

## **The Political Morality of Abortion**

### **1. Stating the Issue**

The issue of abortion—or, more precisely, rights of reproductive choice—is arguably the most contested problem in American political life over the past 30 years. In general terms, the terms of debate are clear: defenders of relatively unrestricted rights of reproductive choice think that stringent restrictions on reproductive choice—from long waiting periods, spousal consent requirements, and intrusive review procedures in hospitals, to simple abortion bans—impose an unacceptably heavy and insulting burden on women. Critics of those rights think that the current system licenses a particularly horrible form of murder, namely the taking of the most innocent human life.

To address the issue, we need to begin by distinguishing two questions about abortion: a question of personal morality and a question of political morality. The question of personal morality asks: is it morally permissible to have an abortion, or is abortion morally wrong? The question of political morality asks: is it permissible for a legal-political system to impose restrictive regulations on reproductive choices (or, to put the question from the other side, permissible for a legal system to allow abortions)? The proposition that these two questions are distinct is disputable, but true, I believe. While people who think that legal regulation is impermissible often also believe that abortion is morally permissible, a person might believe that abortion is morally impermissible, but at the same time oppose regulation because the person knows that other citizens disagree

conscientiously and profoundly on the moral question and thinks that political regulation is impermissible when citizens have such profoundly different views on the moral issue. Similarly, a person might think that abortion is morally permissible, but that restrictive regulation is nevertheless permissible. Someone who holds this view might say that, in a democracy, the views of the majority should rule, unless the rules favored by the majority are in clear conflict with constitutional rights. So if the majority thinks that abortion ought to be outlawed, then they may permissibly outlaw it—at least if the law is consistent with basic constitutional rights.<sup>1</sup>

Here, then, I will focus on the question of political morality: may a majority justifiably establish stringent restrictions on reproductive choice?

## **2. Roe and Casey**

The Supreme Court had addressed this question in two important decisions over the past 30 years: first in the case of *Roe v. Wade* (1973), then more recently in *Planned Parenthood v. Casey* (1992), which (in general terms) upheld the decision in *Roe* (thus creating what was described in the Roberts hearings as a “superprecedent”). The basic claims in *Roe v. Wade* can be summarized as follows:

1. Decisions about continuing a pregnancy are intimate and personal decisions of a kind that are covered by a privacy right implicit in the Fourteenth Amendment’s requirement that liberty not be deprived without due process of law;

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<sup>1</sup> See John Hart Ely, “The Wages of Crying Wolf”

2. Until viability—when the fetus can live independently of the mother’s body—the state has no basis for restricting abortion that is sufficiently weighty or “compelling” to justify the imposition of substantial burdens on these personal decisions;
3. The state has a compelling interest in protecting maternal health, but because first trimester abortions are safer than pregnancies, government cannot make any regulations at all in the first trimester in the name of protecting maternal health. After the start of the second trimester, reasonable regulations can be made to protect maternal health, but such protections—requiring for example that abortions take place in hospitals—must be clearly related to the goal of protecting maternal health, and thus will not require substantial burdens on access to abortions.
4. After viability the state can legitimately restrict access to abortion, in order to protect the fetus (the potentiality for life), and can even prohibit them, so long as exceptions are made to protect the mother’s life and health.
5. Viability coincides more or less with beginning of the third trimester (28 weeks), with the result that abortions cannot be regulated in the first two trimesters in the name of protecting human life or the potentiality for human life.

In essence, then, the decision in *Roe v. Wade* combined two main elements: first, a conception of the *burden* of restrictive regulations—the idea that they

infringe a privacy right, because they restrict a deeply personal choice with large bearing on the rest of a woman's life; and second, an account of the *rationale* for regulation, which states that, until viability, such burdens cannot permissibly be imposed because there is no sufficiently compelling rationale in their favor. The Court did not take the view that the restrictions of the privacy right are so burdensome that they simply could never be justified: the rights are not absolute. Instead the Court said that no acceptable case could be made for imposing the large burdens, at least during the first two trimesters.

*Casey* preserved these essentials of *Roe*: because of the severe burdens on women's liberty, choice is protected by a privacy right; and that no acceptable justification exists for imposing those burdens, at least in the early stages of pregnancy. In *Casey* the Court did reject the "trimester framework," in large part because the time of viability no longer corresponded to the beginning of the third trimester. Moreover, the Court was prepared to accept regulations before viability, so long as they did not impose an "undue burden" on the right.

### **3. Burdens and Rationales for Regulation**

Lets consider the two essential elements more closely, beginning with the nature of the burden.

In *Roe*, the characterization of the burden on women imposed by restrictive regulations focuses on burdens on a woman's *liberty*, broadly conceived: on restrictions on choices of a deeply personal kind, and the way that those restrictions impinge on health and future well-being: "The detriment that the

state would impose up the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.” The point here is not simply that the regulations may do damage, but also that they impinge on a woman’s exercise of personal responsibility about the course of her life. They represent a substantial denial of judgment about the conduct of elementary aspects of life. As Thomson says in her article: “It should not need repeating—over and over again—that women who decide on abortion typically do so for weighty reasons, and that their decisions have already been preceded by serious thought.”

But the burdens extend beyond those noted here. Apart from limits on liberty, restrictions also burden *equality*, in the straightforward sense that women find it more difficult to play a public role if they do not control their reproductive choices, and that control is substantially diminished by the absence of abortion as a fallback. This observation appears in *Casey*, as a point about the consequences of a 20-year adjustment to the *Roe* regime: “The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.” Thus Thomson says: “If women are denied rights over their own bodies, they are denied rights to

equal participation in the work of the world; if they are not permitted to make, for themselves, such deeply important decisions as whether to bear a child, they are not permitted to occupy the status of autonomous adult, morally equal to men.”

Furthermore, restrictive regulations impose what might be described as a *burden on judgment*. Thus different citizens have profoundly different views about the moral permissibility of abortion. Some think it is impermissible because they believe that it is murder, and deprives human beings of a basic right to life; or, even if not murder, that it shows in some lesser but still serious way a disrespect for the importance of human life.<sup>2</sup> In his encyclical, *Evangelium Vitae*, Pope John Paul II takes the first view: he says that abortion is the “deliberate killing of an innocent human being” and therefore violates “the right to life of an actual human person.”

But consider someone who disagrees: she thinks that the fetus is not a human person, certainly not in its early stages—which, it should be said, is when the vast proportion of abortions are performed (half within the first 8 weeks). As the majority notes in *Roe*, “there has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics,” and “appears to be the predominant . . . attitude of the Jewish faith,” and the view of large numbers of Protestants. Traditionally, the Catholic “mediate animation” view was that life begins with quickening, when God ensouls the fetus and gives it the capacity to move: until then, abortion is not murder because it does not take a life at all. And in *Casey*, the Court refers to the “right to define one’s own concept of

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<sup>2</sup> See Dworkin.

existence, of meaning, of the universe, and of the mystery of human life,”<sup>3</sup> and indicates that disagreements about abortion reflect differences of judgment about such matters. The root of the disagreements is not clear: Dworkin suggests that they are really about the relative importance of natural and human contributions to the value of a human life.<sup>4</sup> What matters here is that they are persistent, hard to adjudicate, and interwoven with other aspects of a moral and philosophical outlook on life.

The burden on judgment, then, is that a restrictive regulation not only imposes a serious constraint on conduct—with impact on liberty and equality—but it does for reasons that the person subject to the burden conscientiously rejects. I will return later to this point about conscientious rejection. Suffice to say here that the differences of judgment about the permissibility of abortion are not superficial disagreements, but reflect, among other things, differences of religious outlook. So restrictive regulations not only substantially burden personal liberty and the equality of men and women, they do so for reasons that some of those regulated conscientiously reject.

#### **4. Discharging the Burden**

This characterization of the three burdens imposed by restrictive regulations is not especially controversial: people may disagree on the details, but it seems hard to deny that a restrictive regime imposes substantial burdens—and still harder to deny Casey’s point: that once such a regime has been in place for

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<sup>3</sup> [reference]

<sup>4</sup> *Life’s Dominion*, p. 91.

some time and expectations built up around it, the burdens are especially severe. In any case, my characterization of the burdens may be accepted by someone who nevertheless thinks that the regulations are justified. The disagreement about justification is a disagreement about whether we have reasons of sufficient importance to justify imposing such substantial burdens.

And the strongest case that burdens can permissibly be imposed, despite their considerable weight, turns on the claim that abortion takes innocent human life. Human beings have a right to life, and if life begins with conception—with the fertilized egg, we have the DNA all in place—then the right to life begins with conception. And if abortion takes an innocent human life, then regulation is permissible, despite the substantial burdens. If abortion is murder, then restrictive regulations are entirely appropriate.

But what makes this issue so profoundly complicated is that people who think that abortion is murder still face a problem in making a case in political morality for regulation. And the problem arises from the fundamental differences of moral and religious belief noted earlier: from the pluralism of moral and religious outlooks endorsed by equal persons.

To see the problem, consider the following case. Suppose someone affirms the traditional Catholic view of *mediate animation*, according to which abortion after quickening is impermissible because God ensouls the fetus at quickening; and suppose the person holds this belief on faith. Surely this reason is not suitable for justifying the regulation. When we are imposing demanding regulations on people, and accept that those others are equals and are to be

treated as equals, we want to find considerations in support of the regulations that we may reasonably expect those others to acknowledge as having some weight. But the claim that God ensouls the fetus at quickening—like other beliefs held on faith—is one that many reasonable people reject as weightless, even if it happens to be true.

But what about the claim that the fetus is a living human being from conception? Many people do reject this claim. But perhaps they are unreasonable to reject it. I mean “unreasonable” in the very basic sense that they are quite generally unloved by moral considerations, morally nihilistic, dead to morality. And that seems to be what the Pope says in the encyclical: he claims that the thesis that the fetus has a right to life from the moment of conception is not simply a revealed truth, known from “the written word of God,” but is also “written in every human heart [and] knowable by reason itself.” Moreover, to underscore the force of the idea that it is knowable by reason, and that denying it shows a nihilist’s general inattention to moral considerations, the Pope says “The acceptance of abortion in the popular mind . . . is a telling sign of an extremely dangerous crisis of the moral sense, which is becoming more and more incapable of distinguishing between good and evil, even when the fundamental right to life is at stake.”

But the charge that opponents of restrictive regulation have some generalized trouble distinguishing right from wrong period is unwarranted. The Court says in *Casey* that “men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and

spiritual implications of terminating a pregnancy.” And *Roe v. Wade* devotes considerable attention to the historical diversity and evolution of opinions on the issue of the moral status of the fetus, thus suggesting that this is a matter on which reasonable people—with a sense of justice and undiminished capacity to understand moral distinctions and follow their implications—disagree. And in his 1984 Notre Dame address on abortion and Catholicism, Mario Cuomo makes an especially compelling point: “those who endorse legalized abortions,” he says, “aren’t a ruthless, callous alliance of anti-Christians determined to overthrow our moral standards. In many cases, the proponents of legal abortions are the very people who have worked with Catholics to realize the goals of social justice set out in papal encyclicals.”<sup>5</sup> Cuomo’s point might be put this way: you can take holders of a pro-choice position to be ipso facto entirely unreasonable, or you can conclude that reasonable people disagree on this particular issue. The fact that proponents agree with opponents on so many other moral issues provides strong evidence that the former response is wrong. We have no evidence that proponents of a pro-choice view lack any moral sense *other* than disagreement on this one issue.

But now part of treating people as moral equals is that we give due weight to their conscientious judgments: in particular, by not offering as a justification for burdensome, restrictive regulations some consideration that those who are burdened by the regulations reject. The case against restrictive regulations is that, given deep and persistent moral disagreement on the issue, no justification

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<sup>5</sup> *More Than Words*, p. 42.

of the appropriate kind can be given for imposing such substantial burdens: no justification consistent with the idea of treating people as equals.

### **5. The Symmetry Objection**

I have suggested a case that sounds in political morality against restrictive regulations of reproductive choice, but does not decide the moral issue about abortion. In particular, I have said that reasonable people—with a sense of justice and an undiminished capacity for moral thought—disagree deeply on this issue, and that part of the idea of treating people as equals is we refrain from imposing highly burdensome regulations based on considerations that they reasonably reject.

It is natural to suspect that some sleight-of-hand must be at work here. After all, the conclusion at the level of *political* morality supports one side in the moral dispute. According to the objection, however, the pro-life and pro-choice positions on the moral issue are symmetrical. That is, either abortions are restrictively regulated or they are not. If they are restrictively regulated, the side that favors restrictive regulation wins. If they are not, then the side that has a liberal view on the moral question wins. So you cannot resolve the issue without giving greater weight to one side or another in the moral argument. Applying this general point to the argument sketched earlier: yes, some people do reject the justification for regulation. But why should their objections should carry the day? After all, some people reject the current settlement, which permits abortion. Why don't their objections to the permissive regime carry as much weight as the pro-

choice objections to the restrictive regime?

The answer to this question is to reject the alleged symmetry. What breaks the symmetry are the burdens on women of a restrictive regime. The restrictive regime imposes substantial burdens on women's liberty, equality, and independent judgment; if we suppose with Dworkin that everyone's life matters equally, and that individuals also have special responsibility for their own lives—those burdens need to be justified, and the terms of that justification must carry some weight with those whose liberty and equality are impaired. Otherwise, we fail to respect them as moral equals. The reason that the restrictive regime cannot stand, then, is that no such acceptable justification is available.

Because of the asymmetry created by these burdens, proponents of a restrictive regime have only two options. Either they can deny that a restrictive regime imposes large burdens on women, or, accepting that those burdens are serious, they can deny the equal standing of those who reject the justification for the burdens as weightless. Neither option seems acceptable.<sup>6</sup>

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<sup>6</sup> I have benefited greatly from discussions of these issues with Judith Thomson. The overlap in views reflects those discussions. See her article "Abortion."