms that it supposedly creates to improve the quality of the woman's deliberative process about abortion. If it is not willing to bear those costs, then we may have evidence that it is not acting in good faith to protect women's well-being and the interest in prenatal life. An activist court might insist that the state bear those costs.

Interestingly, the process arguments about how the abortion decision can be made have been at the heart of the Canadian abortion debate. The statute at issue in the recent Canadian decision, *Morgentaler, Smoling and Scott v. The Queen*, [\[FN78\]](#) criminalized abortion unless a committee of physicians concluded that continuation of the pregnancy would or would be likely to endanger the woman's life or health. [\[FN79\]](#) The process left the woman out of the picture; it gave the decision solely to a group of physicians. The Canadian Supreme Court, in a highly divided opinion, found the criminal code provision to be unconstitutional. Several of the justices seemed to understand the inappropriateness of using criminal sanctions to respond to the **\*1399** abortion issue. For example, Chief Justice Dickson said: "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person." [\[FN80\]](#) That analysis might leave room for civil regulations of the decisionmaking process.

Canada is now in a position to consider again how the abortion decision should be made. I hope that Canada will consider replacing its present defective criminal statute with a new civil statute that helps guide a woman to a decision that is the result of serious moral reflection. [\[FN81\]](#) A dialogue about that process might be possible even if pro-life and pro-choice advocates cannot agree on the circumstances under which an abortion is a moral decision.

These observations lead me to two conclusions. First, consideration of the aspiration of agape should make us reluctant to use

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the criminal laws as a response to the abortion issue. Second, it might be possible to use noncriminal means to facilitate abortion dialogue among women.

Let us re-examine Roe and its progeny to see if they leave room for the state to regulate the decisionmaking process. Roe does not give a woman a right to have an abortion; it gives a woman a right to decide whether to terminate her pregnancy. [FN82] The state in Roe criminalized the physician's behavior but did not directly criminalize the woman's behavior. Nevertheless, \*1400 the Court found that the plaintiff, a pregnant woman who wanted an abortion, had standing to challenge the statute because it operated to "thwart" her rights to make an abortion decision. [FN83] The Roe decision is unclear about how important that decisionmaking process is during the first trimester. On the one hand, the Court described the constitutional right at issue as a decisional right. On the other hand, the Court said that the state could not intervene in the first trimester because it had no interest in protecting the woman's health during the first trimester.

Had the Roe Court thought through its concern for the decisionmaking process and the woman's well-being, then I suggest that it would not have spoken so broadly about the invalidity of state regulation during the first trimester. It would have explicitly provided for the possibility of regulations to facilitate the decisionmaking process during the first trimester. Roe's progeny has not facilitated the development of such regulations. When a state has tried to affect a pregnant woman's decisionmaking process by passing consultation or waiting-period requirements, these regulations have been found to be unconstitutional. [FN84] In addition, one might say that the Court has acted cautiously in overturning these regulations, because it has not suggested guidelines for constitutional regulations of the decisionmaking process. [FN85]

The one bright light in this story is the Supreme Court's decision in *Planned Parenthood v. Danforth*. [FN86] In that case, the Court upheld an informed consent requirement and stated: "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made \*1401 with full knowledge of its nature and consequences." [FN87] That statement would seem to imply that the Court does recognize that process regulations to improve the quality of the abortion decisionmaking process might be constitutional, even during the first trimester. But that statement, like the structure of the Roe opinion, focuses on the medical complications of an abortion rather than the moral and ethical aspects of the abortion decision, since the informed consent provision at issue only governed medical information that must be given to the woman.

Perry suggests that the solution to the abortion dilemma would have been for the Court to act with more restraint in Roe. By contrast, I suggest that the more appropriate solution would have been for the Court to act with more activism in the post-Roe cases. The Court could have commented on the process regulations at issue in Roe's companion case, *Doe v. Bolton*. Alternatively, it could have found that the informed consent and waiting period regulations in Akron were unconstitutional, but then dictated the parameters of constitutional procedures that could improve the quality of the abortion dialogue. In so doing, it would have encouraged the states to pass legislation that encouraged real dialogue between a woman and an individual other than the physician trained in discussing moral decisions as embedded in social reality. The Court's activism could then serve as a catalyst for dialogue elsewhere in society.

Many feminists with whom I have discussed this work have strongly objected to procedures that would try to facilitate women reaching a deliberative abortion decision. They argue that such a procedure would cause unnecessary delays and increase abortion costs. I will respond to both objections.

First, I am not suggesting that we require any women to wait to have an abortion or undergo any counseling sessions. All I am suggesting is that we make counseling available to all women who are pregnant. This counseling should include discussions of the social and ethical implications of having an abortion as well as having a child. Many physicians recommend that women wait until the sixth week of pregnancy to have an abortion, because it is harder for the physician to remove all of the

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embryonic tissue until that point in fetal development. These women come to a physician in the fourth week of pregnancy (two weeks after they missed menstruating) and are asked to \*1402 return two weeks later for an abortion. We may have a natural waiting period of two weeks for these women that we could use for voluntary counseling sessions. For women who come to an abortion clinic, hospital, or doctor's office late in their pregnancy, there may be no time to offer extensive counseling. (Nevertheless, it might be appropriate to offer post-abortion and post-childbirth counseling as well.) I do not think we lose by creating voluntary counseling mechanisms for those women who do want to discuss the moral and ethical implications of abortion and childbearing with others.

Second, as I have suggested above, we could insist that the state bear the costs of counseling. If the state is not willing to bear those costs then we could conclude that its interest in protecting the women's well-being is not genuine, and that it is not interested in facilitating good faith dialogue.

Finally, I should emphasize that dialogue cannot be forced on others. In *H.L. v. Matheson*, [FN88] the Supreme Court mistakenly tried to force juveniles to have abortion dialogues with their parents. That attitude is naive. Unless a woman wants to engage in abortion dialogue, I doubt that abortion counseling procedures would facilitate an examination of her conscience. In particular, it is hard to imagine how real dialogue could occur between a juvenile and her parents when the juvenile is so estranged from her parents that she does not even feel comfortable telling them of her abortion decision. If agape is a requirement for real dialogue, it is doubtful that real dialogue could occur in such a setting. Therefore, I am not suggesting that any woman be required to undergo counseling. All I am suggesting is that counseling be made available to all women who are pregnant-- irrespective of whether they are considering having an abortion.

At this time, I am not prepared to set out the details of a counseling procedure to discuss the social and ethical implications of having an abortion or raising a child. But I think that both pro-choice and pro-life advocates should be open to discussing the issue. There may be enough common ground for real dialogue to take place about how we can facilitate further dialogue.

#### \*1403 IV. CONCLUSION

The basic issue raised by Perry's abortion analysis is whether judicial restraint on the abortion issue facilitates dialogue. I conclude that it does not facilitate legislative dialogue. In addition, I conclude that it does not facilitate dialogue in the public at large.

Women's silence, and especially poor women's silence, is an important problem in the abortion area. Both pro-life and pro-choice advocates have criticized society for promoting women's silence about abortion. One common moral belief in the abortion area is the need to break that silence. I would therefore like us to channel our resources into creating ways to empower women to begin to engage in dialogue about all reproductive issues. This empowerment might be accomplished through health care legislation that governs the way in which women make all reproductive decisions and for which the government takes the financial responsibility rather than through criminal legislation. I do not think that we can risk the judiciary or the legislature silencing the voices of women in coming to an abortion decision through the use of the criminal law. Only when women's voices are more fully heard can we begin to engage in real dialogue.

[FNal]. Professor of Law, Tulane University; Visiting Associate Professor of Law, University of Toronto (Fall 1988). I would like to thank Rebecca Cook, Patrick Macklem, John Stick, and especially Michael Perry for providing me with comments on a draft of this Essay. I would also like to thank the participants at the faculty workshops at the University of Toronto and Osgoode Hall Law Schools, as well as the students at the University of Toronto, for their willingness to engage in dialogue with me about this Essay.

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[FN1]. Throughout this Essay, I am going to use the term "good faith" in reference to disagreements. A good faith disagreement is one embedded in respect for the people affected by the issue under discussion as well as the arguments made on each side of the issue. For example, suppose two people disagree about the morality of enslaving black people. That disagreement would not be a good faith disagreement. Why? Because people who respect the well-being of black people cannot be in favor of enslaving black people. There is no competing consideration that might justify a person favoring slavery in order to further an equal or greater good. If a black person is a participant in the discussion, then the problem--lack of respect--would be magnified, because the person who takes the proslavery position probably does not sufficiently respect the black speaker to listen to him or her in order to engage in dialogue. In contrast, let us assume that two people disagree about the morality of women having abortions. That disagreement might not be a good faith disagreement if, for example, the pro-life advocate did not respect the well-being of women. On the other hand, that disagreement could be a good faith disagreement. Why? Because people who respect the well-being of women can consider abortion to be immoral. In addition, people who consider abortion to be moral can respect the value of prenatal life. Of course, not all people who take a pro-life position respect the well-being of women and not all people who take a pro-choice position respect the value of prenatal life. Yet there are enough people who make respectful pro-life and pro-choice arguments that I think we must conclude that it can be an area of good faith disagreement. For an excellent collection of pro-life and pro-choice arguments that are made in good faith, see *ABORTION & CATHOLICISM: THE AMERICAN DEBATE* (P. Jung & T. Shannon eds. 1988).

When an issue is one over which there is good faith disagreement, we may want to try to engage in real dialogue about that issue. Even if we do not change our own positions as a result of such dialogue, we will have gained a more open and respectful understanding of each other that will better permit us to live in harmony. On the other hand, it is hard to see how we benefit from trying to engage in real dialogue on issues in which there is not good faith disagreement (e.g., the slavery issue); such dialogue is unlikely to be fruitful given the absence of a base of respect.

[FN2]. See, e.g., J. BURTCHAELL, *Die Buben sind unser Unglück!:* The Holocaust and Abortion, in *RACHEL WEEPING AND OTHER ESSAYS ON ABORTION* 141 (1982).

[FN3]. Leonard Swidler does an excellent job describing the effect of real dialogue:

We enter into dialogue so that we can learn, change, and grow, not so that we force change on the other, as one hopes to do in debate. On the other hand, because in dialogue each partner comes with the intention of learning and changing, one's partner in fact will also change.

Swidler, *Toward Judeo-Christian-Buddhist Dialogue* xiii, in *BUDDHISM MADE PLAIN: AN INTRODUCTION FOR CHRISTIANS AND JEWS* (A. Fernando & L. Swidler eds. 1986) [hereinafter *BUDDHISM MADE PLAIN*] (emphasis in original).

[FN4]. M. PERRY, *MORALITY, POLITICS, AND LAW* (1988).

[FN5]. A deliberative, transformative politics is "one in which the questions of what ought we to want and, therefore, who ought we to be are open, not closed." *Id.* at 152.

[FN6]. *Id.* at 4. The importance of dialogue is discussed extensively in literature seeking interfaith dialogue. See, e.g., *TOWARD A UNIVERSAL THEOLOGY OF RELIGION* (L. Swidler ed. 1987); *BUDDHISM MADE PLAIN*, *supra* note 3. The fact that I believe that it is important to engage in dialogue does not mean that I necessarily reject the importance and necessity of rhetoric within political movements. I leave aside an examination of the role of rhetoric in this Essay.

[FN7]. M. PERRY, *supra* note 4, at 172.

[FN8]. Perry says, "My overarching aim is to lend support to the position that a deliberative, transformative politics--as dis-

inct from a politics that is merely manipulative and self-serving--is possible (though not always actual) even in a morally pluralistic society like our own." Id. at 4.

[FN9]. Id. at 51-52.

[FN10]. Perry calls agape a "constitutive ideal." I call it an "aspiration." As far as I know, the two terms are synonymous.

[FN11]. Colker, [Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity \(Book Review-Essay\)](#), 68 B.U.L.Rev. 217, 228 (1988).

[FN12]. Colker, *Feminism, Theology and Abortion: Toward Love, Compassion & Wisdom*, CALIF.L.REV. (forthcoming Oct. 1989) (draft available from author).

[FN13]. My use of the word "authenticity" is often misunderstood so I pause briefly to explain it. I use an eastern conception of authenticity to consider what it would mean to discover and experience our authentic sexuality. This conception of authenticity, emphasizes movement and connectedness; it is not a western conception of authenticity, which would emphasize individualism, autonomy, and a pre-social, static self. See Colker, supra note 11, at 218-19.

[FN14]. M. PERRY, supra note 4, at 52.

[FN15]. Colker, supra note 11, at 217-26.

[FN16]. See S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975) (rape); L. WALKER, *THE BATTERED WOMAN* (1979) (battered women syndrome).

[FN17]. My argument focuses on women but is not limited to women. As I discuss elsewhere, men also suffer from a failure to achieve authentic love in their lives. See Colker, supra note 11, at 223 n. 15.

[FN18]. See, e.g., Robb, *A Framework for Feminist Ethics*, in *WOMEN'S CONSCIOUSNESS, WOMEN'S CONSCIENCE: A READER IN FEMINIST ETHICS* 211 (1985 & photo. reprint 1987) (discussing the relationship between ethics and practice).

[FN19]. M. PERRY, supra note 4, at 36.

[FN20]. Id.

[FN21]. See, e.g., West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

[FN22]. M. PERRY, supra note 4, at 51 (quoting A. BICKEL, *THE LEAST DANGEROUS BRANCH* 236 (1987)).

[FN23]. I call this phenomenon a "problem of consciousness" and discuss it extensively in my forthcoming article. See Colker, supra note 12.

[FN24]. In making this observation, I have been especially influenced by C. KELLER, *FROM A BROKEN WEB* (1986) (arguing that we are not a singular self, but that we are a web of many selves with various beliefs and aspirations).

[FN25]. M. PERRY, supra note 4, at 53.

[\[FN26\]](#). [410 U.S. 113 \(1973\)](#).

[\[FN27\]](#). M. PERRY, *supra* note 4, at 121.

[\[FN28\]](#). *Id.* at 145-72.

[\[FN29\]](#). *Id.* at 149.

[\[FN30\]](#). Perry does an excellent job of describing those arguments in Chapter 6. See *id.* at 121-79.

[\[FN31\]](#). *Id.* at 170-72 (footnotes omitted).

[\[FN32\]](#). Perry's abortion analysis is merely intended as a sketch of how his theory could apply to a concrete situation. I have decided to focus on this example in much more depth than did Perry. In doing so, I do not want to distort the importance that this one example plays in the entire book. It comprises seven pages of the 184-page text (not including the appendices or footnotes). My highlighting of the abortion issue is therefore not reflective of the emphasis that Perry chose for that issue in his book.

[\[FN33\]](#). M. PERRY, *supra* note 4, at 174.

[\[FN34\]](#). *Id.*

[\[FN35\]](#). This is how Texas argued the issue in its brief in *Roe v. Wade*. See Brief for Appellee, [Roe v. Wade, 410 U.S. 113 \(1973\)](#) (No. 70-18). Because the Texas statute was enacted in 1854, it is possible that it was originally enacted to protect the woman's health rather than to protect fetal life. Before the advent of modern medicine, abortions were generally quite dangerous for the woman. Texas's argument concerning the purpose of its statute is probably more reflective of modern abortion legislation like that challenged in [Doe v. Bolton, 410 U.S. 179 \(1973\)](#), discussed below. For my purposes, it does not matter what Texas's intent was in originally enacting the abortion legislation. The only important question is the argument Texas used to try to preserve its abortion legislation--whether its contemporary justification is constitutionally permissible.

[\[FN36\]](#). M. PERRY, *supra* note 4, at 175.

[\[FN37\]](#). *Id.* (citation omitted). These exceptions were recommended by the American Law Institute and existed in about one-fourth of the states at the time that *Roe* was decided. Perry seemingly chose them because they would engender little controversy but would serve to minimally protect the woman's liberty interests.

[\[FN38\]](#). Perry uses the phrase "fetal life" to describe the state's possible regulatory interest. The prenatal life is actually not called a fetus during the first trimester. During the first trimester, it is more properly called a conceptus, a pre-embryo, and an embryo. Because the heart of the abortion debate concerns abortion during the first trimester, it would be more accurate to say that there is a dispute about the value of the life of the conceptus, pre-embryo, and embryo. Actually, there is little dispute about the value of fetal life after viability. Both pro-choice and pro-life advocates often agree that the state can protect viable fetal life. I have therefore avoided discussing abortion in terms of the value of fetal life in this Essay because I think that terminology misstates the area of basic disagreement.

Some people might question my use of the word "life" in the phrase "prenatal life." I do not think we can disagree that the embryo and fetus are life. (Similarly, dogs, cats, and trees are forms of life.) The moral question is the meaning we attribute to that life. By using the noun "life," I do not mean to prejudice that issue.

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[FN39]. Perry's full statement follows:

I strongly doubt that sensitive application of the constitutional principle of due process can support the conclusion that a state may not outlaw previability abortions of any sort. Such a conclusion seems to me to require a premise--that the protection of fetal life is not a good of sufficient importance--obviously not entailed by that principle. Moreover, because the issue the premise addresses--the value of fetal life--is so widely contested in American society, and, further, because the issue is one as to which people of good will and high intelligence (among others) seem irresolvably to disagree, it is not at all clear that the premise is an appropriate basis for constitutional judgment. To the contrary, reliance on the premise as a basis for constitutional judgment seems plainly imperial.

M. PERRY, *supra* note 4, at 175.

[FN40]. [410 U.S. 179 \(1973\)](#).

[FN41]. [Id. at 183](#) (quoting 1968 Ga.Laws 1249, 1277-80, § 26-1202(a), repealed by 1973 Ga.Laws 635).

[FN42]. [Id. at 185](#) (quoting Doe's allegations).

[FN43]. The harshness of a criminal solution to the abortion issue could also be seen by examining the facts in *Roe v. Wade*. At the time of her initial suit, the plaintiff claimed that she had become pregnant as result of a gang rape. Texas did not permit abortion even in rape cases. It imposed criminal sanctions on the physician, and presumably could have arrested the pregnant woman seeking an abortion under an aiding and abetting theory. To impose criminal sanctions on a woman who becomes pregnant as a result of a rape would seem to be unacceptably harsh and coercive because it causes her to be victimized a second time. I have refrained from using this example in the text because the plaintiff has now recanted her allegation that she was raped. See M. FAUX, *Roe v. Wade: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 328 (1988). The significance of that recantation is beyond the scope of this Essay.

[FN44]. Doe, 410 U.S. at 185 n. 7.

[FN45]. I am not the first person to make an argument for abortion that is contingent upon social and historical circumstances. See, e.g., Jaggar, *Abortion and a Woman's Right to Decide*, 5 PHIL.F. 347 (1974); Law, [Rethinking Sex and the Constitution](#), 132 U.P.A.L.REV. 955 (1984).

[FN46]. N.Y. Times, Sept. 27, 1988, at A1, col. 4.

[FN47]. 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." *Id.* at B7, col. 4.

[FN48]. M. PERRY, *supra* note 4, at 176 (footnote omitted).

[FN49]. *Id.* at 304 n. 202.

[FN50]. Perry does not use the word "overcoming" legislative inertia; instead, he speaks of simply having the burden of legislative inertia. The phrase "burden of legislative inertia" is not clear without the verb "overcoming," because inertia itself is not a burden unless one wants to move in another direction. I have therefore taken the liberty, for the sake of clarity, of adding the verb "overcoming" to his discussion of the legislative inertia.

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[FN51]. Another confusing aspect of his legislative inertia argument is how Perry thinks that the burden of overcoming legislative inertia would be different under his scenario than under the actual Roe decision. The actual Roe decision invalidated the Texas legislation. It put the burden of overcoming legislative inertia on the side of pro-life advocates who would try to devise legislation that would regulate abortion without violating the Constitution. As we have seen over the last 14 years, they have borne that burden well by introducing and passing much restrictive abortion legislation. (That the Supreme Court has struck down that legislation is a separate issue.) If Perry's version of Roe had been issued, the pro-life advocates would initially have had exactly the same burden--to try to devise legislation that would regulate abortion without violating the Constitution. Their burden, however, would have been less than after the real Roe decision, because the Supreme Court would have provided them with guidance on what kind of legislation would be constitutional. Rather than engage us in more dialogue about the need to criminalize abortion if Perry's version of Roe were issued (as Perry suggests would happen), pro-life advocates would engage us in less dialogue. Why? Because under Perry's scenario they would be asking the legislature to re-enact legislation that is quite similar to what already existed and that the Supreme Court has already preliminarily approved. Under the actual Roe decision, pro-life advocates had a more substantial and creative burden. They had to create legislation that was quite different from that previously existing, and they had to create arguments both for its propriety and constitutionality. Perry's argument that pro-life advocates would have a more appropriate burden after his version of Roe is decided does not make sense if Perry thinks that pro-life advocates should have a greater burden than pro-choice advocates. (Maybe he meant that pro-life advocates should have a burden that is also a more realistic burden than they had after Roe. If so, his revised Roe decision would make sense.)

[FN52]. M. PERRY, *supra* note 4, at 177.

[FN53]. See Colker, *supra* note 12.

[FN54]. [Doe v. Bolton, 410 U.S. 179, 208 \(1973\).](#)

[FN55]. [448 U.S. 297 \(1980\).](#)

[FN56]. H.R.CONF.REP. 1013, 100th Cong., 2d Sess., 134 CONG.REC. H9174-85 (daily ed. Sept. 30, 1988).

[FN57]. See [Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 STAN.L.REV. 1113, 1116 \(1980\).](#) Arguably, the state dialogue has been more respectful because approximately 14 states fund medically necessary abortions for economically disadvantaged women. 11 Abortion Research Notes 1 (July 1982). Nevertheless, most states have deferred to the federal government in this matter, leaving medically necessary abortions for poor women unfunded.

[FN58]. [Morgentaler, Smoling and Scott v. The Queen, 44 D.L.R. 4th 385, 402 \(1988\).](#)

[FN59]. *Id.*

[FN60]. Various provinces have tried to restrict abortions through health care legislation. (Provincial governments do not have the power to rewrite criminal legislation.) These provincial regulations are currently being challenged as violating principles of federalism. See *infra* note 61.

[FN61]. In Canada, the criminal code is determined at the federal level and health care regulations are determined at both the federal and provincial levels. It is therefore theoretically possible for a province to decide not to fund an abortion under health insurance even if the federal government decriminalizes abortion. The two issues could then be untangled. I suspect,

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however, that such provincial legislation would be found to be unconstitutional, so I am assuming, for purposes of this discussion, that the two issues will continue to be interwoven in Canada. Cf. *British Columbia Civil Liberties Ass'n v. Attorney Gen. for British Columbia*, 24 B.C.L.R.2d 189 (1988) (Cabinet does not have the power under administrative law to issue a regulation which states that abortion would not be an insured service). The override provision in section 33 of the Canadian Constitution, however, complicates the power of the provincial government. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 33. Briefly, the provincial legislatures have the power to override the Canadian Supreme Court's decision with respect to individual rights constitutional issues (but not federalism issues). Provincial governments may therefore try to use section 33 to override the individual rights aspects of *Morgentaler*. Nevertheless, it must be remembered that section 33 does not permit a province to violate federalism principles.

[FN62]. One would want to evaluate the many other differences between Canada and the United States before concluding that the courts should take a cautious role and allow for much legislative autonomy. In Canada, the legislature necessarily has a much more powerful role than in the United States, because of its override powers. See CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 33. A Canadian legislature can override a court's evaluation of the constitutionality of legislation in the area of individual rights. Thus, no matter what a court rules, it arguably is not deterring legislative dialogue because the legislature has the power to ignore the court's interpretation. Under Perry's theory of dialogue, one might therefore conclude that Canadian society can afford to have a much more activist court than we have in the United States, because a Canadian court can never truly act "imperiallly."

[FN63]. See, e.g., P. MONAHAN, *POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* 100-06 (1987).

[FN64]. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181-83 (1980).

[FN65]. Callahan, *The Abortion Debate: Is Progress Possible?*, in *ABORTION: UNDERSTANDING DIFFERENCES* 309, 313-14 (S. Callahan & D. Callahan eds. 1984); see also Gudorf, *To Make a Seamless Garment, Use a Single Piece of Cloth*, in *ABORTION & CATHOLICISM*, supra note 1, at 280 (arguing that the use of the criminal laws on the abortion issue does not reflect the appropriate "consequentialist" approach to difficult moral issues); Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, in *ABORTION & CATHOLICISM*, supra note 1, at 202 (arguing for private education efforts on the abortion issue rather than the use of the criminal law).

[FN66]. M. PERRY, supra note 4, at 184 (citations omitted).

[FN67]. D. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1988).

[FN68]. *Id.* at 157 (statement by Donna Merrick).

[FN69]. [476 U.S. 747 \(1986\)](#).

[FN70]. See Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 *WOMEN'S RTS.L.REP.* 3 (1986).

[FN71]. Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 *FEMINIST STUD.* 263 (1987).

[FN72]. See, e.g., A. SPECKHARD, *THE PSYCHO-SOCIAL ASPECTS OF STRESS FOLLOWING ABORTION* (1987).

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When the Roe Court spoke of the woman's health, it was referring to evidence about the relative danger of abortion compared to childbirth. Obviously, potential mortality is an important aspect of a woman's health. However, the psychological dimension should not be forgotten.

[FN73]. See, e.g., A. SPECKHARD, *supra* note 72; D. REARDON, *supra* note 67. This literature focuses on women who choose to have abortions and later regret that decision. There are, of course, women who are not able to have abortions ("choose" not to have abortions) and regret their inability to have an abortion (at that time or later). See E. MESSER & K. MAY, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* (1988) (discussing coercive social context that made it very difficult for women to "choose" to have abortions).

[FN74]. Many pro-life feminists have criticized the Roe mentality as overemphasizing individualism and not insisting that a woman take part in a community ethic of care. See, e.g., Cahill, *Abortion, Autonomy, and Community*, in *ABORTION & CATHOLICISM*, *supra* note 1, at 85-97; cf. Jung, *Abortion and Organ Donation: Christian Reflections on Bodily Life Support*, in *ABORTION & CATHOLICISM*, *supra* note 1, at 141-71 (arguing that we should want to give the gift of our body to support fetal life but that such a gift cannot be compulsory). In contrast, pro-choice advocates often criticize pro-life advocates for not understanding how the unavailability of abortion can provide a significant threat to the well-being of the family and society. See, e.g., R. GOLDSTEIN, *MOTHER-LOVE AND ABORTION* (1988). No matter what the resolution of a community-based discussion would be, it is important that discussion take place.

[FN75]. In particular, I do not want my text to be read as a criticism of the counseling that abortion clinics presently provide. From what I know, most of those clinics do an excellent job of informing women about the medical complications surrounding abortion. Most abortion clinics, like most hospitals, however, do not have people available to discuss the moral and ethical implications of abortion with women. Hospitals routinely have ethics committees to assist physicians in making ethical judgments, yet they do not routinely have such services available to any patients who are making ethical judgments.

[FN76]. In this Essay, I do not discuss the need for more discussions before women make a decision to bear a child. As Adrienne Rich has graphically shown in *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (1976), many women decide to bear a child in an atmosphere of romanticization of child rearing. My observations about the need for greater discussion of the abortion decision also apply to the decision to bear a child.

[FN77]. [462 U.S. 416, 450 \(1983\)](#).

[FN78]. [44 D.L.R. 4th 385 \(1988\)](#).

[FN79]. The Canadian statute also criminalized a woman's behavior in attempting a miscarriage herself. *Id.* at 395 (quoting § 251(2) of the Criminal Code). No member of the Court addressed this part of the statute, although it raised the direct question of whether it is appropriate to impose criminal sanctions on a woman who attempts to procure an abortion on herself.

[FN80]. *Id.* at 402. His earlier comment that "[i]t is not necessary in this case to determine whether the right extends further, to protect ... interests unrelated to criminal justice," *id.* at 401, shows that he deliberately focused on the criminal nature of the Canadian statute in finding it unconstitutional. See also *id.* at 427 ("Enjoying 'security of the person' free from criminal sanction is central to understanding the violation of the Charter right which I describe herein.") (Beetz, J.).

[FN81]. Obviously, I would want that process created with much care. I would want it to facilitate deliberation and concern for the community rather than to act coercively. A process that is modeled after consciousness-raising groups might be appropriate. At this time, I do not claim to know the exact process that might facilitate dialogue, but I think that it is an issue about

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which pro-life and pro-choice advocates can engage in dialogue since I have found that both pro-life and pro-choice advocates agree that there has been too much silence on the abortion issue.

An interesting complication in Canada is that the federal government has jurisdiction over the criminal laws; the provincial governments have primary jurisdiction over the health-care laws. Because there is federal-provincial cooperation over health care, it is possible that the federal government could influence provincial health-care regulations, but it would be a delicate task.

[FN82]. [Roe v. Wade, 410 U.S. 113, 153 \(1973\)](#).

[FN83]. [Id. at 124](#).

[FN84]. See, e.g., [Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 \(1983\)](#).

[FN85]. It is hard to know what is an activist decision and what is a cautious decision in this area. One might argue that the Court's decisions in this area were activist, because the Court was saying that no regulations were permissible. A more cautious decision would be one in which the Court said that this regulation is not permissible but refrained from suggesting the outlines of a constitutional regulation. I interpret the Court's decisions as taking the second route, which is why I characterize them as cautious, but examination of the Court's opinions as a whole might suggest that they have taken the first route. If one concludes that the Court was activist, then my argument is that there was more than one way to be activist--that instead of saying that no regulations were permissible, the Court could have sketched certain kinds of regulations that it concluded were permissible.

[FN86]. [428 U.S. 52 \(1976\)](#).

[FN87]. [Id. at 67](#).

[FN88]. [450 U.S. 398, 411 \(1981\)](#) (suggesting that a mandatory parental notification rule would help deal with the medical, emotional, and psychological consequences of an abortion).

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