



1997

## Valuing Intrauterine Life

Samuel W. Calhoun

Washington and Lee University School of Law, calhouns@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Constitutional Law Commons](#), and the [Health Law and Policy Commons](#)

---

### Recommended Citation

Samuel W. Calhoun, *Valuing Intrauterine Life*, 8 Regent U. L. Rev. 69 (1997).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# HEINONLINE

Citation: 8 Regent U. L. Rev. 69 1997

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Thu Mar 15 14:15:11 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1056-3962](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1056-3962)

# VALUING INTRAUTERINE LIFE

SAMUEL W. CALHOUN\*

In a recent essay, Julia Hanigsberg seeks to correct what she views as an inadequacy in feminist discourse about abortion: its failure to “adequately theoriz[e] about the importance or meaning of intrauterine life.”<sup>1</sup> By remedying this deficiency, Hanigsberg hopes to accomplish two principal objectives: 1) to improve the strategic position of the pro-choice movement, which has been damaged by feminists’ conceding to pro-lifers “the moral high ground” in the debate;<sup>2</sup> and 2) to enrich feminist dialogue about abortion, which ever since *Roe v. Wade*<sup>3</sup> has been impoverished by the pro-choice movement’s dodging “the question of the meaning of intrauterine life,”<sup>4</sup> an issue “critical to a theoretical framework of abortion.”<sup>5</sup>

Given the basis for Hanigsberg’s defense of abortion rights, it is perplexing how she could possibly accord any significant meaning or value to intrauterine life. To Hanigsberg, “the abortion decision is not only about [women’s] autonomy in the sense of self-determination, but in the more radical sense of self-*simpliciter*.”<sup>6</sup> This is so because “[a] sense of control over our own bodies is crucial for maintaining both a sense of self and an ability to interact with others.”<sup>7</sup> Consequently, “the wrong in denying or limiting access to safe and affordable

---

\* Professor of Law, Washington and Lee University. I appreciate the help of Jackie Calhoun, David Millon and Joe Ulrich in critiquing earlier drafts of this paper.

1. Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 380 (1995). By “feminist,” Hanigsberg means only those women on the pro-choice side of the abortion debate. She acknowledges, but never seriously confronts, the fact that there are feminists who oppose abortion on demand. *Id.* at 410 n.63.

2. *Id.* at 407; see also *id.* at 380, 390, 397 n.114, 418.

3. *Roe v. Wade*, 410 U.S. 113 (1973).

4. Hanigsberg, *supra* note 1, at 418.

5. *Id.* at 406. Hanigsberg notes that some feminists have integrated “a consideration of intrauterine life into their analysis of abortion.” *Id.* at 372 n.5. On the whole, however, “[p]ro-choice considerations of the abortion issue have largely failed to account for intrauterine life and the meaning that life has. . . .” *Id.* at 372.

6. *Id.* at 380.

7. *Id.* at 382.

abortions is a wrong that prevents the development of the minimum conditions necessary for individualization and any meaningful concept of selfhood.”<sup>8</sup>

My initial response to this particular defense of abortion access was to wonder about the psychological well-being of the millions of women who oppose unrestricted abortion choice.<sup>9</sup> Be that as it may, despite Hanigsberg’s apparently unequivocal view that complete abortion freedom is critical to “a woman’s sense of selfhood and identity,”<sup>10</sup> she also believes that discussing “abortion solely in terms of bodily integrity” is “insufficient.”<sup>11</sup> Why? Because “[t]o speak *only* in terms of bodily integrity is to miss a key, if not *the* key element of pregnancy. The state of pregnancy entails the ineluctable fact of intrauterine life.”<sup>12</sup>

While I applaud Hanigsberg’s acknowledgment of the incompleteness of “a strict bodily integrity framework,”<sup>13</sup> her point would seem self-evident. From conception, the developing child has a body in the dictionary meaning of an “organized physical substance.”<sup>14</sup> By no later than eight weeks from conception, there is a physical body plainly recognizable as human.<sup>15</sup> Consequently, any serious discussion

8. *Id.* at 389.

9. One indication of the numerical strength of pro-life women is the 1992 formation of the National Women’s Coalition for Life. The Coalition, which rejects rhetoric equating “women’s rights with abortion ‘rights,’” has an aggregate membership of 1.5 million. Press Release, National Women’s Coalition for Life (April 3, 1992).

10. Hanigsberg, *supra* note 1, at 383. Hanigsberg’s position is not just that women should be able “to make choices unburdened by state interference. On the contrary, conditions in which safe abortions are available to women of every race, socio-economic stratum, and nationality are an integral requirement of bodily integrity – and the realization of these conditions may depend upon social obligations that recognize positive rights.” *Id.* at 389.

11. *Id.* at 381.

12. *Id.* at 397.

13. *Id.* at 372.

14. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 246 (1986).

15. See LENNART NILSSON, A CHILD IS BORN 70-71 (1977). James Q. Wilson speculates that most people who examine photographs of intrauterine life would say that what they see “appears to be ‘a baby’ . . . at around seven to nine weeks after conception.” James Q. Wilson, *On Abortion*, COMMENTARY, Jan. 1994, at 26. Some would use the term

of abortion must confront the fact that abortion involves two bodies, not one.<sup>16</sup> Hanigsberg's recognition of this marks her consideration of abortion as a serious one. It also enables one to take seriously her statement that she desires "to bridge what initially seem to be two opposing frameworks: first, the conception of abortion as an issue of women's bodily integrity . . . and second, the acknowledgment of the existence and meaning of intrauterine life."<sup>17</sup>

Clearly, Hanigsberg sets for herself an arduous task. In fact, the gap between Hanigsberg's concept of women's bodily integrity and the value of intrauterine life appears to be unbridgeable. How can one possibly value intrauterine life and at the same time advocate an unrestricted freedom to abort? Doesn't granting to women the unlimited power to destroy intrauterine life necessarily negate its significance and worth? Hanigsberg disagrees. She posits three ways to accord value to intrauterine life without interfering with a woman's right to choose abortion. First, "the abortion decision [should be viewed as] a kind of mothering decision, as women decide when, whether, and with whom to bear children."<sup>18</sup> In making her choice, "a woman's decision would depend upon her own assessment of her ability to mother effectively and *her* assessment of the quality of life that the intrauterine life could reasonably be expected to have if born."<sup>19</sup> Next, Hanigsberg endorses a variety of social welfare

---

"baby" as early as the fifth week. . . ." *Id.* He "would be astonished if any withheld that judgment for as long as the end of the first trimester (roughly, the 12th week)." *Id.*

16. Space constraints prevent me from detailing my belief that concern for the liberty and equality of women does not require that the abortion choice be legally unrestricted. For a full statement of my position on this key aspect of the abortion debate, see Samuel W. Calhoun & Andrea E. Sexton, *Is It Possible To Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers*, 49 WASH. & LEE L. REV. 437, 463-83 (1992).

17. Hanigsberg, *supra* note 1, at 371.

18. *Id.* at 403.

19. *Id.* at 415-16. Hanigsberg, however, is careful to note that she is not trying "to posit a 'good mother' model of the abortion-seeker." *Id.* at 405 n.144. While many women who choose abortion do so only after "analyzing all the responsibilities and interests at stake," some fit "the anti-abortion stereotype of the abortion-seeker as a selfish, self-indulgent, promiscuous woman, irresponsibly and thoughtlessly having an abortion." *Id.* at 405. Hanigsberg appears to concede that women meeting this latter description are not valuing intrauterine life via their abortion decision. See *id.* at 405-06. One would think that this concession would naturally lead to some discussion of which classification of

programs that attempt to assist pregnant women by combating poverty, treating drug-addiction and providing health care and education services.<sup>20</sup> Finally, Hanigsberg would "encourage and facilitate early term abortions," for example, by lobbying "for the legalization and wide-spread use of such abortifacients as RU-486, a pill that can induce abortion early in pregnancy."<sup>21</sup>

It is immediately obvious that Hanigsberg could seriously assert these views only if she had already decided that intrauterine life should not be accorded a baby's right to life. In fact, Hanigsberg's arguments are monstrous without this presupposition. One would surely condemn, not applaud as a mothering decision, a woman's choice to kill a one-week-old baby because of a poor quality of life. Killing intrauterine life should be viewed no differently unless there is a morally significant reason for denying it a baby's right to life. Similarly, unless it is shown that intrauterine life should not have a baby's right to life, it would be reprehensible to allow abortions to continue unrestricted while one worked to make more effective the various social programs mentioned by Hanigsberg. Finally, unless it is established that intrauterine life should be denied a baby's right to life, it would be abhorrent to encourage terminating that life earlier rather than later.

Hanigsberg in fact has decided that intrauterine life does not merit a baby's right to life. She makes this clear throughout her essay,<sup>22</sup> but nowhere more strikingly than when she writes, "As we understand that women may give up a child for adoption for the child's own good, similarly the decision to abort and care for intrauterine life are not inconsistent."<sup>23</sup> This sentence is stunning. How can someone comfortably assert an analogy between giving up a child for adoption

---

abortion-seeker, "good mother" or "selfish," is the larger. A finding that the "good mothers" predominate would seem to be essential to the validity of Hanigsberg's "mothering" analogy. Hanigsberg, however, simply asserts that it is sufficient "that for many women the abortion decision falls within the spectrum of mothering decisions. . . ." *Id.* at 406.

20. *Id.* at 410-13.

21. *Id.* at 414.

22. *See, e.g., id.* at 380, 398, 410.

23. *Id.* at 416.

and aborting him/her? To one who, like I, would attribute "the greatest value to intrauterine life . . . , imbuing [it] with legal rights that oppose the rights of a pregnant woman,"<sup>24</sup> the analogy is obscene. Since, however, Hanigsberg does not accord to intrauterine life a baby's right to life, she no doubt wrote her sentence with a perfectly clear conscience. The burning question -- which has always been the crux of the abortion controversy -- is who is correct: Hanigsberg and those who deny the full personhood of intrauterine life or those, like I, who insist that it should be viewed no differently than as a baby. Hanigsberg recognizes the necessity of confronting this fundamental question of personhood. Her answer, however, should be alarming to anyone interested in a stable foundation for the basic right to life of all human beings.

Hanigsberg believes that each woman should be free to value intrauterine life in whatever way she, in her particular cultural and ethnic context, in fact chooses to value it.<sup>25</sup> To Hanigsberg, safeguarding these "subjective understandings"<sup>26</sup> of intrauterine life is essential. Legally mandated rights for intrauterine life would abstract its meaning from individual women's experiences.<sup>27</sup> Hanigsberg thus denies the possibility that intrauterine life has any intrinsic value entitling it to legal protection -- value premised in its own existence from conception as individual (in the sense of genetically distinct)

---

24. Hanigsberg's quote actually does not accurately describe my position. Contrary to *Roe*, I do not believe that a woman has a constitutional right to an abortion. The rights of intrauterine life, therefore, do not oppose a woman's rights. Rather, both the pregnant woman and the life she carries within her have a right to life, based on their common humanity. See *infra* notes 59-65 and accompanying text.

25. Hanigsberg, *supra* note 1, at 404.

26. *Id.* at 410.

27. Hanigsberg is so committed to subjectivity that she fears

that a feminist acknowledgment of intrauterine life might result in protecting a particular "woman's" understanding of that value. Any legal recognition of such an understanding would result in enforcement of a particular unitary perception of the value of intrauterine life, belying the cultural, religious, and other differences that lead diverse groups of women to value intrauterine life differently.

human life, quite apart from what others may think.<sup>28</sup> Three examples reveal Hanigsberg's radical subjectivity and its nightmarish implications.

First, Hanigsberg acknowledges how technological advances providing "unprecedented access to intrauterine life" have led to a greater recognition of value in early intrauterine life.<sup>29</sup> She later notes that some women's valuation of intrauterine life is affected by their "relative autonomy from technological imagery," due to their recent immigration from places where such technology is not commonly available.<sup>30</sup> Hanigsberg mentions these women to illustrate her view that cultural differences in fact do and properly should determine the value to be accorded intrauterine life in any given case.<sup>31</sup> Totally missing is recognition that intrauterine life actually has the qualities that would be revealed by the technology whether or not a woman has access to it. But rather than encourage that the facts of intrauterine life be communicated more fully to women contemplating abortion, Hanigsberg apparently is perfectly willing to include ignorance of those facts as a form of cultural difference properly a part of women's "subjective understandings." I hasten to add, however, that my point here is not simply that women should be given more facts so that their

---

28. Hanigsberg does note (without comment) Ronald Dworkin's statement that most people "who have strong views about abortion . . . believe, at least intuitively, that the life of a human organism has intrinsic value in any form it takes, even in the extremely undeveloped form of a very early, just-implanted embryo." *Id.* at 406 n.150 (quoting RONALD DWORKIN, *LIFE'S DOMINION* 69 (1993)). To Dworkin, however, intrauterine life's "intrinsic value" does not entitle it to legal protection. *See* DWORKIN, *supra* at 10-15. While Dworkin's restricted view of "intrinsic value" provides support for the pro-choice position, I suspect that Hanigsberg would object to Dworkin's use of the term "intrinsic." For Hanigsberg, the notion that intrauterine life could be at all *intrinsically* valuable would be inconsistent with her supreme commitment to subjectivity.

29. Hanigsberg, *supra* note 1, at 399 n.121.

30. *Id.* at 404 n.140.

31. One wonders what Hanigsberg's opinion of sex-selection abortions would be. In countries such as India, cultural factors make daughters "an economic hardship." Jo McGowan, *In India They Abort Females*, *NEWSWEEK*, Jan. 30, 1989, at 12. Consequently, "sex-selection clinics have become a big business." *Id.* One study showed that "out of 8,000 cases of abortion in Bombay, 7,999 involved a female fetus." *Id.* Given Hanigsberg's view that cultural differences must be honored in accommodating women's abortion decisions, she would seem to be precluded from objecting to what feminists in India have decried as "female feticide." *See id.*



subjective valuations can be as informed as possible. Rather, my point is that technology merely confirms what has always been true, that a new human life exists from conception. As such, it deserves the protection of the law.

The reader at this point may accurately say that I am arguing by pure assertion: once individual human life is identified, it should be entitled to legal protection. Surely, one might say, the issue is more nuanced than this. Degree of development, for example, is often stressed as a way to differentiate very young intrauterine life from such life closer to birth. The second and third examples of Hanigsberg's radical commitment to subjectivity, however, show that development to her is an irrelevant factor as far as any legal status for intrauterine life is concerned.

Second, Hanigsberg acknowledges that for many women a "sense of the 'child-ness' of the intrauterine life may often originate with quickening -- when a woman first feels movement."<sup>32</sup> Under Hanigsberg's view of the subjective valuation of human life, however, the fact that a particular woman viewed intrauterine life as a "child" would not preclude her from obtaining an abortion despite that opinion, if, for example, she believed it necessary to sacrifice the "child" for some reason sufficient to her.<sup>33</sup> Nor would the woman's current "sense of . . . 'child-ness'" prevent her from according a totally different meaning to the life within her at some later point. And certainly one woman's view of intrauterine life could never bind other women who might experience quickening in totally different ways.<sup>34</sup> Completely ignored is the fact that quickening occurs due to the increased body size of the life within the mother.<sup>35</sup> The event dramatically reveals the growing physical reality of intrauterine life. It is therefore curious that Hanigsberg, who laments the law's inability "to 'see' corporeal materiality -- unable to account for how bodies,

---

32. Hanigsberg, *supra* note 1, at 408.

33. I base my conclusion on the fact that Hanigsberg says nothing whatever about quickening's serving as a point in intrauterine development after which the abortion decision can properly be restricted.

34. See *supra* note 27.

35. See DR. & MRS. J. C. WILLKE, ABORTION: QUESTIONS AND ANSWERS 46 (1990).

particularly female bodies, matter,"<sup>36</sup> should defend legal disregard for the "corporeal materiality" of intrauterine life.

The third illustration of how subjectivity reigns for Hanigsberg -- her view of late abortion -- is conclusive proof, in her viewpoint, that no degree of development entitles intrauterine life to legal protection.<sup>37</sup> As previously noted, Hanigsberg's feminist model for according value to intrauterine life includes encouraging early term abortion. What is striking, however, is Hanigsberg's rationale. It is not that, finally, late in pregnancy, Hanigsberg is willing to concede that intrauterine life should have some independent standing before the law.<sup>38</sup> No, it is because of "the increased moral significance that *seems* to attach to later term abortion."<sup>39</sup> For Hanigsberg, gestational age is just another factor which "might . . . influence women considering abortion."<sup>40</sup> If a

---

36. Hanigsberg, *supra* note 1, at 417.

37. Hanigsberg follows in the footsteps of the *Roe* Court, which did not recognize any independent right to life even for viable, third-trimester intrauterine life. Rather, at this point in the pregnancy, a state, *if it chooses to do so*, can restrict abortion to vindicate the state's interest in potential life. *Roe*, 410 U.S. at 164-65. Even then, however, a state cannot prohibit those abortions necessary to preserve the life or health of the mother. *Id.* at 165. *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), defines health so broadly ("all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient"; *id.* at 192) as to render illusory the possibility of meaningful state protection of viable intrauterine life.

38. One wonders what Hanigsberg would think of the result in a recent Oklahoma decision involving a woman whose car was struck by a drunk driver when she "was nine months pregnant and expected to deliver in four days." *Hughes v. State*, 868 P.2d 730, 731 (Okla. Crim. App. 1994). The "child died as a result of the placental abruption which occurred when [the woman's] stomach hit and broke the steering wheel of her car." *Id.* at 732. The Court, holding that an unborn viable fetus "is a 'human being' which may be the subject of a homicide," affirmed the conviction of the drunk driver for first degree manslaughter. *Id.* at 731.

It might seem obvious that Hanigsberg would object to the decision because it represents a state's according baby-like value to intrauterine life, rather than leaving all such matters to the pregnant woman herself. If, however, Hanigsberg were satisfied that the particular woman involved did in fact view intrauterine life in the same way, she might approve the result as a state confirmation of a value choice made by the woman. The problem, of course, is that the next such accident might involve a pregnant woman who did not accord baby-like value to intrauterine life at the same stage of pregnancy. Here, Hanigsberg presumably would protest a homicide conviction for the drunk driver as the state's impermissibly overriding a value choice properly belonging only to the woman.

39. Hanigsberg, *supra* note 1, at 414 (emphasis added).

40. *Id.*

woman is not deterred by advanced gestational age, I see nothing in her essay to suggest that Hanigsberg would countenance any legal interference with that woman's choice to abort.<sup>41</sup> Given this extreme view,<sup>42</sup> it is bizarre that Hanigsberg contends that the main barrier to compromise on the abortion issue is "the current political and ideological bent of the 'pro-life' movement in the United States as it is presently constituted and largely controlled by the extreme political and Christian right."<sup>43</sup>

As discussed earlier, Hanigsberg's explanation for denying legal rights to intrauterine life should be alarming. By now the reason is apparent. Hanigsberg accords absolute sovereignty to each woman to determine what value intrauterine life should have. Thus, although trying to value intrauterine life, she ends up where pro-choice advocates have always been, refusing to acknowledge that questions of legal personhood are more than merely private. Amazingly, Hanigsberg offers no explanation as to why the personhood decision for the intrauterine stage of human life should be a private matter -- why intrauterine life is somehow fundamentally different from life after birth. It is not merely that she makes a bad argument -- she makes no argument at all. All one sees are some phrases reflecting either Hanigsberg's or some other woman's opinion of the nature of

---

41. Hanigsberg not only denies to late term intrauterine life any intrinsic rights, she also refuses to recognize a state interest in protecting intrauterine life at this advanced gestational age. Her theory of abortion freedom thus is more radical than the *Roe* Court's, even though both approaches ultimately are equally permissive of abortion choice. See *supra* note 37.

42. In the section of her essay on the significance of women's bodily integrity, Hanigsberg praises a Canadian Supreme Court decision which explicitly endorses that value in striking down Canadian abortion restrictions. *Id.* at 383 (citing *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can)). Hanigsberg does not inform her readers that the Canadian statute in dispute drew no distinctions based upon gestational age. Nor does she note that three of the five judges in the majority indicated that they might be willing to validate a statutory scheme according more protection to fetuses of more advanced gestational age. See 1 S.C.R. at 127, 183. One of these three stated that he believed that "somewhere in the second trimester" the state could prescribe conditions relating to a woman's reasons for having an abortion. *Id.* at 183.

43. Hanigsberg, *supra* note 1, at 373. Hanigsberg's contention is also strange because she twice states that she herself has no particular interest in seeking compromise on the abortion issue. *Id.* at 373, 418.

intrauterine life: "the possibility of a child,"<sup>44</sup> "potential human life,"<sup>45</sup> "potential only,"<sup>46</sup> "not conceptualized . . . as a baby,"<sup>47</sup> and "*possible child*."<sup>48</sup> These descriptions establish only that some women, including Hanigsberg, in fact view intrauterine life differently than as a baby. They say absolutely nothing about *why* any woman's subjective view should be determinative as to the personhood of intrauterine life.

The notion that one person with power has the right to determine the personhood of another human life is fraught with danger. Hints of the grounds for my concern appear in Hanigsberg's essay. After noting that "the death of a very elderly person" could be considered "less tragic than the death of a younger adult," Hanigsberg states that this example illustrates that "the mere existence of 'life' may not be decisive as to our perception of its worth or value."<sup>49</sup> What exactly does she mean by this? Is there any implication that the very old, rather than being imbued with rights, might in Hanigsberg's view more properly be subject to others' subjective valuations? And what does Hanigsberg intend to convey by informing her readers of "the historical prevalence of infanticide and thus the changing perception of the status of even an infant's life"?<sup>50</sup> Does she intend this as an illustration of how the value accorded to infants properly should be contingent? I hope not. But, if not, since Hanigsberg does not tell us, one wonders how she would distinguish infants from the late term intrauterine life that she would allow women freely to destroy through abortion. Is there any moral significance in birth that should cut off a woman's power to attribute or not attribute value to another human life in whatever way she chooses?<sup>51</sup>

---

44. *Id.* at 398.

45. *Id.* at 400

46. *Id.* at 404.

47. *Id.*

48. *Id.* at 408.

49. *Id.* at 409; *see also id.* at 409 n.160 (Hanigsberg gives other examples to satisfy her goal of not "underestim[at]ing the degree of historical and cultural specificity of the continuum of meaning' that [she has] been exploring.").

50. *Id.* at 399 n.121.

51. I realize that upon its birth each intrauterine life becomes a citizen of the United States and thus entitled to legal protection. *See* U.S. CONST. amend. XIV, § 1. The proper

It is essential that Hanigsberg's subjective standard for according value to human life be repudiated.<sup>52</sup> No one is safe under her approach, including women whom Hanigsberg champions. She apparently recognizes this, for a significant part of her essay is a protest against socially constructed (and therefore subjective) attitudes toward women that deny their dignity as individuals. Hanigsberg believes that "attitudes toward mothers are crucial to the way that North American law and culture defines women."<sup>53</sup> One consequence is "the phenomenon [Hanigsberg] call[s] *homologizing* . . . the way that pregnancy and motherhood are treated as though they are corresponding states of being."<sup>54</sup> An "invidious" manifestation of this process is the fact that "women who are merely pregnant are subject to regulatory frameworks inspired by viewing pregnant women as already being mothers."<sup>55</sup> Hanigsberg's distress is quite ironic. Hasn't she forfeited any standing to complain about an individual's or society's subjective view of women, pregnant or otherwise, as mothers?<sup>56</sup> If women's subjective judgments are to govern the value of intrauterine life, why can't others' subjective judgments govern the value of women?

A similar irony appears in the section of Hanigsberg's essay that stresses the importance of women's bodily integrity. After stating her

---

inquiry here, however, is whether there is any morally defensible reason not to extend legal protection to the stages of human life prior to birth.

52. Equally objectionable are those approaches which, contrary to Hanigsberg's view, do stress the various stages of intrauterine development in evaluating when intrauterine life becomes entitled to legal protection. First, developmental tests usually are phrased in ways that, consistently applied, would also exclude infants from personhood. See Calhoun & Sexton, *supra* note 16, at 460 n.105 (discussing criterion such as "self-conscious, rational, moral agency"). Second, at some point a developmental approach, particularly early in pregnancy, ends up depending upon intuition about who is or is not a person. Slavery and numerous other examples show that human intuition is an unreliable moral standard. See *id.* at 459-63. The surest way to avoid the dangers of an intuition-based standard "is to confer personhood status -- and with it legal protection -- at the point when science tells us that individual human life begins: conception." *Id.* at 463.

53. Hanigsberg, *supra* note 1, at 373.

54. *Id.* at 374.

55. *Id.*

56. It is interesting to recall here that Hanigsberg herself "homologizes" pregnancy and motherhood by her argument that the abortion choice should be viewed as a mothering decision. See *supra* note 19 and accompanying text.

view that the law "constitutes and confirms who is valued, who matters -- who is a person,"<sup>57</sup> Hanigsberg acknowledges that "when women were not legal 'persons' and their rights could not be recognized and adjudicated in a court of law, their fundamental ability to act as autonomous individuals was compromised."<sup>58</sup> Hanigsberg, of course, applauds the bestowal of legal personhood upon women. Yet she is quite willing, without explaining why it should be treated differently than any other human life, to relegate intrauterine life to the status of legal nonpersons.

The greatest irony of all, however, lies in Hanigsberg's apparent dependence upon the law as the source of women's value.<sup>59</sup> As history plainly shows, the law has often bestowed its blessing upon shocking de-valuations of human life. Hanigsberg thus makes a grave mistake if she entrusts the issue of women's ultimate value, whether they "matter," to the law.<sup>60</sup> What is needed is a source of value outside of, and indeed, above, the law.<sup>61</sup> This was recognized by those who founded our country, who in the Declaration of Independence spoke of "truths" which are "self-evident."<sup>62</sup> Among these are the existence of "inalienable rights," the first being the right to life, flowing from endowment by the Creator.<sup>63</sup> The reason ultimately that women

57. Hanigsberg, *supra* note 1, at 384.

58. *Id.*

59. Hanigsberg suggests this by her statement that the law "constitutes . . . who is valued, who matters -- who is a person." *Id.* at 384 (emphasis added).

60. I do not disagree with Hanigsberg's view that the value accorded to one by the law affects one's self-perception and how one is valued by others. *See id.* at 384, 398 n.121. This latter point has no better illustration than the *Roe*-assisted trivialization of the value of intrauterine life by many in our society. As stated by Justice Scalia in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), "*Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. (If the Constitution *guarantees* abortion, how can it be bad? . . .)." *Id.* at 2882. Conceding the influence of one's legal status upon one's own and others' perceptions, however, is quite different from saying that one's value is dependent upon the law.

61. *See* John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984) (with an emphasis upon the historical example of slavery, Noonan discusses the dangers of a jurisprudence positing that one's personhood depends upon recognition by the law, rather than upon one's intrinsic humanity).

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

63. *Id.*

have value is that they, due to their humanity, possess this right to life independently of what others may think or governments may enact.

Because intrauterine life constitutes individual human life, it too rightly should be considered as part of the "whole human family"<sup>64</sup> unless some morally significant grounds for excluding it can be shown. Hanigsberg makes no such showing; in fact, she does not even try. Consequently, intrauterine life possesses the right to life recognized in the Declaration.<sup>65</sup> Hanigsberg argues that women may nullify this right by their private, subjective valuation decisions. By doing so, despite her intentions to the contrary, she ends up paying only lip service to the value of intrauterine life.

---

64. The quoted phrase comes from Abraham Lincoln's speech at Springfield, Illinois, on June 26, 1857. In his address, Lincoln contests the view of Chief Justice Taney that, while the language of the Declaration was "broad enough to include the whole human family," it was not intended to include Negroes. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 405 (Roy P. Basler ed., 1953).

65. Laws prohibiting abortion are thus entirely appropriate because, according to the Declaration, it is the government's role "to secure" the "inalienable rights" which the Creator has bestowed. THE DECLARATION OF INDEPENDENCE, *supra* note 62. The pro-life movement reflects people's frustration that the government, because of the erroneous decision in *Roe*, is no longer free to do its job of protecting intrauterine life's intrinsic right to life. Hanigsberg, though, by pure assertion, attributes to the movement a smorgasbord of unsavory motivations: patriarchy, sexism, class oppression, and racism. See Hanigsberg, *supra* note 1, at 378-79, 379 n.36. I do not know if Hanigsberg has any interest in dialogue about abortion with people other than those with whom she already agrees. If so, disparaging the motives of pro-lifers is not a good way to start.

