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Rewriting Roe v. Wade

Donald H. Regan
University of Michigan Law School, donregan@umich.edu

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REWRITING ROE v. WADE

Donald H. Regan* †

Roe v. Wade is one of the most controversial cases the Supreme Court has decided. The result in the case — the establishment of a constitutional right to abortion — was controversial enough. Beyond that, even people who approve of the result have been dissatisfied with the Court's opinion. Others before me have attempted to explain how a better opinion could have been written.¹ It seems to me, however, that the most promising argument in support of the result of Roe has not yet been made. This essay contains my suggestions for “rewriting” Roe v. Wade.²

Ultimately, my argument is an equal protection argument. I shall suggest that abortion should be viewed as presenting a problem in what we might call “the law of samaritanism”, that is, the law concerning obligations imposed on certain individuals to give aid to others. It is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance. In brief, our law does not require people to be Good Samaritans. I shall argue that if we require a pregnant woman to carry the fetus to term and deliver it — if we forbid abortion, in other words — we are compelling her to be a Good Samaritan. I shall argue further that if we consider the generally very limited scope of obligations of samaritanism under our law, and if we consider the special nature of the burdens imposed on pregnant women by laws forbidding abortion, we must eventually conclude that the equal protection clause forbids imposition of these burdens on pregnant women. Some other potential samaritans whom there is better reason to burden with duties to aid are burdened less or in less

* Professor of Law, University of Michigan. A.B. 1963, Harvard University; LL.B. 1966, University of Virginia; B. Phil. 1968, Oxford University.—Ed.
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objectionable ways, and still other potential samaritans whose situations are closely analogous to that of the pregnant woman are burdened only trivially or not at all. (I shall suggest a similar equal protection argument, based on the notion that abortion can be regarded as a problem in the law of self-defense, but I prefer the samaritanism argument and I shall give it much more attention.)

The argument I have just sketched will require a fairly lengthy development. In particular, it will require an extended (though far from complete) discussion of the law of samaritanism. It is worth explaining as well as I can in advance of the discussion why such an extended discussion is necessary. I do this not to justify my prolixity, but in hopes that the reader will be less likely to lose the thread of the larger argument.

The basic problem is that the situation of the pregnant woman is sui generis. If we regard the pregnant woman as a potential samaritan, there is no other potential samaritan whose situation is not in some important way distinguishable. This means that it is not possible to exhibit the sort of unjustified inconsistency of treatment that amounts to an equal protection violation just by comparing the pregnant woman with some other particular potential samaritan. Rather, it is necessary to survey the entire field of samaritan law, and to argue that laws forbidding abortion subject pregnant women to treatment which is at odds with the general spirit of samaritan law.

I have explained the necessity for a survey of samaritan law. Unfortunately, samaritan law is complicated. The basic and well-established common law principle is that one individual is not required to volunteer aid to another. But there are numerous exceptions to this principle recognized by the common law. There are also a number of exceptions and apparent exceptions to the principle created by statute. Because no single case is perfectly analogous to the case of the pregnant woman, we shall have to discuss a wide range of cases.

The uniqueness of the abortion case also creates problems when we get to the equal protection argument itself. I shall be compelled to sketch an approach to equal protection questions which justifies my rather unusual suggestion that laws forbidding abortion should be struck down, not because they treat pregnant women differently from the way we treat some other class of potential samaritans who are indistinguishable, but rather because they treat pregnant women in a way which is at odds with the general tenor of samaritan law.
It is perhaps worth noting that my equal protection argument will not turn simply on the fact that laws forbidding abortion seem aberrant when viewed against the background of samaritan law. I regard it as important that laws forbidding abortion impair constitutionally protected interests. (The interests I have in mind are not in “privacy” or in freedom of choice with regard to marriage, procreation, and child-rearing, but rather in non-subordination and in freedom from physical invasion.) I also regard it as important that laws forbidding abortion involve a classification which is at least somewhat suspect. These themes, which are familiar elements of the “new equal protection”, will be developed further in Section I. The approach to equal protection I shall eventually sketch will differ somewhat from the Court’s official doctrine on equal protection. Even so, it will represent not merely the approach I think the Court should take, but also, generally speaking, the approach I think they are taking.

Two final introductory points, on vocabulary. First, I have already referred to “laws forbidding abortion”. Obviously there are a great variety of laws and possible laws forbidding abortion in at least some circumstances. What I mean by a “law forbidding abortion” is a law of the general type that was standard in the United States before the decision in Roe. I mean a law that forbids abortion in most circumstances, whether or not the law provides exceptions for cases involving rape, or for cases in which there is a substantial threat of death or serious physical harm to the pregnant woman, or whatever. Similarly, when I argue that laws forbidding abortion are unconstitutional, I do not mean that the state may not forbid abortion under any circumstances. I am arguing for something along the lines of what Roe guaranteed — freedom to choose abortion in the early stages (or before the final stage) of pregnancy. For the most part it will not be necessary to be more precise about the provisions of “laws forbidding abortion” or about the contours of the freedom for the woman I am defending. The second point on vocabulary is simply that for convenience I shall use the word “fetus” to refer to the conceptus at every stage of its development.

I. THE PREGNANT WOMAN AS SAMARITAN

In this Section of the essay, I shall attempt to locate the abortion problem in the doctrinal landscape of samaritan law. Some readers will object that the abortion problem does not belong in that landscape at all, that I am looking at the wrong map. We usually think of samaritan problems as problems
involving omissions. The established general principle that one does not have to volunteer aid (which I shall refer to as the "bad-samaritan principle") is normally thought of as equivalent to the notion that there is no liability for a failure to act. But the behavior of a woman who secures an abortion does not look like an omission. It looks like an act. So does the behavior of anyone who helps her. Perhaps the bad-samaritan principle is irrelevant. The first project for this part of the essay, then, is to explain why the abortion problem should be regarded as a problem in samaritan law.

Once we have established that we are looking at the right map, we shall attempt to orient ourselves with regard to some important landmarks, such as the established exceptions and apparent exceptions to the bad-samaritan principle. Two important propositions will appear. First, the abortion case is distinguishable in some significant respects from every other case in which a duty to aid is imposed. A respectable argument can therefore be made that if the pregnant woman is to be treated consistently with other potential samaritans, it is impermissible to impose on her even a trivially burdensome duty to aid. Many readers will not be persuaded by such an argument, however. They will believe that even if the pregnant woman is distinguishable from every other potential samaritan on whom duties to aid are imposed, still the cumulative force of the similarities of the abortion case to various other cases where duties are imposed makes it clear that the pregnant woman may be subjected to some burdens. That brings us to the second proposition: There is no other potential samaritan on whom burdens are imposed which are as extensive and as physically invasive as the burdens of pregnancy and childbirth. Even if the pregnant woman should be regarded as "eligible for compulsion to samaritanism" to some extent, she is by no means the most eligible member of the family of potential samaritans. It is not acceptable to subject her to specially extensive and specially invasive burdens, as laws forbidding abortion do.

By now every reader who has given any rein at all to his imagination will have thought up at least two or three objections to the claim that laws forbidding abortion are inconsistent with the general tenor of samaritan law. There are many possible objections to be dealt with, and I cannot deal with them all at once. In order that the reader shall not be distracted by impatience to know when I will deal with his particular objections, let
me indicate the order of treatment of the major topics in what follows. First, I shall explain why abortion is a samaritanism problem. Second, I shall examine the extent and nature of the burdens imposed on women by anti-abortion statutes. I shall concentrate on the physical and psychological burdens of pregnancy and childbirth, and I shall explain why I think these burdens are more important to the constitutional argument concerning abortion than the burdens of child-rearing or the psychological cost of giving up a child for adoption. (It is worth mentioning now that one of the reasons laws forbidding abortion are not validated by analogy to the "parenthood exception" to the bad-samaritan principle is that the burdens of pregnancy and childbirth are physically invasive in a way the burdens imposed on parents are not. As I shall show, physical invasions are specially disfavored by our common and constitutional law. I think this is not the only distinction between the pregnant woman and the parent, but it may well be the most important distinction for my purposes.) Third, I shall explain why the pregnant woman is different from every other potential samaritan on whom common-law duties to aid are imposed, including the parent, the social host, the innocent or negligent creator of a dangerous situation, the samaritan who voluntarily begins to give aid and may be forbidden to terminate the aid, and so on. In the process I shall explain why it is not an adequate defense of laws against abortion that pregnancy is "voluntary". Fourth, I shall distinguish the abortion case from certain exceptions and apparent exceptions to the bad-samaritan principle created by statute, notably the military draft. (The draft involves burdens closely comparable to the burdens of pregnancy, but the draft, I shall argue, is not a problem in samaritan law, however much it may seem so at first.) Finally, a few summary remarks will conclude this part of the essay.

A. Is Samaritan Law Relevant?

The bad-samaritan principle depends on a distinction between acts and omissions. It would exempt from all liability a physically healthy adult who watched an unrelated child drown in a foot of water, maliciously refusing to pull the child out. It would not, however, permit the adult to hold the child under the water. One might argue that the pregnant woman does not even come within the general scope of the bad-samaritan principle because aborting a fetus, or securing an abortion, is not an omission but a positive act, like holding the child under.
It is clear that from one perspective securing an abortion looks like a positive act. It should also be clear that from another perspective it does not. Carrying a fetus and giving birth are burdensome, disruptive, uncomfortable, and usually to some extent painful activities. In effect, the fetus makes continuing demands for aid on the woman who carries it. The fetus is not like a child being held under water, whose prospects would be satisfactory if the adult holding it under would merely go away. The fetus is much more like the child drowning on its own, who needs the adult bystander to rescue it. The principal difference between the demands of the fetus and the “demand” the child drowning on its own makes of an adult bystander is that the fetus's demands are much greater. If the adult bystander may refuse aid to the drowning child, then surely the same general principle (leaving aside the possibility of relevant exceptions to the principle, which will be discussed later) allows the pregnant woman to refuse aid to the fetus.

The point of the bad-samaritan principle is to establish that, as a general proposition, one does not have to give aid whenever another requires it. One can turn one’s back on another’s need, declining to subordinate one’s own interests. One can choose not to be involved. When a woman secures an abortion in order to avoid the burdens imposed by an unwanted fetus, she is doing just what the bad-samaritan principle, in its standard applications, is designed to allow. It may seem odd to suggest that securing an abortion is really an “omission”, but if we want the “act/omission” distinction to reflect the values underlying the bad-samaritan principle, then that is how abortion ought to be viewed.

Suppose that a fetus and the pregnant woman carrying it were attached in such a way that the fetus could be removed without damaging it physically. The removed fetus would eventually die unless it was placed in some other womb, but it would come out of the original carrier's womb in just the same condition it was in inside. If this were the way pregnancy worked, it would be much easier to see that the general right of non-subordination or non-involvement embodied in the bad-samaritan principle would entitle the woman to remove the fetus at any time, unless she had waived or forfeited the right. It would be easier to see

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that the woman who did not remove an unwanted fetus was engaged in a continuing course of charitable conduct, which general samaritan law would permit her to terminate at any time. There are certain situations, to be discussed below, in which one who has started to give aid may not stop. But the general principle is that merely giving aid does not commit one to continuing it.

Now, pregnancy does not work the way I have suggested. It is not possible (at least at the stages of pregnancy where abortions are commonly done, and where they are safest and most desirable for the woman) to remove the fetus without making it inviable. This should make no difference to the conclusion that the woman is permitted by the bad-samaritan principle to remove the fetus. One reason it might be thought to make a difference is that the fetus which was removed without being damaged would have a chance of survival, if another willing carrier could be found in time, whereas the aborted fetus will certainly die. But the bad-samaritan principle protects even omissions that are certain to result in the death of the person denied aid. Unless the pregnant woman falls within some exception to the principle, the principle would permit her to remove the fetus without damaging it, assuming that were possible, even if it were known that the fetus would die because no other carrier could be found. Therefore the fact that the fetus is certain to die does not remove the woman from the scope of the principle.

It might be suggested that removing the fetus in a way which renders it inviable is more clearly an "act" than simply removing the fetus without damaging it. But this does not seem right. It may be that removing the fetus in a way which renders it inviable is likely to be a more complicated act, or a more difficult act. But it is no more an act. Like the mere removing, it is an act in one sense, but it ought to be viewed as an omission, or as part of a course of conduct amounting in overall effect to an omission, under the bad-samaritan principle. It is the only way, in the real world, for a pregnant woman to discontinue the burdensome course of aid to the fetus.4

4. Another possible objection to the argument in the text runs as follows: Removing-the-fetus-without-damaging-it and removing-the-fetus-and-rendering-it-inviable differ with respect to the actor's intention. In the latter case, but not the former, the death of the fetus is a means to the protection of the mother. Therefore, in the latter case but not the former the removal of the fetus is impermissible. This is the Doctrine of Double Effect. A great deal has been written about the Doctrine, and I shall not discuss it here. I do not think it has a place in moral reasoning, but that is beside the point. I also do not think it is part of American law, and that is very much to the point. In many situations, appeal
I have argued that abortion must be allowed if we are to respect the pregnant woman’s interest in being free to refuse aid, an interest we protect for other potential samaritans. There are two possible counter-arguments, designed to show that we do not really value the potential samaritan’s freedom to refuse aid as much as the existence of the bad-samaritan principle might suggest.

The first counter-argument involves the notion that we do not value the potential samaritan’s freedom to be uninvolved — rather, we believe only that involvement should not be legally compelled. This suggestion strikes me as somewhat odd, but it is not incoherent. A full discussion of the suggestion would be interesting. For the present, however, it suffices to observe that this suggestion does not constitute a reason for thinking that abortion should be treated differently from other samaritan problems. The pregnant woman’s involvement with the fetus she carries is not originally created by law, but if she does not desire the involvement, then, in the absence of laws forbidding abortion, she will have no difficulty terminating it. Laws forbidding abortion compel her continuing involvement just as much as a general law requiring one to be a Good Samaritan would compel the reluctant adult bystander to be involved with the drowning child.

The second counter-argument suggests that we do not really value either the potential samaritan’s freedom to be uninvolved in every case or freedom from legally compelled involvement.

to the act/omission distinction may resemble argument based on the Doctrine of Double Effect, but the two sorts of argument are not the same, see Foot, The Problem of Abortion and the Doctrine of the Double Effect, in P. Foot, VIRTUES AND VICES (1978), and the latter is not important in our law.

Anyone familiar with the literature on abortion will have assumed, correctly, that I owe the idea of the pregnant woman as samaritan to Judith Thomson’s revelatory article, A Defense of Abortion, 1 PHILOSOPHY & PUB. AFF. 47 (1971). It is worth noting that Thomson does not unequivocally claim that securing an abortion should be viewed as an omission rather than as an act. Much of her essay seems to be based on this implicit premise, but when she addresses the issue directly, she apparently prefers to view abortion as an act of killing justified by principles regarding self-defense. I think a highly plausible argument can be made along these lines, and I shall devote a brief Section II to the self-defense argument. But I prefer to rely primarily on the bad-samaritan principle. I find it very plausible to view securing an abortion as a refusal-to-aid, and it is clear that our law allows refusals-to-aid for less weighty reasons than it requires for killing, even in self-defense. (In saying this, I do not mean to suggest that the reasons which may support an abortion are not weighty. They are.) One reason Thomson may have had for preferring the self-defense line does not concern me. For purposes of moral argument, which she was engaged in, it is much less clear that we accept the bad-samaritan principle than that we recognize a right of self-defense. But there is no doubt that the bad-samaritan principle is a principle of American law.
Instead, it is suggested, the bad-samaritan principle is a response to various difficulties in formulating legal rules requiring aid. In many situations where a person is in need of aid, there will be more than one potential samaritan. Each potential samaritan will be in a position to ask, “Why should I be the one to give aid?” Similarly, in many situations involving potential samaritans, it will be unclear just how much the samaritan ought to be required to do in the way of attempting a rescue, or whatever. Frequently, also, it will be difficult to establish a clear causal connection between the failure to give aid and the harm to the person who needed aid. It may seem that the bad-samaritan principle is a sort of per se rule designed to avoid all these difficulties by establishing a general, easily understood, and easily applied rule of non-liability. If so, it may also seem that the abortion case should be an exception to the per se rule. When a woman is pregnant and the fetus is in need of her continuing aid, there is no doubt who must provide the aid; there is no doubt what aid is required; and there will be no difficulty in identifying the woman’s refusal of aid, if she has an abortion, as the cause of the harm to the fetus.

One answer to this argument is that even if the bad-samaritan principle were a per se rule of the sort described, it would not be clear that abortion cases should constitute an exception. There is no question about whose aid is required in the abortion case, and there is no question that a refusal of aid will be the cause of harm to the fetus. Nor is there doubt about what aid is required if the fetus is to survive. But the difficulty about the magnitude of aid which inclines us to a per se rule is not primarily the difficulty of deciding how much aid is required. It is the difficulty of deciding how much may justly be required of the potential samaritan. If we did not think there were limits to the aid that could justly be required, we could solve the “how much aid” difficulty by requiring the potential samaritan to do everything in his power that might conceivably be useful. As I shall show in the next Section, the burdens of pregnancy and childbirth are considerable, and they are burdens of a sort disfavored by our legal tradition. They are also far greater than the burdens imposed under exceptions to the bad-samaritan principle on any other potential samaritans, except (possibly) parents. The case for making an exception of the abortion situation would be problematic even if the per se analysis were correct and our commitment to the bad-samaritan principle were much weaker than the present scope of the principle suggests.
In any event, I do not think the bad-samaritan principle is adequately explained as a *per se* rule. I do not deny that some legal rules are of this type. Nor do I deny that for someone out of sympathy with the idea that an individual should be free to refuse aid, this sort of *per se* analysis may be the most appealing justification of the bad-samaritan principle available. But it is clear to me that if the difficulties we have mentioned were the only support for the bad-samaritan principle, the principle in its present broad form would not be part of the common law. There are many individual cases not involving abortion in which none of the difficulties mentioned is serious. If these difficulties were the only basis for the bad-samaritan principle, then instead of a flat rule we would consider the issue of samaritans' duties case by case and develop more specific rules. The uncertainty created would be no greater than that created by many hard-to-apply common law rules, and the gain in clarity about what we were doing would be considerable. The common law recognizes the bad-samaritan principle because it does value the freedom to refuse aid, to resist subordination even in trivial ways, to remain uninvolved. If this freedom is important, it is as important for the pregnant woman as for anyone else.

One final point should be mentioned in this Section. It will seem to some readers that even if the woman's act of securing an abortion can be viewed as an omission, the same cannot be said of the act of any doctor who assists her by performing the abortion. I agree that the doctor looks more "active" than the woman. That is not primarily because he performs the abortion while the woman suffers it. Rather it is because the doctor is not freeing himself from the fetus's demands for future aid, as the woman is freeing herself. The question, then, is whether the doctor is shielded from liability by arguments establishing the woman's freedom to refuse aid.

I do not know of any authority on whether a third party may assist a potential samaritan who needs help in refusing aid. The reason for the lack of authority is clear. It is only in the unusual case, like the abortion situation, that anything resembling a positive act is necessary for the samaritan to refuse aid. There is some law on third-party intervention in the context of the right of self-defense (or, from the point of view of the third party, the context of defense of others). In that context, the currently dominant view, and the view which is still gaining ground, is that third
parties are entitled to intervene.\(^5\)

For myself, I find it easy to conclude that if the woman is free to secure an abortion, the doctor should be able to help her. Although I find it easy to conclude this, I do not have much to say in support of my conclusion. I do have one observation. When abortion is forbidden by law, many women suffer severe injury or even death from illegal or self-induced abortions. If we assume that women should not be seeking abortions in the first place, it is possible to ignore this large cost, saying that the women have only themselves to blame. But it seems perverse to say that given the general tenor of samaritan law a woman ought to be permitted to refuse aid to the fetus, and yet to say that she may not receive assistance in this course when the assistance would avoid much suffering and when it is voluntarily offered and privately arranged.

B. The Burdens Imposed By Laws Forbidding Abortion

In this Section I shall discuss the nature and extent of the burdens imposed on women by anti-abortion laws. First I shall consider the extent of the physical burdens of pregnancy and childbirth. Then I shall argue that these burdens are of a kind that our law is ordinarily specially reluctant to impose on unwilling parties. Finally, I shall explain why these are the burdens most relevant to the constitutional status of abortion, even though there are other significant costs associated with or likely to result from an unwanted pregnancy.

1. The Physical Burdens of Pregnancy and Childbirth

It will be instructive to begin by listing what two obstetricians, writing for pregnant women and attempting not to alarm but to reassure them, call the “minor complaints” of pregnancy.\(^6\)

First, complaints involving general inconvenience or discomfort: a tendency to faintness (generally limited to the first four-teen weeks); nausea and possibly vomiting (generally limited to the first fourteen weeks); tiredness (pronounced in the first fourteen weeks, then disappearing, to reappear near the end of preg-

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5. See, e.g., Restatement (Second) of Torts § 76 (1965); W. LaFave & A. Scott, Criminal Law § 54 (1972); ALI Model Penal Code § 3.05 (Proposed Official Draft 1962).

6. The discussion in the text is based on G. Bourne & D. Danforth, Pregnancy (rev. ed. 1975). I have not merely copied a list from that book; rather I have collected and arranged observations scattered throughout the book. To give specific citations would, however, pointlessly clutter these pages.
nancy); insomnia (difficulty going to sleep caused by inability in late pregnancy to find a comfortable position in bed, compounded by difficulty going back to sleep when wakened by a kicking fetus or by the need for frequent urination which accompanies pregnancy, also compounded by general disruption of the body's internal temperature-regulation mechanism); slowed reflexes; poor coordination; uncertainty of balance (caused by increase and redistribution of body weight); manual clumsiness in the morning (caused by swollen fingers and carpal-tunnel syndrome); shortness of breath following even mild exertion; and new aversions to certain foods or smells (especially fatty or spicy foods).

More specific complaints, still involving inconvenience or discomfort, are: tender breasts; stuffy nose; constipation; heartburn (different from nausea, and not limited to early pregnancy); nosebleeds; edema of the feet and ankles; a metallic taste in the mouth; special difficulty in curing any vaginitis that may occur; increased susceptibility to and difficulty of curing urinary tract infection; increased frequency of urination (quite apart from any urinary infection); occasional extreme urgency of urination (as the fetus bumps the bladder); and occasional stress incontinence from the same source. Many pregnant women also report more headaches than when they were not pregnant, though there is no apparent reason for this aside from the increased psychological stress of pregnancy.

Among complaints not merely uncomfortable but painful, some of which can be very painful indeed, we find: backache; costal-marginal pain (caused by the enlarged uterus pushing against the lower ribs); abdominal “round ligament” pain; abdominal muscle pain; pelvic ache; pelvic shooting pain (as the fetus bumps a nerve at the rim of the pelvis); foot and leg cramps; the different pain and leg cramps associated with varicose veins; hemorrhoids; pain and pins-and-needles in the wrist (carpal-tunnel syndrome); and mastitis. Finally, as a result of the general softening of ligaments during pregnancy, along with the extra weight and the loss of balance, there is an increased susceptibility to sprains and to aching feet.

The pregnant woman also experiences changes in her appearance: most obviously, the pronounced change in the shape of her body as a whole; consequent upon the change of body shape, an awkward gait and inability to wear her normal wardrobe; increased dryness of skin (for women with dry skin initially); thin, brittle, unmanageable hair; varicose veins (in the legs or the
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vulva, and sometimes in pelvis, abdomen, or breasts; swelling of the face; changes in pigmentation (darkening of the nipples and areolae; sometimes darkening of larger patches of the breast; darkening of freckles or moles; the linea nigra from the pubic area to the naval; the often blotchy “butterfly mask” or chloasma); stretch marks (which result in part from avoidable excessive weight gain, but which are not always avoidable).

Finally, as a result of hormonal changes, the pregnant woman is likely to be at times markedly irritable, volatile in her moods, or subject to periods of depression. She may also experience a loss of sexual desire.

After the period of pregnancy, there is the actual delivery of the fetus. The days when a woman had a reasonable chance of spending twelve hours or more in sweaty agony are happily gone. But it is still true that for many women parturition is a thoroughly unpleasant and significantly painful experience. It can also involve a major operation, with all the added risk and discomfort that entails, if the fetus is delivered by cesarean section.

I shall say nothing of the rare and dangerous complications of a pregnancy and delivery, except to note that in all probability full-term pregnancy and childbirth involve greater risks of death to the mother than early abortion.

Looking beyond delivery, some of the “minor complaints” of pregnancy listed above persist for varying periods after parturition. There are also a few characteristic post-partum pains, such as the discomfort caused by an episiotomy.

The permanent physical effects of pregnancy which are noticeable by anyone other than a doctor and which are genuinely unavoidable appear to be few, perhaps limited to some stretch marks, some darkening of the nipples and areolae, sometimes varicose veins and hemorrhoids (which become more of a problem as the number of pregnancies the woman has been through increases), and, when a cesarean is performed, the scar from that operation. Beyond these effects, many women attribute to their pregnancies such other permanent effects as weight gain, anemia, constipation, skin damaged by dryness, damaged hair, sagging breasts, weak bladder, and painful feet or back.

The truth may well be that avoiding all the avoidable permanent effects, and for that matter minimizing all the “minor com-

"plaints", requires considerable self-indulgence during pregnancy. The woman who can rest in the afternoon, sleep two extra hours at night, persistently oil her dry skin, give her hair extra attention, not stay on her feet for too long at a time, eat small meals every two hours, never put off the urge to evacuate her bowels, religiously do her post-partum exercises, and so on, will suffer less discomfort and fewer lasting effects of pregnancy than the woman who cannot.

The ills of pregnancy, delivery, and beyond make an impressive list. To be sure, not every pregnant woman suffers all of these ills. Nor do those who are afflicted suffer them in equal degree or at all times during pregnancy. But most of the complaints I have listed are common ones. I suspect it is an unusually lucky woman who does not put up with enough pain, discomfort and disruption of appearance and emotional state to add up to a major burden. (We should perhaps remember that as a society we recoil from being a few pounds overweight, from living in a house where the temperature is below 70°F even though we can afford sweaters, or from going to the dentist.)

It may seem that I must have got it wrong — that if having a child were as bad as I suggest, no woman would ever do it voluntarily. Alternatively, it has been suggested to me by colleagues (male) that the pain of childbirth is a “noble” pain, or that having a child is a “transcendent experience” in which the pain becomes a valued part of an incomparably valued whole. These suggestions completely and shockingly miss the point. I have no doubt that all the pain, discomfort, and annoyance of being pregnant and giving birth are worthwhile if one wants a child. I do not deny the existence of transcendent experiences, and I am prepared to believe that for some women carrying and delivering a child are just that. (I must say that I know other women, devoted and successful mothers, who say they would never go through pregnancy if one could get a child of one’s own any other way.) But the question is not whether pregnancy is worthwhile, or whether it is a transcendent experience, for a woman who wants a child. The question is how burdensome it is for a woman who does not want a child.

The answer, clearly, is that for a woman who does not want a child, pregnancy is very burdensome indeed. It is worth mentioning that all of the pains and discomforts listed above are likely to be significantly aggravated when the entire pregnancy is unwanted. It is much easier to bear up under pain and inconveni-
ence when they serve some end one has chosen than when they do not.

An unwanted pregnancy is vastly more burdensome than the actions required of potential samaritans under other exceptions to the bad-samaritan principle. Compare carrying and delivering an unwanted child to calling a doctor for an injured social companion, or to warning the object of a death threat made by one’s patient in psychotherapy, or to letting a guest invited in for dinner stay the night, and so on. Even setting aside the small risk of serious complications or death that is associated with pregnancy and with none of those other duties, there is no comparison at all. The one traditional exception to the bad-samaritan principle where the burdens bear comparison to the burdens of pregnancy is the parenthood exception. Even here, the burdens are of a different kind. Being a mother (of a child, not a fetus) does not alter the entire functioning of a woman’s body the way being pregnant does. I shall say more about the importance of this point, and about other possible distinctions between the pregnant woman and the parent, later on.

2. The Disfavored Status of Physical Impositions

In addition to imposing burdens greater than any of the recognized exceptions to the bad-samaritan principle (except possibly the parenthood exception), anti-abortion laws also impose burdens of a kind that is especially suspect in our law. We are traditionally very dubious about practices which involve direct

11. See Depue v. Flatau, 100 Minn. 209, 111 N.W. 1 (1907).
12. There is some tension for the proponent of “women’s rights” between the argument I am making here, emphasizing the burdens of pregnancy, and an argument made about cases like Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), emphasizing the pregnant woman’s ability to continue at her normal occupation almost to the point of delivery. The conflict is more apparent than real. First, there is an important difference between asking how great a burden we can impose on the woman for the benefit of the fetus and asking how great a burden the woman can bear while continuing at her usual job if she chooses. Second, the variation in the actual effects of pregnancy on different women works in the woman’s favor in both cases. When considering what we can impose on women, we must surely consider, if not the worst possible case (where what we impose, by increasing the risk, is death), at least the worst situation to which a significant fraction of the women affected are involuntarily assigned. In the LaFleur situation, by contrast, it should suffice to require individual consideration of the woman’s case if a significant fraction of pregnant women can carry on as teachers with their abilities in that role relatively unimpaired.
invasions of the body or the imposition of physical pain or extreme physical discomfort.

The clearest example is corporal punishment. Although the Supreme Court has never directly confronted the issue, Mr. Justice (then Judge) Blackmun wrote an opinion for the Eighth Circuit Court of Appeals in 1968 that apparently condemned any use of corporal punishment, even if specifically authorized by statute and judicial sentence. Delaware, which was notorious in the 1960s as the only state which specifically provided for flogging, abolished that punishment in 1972. To my mind, the most plausible explanation of the Supreme Court's surprising decision in Ingraham v. Wright that the eighth amendment does not apply in schools is that the Justices did not want either to eliminate corporal punishment in schools or to say that the eighth amendment allows corporal punishment.

More generally, decisions of both the Supreme Court and lower courts make it clear that punishment may not be too "physical". The Supreme Court has indicated that prisoners cannot be deliberately denied medical treatment, and lower courts have held that such disciplinary methods as "strip cells" inadequately provided with hygienic facilities constitute cruel and unusual punishment. In one specially interesting decision, a federal district court found a violation of the eighth amendment where prisoners on death row were denied exercise facilities. There is no logical contradiction in requiring that prisoners awaiting death must be allowed to exercise, or in permitting capital punishment while we have effectively abolished corporal forms, but there is a mild paradox that says something about our attitudes towards pain and physical suffering.

In a different area, the result in Rochin v. California was plainly determined by the Court's reaction to the physical brutality of the police and the invasive nature of stomach pumping. (Stomach pumping is not quite what it sounds like. It is accomplished by the introduction of an emetic into the stomach by a tube run through the nostrils and the esophagus. But it can be a distressing procedure, both because of the tube and because of

16. E.g., Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).
the forced vomiting.) Later cases have established that physical
searches — blood samples, mouth searches, rectal searches, per-
haps even stomach pumping — are permissible in appropriate
cases if carried out with decorum and procedural safeguards. But
the few cases which have dealt with surgical searches (as for
bullets) seem to draw a line between searches requiring only a
superficial incision (permissible) and searches which involve
going further into the body (disallowed). 19

Other cases that demonstrate the judicial squeamishness
about physical invasion, pain, and discomfort are the cases in-
volving so-called “organic therapies” carried out in prisons or
other custodial institutions. Organic therapies include psychosur-
gery, shock treatment, and aversive therapy with emetics or par-
alytics. There are many problems raised by the use of such ther-
api es aside from the physical invasion or pain they involve. There
are procedural issues about the need for medical authorization
and supervision on each particular occasion of use; there are ques-
tions about the general efficacy of such therapeutic techniques;
there are issues about the appropriateness of state-enforced
“mind control”. But the physically intrusive nature of the tech-
niques is an important factor in the generally negative judicial
reaction. One of the most persuasive opinions in the area is Judge
Ross’s opinion for the Eighth Circuit in Knecht v. Gillman. 20 The
opinion is persuasive not because of exceptional analysis, but
because it emphasizes that fifteen minutes to an hour of vomiting
(as the result of an injection of apomorphine) is something known
by all of us to be a “painful and debilitating experience”.

In another area, a Pennsylvania court recently held that a
healthy adult could not be compelled to be the donor for a bone-
marrow transplant that represented the only realistic chance for
the survival of his cousin, even though the transplant involved no
significant risk to the donor. 21 So far as I am aware, the case is
unique in confronting the question of compulsory organ donation,
but a number of philosophers and lawyers have recently used
compulsory organ donation as a hypothetical example of a prac-
tice clearly beyond the pale. 22 Evidence for the correctness of this

20. 488 F.2d 1136 (8th Cir. 1973).
Civil Division, July 26, 1978).
22. E.g., R. NOZICK, ANARCHY, STATE, AND UTOPIA 206-07 (1974); Kadish, Respect for
view can be found in decided cases in which judges have been very reluctant to permit organ donation by minors or incompetents, even to close relatives.\textsuperscript{23}

It would be interesting to see a case in which the issue was presented of whether a parent has a duty to donate a needed organ to his or her child. My guess is that no duty would be found. To be sure, there are organ donations and organ donations. Donating an eye would not leave one blind, but it would significantly impair one’s sight as well as increasing the risk of blindness if something happened to the other eye. Donating a kidney ordinarily has no effect at all so long as the other kidney remains intact. Donating bone marrow has only temporary effects, since the bone marrow regenerates. I would be surprised if any American court ordered even a parent-to-child bone-marrow transplant, an imposition which (not to forget our ultimate purpose) seems more defensible than forbidding abortion in every respect.

I do not claim that our disinclination to impose bodily invasion or physical pain overwhelms all other values. We require immunization against certain diseases for public schoolchildren. As noted previously, we allow physically invasive searches within limits. We may deny heroin to an addict in custody, causing the extreme discomfort and pain of a cold turkey withdrawal. Courts do sometimes approve the use of organic or aversive therapies. We are ambivalent about suicide and the “right to die”, even where life may entail considerable pain or else dependence on highly invasive life-support machinery.

I say we are ambivalent about suicide and the right to die. There is the Karen Quinlan case,\textsuperscript{24} holding that an irreversibly comatose patient has a right not to be kept alive by extraordinary means. But there is also the possibility that that unique decision is ahead of its time. There is the fact that abetting suicide is still a crime, in most or all states. But the explanation is in part that we are afraid the abettor may have exerted too much influence on the decision. Juries are notoriously reluctant to convict in appealing cases of abetting suicide or even of outright euthanasia of a terminal patient unable to kill himself.

\textsuperscript{23}E.g., Lausier v. Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (Wis. 1975); In re Richardson, 284 So. 2d 186 (La. App. 1973).

\textsuperscript{24}In re Quinlan, 70 N.J. 10, 365 A.2d 647 (1976).
Even in the cases just mentioned, whenever a major invasion or infliction of pain is allowed (that is, in cases involving heroin withdrawal, aversive therapy, or the would-be suicide), there is a significant distinction from the abortion situation. The burdens, whatever they are, are at least arguably imposed for the subject’s own good. In a day when many people think constitutional analysis should start from the views of John Stuart Mill, this may seem to make the impositions in question less defensible rather than more. But one can quite rationally take the following position: No man is his brother’s keeper, and therefore the law should not require one individual to shoulder burdens for the sole benefit of a particular other. On the other hand, every man is assumed to want to pursue his own interests (except perhaps where he voluntarily chooses to help another), and therefore an individual who acts clearly contrary to his own interests, without thereby helping anyone else, must be incompetent, in which case his choice against his own interests need not be respected. The position I have just outlined may be oversimplified, but I think it is a fair sketch of the relevant part of our legal tradition.

We have wandered slightly from the main point of this Section, which is our reluctance to invade the body or to impose physical discomfort or pain. Let me conclude with three hypotheticals, not the ideal stuff of constitutional argument, but perhaps worth considering.

First, suppose that fetuses were freely transplantable from womb to womb at all stages of development, and suppose that we were confronted with a healthy, normal two-week fetus developing in the womb of a woman who was rapidly dying of some condition that would not affect the fetus until she died in a few days. Would we consider drafting another non-pregnant woman to carry the fetus, choosing her by lot and implanting the fetus, whether she wanted it or not, in her body, forbidding her to abort it?

Second, imagine that we had a machine we could hook a person up to which would cause the person to experience the sensations of a difficult and painful childbirth. Imagine also a completely innocent person who holds in his subconscious mind a piece of information that would allow the police to thwart a planned murder. This person is genuinely unable to recall the relevant information, but he would recall it with the encouragement of the childbirth-simulating-torture-machine. Would we allow a court to order that the person be hooked up to the machine involuntarily?
Finally, consider a simple burning building, with a child trapped inside. Would a court impose criminal liability on anyone, even the child’s parent, who did not attempt to save the child at the risk of second-degree burns over one or two percent of his or her body?

In each of these situations, an innocent life can be saved by a physical invasion comparable to or less than pregnancy and delivery. In the third situation, even if the potential rescuer is specified to be the child’s parent, liability is unlikely. In all other cases, the suggested imposition is unthinkable in the context of our legal system.

I am aware of arguments that can be made to distinguish these hypotheticals from the abortion case. One problem with the abortion case is that it is not exactly analogous to anything else. My hope is merely that these hypotheticals will help the reader to see what a striking departure abortion laws are from our usual commitment to the bad-samaritan principle and our usual reluctance to impose physical invasions or pain.

3. Why the Physical Burdens Are Crucial

So far I have concentrated on those interests of the pregnant woman which are invaded by pregnancy and delivery, including any post-partum or permanent effects of those physiological processes. The opinion in *Roe* and the principal scholarly defense of that opinion\(^2\) give rather more prominence to the woman’s interest in deciding how many children she will raise, and when she will have them. It is time for me to explain my relative unconcern with this “family-planning” interest.

To begin with, it may be doubted whether prohibiting abortion invades this “family-planning” interest at all. Ordinarily, the woman can give up a child she bears for adoption.\(^2\) Now, even if the woman can give her child up for adoption, that does not mean that she can avoid post-partum injury to her interests of every kind. She can regulate the number of children she raises,

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26. Because of legal restrictions or the unavailability of adoptive parents, this possibility may not always be available. For simplicity’s sake, I shall write as if it were. Obviously, when it is not, prohibiting abortion does invade the woman’s family-planning interest. Whether adoption is impossible often enough to make it clear on that ground that women’s family-planning interests are importantly affected is an issue I shall not discuss. For reasons discussed in Section III.B. *infra*, the family-planning interest, even if it is impaired, would be better exploited by a samaritan-type argument than by the “balancing” approach of *Roe*. 
and when she has them, but there may be significant psychological costs associated with giving a child away. There may be personal feelings of guilt over having “abandoned” the child, and there may also be family pressure (in favor of keeping the child) to resist and social disapproval to contend with. In effect, the woman faces, for each child she bears, a disjunctive burden. She must bear either the psychological costs of giving up her child or the burdens of actually raising the child.

If we adopt a relatively straightforward “balancing” approach to the constitutional problem of abortion — if we set out to identify the woman’s interests, to identify the state’s interests, and then (somehow) to balance — we must presumably put into the woman’s side of this balance only the lesser of the two alternatives in the disjunctive burden described above (in addition, of course, to the burdens of pregnancy and delivery already discussed). Defenders of Roe ordinarily point to the number of women who keep and raise children they did not want, and assume that the two alternatives in question can be treated as equal for the purposes of constitutional analysis.

My approach, however, is not a balancing approach at all. I do not argue that the sum of the woman’s interests in having an abortion outweighs the sum of the state’s interests in forbidding it. I do rely in part on the magnitude of certain burdens imposed on the woman, but the magnitude of the burdens is relevant not because I want to compare those burdens to the social benefits achieved, but because I want to compare them to the burdens other potential samaritans are required to shoulder or allowed to shirk. The point of my argument is that the invasion of the woman’s interests cannot be justified even on the ground that it is necessary to save the life of the fetus, so long as other potential samaritans more eligible for compulsion are allowed to refuse much less burdensome and less invasive life-saving aid.

Given the nature of my argument, I cannot deal with the disjunctive burden described above (involving either the costs of raising the child or the costs of giving it up) by saying that the two alternatives are about equally unattractive and the woman is as badly treated by being subjected to the disjunctive burden as she would be if she were straightforwardly required to keep and raise the child. The costs involved in giving up the child do not “count” under samaritan law in the same way that the burdens of raising the child would if that alternative were compelled. The costs of giving up the child are genuine costs, but they are not
costs of giving aid. Once the child has been born and given away, the mother is free of duties to aid the child in any way. The mother may be made unhappy by the thought that she has abandoned the child, or whatever, but all sorts of laws make people unhappy without violating the bad-samaritan principle. I would say that for purposes of samaritan analysis, the effective weight of the lesser of the two alternatives in the disjunctive burden is zero, and the whole post-partum burden must therefore be regarded as irrelevant. The family-planning interest drops out entirely. 27

The reader may wonder why, if samaritan analysis makes it impossible to consider the family-planning interests or the costs to the woman of giving the child up, I do not abandon the samaritan analysis in favor of some approach that would allow all the costs to the woman to be counted. The answer — which I will develop at greater length in Section III — is twofold. First, among the interests of the woman that are impaired by laws forbidding abortion, it is precisely the interests which count for purposes of samaritan analysis that can be shown to be given special status by the Constitution. Second, my approach, comparing the pregnant woman to other potential samaritans, avoids the necessity for a de novo weighing of the woman’s interest in having an abortion against the state’s interest in forbidding it, a weighing which I am not sure favors the woman.

Finally, the reader may be troubled by the fact that I emphasize interests of the woman which many women would not mention in explaining their desire for an abortion. Most women who want an abortion, asked why they want an abortion, would not begin their answer by describing the physical burdens of pregnancy and childbirth. There is a reason for this. The pregnant woman faces at least three possible courses: abortion, bearing and

27. Despite what I say in the text, if the vast majority of women would rather raise an unwanted child than give it up for adoption, then it could be argued that many women have no choice. They are compelled by their psychological make-up and by social pressures to undertake the burdens of parenthood once they have borne a child. If this is the situation, then perhaps the burdens of parenthood should count, for purposes of samaritan analysis, as being imposed by the prohibition of abortion. This possibility may be important to some readers. My own view is that a convincing argument for the woman can be based just on the physical burdens of pregnancy and childbirth. But for the reader who disagrees — and in particular for the reader who ends up thinking I have not adequately distinguished the pregnant woman from the parent or the military draftee — it may be that a convincing argument for the woman is possible if and only if the burdens of parenthood count as imposed by laws forbidding abortion. If they do count, there is no doubt that the total burdens imposed by anti-abortion laws are significantly increased.
raising the child, or bearing the child and giving it away. A full explanation for wanting an abortion must explain why both of the other courses are rejected. In everyday discussion, however, given that most women want to raise children, the question “Why do you want an abortion?” is likely to be intended as equivalent to “Why don’t you want to raise that child?” It is natural, and appropriate, that the answer should focus on the difficulties associated with raising the child, as the answer (I assume) usually does. If the woman were pressed with a further question, “Why don’t you bear the child and give it up for adoption?”, I believe a high percentage of women would give prominent place in their responses to the burdens of pregnancy and childbirth I have described. I do not assert that these burdens would receive more emphasis than the psychological costs of giving the child away. But I am confident that, at this stage, unwillingness to suffer substantial pain and physical invasion for an individual with whom the woman desired no connection would be a significant factor in many women’s explanations. That, I think, is enough to save my argument from the charge of being unrelated to what women really care about.

C. Exceptions to the Bad-Samaritan Principle

I turn now to the matter of comparing the pregnant woman to other potential samaritans who are required to give aid under standard exceptions to the bad-samaritan principle. It is worth repeating something I have said before: My object is not to show that by traditional standards the pregnant woman is indistinguishable from the totally uninvolved bystander who may refuse even the most trivial aid. The pregnant woman is not totally uninvolved. She is sufficiently involved that we could appropriately impose slight burdens of aid on her, if imposing slight burdens would do the fetus any good. Unfortunately, imposing slight burdens on her will not do the fetus any good. It is very large burdens or nothing. What I propose to show in this Section is that even if the pregnant woman is sufficiently involved to justify imposing some small duty of aid, she is still less “eligible for compulsion” than any of the other potential samaritans who figure in the standard exceptions to the bad-samaritan principle. Her situation is distinguishable, in ways that make her a less appropriate subject for compulsion, from the situation of every other potential samaritan on whom duties are imposed. If we consider in addition that the duties imposed on those other sa-
Two of the standard exceptions to the bad-samaritan principle can be disposed of quickly. One is the “statutory duty” exception. Any discussion of the bad-samaritan principle can be expected to include the observation that there is a duty to aid if some statute imposes such a duty. Now, statutes forbidding abortion are (on my analysis) statutes imposing a duty to aid. So it might seem that the pregnant woman falls squarely within the first standard exception we look at. But the statutory duty exception, considered as a general exception, is not relevant to our purposes. The claim that there is a duty if some statute creates such a duty assumes that the statute in question is constitutional, whereas I am arguing precisely that anti-abortion statutes are unconstitutional because they make an exception to the bad-samaritan principle that is unacceptable given the general state of samaritan law. It is relevant, of course, to compare anti-abortion statutes, and the duty they impose, with other specific duty-creating statutes and the duties they impose. Those other statutes are part of the “general state of samaritan law”. I shall discuss some other statutory duties, including the draftee’s duty of military service, in Section D below.

The other standard exception to the bad-samaritan principle that we can deal with summarily is the “contract” exception. Duties to aid may be undertaken by contract. It might be suggested that when a woman marries, or perhaps when a woman has sexual intercourse, she enters into an implied contract with her husband or with the man involved to carry and deliver any conceptus that results. If there is such an implied contract, the fetus can be regarded as a third-party beneficiary. We do not ordinarily enforce contractual duties by criminal sanctions, but contractual duties to aid the helpless can appropriately be so enforced in some circumstances. The trouble with this argument, of course, is that it is absurd to suggest that sex or marriage always carries with it an implied promise to bear a child. Even among people who are married, there are just too many who do not want children. In

28. To be sure, we may say that marriage involves an implied promise to have children, meaning that unwillingness to beget or bear children is or ought to be a ground for divorce. That is obviously quite a different matter. As to whether a husband’s interest in having a child ought, even in the absence of any contract, to entitle him to prevent his pregnant wife from having an abortion, see Section III.B. *infra*.
arguing against the existence of an implied contract on the basis of what people want, I assume that we are talking about a contract implied “in fact”. We sometimes imply contracts “in law” without caring what the parties want. If that possibility is relevant at all in the present context, it is under the heading of “status” exceptions to the bad-samaritan principle, to which I now turn.29

1. Exceptions Based on Status or Relationship

There are a number of cases in which a duty to render aid is based on the status of the potential samaritan, or on the relationship between the potential samaritan and the person in need of aid.30 A common carrier has a duty to aid a passenger; the master of a ship has a duty to aid a member of his crew; a jailer must aid his prisoner. Others on whom duties to aid are imposed are innkeepers (vis-à-vis their guests), storeowners (vis-à-vis their customers), employers of all kinds (vis-à-vis their employees), schools (vis-à-vis their pupils), social hosts, spouses, and parents.

The situation of the pregnant woman can be distinguished from the situations of all these other potential samaritans on whom duties are imposed. In fact, in almost every case there is more than one significant ground of distinction. A ground of distinction which is common to all of the cases, however, is the degree of voluntariness of the assumption of the status or relationship on which the duty to aid is based. Every one of the statuses or relationships I have just named is entered into voluntarily. The condition (or status, or relationship with the fetus) of pregnancy is not chosen voluntarily by those women who, once pregnant, want abortions. Some readers may think the distinction just suggested is more apparent than real. I do propose to discuss it further. First, let us consider the extent to which pregnancy is voluntary.

29. The text ignores the possibility of an express contract to carry the fetus. Given problems of proof (unless we require such a contract to be in writing), and given the reluctance of the common law to grant specific performance of contracts for personal services, it is not clear that even an express contract ought to be enforceable. Certainly, however, a woman who has made an express contract to carry a fetus is a much more appropriate subject for compulsion than one who has not. Fortunately, we need not decide whether a woman should be allowed to bind herself by an express contract not to have an abortion. I am prepared to restrict the argument of this essay, and my conclusions, to women who have not made the attempt.

30. See generally Restatement (Second) of Torts §§ 314, 314A, 314B (1965); W. Prosser, supra note 3, at 340-43; W. LaFave & A. Scott, supra note 5, at 184.
I think it may safely be assumed that most pregnancies of women who want abortions are not intentional.\textsuperscript{31} Unintended pregnancies may occur for a variety of reasons. Many result from contraceptive failure. (If contraceptive methods of very high effectiveness, say 98\%, were used carefully and consistently, there would be hundreds of thousands of pregnancies a year caused by contraceptive failure in a large population such as that of the United States.) Many more, probably, result from inept or inattentive use of contraceptives, or from occasional non-use. And many result from persistent non-use, caused by ignorance, laziness, the expense or disruptiveness of many contraceptive methods, pressure from male partners not to use contraception, and a variety of other possible psychological causes. In none of these cases has the woman who becomes pregnant chosen to be pregnant.

It might be argued, of course, that in every case where a woman becomes pregnant (except the case of rape), she has voluntarily done something. She has given in to pressure not to use contraception; or she has given in to her own laziness. If she has done neither of these things — if she is a victim of contraceptive failure despite responsible contraceptive use, or even if she is totally and excusably ignorant about methods of contraception — she has at least had sex. Assuming she is not so ignorant as to be unaware of the connection between intercourse and pregnancy, can she not be said to have assumed the risk of conception? It is true that in every case in which a woman becomes pregnant (still excepting the case of rape), she has voluntarily had sex. Voluntariness, however, is something that admits of degrees. As Harry Wellington has pointed out, having sex may be more a matter of choice than eating, but it is an act to which most of us feel a strong compulsion.\textsuperscript{32} It is clear to me that the choice to have

\textsuperscript{31} To be sure, there will be cases where the woman becomes pregnant intentionally and then changes her mind about having the child; but these cases will be comparatively rare. (If the practice of amniocentesis to determine the fetus's sex, followed by abortion of a fetus of the undesired sex, becomes more common, the case in question may not be so rare. That does not affect what I say in the remainder of this note.) In any case which is identifiable of this type, the case for denying the woman an abortion is very much stronger than in the usual case of a pregnancy which is unwanted from the beginning. Whether the case for denying an abortion is strong enough is a harder question. Some of the relevant considerations are canvassed later on, in the discussion of duties created by the voluntary commencement of aid, at pages 1598-1601. I think we can leave this unusual case unresolved without impairing the general argument.

sex is ordinarily not as “voluntary” as the choice to be an innkeeper, or a storeowner, or whatever.

It might be suggested that even if an innkeeper (for example) voluntarily chooses (in a strong sense of “voluntary”) to be an innkeeper, he does not choose to be a good samaritan to his guests. He does not even choose that any of his guests shall ever need his aid (beyond room and board). All he chooses is to run the risk that some guest will have an accident or other misfortune which requires special aid. In other words, the innkeeper does just what the woman does when she has sex. He takes a risk. If the innkeeper may be compelled to be a samaritan when the event he does not want occurs, why not the woman as well?

This suggestion overlooks important differences between the innkeeper and the woman. The innkeeper may not want to be a good samaritan. But he actively invites the formation of the relationship on which his duty of aid is based. The innkeeper wants guests. The woman does not want the fetus. What is true of the innkeeper is true of every other potential samaritan mentioned at the beginning of this Subsection (with the possible exception of the parent, to be discussed shortly). In some cases, the relationship which is the basis for the duty of aid is a relationship of some intimacy in which the potential samaritan chooses the particular individual with whom the relationship is to be formed. (I have in mind the relationship of spouse to spouse and of host to social guest.) This obviously makes it easier to accept the imposition of a duty to aid. Innkeepers, storekeepers, and so on, do not choose their guests or customers with such particularity. Even so, unlike the unwillingly pregnant woman, they actively seek the formation of the relationship. That is the point of their calling.

The reference to the innkeeper’s “calling” suggests another observation. The innkeeper, the storekeeper, and so on, are all engaged in providing a service for pay. They are engaged in economic enterprise. That clearly contributes to the feeling that it is acceptable to impose duties of aid, to treat them as having “assumed the risk”. In fact, every potential samaritan on the list at the beginning of this Subsection (still excepting the parent) not only invites the formation of the relationship but either chooses the other party to the relationship with particularity or is engaged in an economic activity.

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33. W. Prosser, supra note 3, at 339.
34. The claim in the text might be denied with respect to jails and public schools.
There is another respect in which all the potential samaritans discussed in this Subsection differ from the pregnant woman. All the relationships under discussion — of innkeeper to guest, shopkeeper to customer, parent to child, and so on — are relationships in which the second-named party would expect aid from the first. The potential samaritan in any of these categories who refuses aid will disappoint expectations which are likely to exist in fact and which we regard as reasonable. It might be suggested that the expectations exist only because of the legal duties to aid, but I think that suggestion is simply false. Even in the absence of legal duties, most innkeepers would aid guests who fell ill (both for humanitarian reasons and because it would be bad for business to refuse), most social hosts would aid their guests, and so on. Substantial expectations of aid would exist regardless of the legal rule, and one justification for the legal rule is that it protects these expectations. The fetus, in contrast, has no expectations to be protected. (Lest there be any doubt, I have been talking in this paragraph about psychological expectations, not "legal" expectations. The claim that the fetus has no expectations is not a petitio principii. It is, I believe, an empirical fact.)

Before we move on to compare the pregnant woman to the parent, let us summarize what we have established so far. There is undeniably some reason to regard the pregnant woman as "eligible for compulsion" for the benefit of the fetus. She has (except in the case of rape) voluntarily done an act which created the risk that her aid would be required. On the other hand, the pregnant woman seems a notably less apt candidate for compulsion than the other potential samaritans we have considered. Surely she should not be compelled to undertake greater burdens than they. And yet, so long as there are laws forbidding abortion, she is compelled to undertake much greater burdens than they.

The aid required of innkeepers and the others is trivial. It is usually something on the order of calling a doctor or sending for medicine. As one of my colleagues put it, we speak easily of the innkeeper's duty to aid his guests, but we would hardly require an innkeeper to give up a kidney for transplanting into a guest whose kidneys had failed. That would be a duty comparable to

These cases are special for a different reason: the duties to aid, to the extent they are not imposed on individuals who are providing services for pay, are imposed on the state. Whatever value we attach to an individual's being free to refuse aid, we do not attach the same value to the state's having a similar freedom, especially where the relevant relationship, with the prisoner or the public school pupil, is not only "invited" but coerced.
the duty anti-abortion laws impose on the pregnant woman.

Probably the most troublesome comparison, for my argument, is the comparison between the pregnant woman and the parent. I have explicitly excepted the parent from some of the claims made in this Subsection about other potential samaritans whose duties are based on status or relationship. It is not true of all parents, as it is true of all innkeepers, that they have invited the relationship with their child. It is not true of any parents that they have chosen the particular individual with whom to establish the parent-child relationship; and it is true of very few parents, if any, that they have children primarily for economic reasons. In addition, the burdens of being a parent are considerably greater than the burdens of aid imposed on innkeepers and the like. All in all, it may seem that the parallel between the parent and the pregnant woman is very close.

There are, however, significant differences between the parent and the pregnant woman who wants an abortion, differences which make parenthood look much more “voluntary” than unwanted pregnancy. The woman who does not want to be a parent, or the couple who do not want to be parents, can give their child up for adoption. There are costs associated with giving the child up, as I have already noted. But if, as I have argued, these costs are not enough so that the burdens of parenthood count for purposes of samaritan analysis as being imposed on women by laws forbidding abortion, then neither are they great enough so that the burdens of parenthood cannot be avoided by parents. It is much more plausible to view keeping the child as a voluntary assumption of the burdens of raising the child than to view having sex as a voluntary assumption of the burdens of pregnancy and childbirth.

We can make the same point in a slightly different way. It is true that the law imposes burdens of care on parents. It is also true that what we normally think of as “the burdens of parenthood” are very great. But it is not really true that the law imposes on parents all the “burdens of parenthood”. Most parents assume most of the burdens voluntarily. They keep their child. They feed it, and care for it, generally speaking. What the law is likely to punish the parent for is some particular refusal of aid fairly local-

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35. In years past, when giving the child up for adoption may have been harder to arrange than it is today, it was probably easier to arrange some informal “farming-out” of the child.
ized in time. (Even where the parent's failure is a long-term course of general neglect, the parent is arguably being punished as much for failure to enlist other assistance on the child's behalf as for anything else.) The parent, much more than the pregnant woman, creates the relationship with the child. The parent who refuses aid, much more than the pregnant woman who has an abortion, is like the samaritan who harms the object of his "assistance" by voluntarily embarking on a course of aid and then terminating it after other potential samaritans have turned their attention elsewhere, satisfied that the need is being met. (An extended comparison of the pregnant woman with the samaritan who volunteers aid and then terminates it is reserved for the next Subsection.)

Finally, it is worth emphasizing again that the burdens of parenthood, however great they are, are not as physically invasive as the burdens of pregnancy and childbirth. For better or worse, our tradition assigns special disvalue to the imposition of pain or extreme physical discomfort and to actual invasions of the body. I have suggested earlier, with my compulsory-organ-donation and burning-building hypotheticals, that we would stop far short of imposing on parents the sort of physical burdens anti-abortion laws impose on women. 36

2. Voluntarily Beginning Aid

There is substantial authority for the proposition that one who voluntarily begins to aid another assumes certain duties. 37 The aid must be provided in a non-negligent manner, and in some circumstances the aid may not be terminated. It might be argued that a pregnant woman has embarked on a course of aid to the fetus which she may not terminate by an abortion.

The principal objection to this argument is that the pregnant woman has not "voluntarily" begun to aid the fetus. I have already discussed the degree of voluntariness of the woman's

36. As a last word on parenthood, it is worth noting that one sort of burden is arguably imposed on parents who are no more eligible for compulsion than unintentionally pregnant women. I have in mind support obligations imposed on fathers who did not want a child. I think the argument of this essay casts some doubt on the constitutionality of such support obligations. But for the reader who thinks such obligations are obviously constitutional (and I assume most readers will fall into this category), it should suffice to note that financial impositions of this sort are much less disfavored than the physical impositions involved in forbidding abortion.

37. RESTATEMENT (SECOND) OF TORTS §§ 323, 324 (1965); W. PROSSER, supra note 3, at 343-48.
choice. I have conceded that, except in the case of rape, her connection with the fetus is not totally involuntary. But in most cases the pregnant woman has not knowingly and intentionally offered the fetus any assistance at all. At most she has taken a small risk, and lost. All of the cases about “voluntarily beginning aid” involve potential samaritans who, unlike the pregnant woman, have knowingly and intentionally embarked on a course of assistance to someone in need.\textsuperscript{38}

In addition, the cases where voluntarily beginning aid has been found to create a duty are ordinarily cases where the “aid” in question has left the recipient worse off, as where a landlord causes injury by performing negligently a repair he was not obligated to perform, or where a half-hearted samaritan terminates a rescue-in-progress short of completion after other potential rescuers have disappeared, thinking that matters were under control. When a pregnancy is terminated, however, the fetus is no worse off than it was before the only action of the woman that could possibly be construed as the beginning of aid, namely the sexual act as a result of which the fetus was conceived.

This “no worse off” argument may seem fanciful. I admit it is an argument many people are likely to be uncomfortable with. It nonetheless deserves to be taken seriously. The point is not just that the fetus is no worse off dead than alive.\textsuperscript{39} The point is that the fetus which is conceived and then aborted is not made worse off by the entire course of the woman’s conduct.\textsuperscript{40} This is a signifi-

\textsuperscript{38}. The discussion in the text may remind the reader of another traditional exception to the bad-samaritan principle, involving people who negligently or innocently create dangerous situations. That exception is the subject of the next Subsection.

\textsuperscript{39}. Since the fetus does not have and has never had any conscious desire to live, I think it can be argued plausibly that it is not worse off dead than alive. But that is not the present point.

\textsuperscript{40}. The reader who does take the argument in the text seriously may object that if the abortion causes pain to the fetus, then the fetus is made worse off by the woman’s entire course of conduct. However, if we take account of the pain caused the fetus, we ought to take account also of the pleasures of its earlier life in the womb (a life for which many inhabitants of the harsher world outside reportedly pine). How we are to estimate the balance of pain and pleasure here I do not know. Conceivably the balance would weigh against a late saline abortion. In any event, early abortions, by whatever technique, can hardly cause the fetus much pain.

It might also be objected that in saying the fetus is no worse off having been conceived and aborted than if it had never been conceived at all, I am overlooking the possibility that the fetus has a soul. I do not claim much knowledge about the fortunes of fetal souls, but it seems to me that if the fetus has a soul, then it is better off (and therefore no worse off) for being conceived and aborted and spending eternity in Limbo, than if it had not been conceived at all.
cant distinction between the abortion case and most cases where a duty is founded upon a voluntary undertaking to aid.

At this point, it might be suggested that there are certain cases where a samsaran who begins a rescue may not terminate it, despite the fact that his whole course of conduct leaves the person in need of rescue no worse off. The Restatement (Second) of Torts suggests in a comment that one who has pulled a drowning man halfway to shore with a rope might not be permitted simply to drop the rope and walk away, even if no other potential rescuer has been discouraged.41 Similarly, the Restatement says that one who has pulled another out of a trench filled with poisonous gas may not then throw him back in even though he is left no worse off than before the rescue was begun.42

These cases both differ significantly from the abortion situation. As to the drowning man, the Restatement only surmises that the half-hearted amsaran may not abandon the rescue. It may seem obvious to many readers that the rescue may not be abandoned, but if so, I suspect it is because the picture that springs to mind is of a relatively effortless pulling-to-shore. If we imagine instead a rescue that requires a long-sustained and painful effort, it should seem much less clear that the amsaran who has done no harm and displaced no other rescuer may not quit. For the benefit of any reader who thinks even the highly burdensome rescue may not be terminated, it is worth noting that there is still a significant difference between the drowning man and the fetus. One of the reasons we would be appalled (in the case of the easy rescue, perhaps only troubled in the case of the difficult rescue) by the amsaran who abandoned the drowning man halfway to shore is that the amsaran would have raised expectations in the drowning man and then disappointed them. The fetus, as I have observed before, has no expectations.

As to the amsaran who has pulled someone from a gas-filled trench and may not throw him back, the point here is that once the unfortunate is pulled from the trench, the rescue (or that part of it) is complete. Throwing the person rescued back into the trench is not in any sense a refusal to aid. Securing an abortion, while it is in some respects a positive act like throwing the person back into the trench, is the only way the pregnant woman can deny future aid to the fetus. Indeed, it is the only way she can

41. Restatement (Second) of Torts § 323, comment e (1965).
42. Restatement (Second) of Torts § 324, comment g (1965).
deny very burdensome aid which, we should note once more, she never really volunteered in the first place.\textsuperscript{43}

3. \textit{Harm or Danger Caused By the Potential Samaritan}

There is authority for the proposition that one who injures another, or one who creates a situation which is dangerous to another, has a duty to take steps to minimize the injury or danger, even if it was innocently caused.\textsuperscript{44} For example, it has been held that when a vehicle becomes disabled in a position where it blocks a highway, the driver of the vehicle, even though utterly free of fault, has a duty to set out flares or otherwise warn oncoming traffic.\textsuperscript{45}

This exception to the bad-samaritan principle is distinctive. It contemplates a duty to aid where the potential samaritan has neither chosen to become involved with the person in need of aid nor invited the formation of a relationship. It might be suggested that the pregnant woman is analogous to the samaritan who innocently creates a dangerous situation. It might be suggested that the pregnant woman has put the fetus in a dangerous situation. Even if she is free of fault, may she not, like the driver of the disabled vehicle, be required to give aid?

There is a significant difference between the pregnant woman and the driver of the disabled vehicle, a difference we have already discussed in another context. If we allow a potential samaritan to refuse aid to someone he has harmed or endangered, he will have made the other worse off by his entire course of conduct. The pregnant woman who has an abortion, however, does not make the fetus worse off by her entire course of conduct. For all practical purposes, the abortion leaves the fetus in just the state it was in before it was conceived. Allowing a woman to have an abortion is therefore quite different from allowing a driver simply to walk away from a disabled vehicle blocking a highway on a foggy night.

\textsuperscript{43} It may seem that the "no worse off" aspect of my argument would tend to justify neonate infanticide. That claim can be rejected for either of two reasons. First, once the infant is born, the woman can refuse further aid with less cost to the infant simply by giving it up for adoption. Second, we can argue that the woman has waived her right to refuse aid sometime before the infant is born. I think a waiver argument is probably adequate to justify the Court's holding in \textit{Roe v. Wade} that third-trimester abortions may be prohibited in most circumstances. See pages 1642-43 infra.

\textsuperscript{44} \textit{Restatement (Second) of Torts} §§ 321, 322 (1965); W. Prosser, supra note 3, at 342-43.

The reader may wonder whether the "no worse off" idea is really as important as I suggest. It is a difference between the abortion case and the disabled vehicle case, but is it a difference that matters? We sometimes allow a person to escape liability even though he clearly makes another worse off, as where, through no fault of the driver, a vehicle goes out of control and kills someone instantly. If the driver in such a case escapes liability even though he makes his victim worse off, can the duty to aid in the disabled-vehicle case really be explained as simply a duty not to make the victim worse off?

I think the "no worse off" idea is important. Where an out-of-control vehicle kills someone instantly, the question of aid to the victim does not arise, because the harm happens all at once. Where the harm does not happen all at once, courts have apparently decided that the right to refuse involvement does not extend to a right to refuse aid to those one has made worse off, even innocently. To make someone worse off, or to put someone in a position where he is likely to be made worse off, is to become involved. The right to non-involvement can be regained only by undoing the damage one has done.

A corollary is that the right to non-involvement ought to be regained once the damage has been undone. Nothing in the cases involving danger innocently caused suggests that the potential Samaritan must do more than undo the damage. If the pregnant woman who has an abortion leaves the fetus no worse off than before it was conceived, nothing in those cases suggests that a pregnant woman must instead carry the fetus and thereby confer on it a substantial net benefit.

I have discussed the duty to aid of a potential Samaritan who has innocently caused harm or danger. There is a similar, and more firmly established, duty to aid when one has negligently caused harm or danger. Now, I have conceded the existence of a duty to aid even when the potential Samaritan is innocent, and it might seem that I have therefore answered the strongest possible case against my position. I have eschewed reliance on the fact that many women who become pregnant are entirely innocent and would clearly be excused from any duty to aid that fell only on potential Samaritans who negligently caused harm or danger. On the other hand, it could be argued that I have made things too easy for myself. It would not be surprising if potential Samaritans who negligently caused harm or danger were subjected to more extensive duties of aid than potential Samaritans who cause harm or danger innocently. If this were the case, and if it could
be argued that most women who become pregnant unwillingly are at least negligent, then I would have made things easier than they should be. In fact, there is no evidence that greater duties are imposed on negligent than on innocent potential samaritans. Even if duties are imposed more consistently on the negligent, the burdens imposed are no greater. Accordingly (returning to my perennial final point), it is as true of the negligent potential samaritan as of the innocent potential samaritan that the duties of aid imposed on him are completely trivial compared to the burdens of pregnancy and childbirth.

4. Erosion of the Bad-Samaritan Principle

Scholars do not like the bad-samaritan principle, and they are eager to claim that the principle is being eroded away. Perhaps it is, but if so, then the erosion is very slow indeed.

Two recent cases that might be cited as evidence of erosion are Tarasoff v. Board of Regents and Farwell v. Keaton. In Tarasoff, the California Supreme Court held that a psychotherapist had a duty to warn a person against whom the therapist's patient made a death threat. In Farwell, the Michigan Supreme Court said a teenage boy had a duty not to abandon in a parked car a friend who was unconscious from a beating by other boys, suffered during a night of drinking and "cruising" in search of female companionship.

Farwell may represent a slight extension of traditional duties to aid, but the relationship of participants in a social "joint venture" is closely analogous to the relationship of host and guest. Most importantly, the relationship is undertaken knowingly and voluntarily. In addition, there is an element of reciprocity in the relationship that is absent in most samaritan cases. This is a case where the court might plausibly find that a bilateral contract to give minor aid is implied "in fact".

Tarasoff appears unusual at first because the duty found by the court runs to a party not directly involved in the relationship that gives rise to the duty. But the case is not really very striking. There is clear precedent for duties to third parties in cases where the potential samaritan has a more extensive duty to control the behavior of another — for example the duty of a jailer to prevent the escape of his prisoners, or of an employer to control his em-

ployees.48 The fact that a psychotherapist does not have a full-fledged duty to control his patient should not prevent us from recognizing, in the duty to warn, a weaker analogue. It is relevant that the role of psychotherapist, like the role of jailer or employer, is undertaken voluntarily and, ordinarily, for pay.

I cannot discuss every case which might be cited as evidence that the bad-samaritan principle is disappearing. I think there is little persuasive evidence for this proposition. In any event, even scholars who see the rule weakening are thinking of its application to cases where the burdens on the potential samaritan are trivial. Thus Prosser suggests that the bad-samaritan principle may erode to the point where “the mere knowledge of serious peril, threatening death or great bodily harm to another, which an identified defendant might avoid with little inconvenience, creates a sufficient relation . . . to impose a duty of action.”49 Or more recently, Marshall Shapo: “I have evolved as a working principle that one has a duty to aid others in situations in which hazardous conditions necessitate assistance for the preservation of life and of physical integrity, and in which one possesses the power to expend energy in that task without serious inconvenience or possibility of harm to herself.”50

Whatever else may be said of the supposed duty of a woman to carry a fetus, it is not a duty that can be discharged “with little inconvenience” or even “without serious inconvenience or possibility of harm”.

D. Statutory Duties

A variety of statutes create duties to act for the benefit of others and therefore create either exceptions or apparent exceptions to the bad-samaritan principle. As I have noted previously, the truth of the general proposition that statutes may create duties to aid does not undermine my argument against laws forbidding abortion, because the general proposition presupposes that the statutes in question are constitutional. However, since my argument is an equal protection argument, based in part on the claim that pregnant women are treated worse than other potential samaritans, it is important to compare laws forbidding abortion with other specific statutes or statutory schemes imposing duties to act.

49. Id. at 343 (emphasis added).
The most arresting statutorily created exception (or, as I think, apparent exception) to the bad-samaritan principle is the military draft. (Though the draft is not currently in force, there is talk of reinstating it, and its constitutionality is not currently doubted, which is the key fact for our purposes.) One of my principal themes has been that the burdens imposed on pregnant women by laws forbidding abortion are significantly greater than, and different in kind from, the burdens imposed on other potential samaritans. The only potential samaritans who are subjected to burdens at all comparable to the burdens of pregnancy and childbirth are parents (whom I have already discussed) and military draftees.

Now, we could attempt to distinguish laws forbidding abortion from the military draft by reference to the nature of the burdens imposed in the two cases. We could suggest that the burdens of pregnancy and childbirth, even if not greater than the burdens imposed on draftees, are more constitutionally objectionable. They involve invasions of the body, and they more directly touch on the specially sensitive area of sexual intimacy. This does not seem to me a sufficient ground of distinction between anti-abortion laws and the draft.

Draftees are likely to be subjected to a good deal of forced exercise under unpleasant and demanding conditions. For many, this will result in considerable discomfort and even pain. To be sure, the draftee is not compelled to allow another person to grow inside his body, and it might be argued that the pains of military training make the body a more versatile and useful instrument for varied physical activities, while pregnancy makes the woman’s body less adapted to physical activities other than carrying a fetus. But these differences do not alter the fact that compulsory military service involves a considerable physical invasion.

As to the suggestion that forbidding abortion touches on a zone of special intimacy, that is true, but I am not certain the draft is so different. The draftee is presented with a new group of associates he has no hand in picking. He will eat with them, sleep in close proximity to them, share bathroom facilities with them, and spend most of his leisure time with them. Intimate associational interests of the draftee are strongly affected. Even as to sex,

51. For a suggestion along these lines, see Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 275 n.153 (1977).
the draftee is taken away from whatever sexual relationships or patterns of sexual behavior he has established for himself in his civilian life and he is thrown into a new society that is likely to have and to enforce by considerable social pressure expectations regarding both what he shall say about sex and what he shall do about it. Remembering that the draftee's tour of duty normally lasts two years while the pregnant woman's lasts nine months, I am not persuaded that the burdens of pregnancy and childbirth are clearly greater than, or importantly different in kind from, the burdens of military conscription.\textsuperscript{22}

To my mind, the crucial difference between the pregnant woman denied an abortion and the military draftee is this: The woman is being required to aid a specific other individual (the fetus); the draftee is not. Rightly or wrongly, our tradition distinguishes between obligations to aid particular individuals and obligations to promote a more broadly based public interest. (This, incidentally, is why the draft is only an \textit{apparent} exception to the bad-samaritan principle. The bad-samaritan principle applies only when aid to specific individuals is in issue.)

In the opinion that established the constitutionality of the draft, the unanimous Court gave most of its attention to a federalism question — whether the power to conscript belonged to Congress or to the states.\textsuperscript{5} The Court gave the thirteenth amendment issue, which is the relevant issue for our purposes, short shrift. That issue is discussed explicitly only in the final paragraph of the opinion:

\begin{quote}
Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.\textsuperscript{34}
\end{quote}

If the Justices were genuinely unable to conceive how the draft could be said to impose involuntary servitude, they were deficient in imagination. But the point of their rebuttal is clear.

\textsuperscript{52} The text notwithstanding, a \textit{possible} argument to the effect that the burdens imposed by laws forbidding abortion are greater than the burdens imposed by the draft was suggested in note 27 supra.

\textsuperscript{53} Selective Draft Law Cases, 245 U.S. 366 (1918).

\textsuperscript{54} 245 U.S. at 390.
It does not offend the traditions of a free people to require citizens to perform their "supreme and noble duty of contributing to the defense of the rights and honor of the nation". When the nation calls and the public welfare is at stake, the citizen must respond.

In answer to the suggestion that the draftee serves a public interest while the pregnant woman denied an abortion serves only the interest of the fetus, it might be argued that every interest protected by state power becomes ipso facto a public interest. There is something to this. I am protected by law against gratuitous physical assault, and that suggests that in some sense there must be a public interest in so protecting me. Still, the public interest involved is ultimately based on my private interest in physical integrity. Similarly, if the prohibition on abortion is justified on the ground that the fetus has a right to life (as it commonly is these days), then the ultimate public interest is in protecting the private interest of the fetus. This public interest is not enough to justify compelling the pregnant woman to carry the fetus. The reason is that in every potential samaritan case there is a public interest in protecting the person in need of aid which is precisely analogous to the public interest in saving the fetus. We cannot rely on this public interest in the abortion situation and ignore it elsewhere.

The draft appeals to a more public, or more general, public interest — in national security. It simply does not present the same issue as abortion. There is a difference between the idea that an individual is not his brother's keeper, which underlies the bad-samaritan principle, and the idea that a citizen owes nothing to society at large.55

If the difference between the draft and laws forbidding abortion is what I have suggested, then laws forbidding abortion might well be constitutional if they were justified on grounds other than the right to life of the fetus. In particular, it seems that

55. It may seem that the distinction between public interest and private interest, which I rely on in the text, is a weak reed on which to base a constitutional argument. The idea that private property can be taken only for "public use" has arguably not been a significant limitation on the power of eminent domain. The idea that government can regulate only businesses "affected with a public interest" is as dead as any constitutional doctrine can hope to be. A full-scale discussion of the public/private distinction, while interesting, would take us far beyond a reasonable scope for this essay. Whatever the difficulty of drawing the line in other contexts, it seems to me there is an intuitively arresting difference between making someone serve in the military, in defense of interests which are plainly public if any are, and making someone carry a fetus, for the benefit of the fetus or the child it might become.
if there were a genuine national commitment to population growth, abortion could be prohibited in furtherance of that commitment. This will strike some readers as a curious and unacceptable conclusion, but it is a conclusion I am prepared to accept. We do sometimes require great sacrifices in the public interest. The draft is the most extreme example. If it were necessary to require women to bear children in the pursuit of a goal similar to national security, I see no reason why that sacrifice could not be required.

In addition to the duty of military service, there are many other statutorily created duties to act for the benefit of others. There are duties to fight forest fires, to work on public roads, to submit to quarantine for infectious disease, to be a witness or a juror. There is the lawyer's duty to serve some indigent clients without compensation, the duty of the master of a ship to rescue at sea, the duty of children to contribute to the support or medical expenses of impoverished parents. Although this list is not exhaustive, I believe a discussion of these representative duties will suffice.

The first thing to say about all of these statutory duties is that they impose burdens very much lighter than the burdens of pregnancy and childbirth. Just as the parenthood exception to the bad-samaritan principle is the only common law exception which resembles laws forbidding abortion in the magnitude of the burdens imposed, so the draft, which I have already discussed, is the only statutory exception or apparent exception which is comparable in this respect.

Every one of these statutory duties differs from the duty to carry a fetus (imposed by laws forbidding abortion) in other ways as well. The duties to fight forest fires, to work on public roads, and to submit to quarantine are, I believe, no longer of great practical importance. Also, like the duty to be a witness or a juror, they all involve public service — they are not duties to aid specific other individuals, but rather duties to benefit the community at large. The duty of the lawyer to serve indigent clients might also be regarded as a duty of public service, promoting the public interest in seeing justice done. If this "public" interest seems too closely tied to the private interest of the lawyer's client (since the lawyer does work for his client in a way the witness and the juror do not), we can also observe of both the lawyer's duty

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and the duty of the master of a ship to rescue at sea that these duties are attached to activities ordinarily undertaken for pay. Furthermore, the lawyer and the ship's master are required to render services of kinds that they have shown a general willingness to render by their choice of occupation. The same cannot be said of the unwillingly pregnant woman. With regard to the last statutory duty, the duty of children to support impoverished parents, I have always had doubts about the constitutionality of statutes imposing such a duty. People do not choose their parents; they do not even choose to have parents. Many states have statutes imposing duties of filial support, but the constitutionality of such statutes has never been passed on by the Supreme Court. Even if such statutes are constitutional, they are distinguishable from laws forbidding abortion. The burdens imposed by filial support statutes, while significant, are monetary. Also, I assume that anyone inclined to defend filial support statutes would rely on the claim that the child was merely repaying the parent for benefits received, a claim which cannot be made in the abortion case.

E. Final Comments

I have argued that abortion is a problem in samaritan law, and I have compared the situation of the pregnant woman with the situations of other potential samaritans and others (such as draftees) who are not strictly speaking potential samaritans (because it is not other individuals who require their aid) but who are compelled to act for the benefit of persons besides themselves. As I have noted, the situation of the pregnant woman has no perfect analogue. There is no other case in which non-involvement on the part of the potential samaritan requires something that looks so much like a positive act; and there is no other case in which the potential samaritan has contributed to the existence of a relationship with the person in need of aid with just the same degree of voluntariness. Expanding on the last point, I have conceded that by having sex the pregnant woman has (except in the case of rape) done something that gives us some reason to compel her to aid the fetus. On the other hand, the pregnant

57. The closest the Court has come was to vacate, with a request for clarification on whether there was an adequate state ground, a California Supreme Court decision that such a statute was unconstitutional under the federal Constitution, or under the California constitution, or both. Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).
woman has not done as much to establish a relationship with the fetus as has the parent to establish a relationship with her child, the voluntary rescuer to establish a relationship with the object of the rescue, or even the innkeeper to establish a relationship with his guest. If we bear in mind that no other potential samaritan is required to bear burdens as physically invasive as the burdens of pregnancy and childbirth, and if we bear in mind also that no other potential samaritan (with the possible, but doubtful, exception of the parent) is subjected to burdens remotely comparable in magnitude to the burdens imposed on the pregnant woman, we conclude that laws forbidding abortion are at odds with the general spirit of samaritan law.

One final point. When I suggest that the woman should not be compelled to subordinate her interests to those of the fetus, I sometimes meet with the response: “But if she is allowed to have an abortion, the fetus is subordinated. It is just a question of who shall be subordinated to whom.” In a sense, of course, this is correct. There is a conflict of interest between the woman and the fetus, and someone is going to lose. But that is true in every samaritan situation. There is a conflict between the distressed party’s need for aid and the potential rescuer’s desire not to give it. The point is that our law generally resolves this conflict in favor of the potential samaritan. When a woman is pregnant, it is the fetus that needs aid and the woman who is in a position to give it. If the conflict between the woman and the fetus is to be resolved consistently with the resolutions of the most closely analogous cases, the woman must prevail.

58. See discussion at pages 1597-98 supra.

59. An issue I have not mentioned is whether, in view of the greater responsibility for the fetus of the woman who has sex without taking measures against conception, a state could make access to abortion conditional on responsible contraceptive use. In theory, this suggestion has considerable appeal. But there are difficulties. Many women are excusably ignorant concerning contraceptive methods. Perhaps before the state makes contraceptive use a prerequisite to abortion it must do a better job of contraceptive education. Also, there are significant side effects from many contraceptive methods. If, as I have argued, the woman who conceives and then has an abortion does not make the fetus worse off by her entire course of conduct, it is not clear that the woman should be required to run any risk to herself in order to avoid these consequences to the fetus. Most significantly, the invasions and uncertainty involved in enforcing a rule that conditioned abortion on responsible contraceptive use would be extreme. More could be said on this topic, but since no state has attempted to condition abortion on contraceptive use, no more need be said in this essay.
II. ABORTION AS SELF-DEFENSE

I have already mentioned that for those who cannot bring themselves to view removing a fetus from a woman’s body as an omission for purposes of the bad-samaritan principle, there is another possibility. We can concede that the woman who has an abortion actively kills the fetus but argue that she acts in self-defense. We can view the woman who secures an abortion as merely resisting the fetus’s unjustified attack on her person.

Obviously the fetus is not like a willful attacker knowingly bent on murder or mayhem. But, despite the absence of much authority, it seems clear that the privilege of self-defense extends beyond a privilege to resist willful attacks. Surely we would recognize a privilege to defend oneself against an assailant one knew to be insane, even though such an assailant would be free of any criminal liability.60 Indeed, I have no doubt that we would recognize a privilege to defend oneself against an attacker whose conduct could not even be regarded as volitional.61 Suppose, for example, one found oneself cabined in a very small space with someone who was seized by wild convulsions while holding a sharp cleaver.

There are limits, of course, to the situations in which one can harm an innocent person to avoid harm to oneself. If someone begins to shoot at me, I cannot seize a completely uninvolved bystander and use him as a shield. If I find myself and another non-swimmer on a boat that is foundering, I cannot throw him off to save myself. The question is, where does abortion fall on this spectrum?

It may help to recall some facts about the early stages of fetal life. The fetus begins as a zygote, inside the woman but unattached. It is not until days later that it adheres to the uterine wall, then burrows into the endometrium, sprouts chorionic villi, and grapples onto the woman’s insides. Once attached, it sends out its own hormone signals, which trigger the enormous changes pregnancy works on the woman’s body.62 The woman simply is not pregnant until the blastocyst latches on and commandeers the woman’s metabolism. On this account, the fetus may seem

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60. See ALI MODEL PENAL CODE § 3.04, comment 5 (Tent. Draft No. 8, 1958). The Restatement (Second) of Torts takes no position on this question. See Restatement (Second) of Torts §§ 64 (caveat), 68 (caveat) (1965).
61. See Kadish, supra note 22, at 68.
less “active” than the violent insane attacker or even than the person in convulsions brandishing a cleaver, but the fetus is not at all like an uninvolved bystander. The fetus is involved with the woman carrying it, and it is the fetus’s presence and nothing else that threatens harm to the woman. Nor does the fetus seem like the second occupant of a foundering boat. The difference, of course, is that the woman is the boat. Perhaps the closest analogue of abortion would be a case where two persons are in an ocean together without any boat at all, swimming or treading water. One tires first and begins in a delirium to cling to the other. Surely the one being clung to may disentangle himself and save himself if he can.\textsuperscript{43}

There may be some special wrinkles to self-defense against innocent attackers. First, the *Restatement (Second) of Torts* suggests that there may be a duty to retreat before using force against an innocent attacker in cases where retreat would not be required if the attack were willful.\textsuperscript{44} But there is never a duty to retreat except where the harm threatened can be avoided by retreating. There is no escape from the burdens of pregnancy save abortion. Second, there may be no privilege to defend oneself against an innocent attacker if one has provoked or invited the attack.\textsuperscript{6} I have noted previously that (except in the case of rape) the pregnant woman has done something which made her pregnancy more likely, indeed which made it possible. But at least if the woman has attempted to avoid pregnancy, she can hardly be said to have invited the fetus’s attack any more than one invites attack by walking near a mental hospital where one knows there are some violent inmates. Finally, it could be suggested that even if there is a privilege to defend oneself against an innocent attacker, there is no privilege to defend a third person against an innocent attacker, since that involves choosing between two innocents without being impelled by the desire for self-preservation. (The defense-of-third-persons problem arises because women need the assistance of doctors to have safe abortions.) Suffice it to say in response that after early vacillation, our law now generally recognizes privileges to defend third persons wherever they

\textsuperscript{63} Surely also the stronger swimmer may disentangle himself from the weaker, even if he could carry the weaker swimmer to safety but only at the cost of serious injury to himself caused by the extra exertion and prolonged exposure to stressful conditions.

\textsuperscript{64} *Restatement (Second) of Torts* § 64, comment b (1965).

are privileged to defend themselves. Surely the asymmetry between the innocent attacker and the innocent attacked is reason enough to allow third persons to intervene on behalf of the latter. Surely if a woman can defend herself against the fetus, a doctor may help.

I have saved for last the most troublesome question raised by the self-defense analysis. On this analysis, the woman is killing the fetus. How does one answer the suggestion that, provided the mother's life is not at stake, the privilege of self-defense is lost because abortion involves excessive force?

Observe first that abortion does not involve force which is excessive in the sense of being greater than necessary to avoid the threatened harm. The woman cannot be spared the burdens of pregnancy without killing the fetus. It might be suggested that if the post-partum interests of the woman are ignored on the ground that they can be avoided by giving the child up for adoption, then the burdens of late pregnancy and delivery can be avoided without killing the fetus by removing the viable fetus during the last trimester. But this is a dangerous operation for the woman, surely involving a sufficient risk of death or serious bodily harm so that she can defend herself against the prospect by removing the fetus earlier. The question, then, is whether abortion is excessive in the sense that the harm to the woman involved in a normal pregnancy and delivery is just not great enough to justify killing the fetus.

According to the Model Penal Code, deadly force may be used to defend oneself against death, serious bodily harm, rape, or kidnapping. We must consider whether, in cases where the risk to the woman's life is minimal, the burdens of pregnancy and childbirth can be assimilated either to serious bodily harm or to rape. To my mind, there is a good case on both counts.

The Model Penal Code, although it talks of "serious bodily

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66. See materials cited in note 5 supra.

67. Model Penal Code provisions making self-abortion a lesser crime than abortion-on-others and forbidding aid-to-suicide even though suicide is not a crime. ALI Model Penal Code §§ 230.3, 210.5 (Proposed Official Draft 1962), are not examples of rejecting intervention by third parties even though the act of the "principal" is innocent. The authors of the Model Penal Code plainly do not approve of either self-abortion or suicide. They treat them as lesser crimes or as no crime at all for reasons of common sense and efficient administration.

harm”, never defines it. It does define “serious bodily injury”, used in analogous contexts in such a way as to suggest that the phrases are intended to be equivalent, as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” The comments to the Restatement (Second) of Torts also indicate that the permanent or protracted loss of function of any important member or organ counts as serious bodily harm.

What a woman suffers from pregnancy is a protracted impairment of function of her body as a whole. It does not seem particularly plausible to view her as losing the function of a member or an organ. If it were important to identify an organ, we could specify several whose functioning is altered during pregnancy: the pituitary and the hypothalamus, for example. But the real point is that the woman’s entire hormonal system and consequently her entire body are altered. Aside from the pain and discomfort of being pregnant, any activities that demand grace, flexibility, balance, coordination, muscle tone, or significant physical exertion are likely to be impossible for the last half of the pregnancy. Surely for an athlete or a dancer, the last four months of pregnancy would involve protracted loss of important bodily functions. And even for the woman who is not primarily an athlete or a dancer, sports or dancing or comparable physical activities may be very important.

It is interesting to note that one of the comments in the Restatement (Second) of Torts includes an illustration which strongly implies that a broken arm is serious bodily harm. The illustration in question does not say that a broken arm is serious bodily harm, because the primary object of the illustration is not to define serious bodily harm but rather to indicate the legal effect of a mistake on the part of the attacker about the extent of harm he is likely to cause. Nor does the illustration specifically say that deadly force can be used to avoid the broken arm, since what force can be used depends in part on how much force is actually necessary in the circumstances. However, the illustration appears in connection with the basic section on the use of deadly force in self-defense, and it would lose its point if it were not intended that a broken arm should represent a higher level

70. RESTATEMENT (SECOND) OF TORTS § 63, comment b (1965).
71. Id. § 65, Illustration 2.
of harm than the harm which justifies the use of non-deadly force. It seems to me that, so far as one can compare these things, a broken arm and pregnancy involve similar interferences with normal physical activity.

There will be those who suggest that pregnancy does not represent any "impairment" or "loss of function". This suggestion seems plausible because there is a sense in which pregnancy is "normal" while a broken arm is not. Even for a woman who wants to be pregnant, however, pregnancy entails a significant interference with normal activities. To say that pregnancy is "normal" in some sense, and even often desired, is not to say that it imposes no costs. Furthermore, as I have said before, the proper point of view in this discussion is the point of view of the woman who does not want to be pregnant. For her the pregnancy represents a major burden without redeeming benefits.

Two further objections may be made against my suggestion that an unwanted pregnancy is serious bodily harm justifying the use of deadly force in self-defense. First, it might be suggested that the force used to repel an attack must always be proportionate to the harm threatened, and that even if pregnancy constitutes serious bodily harm, it cannot be avoided at the cost of the death of the fetus. This objection ignores the fact that, in formulating many sorts of rules, our law tends to divide physical harms into two categories. One category is death-or-serious-bodily-injury. The other category is harms less than death-or-serious-bodily-injury. Whatever some people might like, our law does not take the position that death is in a class by itself.72 Unquestionably one can kill in self-defense in order to avoid some harms less than death. Surely one can kill to avoid being made a quadriplegic. Surely one can kill to avoid being made a paraplegic. Surely one can kill to avoid being blinded. There is, of course, a line-drawing problem. But we frequently operate on the assumption that there is one line, between death-or-serious-bodily-injury and everything less.

It might still be said, however, that before something can count as serious bodily injury it must involve a substantial risk of death. It is probably true that most cases where an attacker threatens serious bodily injury involve a significant risk of death, and it may be that this is one reason why we assimilate serious

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72. Our law does sometimes take the position that death is in a class by itself, as in formulating the law of murder. But it does not treat death as special in all contexts.
bodily injury to death. But I think it is not true that before something can count as serious bodily harm it must involve a risk of death. The Model Penal Code and the Restatement both say quite explicitly that serious bodily injury is injury which involves either substantial risk of death or protracted loss of an important physical function. The broken arm illustration, noted above, involves no risk of death (and pregnancy does, though not a risk so substantial that I would argue pregnancy was serious bodily harm on that account alone).

Let us consider now whether pregnancy can be assimilated to rape, which is generally understood to justify the use of deadly force in self-defense. Why is rape so appalling that a woman may kill to avoid it? Being raped is likely to be painful. Given the habits of rapists as a class, being raped also involves a significant risk of death. Being raped involves an intrusion into the most intimate parts of the body. Being raped may create fears and anxieties that interfere with the victim’s normal sexual relations. Finally, being raped is humiliating because the victim’s body is being used, treated purely as a physical object.

Everything I have just said about rape is true also of pregnancy imposed by prohibitions on abortion. Pregnancy is painful. It involves a significant risk of death. It represents an intrusion into the most intimate parts of the woman’s body. It is likely to interfere directly with sexual relations while it continues (during the latter part of the pregnancy), and the fear of pregnancy, if abortion is not available, is likely to make sexual relations less satisfactory even after the pregnancy is over. Finally, the woman who is compelled to carry a fetus she does not want is in effect being used as an incubator. She is being used as a physical object quite as much as the victim of rape.

There are differences, of course. Being raped may make a woman fearful every time she goes out into the street. Indeed, it may make her fearful everywhere, whether or not she is one of those victims so unfortunate as to be raped in their homes. Unwanted pregnancy, in contrast, makes the victim fearful only of sex. (Remember, however, that being fearful of sex may poison a great deal more of one’s life than just the time spent in intercourse.) Also, it may be that the statistical risk of death associated with rape is greater than that associated with pregnancy. So far, I should say, we have mentioned differences of degree that do not amount to differences in kind for present purposes.

One who objects to the comparison of pregnancy with rape
is much more likely to think there is an intrinsic horror to rape that is absent from pregnancy. Does it not make a difference that the rapist, unlike the fetus, is a full-sized, visible, malevolent, active attacker?

At this point, it is difficult to know what to say. For a start, anyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion. Here both the woman's feelings of being used during the pregnancy and her dismay at the consequent choice between actually raising the child and giving it up for adoption are plainly relevant. Also, if rape involves a malevolent, active attacker who uses the victim's body, laws forbidding abortion involve the requisitioning of the woman's body by the state. Is it clearly worse to be treated as an object by one deviant individual than to be relegated to the status of a broodmare (for this is how the pregnant woman may well view the matter) by society at large?

Two final points. First, we are discussing, in this section, self-defense against an innocent attacker. The general rules of self-defense allow the use of deadly force to avoid serious bodily harm or rape, and I have argued previously that we would allow the use of deadly force to avoid serious bodily harm at the hands of an innocent attacker. But it might be thought that rape is different, that the injury from rape depends more on the hostility of the attacker. It might therefore be suggested that deadly force cannot be used on the innocent rapist or, by extension, on the fetus. There is something in this suggestion. Imagine a woman being raped by a man whom she knows is suffering from the insane delusion that she is his wife, who enjoys resisting and being taken by force. (We can make the attacker more sympathetic by supposing that he actually has such a wife and that his delusion concerns only the identity of the woman he is attacking.) Would this woman be permitted to kill her assailant, if necessary? Certainly the case is harder than that of the ordinary "sane" rapist. To my mind the case is less strong from the woman's point of view than the case of pregnancy imposed by laws against abortion. Yet I believe that if the case arose a privilege to use deadly force would be found.

Finally, it might be suggested that all the normal rules about self-defense assume the impossibility of deliberation — that, at least to the extent these rules allow deadly force to be used for any other purpose than to avoid death, they represent a concession to the way imperfect human beings will behave in emergen-
cies. The fetus is unique among "attackers" in that it allows its victim time to reflect; and it could be argued that the woman should decide, on reflection, to submit to the fetus's intrusion and the attendant costs so long as her own life is not at stake. I have no decisive response to this argument, but I do not find it convincing. I admit that the justification for the use of deadly force in response to non-deadly force seems weaker when there is time to reflect. On the other hand, comparison of the law of self-defense with the law of voluntary manslaughter and of duress makes it clear that the right of self-defense is not merely a concession to predictable human weakness. The law of self-defense is shaped in part by the notion that there is an asymmetry between attacker and attacked (even when the attacker is innocent) which justifies the attacked in protecting himself or herself even in some cases where the cost to the attacker is greater than the harm from which the attacked is spared.

III. The Constitutional Argument

I have spent quite a number of pages trying to show that if we viewed abortion as a problem in samaritan law, or if we viewed it as a problem in the law of self-defense, abortion would be allowed. It is time now to say more about the constitutional argument I think my observations support. I shall treat explicitly only the constitutional argument suggested by the discussion of samaritan law. An argument that is similar in outline could be based on the law of self-defense, but I find the samaritan argument more persuasive. Enough of what I say about the samaritan argument would carry over to the self-defense argument that a separate treatment of the latter is unnecessary. Having spelled out the constitutional argument, I shall comment briefly on two further topics: (1) the advantages of my argument over the Court's actual argument in Roe, and (2) the consequences of my argument for other problems in the general area.

A. The Nature of the Argument

John Hart Ely has rightly insisted that constitutional arguments ought to be based on values that can be inferred from the text of the Constitution, the thinking of the Framers, or the structure of our national government. The argument against laws

prohibiting abortion is based on three such values: non-subordination, freedom from physical invasion, and equal protection. Before I specify the precise nature of the argument, let me say a few words about the first two of the values just mentioned.

The non-subordination value that is implicit in the bad-samaritan principle of the common law is also at the core of the thirteenth amendment. The thirteenth amendment speaks not merely of slavery, but of “involuntary servitude”. In numerous cases, the Supreme Court plainly viewed peonage as a form of involuntary servitude, and not just as a vestige of slavery which Congress may prohibit on a theory like that of Jones v. Mayer. The objection to peonage is best summed up in one of the early decisions, by then Associate Justice Hughes: “The plain intention [of the thirteenth amendment] was to abolish slavery of whatever name and form . . . ; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.” Unwilling pregnancy is not slavery in the fullest sense, nor does it involve labor of the sort Hughes was referring to; but it certainly involves the disposition and coercion of the (intensely) personal service of one “man” for another’s benefit.

The second value, freedom from physical invasion or imposed physical pain or hardship, is embodied in the eighth amendment and also plainly counts among those fundamental values of our society which are traditionally subsumed under fifth and fourteenth amendment due process. The due process clauses are vague, and it might be objected that to say something is subsumed under the due process clauses is not really to name a connection with any recognized constitutional value at all. That may be true in some cases, where the claim that something comes under the due process clauses is a novel one. But there is nothing novel about the claim that the due process clauses speak to the

77. Peonage is not less objectionable when it is “voluntarily” entered into. Pollock v. Williams, 322 U.S. 4, 24 (1944). Nor is peonage less “involuntary servitude” because it is not a permanent status. (Peonage contracts apparently tended to be open-ended, the effective term being “until the laborer pays back his advance”. In Pollock, the Court overturned a conviction secured less than three months after the laborer received his advance. In Bailey v. Alabama, 219 U.S. 219 (1911), there was a definite term of one year.) On both counts, compare an unwanted pregnancy which the woman is forbidden to terminate.
matter of physical maltreatment. 78

It may be that an adequate constitutional argument against abortion statutes could be based on these two values alone. The non-subordination value is not enough to prevent all impositions of duties to aid, as many of the exceptions to the bad-samaritan principle, involving trivial impositions, make clear. Similarly the physical integrity value is not enough to prevent all physical invasions, nor even all serious physical invasions, as the example of the draft and perhaps the example of medically proven and carefully supervised aversive therapies make clear. But the woman who is prevented from terminating her pregnancy can appeal simultaneously to both of these values. There is no other case, I believe, in which the law imposes comparable physical invasion and hardship as an obligation of samaritanism. We might plausibly suggest that imposing such invasion and hardship for the benefit of a third person is flatly inconsistent with our nation's fundamental traditions.

There are two difficulties with this suggestion. First, I am not certain that laws imposing comparable impositions more uniformly would be, or should be, held unconstitutional. If a state altered the bad-samaritan principle by statute, creating an obligation to undertake even physically dangerous rescues, I would be disinclined to say that the new statute was unconstitutional. Nor am I confident that the Court would invalidate it. Similarly, if a state passed a statute requiring parents to donate needed organs to their children (where this would not endanger the life of the parent), I am not certain that the statute would be, or should be, held unconstitutional. If these hypothetical statutes would be held unconstitutional (and I am sure some readers will think they would be), then statutes forbidding abortion should be held unconstitutional for the same reasons. But if these hypothetical statutes would not be unconstitutional, then abortion statutes cannot be held unconstitutional just on the basis of the values so far considered.

The second difficulty with the argument under consideration (to the effect that, equal protection aside, laws forbidding abortion violate our fundamental traditions with regard to non-subordination and physical integrity) is the fact that statutes forbidding abortion had, until Roe, been on the books in all states for many years. This history does not conclude the constitutional

question. On occasion, the Court has overturned a great deal of history. But the Court has rarely overturned as much history all at once as it did in Roe v. Wade. That surely ought to give us pause.

I do not say, of course, that history is entirely on the side of those who would defend abortion statutes. The values of non-subordination and freedom from physical invasion are very much a part of our history. Although arguments nominally based on our "fundamental traditions" often have little to do with our traditions, fundamental or otherwise, that is not true of the "fundamental traditions" argument I have suggested.

On the other hand, there is no logical reason why our traditions forbidding subordination of one individual to another, or forbidding physical invasions, should not recognize exceptions. It is not implausible to suggest that one of the exceptions our traditions recognize is for laws prohibiting abortion. That is why I do not find the pure "fundamental traditions" argument sufficient.

We need to bring in the equal protection value. We need to argue that even if those parts of our tradition which forbid subordination or physical invasion have historically included an exception for abortion laws, the exception is impermissible. It creates an inequality that is inconsistent with an even more fundamental part of our tradition, reflected in the equal protection clause and the due process clause of the fifth amendment. It is no accident, I think, that the greatest inroads on history (that is, the most sweeping invalidations of existing legal arrangements) have come in equal protection decisions like Reynolds v. Sims79 and Brown v. Board of Education.80 For all of our failures in the pursuit of equality, and for all of our (justifiable) uncertainty about just what equality means, there are few values, perhaps none, with deeper roots in our traditions or a firmer hold on our imaginations than the value of equal treatment under law.

Some readers may doubt that the value underlying the equal protection clause is relevant to the abortion problem. Anti-abortion statutes do not look like the sort of statute that normally raises equal protection issues. The state does not draw a line between blacks and whites, or between women and men, and treat the two classes differently. The state does not even draw a line between optometrists and opticians and say the former may

offer services which the latter may not.\footnote{See Williamson v. Lee Optical Co., 348 U.S. 483 (1955).} The state simply says that no one may have an abortion. It is true that only some people want abortions. But so long as the state denies abortions to everyone who wants them, there does not seem to be a problem of the equal protection variety.

To see the equal protection problem, we must look at abortion in a broader context. Life in society produces many situations in which one individual is in a position to give needed aid to another individual. That is to say, life in society offers many opportunities to be a good or bad samaritan. The objection to an anti-abortion statute is that it picks out certain potential samaritans, namely women who want abortions, and treats them in a way that is at odds with the law's treatment of other potential samaritans. Women who want abortions are required to give aid in circumstances where closely analogous potential samaritans are not. And they are required to give aid of a kind and an extent that is required of no other potential samaritan.\footnote{Recall that the draft, which might seem to provide a counterexample, is not a true samaritan case at all.}

The preceding paragraph, sketchy as it is, is enough to reveal that the equal protection argument I am suggesting is non-standard in two respects. First, I do not claim that the situation of the woman who wants an abortion has any perfect analogue among the situations of other potential samaritans. The abortion case is unique in requiring us to view what is in some sense an act as being, for purposes of samaritan law, an omission. The abortion case also differs from every other case except that of parenthood in that the woman has, by her prior behavior, contributed to the creation of the fetus which needs her assistance.

I argued in the course of the discussion of samaritan law that the woman seeking an abortion falls somewhere on a spectrum of eligibility for compulsion to be a samaritan, a spectrum that runs from the totally uninvolved bystander at one end to the parent at the other. I do not assert that the pregnant woman is placed under greater burdens than other potential samaritans who are precisely as eligible for compulsion. It is not clear just where on the spectrum the pregnant woman belongs. Rather, I suggest that the burdens imposed on the pregnant woman are out of line with the general treatment of other potential samaritans all along the spectrum. There are some cases in which other potential samari-
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I said earlier that there were two respects in which my equal protection argument is non-standard. One respect, which I have been discussing, is the lack of any precise analogue for the pregnant woman. The other respect, which is related but distinct, is that the argument goes so far afield for its comparisons. Laws which classify on the basis of race or sex, or which draw lines between opticians and optometrists or between advertising on a truck for the owner’s business and advertising for someone else’s, suggest equal protection issues to anyone. But most people, unprompted, do not connect the abortion problem and the problem of samaritanism. It may seem that courts should not look so far afield. There are enough equal protection problems presented on the faces of statutes without looking for problems in imaginative comparisons. As Justice Douglas said in *Railway Express Agency v. New York*, “[T]he fact that New York City sees fit to eliminate from traffic this kind of distraction [certain advertising on the sides of trucks] but does not touch even

83. As a matter of logic, it might seem that the strongest part of my argument is the comparison of the woman seeking an abortion with the parent. Should I not simply say that the woman seeking an abortion, who is less eligible for compulsion than the parent, is subjected to greater burdens (or at least greater burdens of the particular physically invasive sort that are specially disfavored) and leave it at that, eschewing comparison with any other potential samaritans? There are three reasons for not doing this. First, the most telling comparisons between the woman seeking an abortion and the parent are in a sense hypothetical. I assume that parents are not required to rescue their children from burning buildings or to donate organs. Certainly there are no statutes or cases imposing such obligations. But then, so far as I know, there are no statutes or cases specifically rejecting such obligations either. There is simply no explicit authority. Second, parents do bear heavy burdens, of a general sort, even if they are subjected to less in the way of physical invasion than the pregnant woman. Finally, since the pregnant woman is not precisely analogous to any other potential samaritan, but is somewhere in the middle of the spectrum of eligibility for compulsion, it seems foolish to drop from the argument the fact that in virtually all cases where obligations of samaritanism are imposed, the burdens are trivial.

greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. 85 I shall refer to the notion that courts should not concern themselves, in equal protection analysis, with comparisons so far-ranging as that between the pregnant woman and other potential samaritans as the “too far afield” objection to my argument.

We now have before us two questions: (1) What do we make of the “too far afield” objection? In other words, should the Court even consider an argument which proceeds by comparing the pregnant woman and other potential samaritans? (2) If the argument merits consideration, does it justify the conclusion that laws prohibiting abortion are unconstitutional? It might seem that the first question is logically prior to the second and should be disposed of first. Whatever the logic of the matter, the considerations relevant to the two questions overlap considerably. Because the second question is of a more familiar sort than the first, I propose to begin with the second question. Let us hold the “too far afield” objection in abeyance and attack the substantive issue.

If there were a non-controversial general theory of equal protection, all we would need to do at this point would be to apply the general theory to the case of abortion. Unfortunately, there is no non-controversial theory. Even more unfortunately, I do not have a general theory to suggest. Still, given the uncertain state of equal protection theory, it seems desirable to say something on a general level before turning to the specific problem at hand.

What I propose to do is to describe some features I think an acceptable general theory is likely to have. My list of general features will be in some degree controversial, but I think it will establish enough common ground between me and a sufficient number of readers that I can then proceed to a meaningful discussion of the abortion problem. I would emphasize that little of what I shall say on the general level is original. Nor will it be necessary for the reader to accept everything in my general remarks to find elements of the specific argument about abortion persuasive. Finally, I would observe that within the tolerance of this schematic presentation, I think I shall be describing both what courts ought to be doing in the equal protection area and what the Supreme Court is doing. (What the Court is doing is

somewhat different, in my view, from what the majority of Justices say they are doing.)

For a start, I approve of the “new equal protection” to this extent: I think it is appropriate to subject different laws to different levels of judicial “scrutiny”. Actually, to say one law deserves more scrutiny than another may mean two quite different things. It may mean that judicial resources are more appropriately spent in reviewing the law which deserves more scrutiny, or it may mean that that law should be held to a higher standard of justification in terms of its tendency to promote significant state interests. The Court has generally concentrated on the second meaning, ignoring the first so far as theory goes. (They have not ignored it in their traditionally unexplained decisions regarding choice of cases.) Ordinarily, considerations that tend to justify heightened scrutiny in the sense of greater judicial attention will also tend to justify it in the sense of requiring a stronger justification for the law, and vice versa. But there may be some situations in which special judicial attention is called for, but not a requirement of special justification. As it turns out, this distinction between different ways of giving special scrutiny is of limited relevance to the present problem. I shall have scant occasion (though I shall have some occasion) to mention the distinction in what follows.

Although I accept the idea of different levels of scrutiny, I do not think the Court’s official “two-tier” model is satisfactory. I agree with those Justices and commentators who think the Court is not actually applying such a model. Instead of regarding all classifications as either suspect or innocent, the Court seems to perceive a range of classifications of varying degrees of suspectness. Race is thoroughly suspect, along with national origin or ethnicity. Sex and illegitimacy are somewhat suspect, but not as suspect as race. Alienage is probably still somewhat suspect, though the question is confused by the federalism aspects. Similarly, there is a range of rights — some more fundamental, some less. The right to vote is fundamental, but not quite so fundamental is the right to vote by absentee ballot. The right of a criminal

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defendant to certain assistance in his defense is fundamental. The right to education is apparently fundamental up to a point, but not fundamental or certainly less fundamental thereafter.\textsuperscript{88} Marriage and divorce seem both to be “somewhat” fundamental.\textsuperscript{89}

Although I do not endorse all the Court’s decisions about which classifications are suspect (and to what degree) and about which rights are fundamental (and to what degree), I regard the general approach the Court seems to be following as the correct one. I approve of “variable suspectness”, “variable fundamentality”, and consequent “variable scrutiny”.

I do not think the eventual scrutiny should be just a matter of vetting the law in issue for an appropriate degree of “goodness of fit” between means and ends. We could build a theory in which the suspectness of classifications and the fundamentality of rights were appealed to only as the basis for selecting an appropriate level of review for the “goodness of fit”. But that is not the sort of theory I have in mind. The mere use of suspect classifications imposes costs. Any impairment of fundamental rights is a cost. Differential impairment of different persons’ fundamental rights is a special cost. These costs must be justified by what is achieved by the law under review. A law that is perfectly designed to achieve an insufficiently important end is still unacceptable.

It may seem that what I have sketched so far is a “balancing” approach to equal protection. We throw into the scales on the individual’s side the costs imposed by the use of suspect classifications or by the impairment of fundamental rights. These costs will of course vary with the degree of suspectness of the classification or the degree of fundamentality of the right involved. We throw into the scales on the government’s side the benefits achieved by the law, which depend upon the weightiness of the state interest and the degree to which the law promotes the interest. Then we “balance”.

This sketch of the process is not entirely off the mark, but it is incomplete or misleading in two respects. First, and most important, talk of balancing suggests that any interests of the individual are eligible to be labeled “fundamental” and put into the scales against the law. One of the unsatisfactory aspects of the


Court's opinion in \textit{Roe v. Wade} (which is not, of course, an equal protection opinion but which does deal with "fundamental rights") is that it lists a variety of interests belonging to a pregnant woman that laws against abortion may impair, but it gives very little attention to the question of which of these interests are actually protected by the Constitution. Under the scheme I have in mind, rights would be regarded as fundamental or classifications as suspect only if the rights in question were protected, or the classifications disfavored, by the Constitution or by constitutionally based values as developed in our legal tradition. (Incidentally, it seems to me that if we try to identify fundamental rights and suspect classifications by reference to our constitutional tradition, it is almost inevitable that we should end up with "variable fundamentality" and "variable suspectness". It would be a poor tradition indeed, and not ours, which recognized only two degrees of importance of rights, or only two degrees of acceptability of classifications.)

The second reason the "balancing" sketch above is misleading is that it suggests that once the Court has decided to take an equal protection question seriously, there is no further room for deference to the legislature. Obviously deference to legislative judgment is not something that is easily defined or quantified, but I think some deference is appropriate even in cases where specially protected rights or specially disfavored classifications are involved.

I prefer to think of my suggested approach to equal protection as a "reasonable American legislature test". According to this test, an inequality of treatment imposed by the law is unconstitutional if and only if it is one that a reasonable American legislature could not countenance. The reference to \textit{reasonableness} (which is something more than mere rationality) captures the balancing aspects of the approach, the role of specially protected rights and specially disfavored classifications. The reference to the reasonable \textit{American} legislature reminds us that decisions about what rights and classifications raise special problems are to be made on the basis of our constitutional tradition. Finally, the formulation of the test in terms of the behavior of a reasonable \textit{American} legislature emphasizes that even when dealing with fundamental rights or suspect classifications, legislatures must have some leeway.

Labels, for all their usefulness, can be misleading. Although I have attempted to explain my choice of the phrase "reasonable
American legislature test”, there is some danger that the phrase will create precisely the wrong impression. I do not suggest that the Court should try to decide what it would do if it were the legislature. The question is not what the “ideally reasonable” legislature would do, but rather what a “humanly reasonable” legislature (steeped in and concerned for our national traditions) could do. A law is constitutional, under this test, if a reasonable American legislature could pass it or fail to repeal it. The relationship I envision between the Court and the legislature is somewhat like the relationship between a trial judge and trial jury.

Another aspect of the theory I am now outlining deserves mention. Legislative purpose is important. The Court may have gone slightly too far in its unqualified pronouncements about the importance of purpose in recent cases, but basically it is on the right track. Suspect classifications are suspect in considerable part because of the “badge of inferiority” aspect, and because they are specially resented. A classification that is neutral (non-suspect) on its face but that produces effects significantly describable in terms of some non-neutral (suspect) classification does not have the same “badge of inferiority” aspect unless the apparently neutral classification was chosen by the legislature with a bad purpose, that is, as a surrogate for an impermissible classification.

Justice Stevens is right to remind us that bad effects are often the best evidence of bad purpose. And Paul Brest is right to suggest that indifference to bad effects may sometimes be so extreme as to count as bad purpose. (This is especially likely to be the case where what is in issue is the legislature’s failure to repeal or modify a scheme that was adopted with innocent purposes, but that now produces bad effects.) But as a general proposition, where the only objection to a statute is that it has bad effects (in terms of suspect classifications), the legislature’s innocent purpose ought to protect the law from being held unconstitutional.

This treatment of purpose is also suggested, to my mind, by the label of the “reasonable American legislature test”. It may be that an ideal legislature would never pass a law that had a dispar-


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ate impact on a class protected against purposeful discrimination without weighing the special costs such a disparate impact would impose by aggravating historic disadvantages. But unless the disparate impact is extreme, it is enough for the humanly reasonable legislature to avoid, or to weigh carefully, the explicit use of suspect classifications and to refrain from using apparently neutral classifications with the purpose of discriminating.13

So much for my outline of an equal protection theory. The approach I suggest will strike many readers as unacceptably "unprincipled". I concede that the "reasonable American legislature test" does not lend itself to mechanical application. On the other hand, it should not be taken as a license for unbridled judicial interference with legislative decisions. The court applying this test should be constrained both by attention to our tradition and by deference to legislative decisions. Those constraints can be real even though they are not precisely definable nor their effects on judicial decision precisely measurable. Furthermore, within the context of a fairly loose general theory, it is still possible for judges to tell us a great deal about why individual cases strike them as they do, and why different cases strike them differently. Candid discussion by judges along these lines may tell us more about both the judges' thinking and our traditions than discussions concerning the application of some purportedly mechanical test. The "reasonable American legislature test" may do little more than emphasize that there is no mechanical test in the equal protection area. But it is better to have a vague "test" that captures the right idea than a precise test that captures some wrong idea.

93. Just as legislative purpose is relevant, so is legislative process. That is, whether a law is constitutional may in some cases appropriately turn on what the legislature thought about in passing it, and on how hard they thought about it. There are at least two reasons for this. First, a legislative judgment about what is required by our constitutional tradition is entitled to some deference. How much deference the judgment is entitled to in any particular case depends in part on how thoroughly considered it was (if it was made explicitly at all). Second, and probably more important, the legislature is entitled to rely on any empirical proposition that an American legislature could reasonably accept. The fact that a legislature has acted on a particular empirical proposition is always evidence that a reasonable legislature could accept it. But the strength of this evidence varies with the amount and nature of the consideration given by the legislature to the empirical proposition in question. Although I think there are probably objections to the legislative process behind many abortion statutes — particularly regarding the extent to which significant constitutional interests have been overlooked — I shall not rely on process arguments in this essay. Deficiencies of process can be cured. But even careful legislative reconsideration would not answer the objections to abortion laws detailed below.
It is time to return to the abortion problem and to explain why abortion laws are specially problematic and why, ultimately, they should be held unconstitutional. In the process I shall expand implicitly on some of the features of my general approach to equal protection. I shall continue to hold the "too far afield" objection (the objection that my comparison of the pregnant woman to other potential samaritans ranges too far afield for an equal protection argument) in abeyance for the present.

First, it is important that the inequality of treatment between pregnant women and other potential samaritans touches on the constitutional values of non-subordination and freedom from physical invasion. A woman who is denied an abortion is compelled to serve the fetus and to suffer physical invasion, pain, and hardship. As already noted, it can be argued that the Constitution prohibits this imposition outright, without regard to any inequality of treatment. I have said that I do not find this argument persuasive. But the fact that such an argument can plausibly be made surely means that any inequality of treatment we can point to becomes harder to justify. Inequalities with regard to interests given specific constitutional protection are likely to be more costly, in terms of our community value structure, to the relatively disadvantaged parties than inequalities involving other interests. For this reason, and also because of the apparent hypocrisy of guaranteeing a full measure of the constitutionally sanctioned interest for some people but not for others, inequalities with regard to such interests are likely to be specially resented by the disadvantaged parties. If these inequalities are both specially costly and specially resented, that is surely some reason for the Court to look at them carefully and to require special justification for them.

I have indicated that subjective resentment on the part of the individuals disadvantaged is a significant element in equal protection analysis. It might be suggested that even women who want abortions do not resent the specific inequality (between the treatment of them and other potential samaritans) that I focus on. There is some truth in this. The precise comparison between pregnant women and other potential samaritans is not a standard one. On the other hand, it is clear that there is a great deal of resentment among women of laws forbidding abortion. (That many women do not feel this resentment does not strike me as important. Many women do feel it.) Furthermore, it is clear that a good deal of the resentment is based on a feeling among women that they are being used in a way no one else, or almost no one
else, in our society is ever used. The perception on the part of women that they are being used — more specifically that their bodies are being taken over by the state for the benefit of third persons — in a way which is at odds with our society’s general practices is sufficient, to my mind, to constitute resentment of the inequality I rely on.

Other reasons for the Court to give the abortion problem special attention are related to the suspect classification idea. Only women need abortions. Parents of both sexes might be required to undertake physically dangerous rescues, or to donate organs, and people of both sexes find themselves in most of the standard potential-samaritan situations. But the one potential samaritan who is singled out for specially burdensome treatment is a potential samaritan who must, given human physiology, be female. Why is this important?

First, any inequality that flows from an unchosen and unalterable characteristic is likely to be specially resented. It also works against the idea, deeply rooted in our culture, that people ought to be masters of their own destinies, at least within the limits of legally acceptable behavior that apply to everyone. Since pregnancy happens only to women, and since no one has any choice about whether to be a woman, susceptibility to pregnancy (and to being in the position of wanting an abortion) is a non-chosen characteristic. (It is not an unalterable characteristic, since a woman might have herself sterilized, but this method of altering the characteristic itself involves a significant physical invasion.)

It might be objected that even if susceptibility to pregnancy is an unchosen characteristic, pregnancy itself is not, and that laws attaching unpleasant consequences to pregnancy therefore do not interfere with women’s controlling their own destinies. Even if such laws are resented, the objection continues, the resentment is unjustified. Now, many pregnancies are not chosen in the fullest sense. They are the result of accident, of carelessness, or whatever. I assume this is true of the vast majority of pregnancies which the women involved want to terminate by abortion. What the objector presumably means, when he says that pregnancy is not unchosen, is that the woman could avoid pregnancy (leaving rape out of account) by eschewing sexual intercourse. This is true. Women could avoid becoming pregnant. But the only method of avoiding pregnancy with certainty requires, for many people, extraordinary self-denial. The availability of sexual abstinence as a means of avoiding pregnancy does
not, to my mind, eliminate the force of the suggestion that pregnancy is often sufficiently "unchosen" so that laws specially disadvantaging pregnant women limit women's control of their lives, are justifiably resented, and deserve more-than-minimal judicial attention.  

Another reason for heightened equal protection scrutiny of abortion laws is that women (and perhaps pregnant women especially) have suffered from a history of discrimination in our society. They have suffered not just from occasional laws counter to their interests, but from an extensive pattern of discriminatory laws and social practices. This makes them suspicious and resentful (and justifiably suspicious and resentful) of any particular inequality, however it is supposed to be justified. It is certainly worth investing some extra judicial resources in review of laws that impose inequalities tied to sex in order to allay this suspicion and resentment. It is probably worth requiring more-than-minimal substantive justification for such laws, both to minimize resentment and to avoid adding to the continuing burdens resulting from past injustices whose effects have not been entirely eliminated. An inequality that would be tolerable against a background of equal treatment may be intolerable when it is an extra burden imposed on top of other disadvantages.  

It is worth adding that, at the level of statistical generalities, the women who suffer most from prohibitions on abortion are likely to be the same women who have suffered most from other sorts of discrimination or injustice. I have in mind both poor women and women who want to pursue careers outside the home. These two groups of women have suffered from distinct but overlapping injustices in our past, and they have probably both suffered more than the adequately-provided-for woman whose life has focused primarily on her family. 

It might be suggested that the "suspect classification" elements in the argument just presented should all be discounted because there is (or may be) no legislative purpose to disadvantage women. I have indicated previously that innocent purpose is relevant principally in cases where we are confronted with bad effects of a classification which is not suspect on its face. Now the inequality created by abortion laws is not expressly an inequality between women and men. It is between pregnant persons and

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94. The claim that pregnancy is "unchosen" for present purposes is refined somewhat in the discussion at pages 1633-34 infra.

95. See Brest, supra note 92, at 10-11.
others. But pregnancy is much more closely connected with sex, both empirically and in our habits of thought, than are, say, educational qualifications\textsuperscript{66} or wealth\textsuperscript{67} with race. Classification in terms of pregnancy is sufficiently like classification explicitly in terms of sex, especially when we remember the costs of definitively avoiding pregnancy, that classification in terms of pregnancy should be regarded as significantly suspect regardless of legislative purpose.

Of course, to say that classification in terms of pregnancy should be regarded as significantly suspect is not to say that all laws disadvantaging pregnant women should be held unconstitutional. For example, I tend to think that \textit{Geduldig v. Aiello},\textsuperscript{88} in which a California disability insurance plan for private employees disabled by an injury or illness not covered by workmen’s compensation was upheld by the Court even though the plan excluded normal pregnancies from coverage, was rightly decided. Without discussing \textit{Geduldig} extensively, it may help to illustrate the approach to equal protection I have in mind if I explain why a reasonable American legislature could regard the scheme at issue in \textit{Geduldig} quite differently from the statute at issue in \textit{Roe}.

First, no established constitutional interest was impaired in \textit{Geduldig}. The supposed “right to procreate” is not inferrable from the text, historical background, or structure of the Constitution. In this respect it differs from the interests in non-subordination and in freedom from physical pain and invasion. Even if we say that there is a constitutionally protected interest in procreation (citing the ninth amendment, the fourteenth amendment privileges and immunities clause, and \textit{Skinner v. Oklahoma}\textsuperscript{89}), that interest is not impaired by denying disability benefits in connection with pregnancy in the same way that the interests in non-subordination and physical integrity are impaired by laws forbidding abortion.

Furthermore, the choice to be pregnant is much more likely to be a fully voluntary choice in the \textit{Geduldig} context than in the abortion context. Most women who want abortions did not want to be pregnant in the first place. But I assume it is still the case that most children in this country are wanted, which is to say that

\begin{itemize}
  \item \textsuperscript{66} See \textit{Washington v. Davis}, 426 U.S. 229 (1976).
  \item \textsuperscript{86} \textit{Geduldig v. Aiello}, 448 U.S. 484 (1974).
  \item \textsuperscript{88} \textit{Skinner v. Oklahoma}, 315 U.S. 535 (1942).
\end{itemize}
most women who are pregnant and do not want an abortion did want to be pregnant. To be sure, I am now generalizing. I am ignoring cases such as the woman who did not want to be pregnant but who rejects abortion for moral reasons. But the likelihood that the relevant pregnancy is voluntary is very different in Roe and Geduldig. Also, it is more appropriate to rely on generalizations, even if we know there are exceptions, when we are justifying features of an insurance scheme that allocates monetary benefits among a group of employees, than to do so when we are justifying direct state interference with individual decisions. To a considerable extent the real question in Geduldig is whether those employees who do not want (additional) children shall subsidize, indirectly, those who do.

This discussion of the difference in “voluntariness” of the pregnancies involved in Roe and in Geduldig suggests a refinement of the claim that classification in terms of pregnancy should be assimilated to classifications in terms of sex. Perhaps we should say that classifications in terms of pregnancy are just as suspect as classifications in terms of sex for purposes of justifying the expenditure of resources in judicial review, but that whether they are as suspect for purposes of raising the level of required substantive justification for the law in question depends on just how “voluntary” are the pregnancies affected.

Before I attempt to say where all of this leaves us, let me point out an argument I have not made. I have not suggested that laws against abortion deserve special judicial scrutiny because women are politically powerless or because most legislators are male. That argument is not persuasive in this context. Both sides in the abortion controversy have been well organized politically. Further, many of the opponents of abortion are women. This is simply not an issue to which the partial exclusion of women from the political process is relevant. Generally speaking, the reasons I have suggested for special judicial concern about abortion do not depend on the political powerlessness of women as a class. On the contrary, they show why legislators should not be able to hide behind the claim that because many women oppose abortion the sex-specificity of the burdens of unwanted pregnancy is irrelevant.

It is time to take stock. In view of the considerations I have mentioned, could a reasonable American legislature pass or fail to repeal a statute forbidding abortion? I think the answer is “No.” I am certain that most legislatures would defend laws against abortion on the ground that they protect human life (or
potential life). This is certainly the most promising defense of such laws. But, in the context of our legal system, the defense is inadequate. The inequality between the treatment of pregnant women and the treatment of other potential samaritans who are not required to undertake burdens (often very much smaller burdens) in order to save life is too great. The inequality trenches on two distinct constitutionally protected interests — the interest in non-subordination and the interest in freedom from serious physical invasion. In addition, the inequality disadvantages a class that is defined by a non-chosen characteristic (whether sex or unwanted pregnancy) and that has suffered from a history of discrimination. This is more than any reasonable American legislature would tolerate.

An argument that might be made on the other side runs as follows: As a society we simply discount the pain and invasion of pregnancy, as compared to other pains of comparable intensity or invasions of similar extent. We view pregnancy as special, either because so many women undertake it voluntarily, or because it is a "natural" part of the process of continuing the species, or both.

I do not deny that there is a tendency to view pregnancy as special and to devalue accordingly the pain and invasion it involves. I suggest that this tendency is one that reasonable American legislators, looking squarely at the question properly formulated, would overcome. The fact that many women willingly undertake the burdens of pregnancy, for reasons of their own, is no reason to discount the burdens as they affect women to whom they are unwelcome. Similarly, the fact that some women must bear children if the nation is to continue is no reason to impose the burdens of pregnancy on women who are unwilling, so long as there is an adequate supply of volunteers.

It might also be suggested that a reasonable American legislature would remember and be swayed by a fact that has somehow been pushed from center stage in my analysis, namely, that a life is at stake.100 This objection depends on a common assumption that preserving life is the highest value in our tradition. But the assumption is either stated too broadly or simply wrong. The equal protection argument I have made about abortion could not be made were it not that in many other cases involving potential samaritans our legal system prefers values such as non-

100. I shall explain in Section III.B. infra why I think we must accept the proposition that a life is at stake for purposes of constitutional argument about abortion laws.
subordination and physical integrity to the value of preserving life. It is simply not possible to claim that in our system preserving life takes precedence over everything else.

Finally, it might be suggested that a reasonable American legislature would (or at least could) reject my argument at its very first step, the step where I decide that securing an abortion counts as an omission in the context of samaritan law. For purposes of constitutional analysis, viewing my entire argument through the lens of the reasonable American legislature test, I think this first step is the most problematic. It seems clear to me that if we want to be faithful to the spirit of our law regarding samaritanism, we must conclude that securing an abortion is more an omission than an act. But, just because the degree of deference due a contrary legislative judgment is not precisely quantifiable, I am not completely comfortable asserting a proposition (which I do nonetheless assert) that is essential to my argument, namely the proposition that any reasonable American legislature would, on reflection, see this matter as I do.

I do not claim to have established beyond doubt that laws against abortion deny equal protection. There are limits to how far logic and analysis can carry us. If the ultimate test in the equal protection area is whether a reasonable American legislature could have passed (or in some cases, could fail to repeal) a particular law, then there comes a point at which the judgment of persons imbued with and sensitive to our traditions is worth more than hypotheticals and distinctions.

In effect, the Court in Roe decided that a reasonable American legislature could not have passed (or failed to repeal) most state abortion laws. To be sure, the Justices did not explain themselves in this way. To my mind, they did not even explain as well as they might have why abortion laws presented a hard constitutional question — why they were not obviously constitutional. But I have tried to explain why abortion laws do present a hard question. Against that background, the most important fact about the decision in Roe is that seven Justices, including some not known for their activist tendencies, were impelled to strike down abortion laws even though they must have realized that their arguments were not very persuasive. In this case, given the nature of the issue, the fact that the Court held abortion laws unconstitutional is evidence for the proposition that they are unconstitutional, even though the Constitution does not simply mean what the Court says it means.

Of course, the Court’s decision would be stronger evidence
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(to my mind) if the Court had cast its argument about why abortion was a hard question in the terms of this essay. If the Court must exercise judgment, it is better that it exercise its judgment on properly formulated questions. If the Court had decided there was no general “right of privacy” and no right inferrable from the Constitution to decide how many children to bear, and if it had formulated the question in my equal protection terms, it is possible that it would have upheld abortion laws. If so, then the decision in Roe should be reconsidered. But my guess is that the Justices would have answered my question the same way they answered their own. And my judgment is that they would have been right. If one considers dispassionately the question, “Could a reasonable American legislature, remembering the constitutionally protected interests impaired by abortion laws, focusing on the inequality of treatment between some potential samaritans and others, and bearing in mind all the other considerations we have mentioned, pass or fail to repeal a law forbidding abortion?”, I think the correct answer is “No.”

There is one final matter to be dealt with. We have yet to answer the “too far afield” objection, the claim that courts simply should not entertain equal protection arguments which depend on such far-ranging comparisons as that between abortion and other samaritan problems. I can think of four possible arguments against such far-ranging comparisons: (1) Allowing such comparisons expands vastly, and unacceptably, the number of laws subject to equal protection scrutiny. (2) Allowing such comparisons raises issues too subjective and formless to be appropriate for judicial decision. (3) Striking down a law on the basis of such a comparison suggests implicitly a criticism of the legislature, which criticism may be undeserved. If the comparison is too unusual, the legislature may not have been at fault in failing to take it into account. (4) Inequalities that are revealed only by far-reaching comparisons are unlikely to be resented in the same way as traditional, immediately apparent inequalities. They therefore do not impose the same social costs or call for as much judicial solicitude.

These arguments are not without substance. They suggest that a degree of circumspection may be appropriate where far-reaching comparisons are suggested. But they do not, to my mind, justify a general refusal to consider such comparisons. Nor do they weigh strongly against considering the comparison I suggest in the abortion case.

As to the idea that far-ranging comparisons will cause new
equal protection issues to spring up everywhere, it is a sufficient answer that other aspects of the approach I suggest — the attention to tradition in defining specially protected interests and specially disfavored classifications, and the general deference to the legislature — will limit the number of problems which need to be taken seriously and will limit results overturning legislative choices. In the abortion case, as we have seen, two specially protected interests are impaired by an inequality of treatment involving a specially disfavored classification.

As to the idea that far-ranging comparisons give rise to questions that are too subjective, the answer is that every serious equal protection problem eventually reduces to a question that is subjective in the same sense. I say "subjective in the same sense" advisedly, since the ultimate question is not "subjective" in the strongest sense in which that term is commonly used. Ultimately, every equal protection problem comes down to a question about whether some law is or is not consistent with our legal tradition. There is no mechanical way for a judge to answer such a question. However, the conscientious judge who attempts to answer such a question is doing something quite different from attempting to decide whether the law before him comports with his own sense of justice. Also, even if the ultimate question is subjective in some significant sense, the example of this essay demonstrates (I hope) that argument and analysis are important in identifying the precise contours and context of the ultimate decision about what our tradition allows.

As to the suggestions that far-ranging comparisons will require the courts to consider inequalities which legislatures reasonably overlooked and which no citizen is troubled by, I think the answer is that some far-ranging comparisons will have more force than others. The comparison of the pregnant woman with the potential samaritan is not yet a commonplace of legal or public discussion of the abortion issue. But my experience is that most people, once introduced to the comparison, see that it is a significant and troublesome comparison. It is easy to overlook, but it is not easy to put aside as fanciful or irrelevant, once it is noticed. Even if legislatures have not noticed this comparison, I suggest that any reasonable American legislature would be persuaded by the comparison to repeal abortion laws once the comparison was brought to its attention. If that is so, then it is appropriate for courts to strike down abortion laws on the basis of the comparison without waiting for legislative reconsideration. No serious criticism of legislatures is implied.
With regard to the claim that members of the public, or women in particular, are not disturbed by this specific comparison, I have explained previously why many women's manifest resentment of abortion laws is based on considerations closely related to the equal protection argument of this essay, even if the considerations have not been articulated in quite the same way.

In sum, whatever we may think of other arguments based on far-ranging comparisons, the argument I have suggested against abortion laws cannot be brushed aside on the ground that it ranges too far afield.

B. The Consequences of the Argument

In this final Section, I shall comment very briefly on why I regard my argument as stronger than the Court's argument in Roe and on what it would mean for other cases involving abortion or "privacy" generally if my argument were adopted.

The Court's argument in Roe posits a "right of privacy" that is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court's argument has been elaborated in the scholarly literature by Heymann and Barzelay, who infer constitutional protection for the woman's interest in having an abortion from a series of cases running from Meyer v. Nebraska to Eisenstadt v. Baird. According to Heymann and Barzelay, these cases establish a "realm of private decision as to matters of marriage, procreation and child-rearing". Unfortunately, as John Hart Ely has pointed out, the cases relied on are a rag-tag lot. Most of them either claim to be or are best understood as being primarily about something other than "marriage, procreation and child-rearing". It is not clear that they add up to anything at all, especially when one remembers other cases in which colorable claims concerning marriage, procreation, or child-rearing have received short shrift.

My argument, unlike the Court's, appeals to constitutional values — non-subordination, freedom from physical invasion,
and equal protection — which are firmly established. I do not claim that my argument generates the result in *Roe* by unassailable logical deduction from unimpeachable premises. Constitutional argument does not work that way. I do claim that my argument is better grounded than the Court's in what are undeniably constitutional values.

The Court's argument not only relies on a right to make decisions about "marriage, procreation and child rearing", but it also relies heavily on what I have referred to as the post-partum "family-planning" interests. In enumerating the costs to the woman of being denied an abortion, the Court emphasizes costs associated with actually raising the child. However, it is not appropriate to count all of these costs even in a "balancing" process unless we are persuaded (as I am not) that the psychological cost to a woman of giving up a child for adoption is as great as the cost of rearing an unwanted child. (We should remember also that what is relevant is not the cost to a woman who wants a child of being compelled to give it up once it is born, but rather the cost of parting with the child for a woman who did not want it in the first place. The woman may be ambivalent at all stages, and being compelled to bear the child and then give it up, instead of aborting it, may make the feelings of attachment to the child harder to deny. Even so, this is an aspect of the problem where remembering the relevant viewpoint, which is that of the mother who does not want a child, seems to make the cost smaller rather than greater.) My argument, as I have explained, does not rely on these "family-planning" interests.

Perhaps the greatest advantage of my argument is that it makes it possible to avoid the question of whether the fetus is, or may be treated by the state as, a person. Justice Blackmun claims at one point that the Court need not decide "when life begins". But his general argument, which during the first two trimesters prefers the woman's "right of privacy" over the state's interest in protecting "potential life", seems plainly to assume that the fetus is not a person until the point of viability (at the earliest). Indeed, Blackmun elsewhere suggests that if the fetus were a person within the meaning of the fourteenth amendment, the woman's claim to an abortion would be foreclosed by the

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108. 410 U.S. at 153.
109. 410 U.S. at 159.
110. See, e.g., 410 U.S. at 163.
Constitution itself.\textsuperscript{111} On the last point, I think Blackmun is mistaken. Even if the fetus were a person for purposes of the fourteenth amendment, it would not follow that abortion was forbidden by the Constitution or that states were required by the Constitution to have laws forbidding abortion. The people who need the assistance of potential samaritans in ordinary samaritan cases are persons under the fourteenth amendment, and yet the general common law bad-samaritan principle is not unconstitutional. (Similarly, the fact that fourteenth amendment persons are killed does not vitiate the ordinary law of self-defense.)

Although I think Blackmun is mistaken about what would follow from a holding that the fetus is a person under the fourteenth amendment, I think he is right that the fetus is not a person under the fourteenth amendment.\textsuperscript{112} That, however, is not enough to justify his refusal to treat the fetus as a person for purposes of weighing the interests affected by the Texas abortion statute. The fourteenth amendment does not say that the fetus is a person, but neither does the fourteenth amendment say that a state may not decide to regard the fetus as a person, if the state so chooses.

It is essential to Blackmun’s argument that he brush aside the state’s attempt to regard the fetus as a person. As far as I can see, there is no adequate constitutional justification for this brushing aside. My argument, unlike Blackmun’s, does not depend on refusing to allow the state to regard the fetus as a person. Everything I have said is consistent with the assumption that the fetus is a person. Other persons are allowed to die when potential samaritans are authorized by the bad-samaritan principle to deny aid. The personhood of the fetus, even if it be conceded, is not an adequate reason (indeed it is no reason at all) for treating the pregnant woman differently from other potential samaritans.

A similar but more general point in favor of my argument is that it is not a “balancing” argument.\textsuperscript{113} Even after the Court decides that the fetus may not be treated by the state as a person (during the first two trimesters), the Court must still balance the woman’s “right of privacy” against the state’s interest in protecting potential human life. It is far from clear that this balance favors the woman. Whether or not the cases from Meyer to

\textsuperscript{111} 410 U.S. at 156-57.
\textsuperscript{112} 410 U.S. at 158.
\textsuperscript{113} See pages 1589-90 supra.
Eisenstadt establish a right of family-related freedom-of-choice, none of those cases involves a state interest remotely like the interest in protecting "potential" but already conceived human life. Accordingly none of those cases establishes or even suggests that the right of family-related freedom-of-choice is weighty enough to overcome the state's interest in forbidding abortion.

My argument, on the other hand, does not require any such balancing by the Court. I doubt that it is correct to regard the bad-samaritan principle and the right of self-defense as based on "balancing" at all, but even if they are, the balancing is already done when those doctrines are accepted. Whether or not the interests in physical integrity and non-involvement "outweigh" the interest in human life, our law leaves no doubt that they prevail over it (and a fortiori over the interest in potential life) in the relevant contexts.

Finally, my argument justifies more clearly than the Court's argument the Court's conclusion that abortion may not be forbidden even in the third trimester when the life or health of the mother is at stake. If the problem is ultimately one of balancing, as the Court's opinion suggests, it is not clear why the state's compelling interest (as the Court describes it) in protecting the potential life of a fetus already capable of "meaningful life outside the mother's womb" (in the Court's phrase) is outweighed even by the woman's life, much less by her health. On my approach, however, the matter is clear. Even the reader who rejects my general conclusions must admit that there is no other case in which we would even consider requiring one individual to sacrifice his life or health to rescue another.

Since I have suggested that my argument provides a better justification than the Court's for the result in Roe, it is worth asking whether my argument justifies all of the result. In particular, does it justify drawing a line at the end of the second trimester, after which abortion may be generally forbidden? To be sure, the burdens of pregnancy and delivery that will be avoided by an abortion diminish as the pregnancy advances. Even so, an abortion by induced labor early in the third trimester would spare the woman two months of advanced pregnancy plus the difference between the pain and discomfort of a full-term delivery and the lesser pain and discomfort of an easier, earlier-induced delivery.

114. 410 U.S. at 163-64.
115. 410 U.S. at 163.
The burdens avoided by even a third-trimester abortion are distinctively greater than the burdens imposed by other exceptions to the bad-samaritan principle.

I think the Court's line between the second and third trimesters can be justified on the ground that the woman who allows her pregnancy to reach the third trimester without having an abortion (assumed to be permissible in the first two trimesters) has waived her right of non-involvement with the fetus. Surely by the end of the second trimester a woman has had knowledge of her pregnancy long enough to have had a reasonable time to think through the difficult issue of whether she wants an abortion. There is a genuine state interest in encouraging decision at the earliest reasonable opportunity, even if it is only the interest in avoiding the greater dismay of many members of the public at late abortions. Admittedly, this argument does not tell us precisely where the "waiver" line should be. But if we consider the possibilities for denial by the woman early in the pregnancy, the difficulty of the issue for many women, and, on the other hand, the desirability of some clear line so long as it is not too early, a line at the beginning of the third trimester seems a reasonable solution.

Since Roe, the Court has dealt with a number of subsidiary issues involving abortion — procedural requirements, parents' consent requirements, husband's consent requirements, public funding, and so on. With the possible exception of the cases on public facilities and public funding, these cases largely involved state attempts to forbid abortion by indirection. Generally speaking, my argument leads to the same results in these cases.
that the Court has reached. To the extent that there is more to these cases than mere striking down of attempts to avoid Roe, my argument may explain the Court's results marginally better than the Court's argument does.

For example, the step from saying the state may not forbid an abortion when the woman and her husband both want it (or when there is no husband in the picture) to saying the state may not forbid an abortion when the woman wants it and her husband does not is not quite so simple on Blackmun's approach as Blackmun claims. After all, if the whole issue is one of balancing, might it not be that the state's interest, which is less than the interest of the woman or of the woman and her husband together when they are aligned, is greater than the difference between the interests of the woman and her husband when they are opposed? Indeed, given the weightiness of the state's interest and the similarity of the woman's interests to her husband's (especially while the Court emphasizes the "family-planning" aspect rather than the physical burdens of pregnancy), is it not quite likely? On my approach, however, it is clear that the state can no more make the unwilling woman serve the fetus and her husband than it can make her serve the fetus alone.

As to the issue of parents' or judges' consent to abortion for minors, this is a difficult problem. It is far from obvious that a statute which was well calculated to encourage identification of the minor's best interests (a statute, that is, which was not a mere anti-abortion statute in disguise) would deserve to be struck down. But again, if the Court is committed to striking down such statutes (and this is much less certain after Belotti II than it seemed before), the justification seems somewhat stronger on my approach than on the Court's. The interests of the woman which my approach makes central (interests in avoiding physical burdens) are more easily appreciated and weighed by a minor than the comparatively abstract family-planning interests emphasized by the Court.

With regard to the public facilities and public funding cases, there is also little to choose between the Court's approach and mine. I tend to think the Court decided these cases correctly, though I shall not argue for that view here. My approach may

122. See Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976): "[T]he State cannot delegate authority to any particular person, even the spouse, to prevent abortion [when the State alone may not prevent it]."
make the correctness of the decisions a bit clearer than the Court's. The Court's approach more easily suggests a fundamental right of the woman to have an effective choice whereas my approach emphasizes that what is objectionable is the state's compelling the woman to serve the fetus, a compulsion which is absent once abortion is no longer forbidden.

It is when we look at problems not involving the right to abortion that the difference between my approach and the Court's becomes striking. One noteworthy feature of my argument is that it is asymmetric. Unlike Blackmun's argument, it provides no support for a right to bear children. I regard this as an advantage. There may be a right of some sort to bear children, but such a right does not find much support in the Meyer-to-Eisenstadt line of cases (aside from some quotable language here and there). The right, if it exists, must be founded rather on the sort of argument Harlan advanced in his Poe v. Ullman dissent,124 and it must, I think, be an incident of marriage.

Looking beyond procreation, there is a considerable literature suggesting that a broad "right of privacy" was established in Roe. The Court's language certainly encouraged this belief. Yet litigants who have tried to persuade the Supreme Court to implement the right of privacy outside the abortion area have generally been disappointed. Consider Doe v. Commonwealth's Attorney,125 in which the Court summarily affirmed a decision upholding Virginia's sodomy statute. It is far from obvious why something called the "right of privacy", which encompasses the right to bring about the death of a fetus in a clinic serving the public, should not encompass the right of consenting adults to engage in the nonviolent sexual behavior of their choice in private. It is obvious, however, that my argument in support of Roe, based on the bad-samaritan principle or the self-defense analogy, says nothing at all about the right to engage in homosexual (or heterosexual) relations. The argument I suggest in justification of Roe is much more closely tied to the specific problem of abortion than is the Court's argument. My argument therefore seems more in line with the Court's later decisions in the "privacy" area.

Envoi

If I had been writing an essay about moral philosophy instead

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of about constitutional law, I would have made the argument in favor of abortion turn centrally on the proposition that a fetus is not a person. I would not have relied on the proposition that there is no general duty to aid a person in serious danger even when one can do so at trivial cost to oneself. I would not have appealed to any notion that corporal punishment is impermissible, nor indeed would I have given the same negative weight to physical invasions generally that I do in the present essay. I would not have claimed that there is a right to kill an innocent rapist. However, I have not been writing about moral philosophy. I have been writing about American constitutional law. For reasons I cannot explain here, I think the projects are quite different.

Sometimes the argument of this essay seems to me an adequate constitutional justification of the result in *Roe*. Sometimes it does not. (My principal nagging doubt is about the very first step of the argument, when viewed from the constitutional perspective. I think the general thrust of samaritan law requires that securing an abortion be treated as an omission in that context. Indeed, I have no doubt on that point. But might not a reasonable American legislature simply disagree?) Adequate or not, the argument I have presented almost always seems to me the best justification of the result in *Roe* that I know of.