

## PHL271 Handout 10: Abortion and the Law

### §1 Questions about Abortion

A running theme in this course has been the relationship between law and morality. Today our topic is abortion. The various debates over abortion bring into focus the importance of a right account of the relationship between law and morality.

We've seen that serious problems arise when we uncritically move from questions about morality to questions about legality (and vice versa). Hence our first order of business is to distinguish some of the various legal and moral questions to which abortion gives rise.

*General Question:* how should our answers to these legal and moral questions inform one another?

#### Moral Questions:

1. *Deliberative Question:* Are women morally permitted to obtain abortions?
2. *Interference Question:* Are others (e.g. agents of the law) morally permitted to prevent women from obtaining abortions?
3. *Accessory Question:* Are others (e.g. doctors) morally permitted to aide women in obtaining abortions?

Why might 1 and 2 come apart? A potentially analogous case is that of hate speech. Most would insist that it is morally impermissible for individuals to engage in hate speech (taken broadly). Yet we also condemn those who seek to suppress freedom of speech and thought, even when the proscribed speech or thought is hateful or obscene.

We'll see Judith Jarvis Thomson wrestle with the *Accessory Question*. And next time we will see that versions of these same three questions arise for the case of suicide.

#### Legal Questions:

1. *Standing Question:* Is the state permitted to pass laws governing when women can obtain abortions?
  - *Question:* What would Mill say about abortion, given Mill's Principle? What about Devlin, if he were writing today?
2. *Scope Question:* Should the state pass laws governing when women can obtain abortions?
  - *Worry:* this question might seem to be answered by a 'yes' answer to the Standing Question. However what if the sense in which the state *is permitted* to pass the relevant laws is not the same as the sense in which the state *should not* pass the laws? For instance, Devlin argued that while it is within the purview of the state to regulate 'immoral' behaviour, a law that proscribes abortion will *in practice* undermine the ideals of the law, since it will punish only those who help women obtain abortions.

*Short Version:* even if the law has standing, imposing a sanction might bring the administration of the law into disrepute. Indeed, this was part of the reasoning behind the Morgenthaler decision.

3. *Restriction Question:* Should the state pass laws restricting when women can obtain abortions?
  - This question is distinct from the Scope Question, since we could answer ‘no’ to the former question and ‘yes’ to the latter. For example, the *Roe v. Wade* decision included the recognition by the Supreme Court of the United States of a legal right to abortion; one could accept the provision of this right while denying the state the permission to restrict abortion.
4. *Legal Accessory Questions:* Should the law permit others to aid women in obtaining abortions? Should it block those who seek to prevent women from obtaining abortions?

As we move through the material on abortion, keep careful track of which arguments bear on which of the various moral and legal questions. Often an argument that looks to support a particular answer to a moral question will not straightforwardly support the same answer to a corresponding legal question (e.g. see ‘Reply 2’ in §4.2).

## §2 The Legal Status of Abortion: *R. v. Morgentaler* and *Roe v. Wade*

The major precedent-setting cases involving abortion are *R. v. Morgentaler* (1988) in Canada, and *Roe v. Wade* (1973) in the United States. The Canadian decision was narrower than *Roe v. Wade*: it merely struck down the existing restrictions on abortion due to their violation of Section 7 of the Charter, whereas *Roe v. Wade* established a constitutionally-protected right to abortion. Thus Canadian law remains silent on abortion, whereas American law protects it.

The *Roe v. Wade* decision, which was later bolstered in *Planned Parenthood v. Casey* (1992), claimed that the 14<sup>th</sup> Amendment to the U.S. Constitution includes an unenumerated (i.e. non-explicit) right to privacy. It was on the basis of this right to privacy that the court recognised a right to abortion (at least in the first trimester).

*Question:* Dworkin would recognise unenumerated rights; what about Hart? A confusing complication: the 9<sup>th</sup> Amendment *explicitly* requires the recognition of unenumerated rights (‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’)

*Note:* English Common Law (which remains binding in Canada) includes a “Born Alive” Rule: actions that result in death constitute an act of murder only if the dead human being was already born. Hence abortion cannot qualify as murder under English or Canadian law.

## §3 The Moral Argument Against Abortion

While a variety of arguments have been offered against permitting women to abort a pregnancy, most of these arguments exhibit the same general form.

The general argument finds pithy expression in Judith Jarvis Thomson's seminal paper 'A Defense of Abortion' (1971), hereafter 'JJT'. Here's the argument (cf. p. 48 of JJT)

1. Every person has a right to life
2. A foetus is a person
3. So a foetus has a right to life [From 1 and 2]
4. This right to life outweighs the mother's competing rights (e.g. the right to decide what happens to her body)
5. So the foetus may not be killed [From 3 and 4]

We're going to consider two replies: the first rejects 2 on the grounds that while foetuses are human, they do not qualify as 'persons' in the sense that supports 1; the second reply accepts 1–3, but rejects 4.

#### §4 First Response: Foetuses Are Not Persons

Mary Anne Warren, in her seminal paper 'On the Moral Status of Abortion' (1973), provides a strident defence of the claim that foetuses, while *human*, do not qualify as *persons*.

Since Warren and her opponents both assume that only persons possess a significant right to life, her claim entails that we cannot restrict abortion on the grounds that it violates a foetus's right to life.

Any defence of the claim that foetuses are not persons must provide some kind of criterion for distinguishing persons and non-persons. Here is Warren's method for deciding upon a suitable criterion of personhood:

'Imagine a space traveler who lands on an unknown planet and encounters a race of beings utterly unlike any he has ever seen or heard of. If he wants to be sure of behaving morally toward these beings, he has to somehow decide whether they are people, and hence have full moral rights, or whether they are the sort of thing which he need not feel guilty about treating as, for example, a source of food.'

Warren suggests that the *absence* of all the following traits *excludes* an organism from membership in the moral community (and thus prevents such organisms from being 'persons' in the moral sense):

1. Consciousness (esp. the capacity to feel pain)
2. Reasoning (i.e. the capacity to solve new and complex problems)
3. Self-motivated Activity
4. The Capacity to Communicate
5. A Self-Conception and Capacity for Self-Awareness

While she allows that an organism might be a person without possessing *all* (or even most) of these traits, she intimates that no single trait is such that its possession *suffices* for

personhood.

#### §4.1 Slippery Slope Argument

An influential argument against a Warren-type strategy is what Judith Jarvis Thomson calls the ‘Slippery Slope’ argument (cf. p. 47 of JJT).

1. Suppose an entity engages in continuous change over an extended temporal interval.
2. And suppose we attempt to select a time  $t$  from this interval such that the entity (a) isn’t F prior to  $t$  but (b) is F after  $t$ , where ‘F’ is a predicate whose application to the entity depends upon those aspects of the entity undergoing continuous change.
3. Given that the change is continuous, any (competent) choice of such a time  $t$  will be *arbitrary*—it will be a choice for which ‘no good reason can be given’ (JJT, p. 47).

We can apply 3 to the case of foetal development to get 4:

4. Assuming that human development from conception to birth is continuous, and assuming that ‘person’ is a predicate whose application turns on facts about human development, to select a point during that development and declare that a foetus counts as a *person* after that point is to make an arbitrary choice. [From 3]

What follows from 4? JJT rightly accuses some opponents of illegitimately moving from 4 to 5 (she herself accepts 4 but rejects 5):

5. We must treat a foetus as a person from the moment of conception.

As JJT points out, there are cases for which we get a version of 4 from 3, yet for which a suitable analogue of 5 is absurd.

*JJT’s Example:* an acorn grows into an oak tree, yet it would be absurd to say that acorns are already oak trees.

Yet given the plausibility of 4, we don’t need 5 to launch a challenge to Warren’s strategy of denying that foetuses are persons. For we could replace 5 with 6:

6. In cases where recognition of a foetus as a person would be arbitrary, we ought to act *as if* the foetus is a person.

4 and 6 together license fairly severe restrictions on abortion (just how severe will depend upon when the denial of personhood is non-arbitrary).

Why accept 6? One reason: if what’s at stake with the recognition of personhood is the recognition of a *strong* right to life—a quite important moral right—we ought to err on the side of caution in order to respect the importance of the right (or, put another way, in order to avoid the substantial harm that would result from acting contrary to such a right).

#### §4.2 Replies and Complications

Reply 1: Personhood comes in degrees, and so does the corresponding right to life (cf. Warren 1973)

This reply would undermine the argument for 6, and would thus serve to weaken worries about the arbitrariness at 4. A weak right to life might be overridden by a woman's right to make decisions concerning her health and well-being.

*Potential Response:* a right to life just isn't the sort of thing that can come in degrees, even if personhood is gradable. If personhood—even minimal personhood—generates a right to life, this right does not admit of degree.

*Observation:* minimal personhood is likely not a high bar. Many animals, and perhaps even some plants, would satisfy (in some minimal way) certain personhood criteria. Perhaps abortion is morally impermissible only if killing animals (and certain plants) is morally impermissible.

Reply 2: The Law Should Be Silent Rather Than Arbitrary

Lord Devlin's attack on Mill's Principle exhibited considerable nuance, in part because he clearly distinguished questions about when the law has standing from questions about when the law *should* regulate behaviour. Abortion might be a case in which the law has standing—due to the potential for the immoral infringement of a foetus's right to life—yet in which the law shouldn't impose restrictions on behaviour.

In particular, we might demand that the law avoid *arbitrariness*. 6 seems to exhibit an arbitrary prejudice in favour of the a foetus's right to life over a woman's competing rights, and the situation wouldn't improve if the law were to instead treat mature foetuses as non-persons.

Instead of drawing an arbitrary line in the sand, as it were, perhaps the law should simply *remain silent* about the personhood (or lack thereof) of foetuses.

Of course, the silence of the law wouldn't settle the various moral questions about abortion. Yet one lesson we've learned from Hart, Dworkin, Mill, Berlin, and Devlin is that the law isn't necessarily the right instrument for responding to immoral behaviour.

Complication: Even if the slippery slope argument against the Warren strategy fails, an even more disturbing worry lies just around the corner. The worry runs as follows: in order for abortion to be morally permissible past the first trimester of pregnancy, the criteria that a fetus must satisfy to count as a person will need to be quite demanding; yet the more demanding the criteria, the larger the class of organisms we exclude from the moral community; however some of these excluded organisms intuitively count as worthy of moral concern.

Warren's account of personhood seems to face a particularly acute version of this worry, since many infants will count as non-persons according to her criteria. So her view seems to permit infanticide.

In a postscript to her paper, Warren accepts this consequence of her view, but insists that the consequence isn't as unacceptable as it might appear.

Call the general worry—which applies to any attempt to delineate the moral community—the 'Problem of Moral Chauvinism'.

*Question:* does this problem generate an argument against the killing of animals? It's no accident that many philosophers are vegetarians or vegans. For a seminal defence of the moral status of animals, see Peter Singer's 1975 book *Animal Liberation*.

## §5 Second Response: Abortion Is Not Unjust Killing

Judith Jarvis Thomson's defence of abortion grants—though only for the sake of argument—the first part of the standard anti-abortion argument:

1. Every person has a right to life
2. A foetus is a person
3. So a foetus has a right to life [From 1 and 2]

Thomson's major insight (cf. p. 57) is her addition of 4 to 1–3:

4. A right to life is a right not to be killed unjustly

To complete her argument against the prohibition of abortion, she argues for 5:

5. Abortion does not always constitute the unjust killing of a foetus

But given 5, we get 6:

6. So abortion does not always violate a foetus's right to life [From 3, 4, and 5]

Notice that 6 is not a blanket justification for abortion. Thomson admits that her argument leaves open the possibility that in many cases abortion is morally impermissible, since in those cases abortion constitutes the unjust killing of a foetus.

Yet it's important to remember the purpose of Thomson's argument. She is trying to show that even if one were to grant anti-abortion advocates their most cherished premiss—the personhood of the foetus—it remains possible to resist attempts to declare all abortion immoral.

### §5.1 Thomson's *Violinist Case*

Thomson argues for her premiss 5 by appeal to a (now famous) thought experiment:

'You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "look, we're sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation?' (JJT, p. 49)

Operating in the background of Thomson's case is her view that it's permissible to kill in self-defence, even when the threat to your health (or life) is innocent. She emphasizes a distinction between someone needing something of you—as the violinist does—and that person having a *right against you* such that you must provide what he needs. Those kinds of rights must be given (cf. p. 55).

*Note:* Thomson doesn't endorse the claim that self-defence justifies any means to its fulfilment. For instance, she thinks you can't torture someone else in order to save yourself.

### §5.2 *Morals of Thomson's Argument*

*Important Consequence:* to restrict abortion in a given case, one must show that it involves the unjust killing of a foetus.

*Minimally Decent Samaritan vs. Good Samaritan* (JJT, pp. 62-63): The Good Samaritan does more than is morally required; the Minimally Decent Samaritan does strictly that which is decent. JJT uses this distinction to strike a blow against legal restrictions on abortion:

'[I]n no state in this country is any man compelled by law to be even a Minimally Decent Samaritan to any person... By contrast, in most states in this country women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them.' (JJT, p. 63)

She points out that those who oppose abortion should, if they're to avoid accusations of bad faith, seek to impose Good Samaritan laws in cases other than abortion.

*Observation:* Dworkin's Interpretive Model of adjudication would recognise the force of this demand for moral consistency. What would Hart say?

Thomson also uses the distinction to explain why abortion would be 'indecent' in cases where the inconvenience posed by the foetus to the pregnant woman is minimal. However in these cases the foetus still doesn't have a right to the woman's body.

### §6 **On The Scope of Moral Responsibility**

Thomson's violinist case seems to support the permissibility of abortion in cases of rape. But it does so partly on the grounds that in cases of rape a woman isn't responsible for the presence of the foetus. But now we get a hard question: can bringing about the existence of

the foetus through consensual intercourse generate a right against the woman (on the part of the foetus) for the use of her body? Here is what Thomson says:

‘Again, suppose it were like this: people seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You don’t want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very, very rare occasions does happen, one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house? Surely not... Someone may argue that you are responsible for its rooting, that it does have a right to your house, because after all you could have lived out your life with bare floors and furniture, or with sealed windows and doors. But this won’t do—for by the same token anyone can avoid a pregnancy due to rape by having a hysterectomy...’ (p. 59)

Thomson is aware that the intuitions generated by this case are highly sensitive to contingent features of the case. In particular, we get a quite general question about a woman’s moral responsibility in cases where there exists a non-zero chance that her actions will bring about the existence of a foetus.

There are two questions here: (1) How likely is it (given the circumstances) that pregnancy will result from a given action? (2) Which precautions are such that a woman who takes them will be exempt from moral responsibility for a foetus that comes into existence as a result of her actions? The answers to these questions are connected: what counts as a reasonable and responsible precaution will vary according to the likelihood of the relevant outcome.

## §7 Third Parties and the Law

We have yet to address the moral and legal questions about the intervention of third parties in cases of abortion. Here is what Thomson says about the issue:

‘For what we have to keep in mind is that the mother and the unborn child are not like two tenants in a small house which has, by an unfortunate mistake, been rented to both: the mother *owns* the house. The fact that she does adds to the offensiveness of deducing that the mother can do nothing from the supposition that third parties can do nothing. But it does more than this: it casts a bright light on the supposition that third parties can do nothing. Certainly it lets us see that a third party who says “I cannot choose between you” is fooling himself if he thinks this is impartiality. If Jones has found and fastened on a certain coat, which he needs to keep him from freezing, but which Smith also needs to keep him from freezing, then it is not impartiality that says “I cannot choose between you” when Smith owns the coat. Women have said again and again “This body is *my* body!” and they have reason to feel angry, reason to feel that it has been like shouting into the wind.’ (JTT, p. 53)

Thomson does not let the issue rest there. She goes on to ask what drives our instinctive response that ‘no one may choose’ between the foetus and the mother. She suggests that we confuse ‘no one may choose’ and ‘I cannot choose’: while we each arguably have a right to refuse to lay hands on others (even when it would be just to do so), we must leave it open that *others* could act (cf. JTT, p. 54).

*Question:* are you convinced by Thomson’s argument here? Would the argument extend to cases of self-defence involving innocent threats?