The King's Student Law Review

Title: Dworkin's Argument on Abortion
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Source: *The King's Student Law Review*, Vol. 5, No. 2 (Winter 2014), pp. 33-51
Published by: King's College London on behalf of The King's Student Law Review

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DWORKIN'S ARGUMENT ON ABORTION

Dorota Galeza[*]

As there is no legal difference between successful tax mitigation and successful tax avoidance, any distinction must lie outside the law. This article argues that the difference is in objectionability; and this objectionability should be approached, as is the case with the GAAR, by addressing the egregious or abusive nature of the attempt to reduce tax. What is important is the nature of the opportunity to reduce tax that is being exploited, which must be considered independently of any moral judgment on the conduct of the taxpayer. Avoidance opportunities are arbitrary and capricious, in distinction to those deliberately offered by the legislature for policy reasons, however contestable.

INTRODUCTION

In *Life's Dominion,*[1] Dworkin has provided an innovative justification of abortion, which incorporates the latest dilemmas generated by technological advances in medicine, as well as modern philosophical and legal solutions to the abortion problem. He has restricted the controversy of abortion to a mother-foetus conflict and has argued that in this bilateral relation, a due respect ought to be given to both sides. The majority of the current theories recognise only one side of the equation. This is partly due to the limited number of modes of regulation available - law can either legalise abortion or prohibit it - and partly due to the wrong focus and dogmatic methods of justification.

In this article, I assess whether Dworkin has provided a plausible response to key alternative ethical arguments on abortion, particularly Finnis's argument of the creation of personhood at conception and feminists' postulation of self-determination. I also examine whether the claims in his theory can be supported on any other grounds. This article is not concerned with Dworkin's justification of the ruling in *Roe v Wade;*[2] any constitutional debate about the morality of abortion is restricted to public debate about the legalisation of abortion, because only such a wide reading of his argument can serve the purpose of providing a theory of the morality of abortion, which I consider to be his main aim.[3] I will conduct my evaluation by assessing the aims and results of his theory and by comparing it to alternative theories.

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[1] Ronald Dworkin, *Life's Dominion* (HarperCollins 1993).

[2] *Roe v Wade* 410 US 113 (1973).

[3] This is apparent in his promise of providing a moral theory acceptable for 'any nation dedicated to liberty,' (Dworkin, (n 1) 171); and his reference to society, rather than political community.

DWORKIN'S ACCOUNT

In *Life's Dominion*, Dworkin's purpose is to present the middle ground that respects both of the contentious values - the woman's right to self-determination and the foetus's potential personhood.[4] This 'compromise way' would safeguard

'a framework that recognizes an individual right against the state criminalization of abortion… but nevertheless recognizes a place for state to protect the moral environment and to encourage individual to reflect responsibly and consciously concerning how to respect the sacredness of life, including fetal life.'[5]

In order to settle the abortion controversy, Dworkin provides an interesting and innovative argument that holds that abortion is intractable due to the traditional position that characterizes the debate. According to the traditional view, abortion is about whether or not a foetus is a person.[6] Instead of starting his analysis from the standard personhood controversy, Dworkin begins his debate with the premise that the abortion controversy results from intellectual disagreement about what is sacred. Dworkin suggests that 'the antagonists to controversy obscure with needlessly divisive rhetoric how much they share in the way of background conceptual agreement.'[7] The majority of the first part of his argument exposes the moral stance on 'abortion that Dworkin believes most … [people] already accepted implicitly.'[8]

He then argues that both conservatives and liberals do not reject any values that the other side holds to be fundamental, but they disagree about the *relative weight* of these values.[9] Dworkin substantiates this claim with a complex theory of the intrinsic value of life and the notion of the inviolability of life.[10] Nevertheless, it is not certain what relative weight means. It appears to require that we consider certain principles more important than others, which may prove problematic, as these initial assessments presupposes controversial decisions on the goodness of a principle.

Michael Bayles' suggestion for the ascription of weight to principles, tries to offer a solution to this problem, by saying that the characteristic of weight enables us to add principles together and to balance them. He suggests that several principles lead to one decision, and several others to the opposite: we can 'add up' the weight of the principles of each side, and balance them in order to

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[4] Emily Jackson, *Medical law: texts, cases and materials* (OUP 2006) 594; Jonathan Herring, *Medical Law and Ethics* (OUP 2006) 262.

[5] Benjamin C Zipursky and James E Fleming, 'Rights, Responsibilities, and Reflections on the Sanctity of Life' in Arthur Ripstein (eds), *Ronald Dworkin* (Cambridge University Press 2007) 112.

[6] *Ibid*113; Dworkin (n 1) 9-10.

[7] Steven Ross and Terry F Godlove, 'Books Review' (1994) 25(1) *Methaphilosophy* 96, p 96.

[8] [no author], 'Inside out, Within and Beyond, or Backwards? Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom' (1994) 107(4) *Harvard Law Review* 943, 943.

[9] Dworkin (n 1) 94.

[10] Dworkin (n 1) 89-94.

reach the decision.'[11] This does not however solve the problem:[12] Dworkin insists in fact that the nature of the disagreement over abortion stems from divergent views about what is required from respect for human life. Therefore, the core of Dworkin's thesis is his rejection of the personhood view and the related theory of rights. Instead of rights, Dworkin talks about values. He advocates that people share a common belief about the *intrinsic* value of human life, which makes harm to a foetus a wrong.[13]

The 'no right answer' situation occurs when the foetus's interest in continued existence conflicts with the woman's interest in making important life decisions and maintaining control over her body. In such scenarios, Dworkin refers to 'public morality'. He considers abortion decisions as an extension of freedom of religion and he places this in the public sphere.[14] This link between the private and public sphere is very important, as even authors who oppose abortion on the grounds of personal morality often support it on the grounds of public policy. This is apparent in Hursthouse's thesis who, although she opposes abortion on the grounds of personal morality, claims that she would opt for a liberal abortion framework.[15] But does Dworkin's link between moral and political theory serve the original purpose of his thesis, which is to achieve a compromise that 'everyone can accept with full self-respect',[16] or is this an inevitable and impossible compromise?[17]

INTERNAL INCONSISTENCIES

Although Dworkin's account of abortion could explain the underlying moral principles of the most common abortion framework[18] and his theory has been acknowledged in case law,[19] it is not free of criticism. Dworkin is commonly accused of inconsistencies in his theory and of using the wrong methods of justification. In this section, I examine the most common criticisms aimed at Dworkin's theory.

Kamm contented that Dworkin confused religion with philosophy. She maintains that Dworkin by using the word 'sacred', which indicates a religious nature of the subject matter, blurs the distinction between religion and philosophy.[20] Dworkin responds that he has never intended to draw the line

[11] Ovadia Ezra, *Withdrawal of Rights: Rights from a Different Perspective* (Springer 2002) 111.
[12] Ibid.
[13] Dworkin (n 1) 89-94.
[14] Dworkin (n 1) 3-29.
[15] Rosalind Hursthouse, *Beginning Lives* (Blackwell 1987) 25.
[16] Dworkin (n 1) 101.
[17] Sylvia A Law, 'Law, Abortion Compromise - Inevitable and Impossible' (1992) *University o Illinois Law Review* 921, 937-41.
[18] By common abortion framework, I mean one that restricts abortion decisions by certain parameters, such as: time limits, the degree of foetal deformation, woman's health and mental state. Zipursky and Fleming (n 5)113.
[19] *Airedale NHS Trust v Bland* [1993] AC 789; *Rodriguez v British Columbia* [1993] 3 S.C.R. 519; *Compassion in Dying v Washington*, 850 F. Supp. 1454.
[20] Dworkin (n 1) 224.

between philosophy and religion,[21] which is evidenced by Dworkin's interchangeable use the word 'sacred' with 'inviolable'. But, as noticed by Kamm, highlighting *any* secular counterpart of the word 'sacred' hinder Dworkin's political aims in *Life's Dominion* to prove that 'views about the intrinsic value of life and debates about the weighting and balancing of intrinsic value are fundamentally religious rather than philosophical.'[22]

Dworkin's notion of inviolability is also open to critique. Dworkin does not use the word 'inviolable' in its ordinary meaning, which would presuppose a strong prohibition on the commission of certain act, but he suggests that something objectively bad, a waste, or shame would happen if the act was committed.[23] Kamm suggests that it is misleading to use this term in this context, because it blurs the distinction between the theory of value and the theory of right,[24] where the former describes good and bad states of affairs and the latter differentiates between permissible and impermissible acts.[25] Kamm suggests that it would be valuable for his theory to use other terms, because Dworkin's notion of inviolability is 'not at all an overwhelming value, not a sort of thing one means when one says that the 'inviolability' of one person stands in the way of preventing the deaths of many others.'[26]

I agree with Kamm that redefining of the term would clarify the issue, however, Dworkin is very precise in what he means by this term and 'it is a matter of substance not definition whether inviolability is absolute. But, once again, nothing turns on the verbal point.'[27] Furthermore, there are also certain practical reasons for leaving the present terminology. Kamm maintains that Dworkin's notion of inviolability can be considered as a political move, because 'his position can … appear to give more to conservatives than it really gives, thus mollifying them.'[28] In my view, considering the reconciling aspirations of Dworkin's argument, this might be an important quality.

The other contentious issues are the word intrinsic and the concept of 'intrinsic value'. Kamm suggests that Dworkin by contrasting intrinsic value with instrumental value, argues that life is measured not merely instrumentally. Kamm argues that intrinsic, as proposed by Christine Korsgaard,[29] should be

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[21] Ronald Dworkin, 'Ronald Dworkin Replies' in Ronald M Dworkin and Justine Burley (eds), *Dworkin and His Critics: with Replies by Dworkin* (Blackwell Publishing 2004) 372.
[22] Frances M Kamm, 'Abortion and the Value of Life: A Discussion of *Life's Dominion*' (1995) 95 *Columbia Law Review* 160, 172; Dworkin (n 1) 156.
[23] Dworkin (n 1) 84.
[24] In her previous writings, Kamm also suggested that Dworkin interlinks the inviolability concept with the theory of the good, because according to the way he describes the concept, it is possible to form a conclusion that 'sacred entities need not be good Xs of their type of X. For example, a sacred painting may not be a good painting', Kamm (n 20) 171.
[25] Frances M Kamm, 'Ronald Dworkin's Views on Abortion and Assisted Suicide', in Ronald M. Dworkin and Justine Burley (eds), *Dworkin and His Critics* (Blackwell Publishing 2004) 221.
[26] Kamm (n 22) 171.
[27] Dworkin (n 21) 371.
[28] Kamm (n 22) 171.
[29] Christine Korsgaard, 'Two Distinctions in Goodness' (1983) 92 *Philosophy Review* 169.

contrasted with extrinsic.[30] Dworkin's replies to this that he relied on a distinction, which he found more instructive for his thesis.[31] This reply does not however answer the more complex criticism, aimed at his concept of 'intrinsic value'. Hartogh observes that Dworkin does not provide a general definition of this concept, but only describes it on the case-by-case basis.[32] For example, he defines this concept by reference to the objects of art. This has more severe consequences for his argument, because it divests it out of strong theoretical underpinning.

The definitions given by Dworkin in *Life's Dominion* may not be entirely successful, but most important is the substance of the argument behind them. In such contentious issues as abortion, the theory should not be assessed in terms of its semantic uncertainties, but on its practical merit. The more severe problem with Dworkin's theory are its substantive shortcomings. Firstly, Dworkin's argument is not always supported by valuable moral justification, based on medical evidence or philosophical underpinning.

Dworkin often takes a recourse in his theoretical deliberation to quasi-empirical evidence, stemming from opinion polls, rather than sound scientific evidence.[33] In particular, his data about pro-life supporters is not precise and sometimes verges with speculation. For instance, he argues that anti-abortionists do not acknowledge a consistently imperative right to life throughout pregnancy.[34] He deduces this from the assertion that pro-lifers regard an early abortion as a lesser evil than the late one, but he does not adduce any evidence to support such a contention.[35]

Another substantive problem with Dworkin's theory is his disregard for the intentional-accidental and active-passive distinctions.[36] This is rooted in Dworkin's investment theory, which 'weights' every waste of investment in life equally, regardless of the origin of the inviolability of life. The lack of the aforementioned division is most apparent in Dworkin's justification of foetal euthanasia, which is demanded by the notion of the sanctity of life.[37] I do agree that the distinction between intents and accidents is not clear-cut, as what is an intent for one person might not be for the other, but I do not see the desirability of such a definite division.

[30] Kamm (n 25) 220.
[31] Dworkin (n 21) 370.
[32] Govert A Den Hartogh, 'The values of life' (1997) 11(1) *Bioethics* 41, A similar claim is made by Rakowski; Eric Rakowski, 'Reverence for Life and the Limits of State Power' in Ronald M Dworkin and Justine Burley (eds), *Dworkin and His Critics* (Blackwell Publishing 2001) 253.
[33] Zipursky and Fleming (n 5) 13-15.
[34] Dworkin (n 1) 32-33, 88-89, 93-94.
[35] Richard Stith, 'On Death and Dworkin: A Critique of his Theory of Inviolability' (1997) 56 *Maryland Law Review* 289, 300.
[36] Gerald V Bradley, 'Life's Dominion: A Review Essay' (1993) 69 *Notre Dame Law Review* 329, 387.
[37] Dworkin (n 1) 159.

The theoretical problems of such distinction in the abortion context have been persuasively acknowledged by Foot[38] and Hart,[39] who argue that even in those cases where the mother's life is endangered 'the child's death is not strictly a means to saving the mother's life and should logically be treated as an unwanted but foreseen consequences'.[40] Therefore, in the abortion context, we can only speak of 'oblique' intentions, because the death of the foetus is never a socially desirable outcome. The latter are used primarily to justify certain acts *ex post facto* according to its practical merit, rather than to make a significant theoretical distinction.

Foot justifies this by the artificiality of the recognition of the hysterectomy as the foreseen, but not directly intended, act of the physician. It is difficult to distinguish this surgeon's act among the others, as the effect of it is the same: the death of the foetus. Although, I understand the desirability of a general and universal theoretical distinction between intent and accident, I do not see any chances of practical application of such concepts to the abortion context and therefore, I consider Dworkin's abandonment of the aforementioned division a strength. By stemming from the premise of 'the nonabsolute character of the duty of preservation to the nonabsolute character of the duty of nonviolation'[41], he combined our basic intuitions about intentional killing.[42] This is why, Dworkin's greatest mistake in this respect is not the ignorance of the aforementioned distinction, but inconsistent approach in justifying it.

In *Life's Dominion*, he argues that the division between inaction and action is 'apparently irrational'.[43] Whereas, in his subsequent writings, instead of adhering to this unambiguous line of argument, he changes it completely by insisting that he devoted a great attention to the contentious contrast.[44] In this manner, he divests his original argument of strength, as he concedes that the lack of such division was not an intentional element of his theory, but a mere lapse.

The greatest substantive deficiency of Dworkin's argument appears to be the misconceived notion of inviolability and related concept of investment, which form a core of his theory. He argues that the productive investment in each person is strictly correlated with the loss caused by his death.[45] For example, in abortion context, he argues that the unborn child does not develop but is being

[38] Phillipa Foot 'The Problem of Abortion and the Doctrine of the Double Effect' in Bonnie Steinbock (eds), *Killing and Letting Die* (Prentice-Hall Inc 1980) 156-165.
[39] Herbert LA Hart, 'Intention and Punishment' (1967) 4 *Oxford Review* 5.
[40] Foot (38) 157.
[41] Stith (n 35) 341.
[42] This rhetoric is also present in the writings of the other theorists (Richard A McCormick, 'The Gospel of Life' *America* (29 April 1995) 16-17) and in certain court rulings (*Quill v Vacco*, 80 F.3d 716, 729-30 (2nd Cir.), *cert. granted*, 117 S. Ct. 36 (1996), *Compassion in Dying v Washington*, 79 F.3rd 790, 821-24 (9th Cir.), *cert. granted sub nom. Washington v Glucksberg*, 117 S. Ct. 37 (1996)).
[43] Dworkin (n 1) 184.
[44] Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Thomson 'The Philosopher's Brief on Assisted Suicide' [1997] 44 *New York Review of Books*, March 27, p. 42.
[45] *Ibid* 71-101.

constructed,[46] and the only reason why we value a more developed foetus than the newly fertilised ovum is because of the investment we put into it.[47]

This process-based analysis overlooks an intuitive belief in foetal dignity, which is recognised in the results achieved rather than in the efforts incorporated. Stith believes that most people recognise personhood in a 'sudden threshold of recognition' rather than a 'gradual matter of degree'.[48] That is why, Stith argues, Dworkin's investment theory erroneously ignores an individual who should be placed in the centre of our moral intuitions. Value-based analysis, as advocated by Dworkin, undermines the magnitude of certain entities.[49] It disregards the individual in its etymologically pivotal implication of an undividable unity, concentrating instead on the elements of which it consists of.[50]

The method of valuing overlooks the non-fungible distinctiveness of each individual, taking into account only the kind of being he is at present. Stith exemplifies this by comparison to the misplaced reverence for bricks instead of churches. The destruction of brick buildings do not disturb our sense of the sacredness and therefore cannot explain the inviolability of churches. This example is very instructive in showing the fallibility of Dworkin's investment theory, which, as shown in comparison to the bricks' justification for the respect of churches, is too selective.[51]

The shortcomings of Dworkin's theory are apparent in his explanation of inviolability caused by human and natural investment,[52] as he expressly acknowledges that there is no underpinning notion in discerning any pattern of the selectivity of his theory: 'We do not treat everything that human beings create as sacred. We treat art as inviolable, but not wealth or automobiles or commercial advertising, even though people also create these. We do not treat everything produced by a long natural process - coal or petroleum deposits, for example - as inviolable either …'.[53] The idea of making an investment *de*sanctifies a result.[54]

Furthermore, Dworkin's concept of investment distorts the human contribution to a developing foetus. Rakowski argues that Dworkin by human investment means the couple or women's prior intentions,[55] as Dworkin associates the human investment with the creative element, inherent in a decision to have a child.[56] In the light of observation, Rakowski correctly notices that it is inappropriate to maintain that 'the abortion of a planned pregnancy is morally worse than the abortion of an unplanned pregnancy, if the woman who intended

[46] *Ibid* 86-87.
[47] *Ibid* 89.
[48] Stith (n 33) 334.
[49] *Ibid* 385.
[50] *Ibid* 385.
[51] *Ibid* 330-331.
[52] Dworkin (n 1) 80.
[53] *Ibid*.
[54] Stitch (n 35) 331.
[55] Eric Rakowski, 'The Sanctity of Human Life' (1994) 103 *Yale Law Journal* 2049, 2072.
[56] Dworkin, (n 1) 83.

to become pregnant changed her mind and wanted, at the time of abortion, to end her pregnancy as much as someone who did not plan to become pregnant. If abortion is wrong in either case because of what it does to the fetus, it is equally wrong in both cases. Prior intentions are irrelevant.'[57] In the light of these criticisms, the notion of investment, in the manner proposed by Dworkin, inconsiderately denigrates the right to life as well as human dignity and equality. Stith also suggests that there are there are more credible ways to solve the ambivalence surrounding the abortion issue, without negating it. Such as replacing the inviolability of life with respect. Contrary to inviolability, which is measured in a very business-like manner, we cannot attach a value to respect.[58]

I agree with Stith's critique of Dworkin's investment theory, but I do not incline towards his general evaluation of Dworkin's notion of inviolability. Although, respect appears to be a more satisfying point of reverence in determining the sacredness of life, Stith's criticism of Dworkin's argument for inviolability is largely exaggerated, as Dworkin clearly stated in his responses that inviolability is just a term. Furthermore, in *Life's Dominion*, he used both terms 'respect' and 'reverence', interchangeably with inviolability,[59] which shows that Dworkin's intended distinction between two concepts is less distinct.

Dworkin's ambivalence of terminology also moderates the accusations of inconsistency of the approach he adopts in *Life's Dominion* as in comparison to the whole of his writings. Stith argues that in *Taking Rights Seriously*,[60] he defines respect differently. The absence of the term 'inviolability' in his earlier writings combined with the fact of interchangeable use of alternative concepts in *Life's Dominion* shows that the inconsistency has a purely symbolic semantic character. Ethical theory is full of indeterminate and not completely delineated concepts. The ideological nature of the language facilitates delineation between concepts, but this practice does not lead us to any reconciliation, because it only reduces our intuitive understanding to a purely semantic discourse.

Nevertheless, if we strive for the compromise on the level of our intuitive understanding, we should endeavour to amalgam similar concepts, rather than scrutinise them to differentiate between them. First of all, we have to consider what we expect from moral philosophy. Do we expect it to produce a cut and dried answer in every single case, or do we expect it to organise our system of value judgments and ensure that the results are not contrary to conventional morality?[61] I would be inclined to support the second aim, as the first is too idealistic.

However, even if we accept the second aim, we still find holes in Dworkin's theory. His theory sometimes leads to unacceptable paradoxes. For instance, Dworkin, by contending that the pregnant teenager would risk a greater loss of

[57] *Ibid* 2072-2073.
[58] Stith (n 35) 383.
[59] *Ibid*.
[60] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 272. He argues that to treat a person with respect means treating him 'as [a] human … [being] who … [is] capable of forming and acting on intelligent conceptions of how … [his life] should be lived.'
[61] Hursthouse (n 15) 8-9.

investment in her own life by refraining from an abortion, reaches an illogical conclusion that the inviolability of life may necessitate the destruction of life.[62] It is important to notice that these unacceptable results of Dworkin's theory are due to his unsatisfactory investment theory rather than his notion of inviolability. The inappropriateness of this thesis is emphasised by Dworkin's modification of it in *Freedom's Law: The Moral Reading of the American Constitution*[63], where he replaces the investment-based theory of inviolability by the political morality, which he considers to be the heart of constitutional law.[64]

EXTERNAL ATTACK

A. The conservative view

Having conducted an internal analysis of the Dworkin's argument, I will consider its relation with alternative theories and answer whether it forms a plausible response to them. As I have already mentioned, the aim of Dworkin theory is to produce a compromise that will produce 'a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect'.[65]

Despite these ambitious aims, Dworkin, as aptly noticed by conservative critics, does not provide a new position in the abortion controversy, but merely provides a one-sided 'attempt to show that this commonly accepted position is … virtually indistinguishable from the policy urged by many of abortion's defenders: freely available abortion through at least the first six months, apparently with no consent requirements or waiting periods, combined with public funding for women too poor to pay for their own abortions.'[66] Some of the critics suggest also that Dworkin does not even provide a reconciling environment, because he 'accuses … [the conservatives] virtually of bad faith, or at best self-deception, for he claims that they do not really believe in foetal rights but only in foetal sanctity and inviolability.'[67]

By saying that the sanctity of life may authorize and necessitate abortion,[68] he even deliberately ridicules pro-life beliefs.[69] It is important to notice here that such unfortunate consequences of his theory such as the mischief to certain social groups and the one-sidedness of his position do not necessary invalidate his theory, but only necessitates a closer re-examination of his argument.[70] Nevertheless, in light of such a strong attack aimed at the anti-abortionists

[62] Stith (n 35) 311.
[63] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* (Oxford University Press 1996).
[64] Stith (n 35) 290.
[65] Dworkin (n 1) 10-11.
[66] Rakowski (n 56) 2051.
[67] Stith (n 35) 296.
[68] Dworkin (n 1) 99.
[69] Stith (n 35) 296; A similar point is made by Norman; Richard Norman, 'From the inside out' (1996) 76 *Radical Philosophy* 43, 43.
[70] *Ibid* 328.

opposition, it should not surprise that Dworkin's argument is most heavily criticised by the pro-lifers, who accuse him of the unjustified rejection of the personhood view on both secular and religious grounds.[71]

Here, I would like to analyse the substance of the criticism of the anti-abortionists. I will begin my discussion of the conservative position with the analysis of the theological view. It is indisputable that Dworkin is quite neglectful and selective regarding the theological argument. He does not touch upon its metaphysical underpinning, such as the idea of ensoulment at conception, and he restricts his analysis to the doctrinal evaluation of the canon of the Catholic Church.

Dworkin begins his counterargument to the rigid position adopted by the Roman Church by pointing at the historical inconsistency in the Catholic doctrine. He argues that Catholic Church supported in the past the detached justification of the abortion[72] and it not officially adopted the derivative view until 1869, when Pius IX decreed that even an early abortion should be punished by excommunication.[73] Dworkin's main point is that the historical analysis of the doctrine of the Catholic Church is evidence that Catholics are not concerned with the rights of the foetus, but only with its intrinsic value. Dworkin points out at the 'concessions' Catholics are willing to make to allow abortion when pregnancy engenders mother's life, and when it results from rape or incest.

According to Dworkin, such concessions are irreconcilable with derivative justification of ensoulment. This position is, nevertheless, open to critique. Hartogh argues that such concessions, particularly the first one, are incompatible with the 'right to life' of the foetus only on a certain construction of the rights.[74] There are concepts of indeterminate rights, which justify their dependance to surrounding circumstances.[75] Such notions of the rights are nevertheless unpopular and play marginal role in the current jurisprudence. They are also more commonly used by liberals than in the doctrine of the Catholic Church.

Therefore, in my view, they do not significantly undermine Dworkin's claim in inconsistencies in the Catholic position. Dworkin' limited analysis of the theological view may not satisfy its greatest proponents, but such rational and reasoned dispute of theological argument emphasises the universal nature of abortion controversy, which I consider to be the main aim of Dworkin's theory.

Now, I will move to a more objective side of the conservative argument, which stems from natural law and makes no use of metaphysical justification. For this reason, it presents a more attractive alternative to Dworkin's universal and transcultural abortion theory. The natural law argument is proposed by John

[71] Bradley (n 36) 329.
[72] Dworkin supports this point by the ambivalent position adopted by the medieval Christian theologians, such as St. Augustine, St. Aquinas and St. Jerome; Dworkin (n 1) 40.
[73] *Ibid* 44.
[74] Den Hartogh (n 32) 48.
[75] Judith J Thomson, (1986) 'Self-Defence and Rights' in Judith J Thomson (eds), *Rights, Restitution, and Risk,* Harvard University Press 1986) 38.

Finnis, who although derives his theory from Catholic ethics, does not make use of religion and metaphysics.[76]

Finnis, similarly to the Catholics, argues that from the moment of conception, the foetus is on a par with an adult human being. He supports his argument with medical evidence. He justifies it presuming that the foetus forms a person at conception, because the only elements that differentiate a foetus and a full-grown person are growth and development.[77]

Opponents of this view adduce different, often more sophisticated, medical evidence to justify the formation of the personhood at the later stage. I think that Finnis' medical justification of the personhood view does not entail sufficient reverence to medical data and it can only be supported by a 'slippery slope' argumentation.[78] Thomson, for instance, compares Finnis' insistence on the establishment of the personhood at conception to the mistake of attributing an acorn the status of a tree. She argues that 'A newly fertilized ovum, [or] a newly implemented clump of cells, is no more a person than an acorn is an oak tree'[79] and there is not plausible reason to assume otherwise.

Personhood is developed through a long process, and any definition that is based on one single characteristic would not encompass all obvious instances.[80] Therefore, Finnis' position can be easily contrasted with other, more plausible and comprehensible explanations of personhood, which gives more extensive objective criteria to determine it. For example, Warren suggests the following criteria: consciousness, reasoning, self-motivated activity, the capacity to communicate and the presence of self-concepts, and self-awareness.[81] Certainly, some of these criteria are disputable, but are not devoid of value, whereas the indirect extension of the common good by the notion of 'practical reasonableness'[82] calls for further justification.[83] Finnis seems too dogmatic in his statements. Therefore, I am more inclined towards Dworkin's justification, which, though not exhaustive, gives a more plausible and comprehensible explanation,[84] consistent with the philosophical mainstream.[85]

Dworkin relates personhood with interests and he justifies abortion by the presence of the interests of a foetus 'at the time the abortion is performed', and not on a future time, when 'interests will develop if no abortion takes place'.[86] By referring to the philosophical aspects of personhood instead of its biological

[76] Micheal DA Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet & Maxwell 2001) 132-139.
[77] John Finnis, 'The fragile case for euthanasia: a reply to John Harris' in John Keown (eds), *Euthanasia Examined* (Cambridge University Press 1995).
[78] Bernard Williams, 'Which slopes are slippery?' in Micheal Lockwood (eds), *Modern Dilemmas in Modern Medicine* (OUP 1985126-137.
[79] Judith J Thomson, 'A Defence of Abortion' (1970) 1 *Philosophy and Public Affairs* 47, 48.
[80] Jenny Teichman, 'The Definition of *Person*' (1985) 60 *Philosophy* 175.
[81] Mary A Warren, 'On the Moral and Legal Status of Abortion' (1973) 1 *The Monist* 43.
[82] John Finnis, *Natural Law and Natural Rights* (Clarendon law Series 1980) 280.
[83] Lloyd L Weinreb, *Natural Law and Justice,* (Harvard University Press 1987) 113.
[84] Sionaidh Douglas-Scott, 'Book Reviews' (1994) 2 *Medical Law Review* 252, p. 256.
[85] Rakowski (n 54) 14-24.
[86] Dworkin (n 1) 19.

characteristics, Dworkin, contrary to Finnis, draws a distinction between a person and a human being.[87]

Whereas, Finnis' argument is tainted by 'slippery slope' argumentation and is not based on the clear philosophical premise, Dworkin presents a more plausible and cogent medical analysis. By stemming from plain philosophical premise, which is the association of the personhood with consciousness, Dworkin's reliance on medical data is more instrumental and imperative. Dworkin argues that rudimentary sensory and cognitive capacities cannot emerge until neurons in the brain's cortex spread and connect to nerve endings in the thalamus, which occur in the end of the second trimester. Then, he continues, basic consciousness may transpire even at the later stage of the development of the cerebrum.[88] Such pragmatic use of medical evidence is a significant breakthrough.

In addition to this, Dworkin adduces empirical evidence to support his claim that nobody believes that the foetus is a person with rights. It is plain that statistical data do not suffice to form a coherent moral theory, but considering the sensitive and controversial nature of abortion, analysis backed up by same empirical research gives teeth to the formal argument, because it shows how an existing problem actually affects matters and facilitates conclusive policy solutions, which may have existed for a considerable length of time on an intuitive basis. This is a greatest advantage of Dworkin's 'philosophy from the inside out'.[89]

Nevertheless, Finnis' argument is insightful, not due to his consistent standpoint on the on the creation of personhood at conception, but because of his postulate that the discussion about abortion should not be conducted in terms of competing rights, which forms a bridge between Dworkin's middle ground and the Orthodox Catholic view. Finnis' theory is, however, unacceptable due to its duty-based nature, which is inconsistent with the most common justification of criminal law that is rooted in the combination of individual rights and collective goals. Duties, therefore, should never be considered as fundamental.[90]

Such view is common not only to liberals, but also conservatives and positivists.[91] For example, Devlin resisted an argument that the enforcement of morals is based on a fundamental duty, and argued instead that the objectives related to social cohesion necessitate the enforcement of morals.[92] Therefore, Finnis' argument cannot be reconciled with the requirements of a coherent political theory[93] and Dworkin's theory presents a more plausible response to the underlying principles of law. Furthermore, Dworkin's argument appears to be more acceptable due to its politically diplomatic character, which endeavours to equip each side with 'face-saving ways of recognizing both the rights to abortion

[87] Teichman (n 79); Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses,* (OUP 1992) 14-24.
[88] Dworkin (n 1) 17-18.
[89] Zipursky and Fleming (n 5) 109; Dworkin (n 1) 28.
[90] Ronald Dworkin, 'The Original Position'(1973) 40 *University of Chicago Law Review* 500.
[91] Herbert LA. Hart, *The Morality of the Criminal Law* (Magnes Press 1965) 47; Thomas Aquinas, *Summa Theologica* I-II.
[92] Patrick Devlin, *The Enforcement of Morals*, (OUP 1965).
[93] Ronald M Dworkin, *The philosophy of law*, (OUP 1986)13-14.

… and the obligations to take seriously the moral responsibilities involved in exercising these rights.'[94]

Unfortunately, Dworkin does not support his argument with appropriate justification. Instead of referring to deeper principles of public law, he restricts his analysis to the subsumption of the abortion discourse under the legal doctrine of the First Amendment. In particular, he was criticised for extending abortion decisions to an exercise of religious freedom, which does not receive support in case law.[95] By adapting these descriptive modes of argumentation, he divests his argument of prescriptive and normative force.[96] It also make his thesis inapplicable to other jurisdictions, failing to provide a moral theory acceptable for 'any nation dedicated to liberty.'[97] Reference to *Open Door and Dublin Well Woman* [98] does not even elevate his constitutional discourse even to European level, as his discussion of the ruling of the ECtHR does not operate on the level of the comparative *quasi*-federal analysis between the ECtHR and the Supreme Court of the USA and has a purely anecdotal character.

The link between a general and universal argument about the morality with a particular jurisdiction is contentious and there are numerous natural law theories, which argue for necessary conceptual connection between law and morality.[99] But, as aptly noticed by critics, Dworkin could avoid this muddle by separating his imperative and essential moral discourse from rather technical and pragmatic legal discussion.[100] He should rather link his theory of inviolability with the general principles of public law - such as the limits of criminal law.[101]

Although the aim of this essay is not to provide an analysis of an American constitutional framework, I would like to focus on few points of Dworkin's analysis of case law related to his interpretation of the First Amendment that obscure the force of his position philosophically. Such problems could be in fact easily attributed to any jurisdiction. For example Dworkin's notion that views

[94] Zipursky and Fleming (n 5) 109; Dworkin (n 1) 131.
[95] Ross and Godlove (n 7) 101.
[96] (n 8) 943.
[97] Dworkin (n 1) 171.
[98] *Case of Open Door and Dublin Well Woman v Ireland, European Court of Human Rights* (October 29, 1992): Volume 246, Series A, Publications of the Court (Koln: Carl Heymanns, Verlag K.G).; Dworkin (n 1) 66.
[99] Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978); Deryck Beyleveld, *The Dialectical Necessity of Morality: an analysis and defence of Alan's Gewirth's argument to the principle of genetic consistency* (University of Chicago Press 1991).
[100][no author] (n 8) 947; The insightful example of such separation of legal and moral discourse are present in Dworkin's earlier writings. For instance, in *The Great Abortion Case*, Dworkin restricts his analysis only to universal moral issues, as he says that a government's apprehension of 'the impact of widespread abortion on its citizens' instinctive respect for the value of human life and their instinctive horror at human destruction or suffering, which are values essential for the maintenance of a just and decent civil society,' is the most authoritative ground for limiting abortion and an adequate reason for states to forbid post-viability abortions. Ronald Dworkin, 'The Great Abortion Case' *New York Review of Books* (New York, June 29 1989), 52. In *Life's Dominion*, Dworkin not offer any universal reason for non-interference by governments in post-viability abortions. Dworkin (n 1) 170.
[101]Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing, vol 4* (OUP 1988).

about the intrinsic value of life are fundamentally religious in nature because of its controversial nature is at odds with his postulate not to 'bracket' the issues because of the controversy surrounding them. Furthermore, Dworkin's analysis of the First Amendment case law does not deal well with the pivotal constitutional distinction between conduct and belief. Whereas it is socially desirable to punish persons for a racially motivated crime, or an act of discrimination in a workplace, it is inappropriate and too intrusive to sanction someone for holding such discriminatory and racial beliefs.[102]

Dworkin's failure to distinguish between descriptive and prescriptive notions casts doubt on the 'inside out' philosophy adopted in *Life's Dominion*[103] and the 'law as integrity' methodology conservatively advocated by Dworkin.[104] The latter entails uniformity among contemporary doctrines and between current legal theories and their historical predecessors.[105] According to critics, Dworkin's correlation between his argument about the morality of abortion and First Amendment jurisprudence does not meet these rigid criteria,[106] but this contention is largely exaggerated, because, as Dworkin explains in his replies, integrity is process-based.[107] Therefore, it only requires collective reasoning and debating and it does not necessitate agreement 'distinct from political deference to the conclusions of any group or institution.'[108]

If we accept this narrow procedural interpretation of integrity, then, in *Life's Dominion* the rigid 'law as integrity' criteria appear to be satisfied, as a result is reached after a thorough analysis of the contemporary and historic doctrines. I think that the tension between descriptive and prescriptive notions in *Life's Dominion* is more apparent in the moral relativism methodology, which unequivocally requires 'higher' fundamental values of the previous generations to be given priority over the collectively adopted contemporary moral choices.[109] Nevertheless, the 'inside out' methodology completely contradicts such conclusions, as extension of this reasoning to this correlation would amount to, as ironically put by the critic, 'little more than backward reasoning from desire conclusion to major premises.'[110]

In the light of the above analysis of the conservative position, I am inclined to agree with Greenwood in his conclusion that the alternative positions in *Life's Dominion* are seriously held and form a plausible response to pro-life theories.[111] Repeating examples of inconsistency in conservatives' standpoint that the foetus is a person with rights is, as noticed by Baird, is 'rhetorically

[102] Arthur Ripstein, *Ronald Dworkin* (Cambridge University Press 2007) 131.
[103] Dworkin (n 1) 28-29.
[104] Ronald Dworkin, *Law's Empire*, (Hart Publishing 1998) 94.
[105] *Ibid* 227.
[106] (n 8) 948; John C. McCaffrey, Julie Novkov, 'The emperors wears no clothes: Life's Dominion and Dworkin's Integrity' (1993) 21(1) *Review of Law and Social Change* 181.
[107] Dworkin (n 19) 386.
[108] *Ibid* 386.
[109] Charles EF Rickett, 'Book Reviews' (1993) 52(3) *Cambridge Law Review* 511, 513.
[110] (n 8) 948.
[111] Daniel J Greenwood, 'Beyond Dworkin's Dominions: investments, memberships, the tree of life, and the abortion question' (1994) 72(3) *Texas Law Review*, 559, p. 563

counterproductive'.[112] In addition, even if Dworkin's rejection of conventional conservative theories is not supported with axiomatic truth, it certainly undermines alternative theories to the extent that rigid adherence to them would be discriminatory and undemocratic. In these circumstances, Dworkin's argument should prevail due to its liberal nature, which is committed to toleration that is never inimical to community, but essential to it.[113]

B. The liberal view

The more rounded criticism of Dworkin's argument is presented by the pro-choice proponents, who although they reach the same conclusions as Dworkin, they base their view on different premises and offer different justifications. The general tendency of pro-choice advocates is to base on formal models of argumentation. But these formalistic models often tend to be a simplification of the real world. If they incorporate all relevant material considerations, they often lose force. Dworkin, by adopting a more fine-grained mode of argumentation, provides a very comprehensive discussion of the abortion problem, which is most abreast with the intuitive perceptions about its nature.[114]

The principal attack on Dworkin's argument presented by pro-choice theorists is aimed at what Kamm calls Dworkin's 'hard line', according to which killing the foetus could not be justified if it was a person.[115] The pro-choice view is very divergent and internally inconsistent, fluctuating from moderate feminism that recognises the moral significance of abortion to extreme liberal feminism which treats the foetus on a par with a bit of tissue.[116] In this essay, I disregard the extreme view, which is inconsistent with natural and religious views and could easily be undermined by the potentiality view or any other non-Dworkinian theory that recognises rights or values of the foetus.

I therefore concentrate only on the moderate feminism, which forms an insightful alternative to Dworkin's theory. Thomson in 'A Defence of Abortion' presents the most well-known and provocative argument in this domain.[117] She argues that a pregnant woman has a right to use self-defence to protect herself from the physical invasion of pregnancy. She justifies this by comparing pregnancy to a situation when a woman is connected by the doctors to a violinist with malfunctioning lungs or a scenario where a person leaves an open window during the Second World War, so that Jews can hide inside.

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[112] Robert M Baird, 'Dworkin, Abortion, Religious Liberty, and the Spirit of Enlightenment' (1995) 37 *Journal of Church and State 753,* 761.
[113] *Ibid* 768
[114] Zipursky and Fleming (n 5) 133.
[115] Kamm (n 25) 185-221, 226; Frances M Kamm, *Creation and Abortion*, (OUP 1992).
[116] Hursthouse (n 15) 12-27.
[117] Thomson (n 80).

But as aptly noticed by Dworkin such examples distort the nature of pregnancy.[118] In reference to Thomson's violinist example, the criticisms are as follows: 'l) the issue of consent; 2) the familiar relation between the parties in question; 3) the artificiality of the example, and 4) the distinction between killing and letting die.'[119] In light of the controversies surrounded Thomson's analogies, it should not surprise us that Dworkin argues against it, because 'if we were to assume (and make sense of the idea) that a fetous has rights, then a pregnant woman might have responsibilities to it that people do not have to strangers.'[120]

The very insightful comment about Dworkin's theory, as in comparison to alternative pro-choice theories is made by Stith, who argues that Dworkin is more accurate in abandoning the language of rights and interests of the foetus. Stith contends that the estimate of interests is more common in adversarial commercial negotiations.[121] Rights and fairness are crucial factors in contracts between self-interested adults, but are not appropriate in the description of the social position of foetuses and newborn infants, who are not capable to bargain at arm's length with the remainder of competitor social agents. Their consciousness has not reached the standard of the competitor social agent.[122]

Therefore, I concur with Stith that there is no reason to place social contracts, with its pitfalls of reciprocity, interests, and consent, as the principal mode of legal and political dialogue.[123] Such narrow understanding of the legal discourse is distorted by modern individualism, which is at odds with the normative concepts of an ancient world with no comprehensible perception of a right in the current denotation of a power possessed by a person. In an ancient world, rights were more associated with justice or appropriateness, or were treated as law itself. 'The notion that one could possess a right would have made as little grammatical sense as to say today that one can possess the law.'[124]

Therefore, by attributing to people positive and natural rights, we apportion the law among ourselves like a commercial good, so that law is distorted from a public power, governed by a common authority over an array of private safeguards, each of which is ruled by a sovereign, having a personal control over those who trespass over his domain.[125] Since the language of rights generates a disagreement and competition in 'an already polarised political dispute'[126],

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[118] Dworkin (n 1) 54.
[119] Eric Wiland, 'Unconscious violinist and the use of analogies in moral argument' (2000) 26 *Journal of Medical Ethics* 466, 467; Benedict Smith, 'Analogy in moral deliberation: the role of imagination and theory in ethics' (2002) 28 *Journal of Medical Ethics* 244, 245-246.
[120] Dworkin (n 21) 372.
[121] Stitch (n 35) 305.
[122] *Ibid* 305; John Rawls, *A Theory of Justice* (Harvard University Press 1971) 509; John Rawls, *Political Liberalism* (Columbia University Press 1993) 234.
[123] Stith (n 35) 305.
[124] *Ibid* 305.
[125] *Ibid* 306.
[126] *Ibid* 308.

Dworkin by advocating his notion of inviolability is more likely to end the abortion war, at least in the form of practical compromise.[127]

Apart from unconvincing use of analogies, her moral language unnecessarily obscures Thomson's argument, such as by the distinction she makes between the word 'permissible' and 'impermissible'.[128] As aptly noticed by Finnis, the question of the permissibility of abortion in the circumstances which she identifies is logically independent of her discussion of rights and could be achieved otherwise. Thomson attributes to a right a very restrictive and narrow meaning of what a man has 'title' to, which needs to be constantly rephrased according to time, place, person and circumstances. The examples of such rephrasing are the claim that 'innocent persons certainly have a right to life, [and] that mothers have the right to abort themselves to save their lives.'[129] The conducting of such rephrasing indicates that the formal inferences to the most suitable definition and use of the term 'right' are immaterial to the substantive moral defence or critique of abortion. Therefore, the distinction between Dworkin's argument and the 'real' core of Thomson's thesis is a matter of form, not of substance.

But as far as the formal value of the argument is concerned, Dworkin appears to be more accurate in his analysis. Thomson's reasoning suffers from a *non sequitur,* which is apparent in the end of her argument, where she says: 'I *do* argue that abortion is not impermissible', 'I *am* arguing for the permissibility of abortion in some cases',[130] where the first premise is a claim for a categorical permission of abortion and the second is its conditional variation.

These statements do not follow logically one from the other, however they are not mutually exclusive. Dworkin, by adopting the second premise in the beginning of his work avoids this pitfall and concentrates on the core of Thompson's argument, which is not the issue 'whether abortion should be morally approved and legally permitted, but over the conditions under which it can be morally justified and should be legalized.'[131] Dworkin's language of rights and values, despite it semantic inconsistencies, appears to be more satisfying compared to the discussed alternative pro-choice theories, because it gives a better explanation to morally problematic acts. The law enables a woman to have an abortion out of the respect of her freedom, not to approve destroying of a foetus as a right. This is consistent with a criminal division of defences between justifications and excuses, which forms a fundamental underpinning of the British criminal justice system.[132]

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[127] *Ibid* 308.
[128] John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy and Public Affairs* 117,125.
[129] *Ibid*117-45, 121-122.
[130] Hursthouse (n 15) 196.
[131] Baird (n 113) 754; Ronald Dworkin, 'Replies to Endicott, Kamm and Altman' (2001) 5 *Journal of Ethics* 263, 266.
[132] Jonathan Herring, *Criminal Law: Text, Cases and Materials* (OUP 2006) 732.

CONCLUSIONS

The argument about the morality of abortion in *Life's Dominion* has been heavily criticised by commentators. Nevertheless, the criticism surrounding Dworkin's theory has often a superfluous character, largely limited to identifying semantic inconsistencies, which are inevitable element of every moral theory. The commentators point out inconsistencies in Dworkin theory, but often do not offer alternative solutions to contentious issues, which in my view, shows that Dworkin's theory is coherent and well-conceived.

As the fundamental aim of Dworkin's argument is to provide a compromise to alternative abortion theories, the most rigid critique should be placed at its response to these theories. In *Life's Dominion,* Dworkin endeavoures to make sense of ambivalence concerning the personhood of the foetus.[133] And to a certain degree he achieves this objective. However, by aiming to create a reconciliation, which does not 'demean' any group, Dworkin sets himself an impossible task.[134] and should not be not criticized for its failure to achieve such task. Although the central aspect of his theory - the inviolability of life - may sometimes result in unfortunate consequences, such as the mischief to public and discrimination between certain foetuses, it is important to notice that such notions do not invalidate his theory, but merely encourage one to re-examine his thought more carefully.[135]

The reconciling nature is the core novelty of his theory, in comparison to alternative arguments. Dworkin by acknowledging that opponents of abortion have good reasons, but their aim can be achieved in different way, creates a diplomatic climate, which strengthens his pragmatic solution. Given the lack of plausible medical or secular argument to justify the creation of the personhood at the time of conception, it appears to be more rational to adopt a less rigid view on this point. Dworkin, provides an interesting argument in this respect, which, although is a 'pro-choice' position, his thesis is 'pro-choice' in a much more 'embracing sense'.[136] His argument makes use of the rhetoric of both, pro-choice and pro-life camps,[137] and this, to some extent, engenders a compromise.

Nevertheless, there are significant differences between Dworkin's theory and alternative arguments. In comparison to pro-life theories, Dworkin's argument is more sophisticated and plausible in terms of adopting new medical innovations and backing it up with the relevant philosophical reasoning. Both theistic and natural law theory appeals too dogmatic modes of justification and therefore do not provide useful alternative to Dworkin's theory.

His argument could be harmonised with other pro-choice theories, such as the simplified version of Thomson's theory, which reaches the same conclusion; but Dworkin's justification is fuller, because it covers arguments from both public

[133] Stith (n 35) 382.
[134] John Keown, 'Life's Dominion: An Argument About Abortion And Euthanasia' (1994) 110 *Law Quarterly Review* 671, 675.
[135] Stith (n 35) 328.
[136] Rickett (n 110) 513.
[137] Stitch (n 35) 293-294.

and personal theory. Whereas Thomson's sophisticated analytical reasoning must be carefully scrutinised in terms of logical inconsistencies, Dworkin's 'inside-out' analysis leaves a greater scope for interpretation. This distinguishes Dworkin's argument form the alternative theses, because it offers a useful, practical perspective, examinable by the normal intuitive processes, often preferred by lawyers and law reformers.

Dworkin's thesis provides a significant breakthrough from the cynical academic dispute that the abortion issue 'will never be settled, but simply won or lost.'[138] The deficiencies of his thesis could be justified by the requirements of a real life, as 'analysis can proceed only by abstraction, but abstraction, which ignores the complexity and interdependencies of real life, obscures much of the content on which each actual, concrete decision is made.'[139]

[138] Peter Koritansky, 'The Role of Philosophy in the Contemporary Abortion Debate' (2004) 10(1) *Christian Bioethics* 63, 64.
[139] Dworkin (n 1) 100.