

## **The Political Morality of Abortion**

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

Perhaps no issue in American political life over the past 30 years has been more intensely contested than the issue of abortion—or, more precisely, rights of reproductive choice. Defenders of relatively unrestricted rights of reproductive choice think that stringent restrictions on reproductive choice—ranging from long waiting periods in advance of the procedure, to requirements of spousal consent, to 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 is a license to commit murder—and a particularly horrible form of murder, namely the taking of innocent human life.

To address the issue here, I want to start by distinguishing two kinds of questions about abortion: a moral question and a political question: or, perhaps better, a question of personal morality and a question of political morality. The issue of personal morality can be stated as follows: is it morally permissible to have an abortion, or is abortion morally wrong? The question of political morality asks, in contrast, whether it is permissible for a legal 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)? Our earlier discussions of the enforcement of morality indicated that these two questions are separate. Thus a person might believe that abortion is morally impermissible, but at the same time think that the law should not regulate it, perhaps because the person knows that

other citizens disagree profoundly on the moral question and thinks that political regulation is impermissible when citizens have such profoundly different views on the moral issue. Governor Cuomo expressed this position with particular force in a 1984 speech at Notre Dame: morally unacceptable, but politically legitimate. Similarly, a person might think that abortion is morally permissible, but that it is nevertheless permissible to regulate abortion restrictively. 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: is it permissible for a majority to establish stringent restrictions on reproductive choice? Cutting to the chase, I will present a case for the impermissibility of such regulations, and argue in particular that they are incompatible with the idea of treating the members of society as equals.

## **2. Roe and Casey**

The Supreme Court had addressed this question twice in 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*. The basic claims in *Roe v. Wade* can be summarized as follows:

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

- (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;
- (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 bases 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 burdens, at least during the first two trimesters.

These essential elements of the *Roe* framework were preserved by *Casey*: first, because of the severe burdens on women’s liberty, choice is protected by a privacy right; and second, there is no acceptable justification for imposing those burdens. The principal change in *Casey* was that the “trimester framework” was rejected, 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 then 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 her 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 responsibility about the course of her life. They represent a substantial denial of judgment over basic elements of her life.

But the burdens extend beyond those noted here. Apart from limits on liberty, restrictions also burden equality, in the straightforward sense that it is more difficult for women 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.”

Furthermore, restrictive regulations impose what might be described as a *burden on judgment*. Here the idea is that different citizens have different and incompatible moral 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 in 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 existence, of meaning, of the universe, and of the mystery of human life,”<sup>3</sup> and

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<sup>2</sup> See Dworkin.

<sup>3</sup> [reference]

indicates that disagreements about abortion reflect differences of judgment about such matters. The foundation of the disagreements is not clear: Dworkin suggests that the root disagreement is 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 outlook.

The burden on judgment, then, is that a restrictive regulation not only imposes a serious constraint on conduct, 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 apart from the fact that restrictive regulations substantially burden liberty and equality, they do so for reasons that some of those regulated reject, as a consequence of their basic outlook.

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

This characterization of the 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 it seems especially hard to deny the point in *Casey*: that once such a regime has been in place for some time and expectations built up around it, the burdens are especially severe. In any case, my characterization of the burdens need not be

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

disputed by someone who thinks that despite the substantial burdens, such regulations are justified. The disagreement about justification is a disagreement about whether there are good enough reasons to impose the burdens despite their magnitude.

And the strongest case that burdens can permissibly be imposed, despite their considerable weight, certainly 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 it is permissible to prevent it, despite the substantial burdens. If abortion is murder, then restrictive regulations are entirely appropriate.

And of course some people think that it is murder. But those who do face a problem in making the case that it should be restricted on the grounds that it is murder: they face a problem in making the political case. 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 argues that abortion after quickening should not be permitted 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 those others 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: perhaps that rejection reveals that they are unreasonable in the very basic sense that that are entirely indifferent to moral considerations. 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 completely inattention to moral considerations, the Pope says that “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 this charge— that opponents of restrictive regulation have troubling 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* gives 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 capacity to understand moral distinctions and follow their implications—disagree. And in an important statement about 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 respond to the pro-abortion-rights position in two ways, either as showing that those who hold that position are ipso facto entirely unreasonable or as showing that people who hold reasonable views disagree on this particular issue. But the fact that proponents agree on some many moral issues with opponents provides strong evidence that the former response is wrong. We have no evidence of a lack of moral sense or conscientiousness *other* than disagreement on this one issue.

But now part of treating people as equals is that we give due weight to their conscientious disagreements: in particular, by not offering a justification for burdensome, restrictive regulations that those who are burdened by the regulations reasonably reject. The case against restrictive regulations is that, given deep and persistent moral disagreement on the issue, no justification of the appropriate kind can be given for imposing such substantial burdens.

## 5. The Symmetry Objection

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

I want to conclude by noting an objection to the line of argument I have suggested here. I have suggested in effect that we can make a case—at the level of political morality—against restrictive regulations of reproductive choice, without deciding the moral issue about whether or not abortion is permissible. In particular, I have said that reasonable people disagree deeply on this issue, and I have suggested that we treat people as equals in part by not offering a justification for burdensome, restrictive regulations that they reasonably reject.

The objection to the argument is that there must be some sleight of hand at work, because the result conforms to the views of one side. According to the objection, the pro-life and pro-choice positions are symmetrical: because people disagree deeply about the morality of abortion, one view or the other must win. 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 opposes restrictive regulation wins. You cannot resolve the issue without giving greater weight to one side or another in the moral argument. Yes, the objection continues, some people do reject the justification for regulation. But why should their objections should carry the day? After all, some people reject the current regulatory regime, which does not restrictively regulate 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 is to reject the assumption of symmetry. The two views that stand in stylized contrast in fact have to face very different argumentative demands because of the burdens that a restrictive regime imposes on women.

The restrictive regime imposes substantial burdens on women's liberty and equality; in a society of equals—where everyone's life matters equally, and 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 this asymmetry, proponents of a restrictive regime have only two options. Either they can deny the burdens on women that result from a restrictive regime, or, accepting that those burdens are serious, they can deny the equal standing as members of society of those who disagree. 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," <http://bostonreview.mit.edu/BR20.3/thomson.html>