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Lecture Notes: Abortion

Abortions were not illegal until the late nineteenth century. At that time, before antibiotics, it was a dangerous procedure, mortality rate was high. Even the Church didn't have an official anti-abortion stance; this was left as a practical matter to women and their midwives. But, in large part in response to the high mortality rate, state laws arose prohibiting abortion.

In 1973, after a period of emphasis on civil rights and, in particular, women's rights, the Supreme Court ruled in *Roe v Wade* that states may not ban abortions. They also ruled, that states may impose certain limits on abortions.

Some philosophical questions surrounding abortion:

- 1) Who has rights?
- 2) What kinds of obligations do we have toward others?
- 3) What is a person?

Some non-philosophical questions:

- 1) What is the law?
- 2) When is a fetus viable?
- 3) How does the fetus develop?

These may or may not be relevant to a philosophical position.

On absurd examples:

Abortion is a difficult subject, so we look toward easier cases, to refine our intuitions.

We wonder about those cases, and then apply them here.

Some of those cases may look pretty weird, but that's not necessarily relevant.

We're taking a stand where none is obviously right.

Roe v Wade

The question at hand: Is the law that prohibits abortion constitutional?

This is not a question of morality, per se, but if the law is based on morality, maybe we can get an insight into the moral question. Plus, it is not a bad idea to check out the laws every once in a while.

Three classic anti-abortion arguments:

- 1) To discourage illicit sex.
- 2) To protect the mother.
- 3) To protect pre-natal life.

Notice that the second is clearly an instance of paternalism: the state acts to protect citizens from themselves; e.g. drug laws, suicide prohibitions.

Some would argue that the real causes are different: men controlling women, but since those aren't the arguments any one uses, we will not consider them here.

The Court responds:

To 1) that it's not their place to do this

To 2) that with current medicines, it's more dangerous for a woman to carry to term than to get an early abortion. This is especially true for very young women. As the fetus grows, the procedure becomes more dangerous, so perhaps it would make sense to prohibit dangerous late term abortions.

To 3) that the fetus is not protected by the fourteenth amendment, p 192.

So, there's no defense for outlawing abortions.

But the State's interest in both 2) and 3) grow as pregnancy progresses.

Eventually there's a 'compelling point' at which the states may prohibit abortions.

Note that the Court ignores the question of when life begins, p 192b-3.

The questions become, p 193

1) When is the fetus viable?

For then the 3rd reason kicks in, p 194.

Viability grows earlier as medicine progresses.

2) Is the procedure dangerous enough to prohibit?

Like prohibition of dangerous drugs, or seat belt laws, p 193.

Technically:

1st trimester: no restrictions may be made.

2nd trimester: states may restrict abortion for maternal health reasons.

Post-viability: states may limit abortions.

What makes the abortion issue so interesting is that there are competing rights.

1) The general right to decide what happens in and to one's body.

2) The right to life for the fetus.

The classic anti-abortion argument:

1) Every person has a right to life.

2) The fetus is a person.

3) So the fetus has a right to life.

4) The right to life is stronger than the right to choose.

So, abortion is impermissible.

The goal of Thomson's argument is to show that the right to life isn't really that strong.

She concedes the premise that the fetus is a person. (She doesn't really believe it though.)

She rejects the conclusion.

So, she's rejecting premise 4.

Consider the violinist story, p 196-7.

Replace 'the violinist' for 'the fetus' and 'disconnect' for 'abortion'.

The same argument now gives you the wrong answer.

It is possible to continue to hold that abortion is impermissible, if you accept that disconnection from the violinist is also impermissible.

Thomson calls this the 'extreme view'.

This holds the line about rights to life.

But what about cases in which the mother will die if she carries to term?

To hold the extreme view, you could rely on the doctrine of acts and omissions: it's better to let die than to kill.

But we generally let people kill in self defense, or for a just war.

In this scenario, there are competing equal rights.

So the extreme view seems implausible.

Still, one might hold the 'weak extreme view': abortion is permissible only given equal, competing rights to life.

That is, if the mother's life is at stake, an abortion is allowable.

Even on the weak extreme view, you have to stay connected to the violinist, unless doing so would kill you.

But let's proceed on the assumption that you are in fact morally permitted to disconnect from the violinist. Either:

1) the classic argument is defective; or

2) the difference between the violinist case and the abortion case is important.

If 2), the difference can not be that the fetus is voluntarily assumed.

If you have a right to life, it shouldn't matter how you were created, e.g. by voluntary pregnancy or rape.

This would be a dangerous distinction to make.

It would create different classes of people depending on their parents.

In other words, you might want to say that the difference was that you were kidnaped in the violinist story, but you become pregnant voluntarily. That would mean that if your pregnancy was involuntary (rape), then you would be allowed to have an abortion. This would entail that the difference in whether the right to life outweighs the right to choose depends on how you came to be. So different people would have different rights, depending on their origins. This is really indefensible, inconsistent with what we think about human rights. So the only way for this argument to hold is if you allow no exceptions.

If there's no other support for 2), the argument must be defective.

And Thomson says the problem is in premise four, that the right to life isn't strong enough.

What is a right to life?

It's not a right to bare minimum we need to survive.

Consider Thomson's Henry Fonda example.

Also, consider the debates over welfare in our country.

We might provide a basic right to food and shelter.

But we don't even do that, let alone ensure survival.

The right to life is also not a right not to be killed.

For, consider the violinist again.

He has a right to life, but disconnecting him is killing him.

Whatever a right to life is, it doesn't give you the right to use some one else's body.

So Premise 4 in the classic anti-abortion argument is wrong.

If you aren't responsible for the pregnancy, then you may justly take steps to remove the fetus from your body.

Thomson argues that if you use contraception (responsibly), then you aren't responsible for the pregnancy.

A response: maybe the fetus doesn't have rights, but shouldn't the mother carry to term anyway?

Thomson replied that it's not required, so we can't outlaw abortion, p 202.

Consider the Good Samaritan vs the Minimally Decent Samaritan.
Normally, we have no laws enforcing even minimally decent samaritanship.
Consider Kitty Genovese.
Carrying a pregnancy to term is demonstrating at least good samaritanship toward the fetus.

As an introduction to the Warren and Marquis articles, imagine you are space travelers, and you come upon a new substance.
Is it ok to eat it?
Or is it a life form worthy of protection?
How would you decide?

Thomson's defense of abortion rests on denying premise four in the classic anti-abortion argument, which asserts that the right to life for the fetus outweighs the woman's right to choose what happens in and to your body. She provides us with a series of examples which attempt to show that whatever the right to life is, it doesn't give you the right to use another person's body.

But what would give you the right to use another person's body? Surely, their consent would. So, if a woman consents to getting pregnant, then, according to Thomson's argument, she has no right to abort. The question thus becomes, 'What constitutes consent in cases of pregnancy?' Thomson clearly thinks that a reasonable use of birth control constitutes denial of consent. An opponent might argue that any consensual sex, with the knowledge that birth control does sometimes fail, is a kind of consent to pregnancy. Here, Thomson's examples of intruders and specks of dust are relevant.

Warren argues that Thomson has shown a clear right to abortion in cases of rape, where consent is clearly absent. But if the fetus has full moral rights, she's not so sure that the premise which Thomson denies doesn't in fact hold. Warren holds that Thomson's argument doesn't work for cases in which the woman has some responsibility for the pregnancy. If the fetus were a full-fledged human being with moral rights, then abortion, as murder, would not be defensible. She believes that Thomson is too quick in assuming that the fetus is a life from conception.

There is a gulf between human beings (biological) and persons (social, moral).
Genetic humanity is not sufficient to establish moral personhood, p 206
Some humans aren't persons: brain dead, dead.
We might protect them anyway.
But that stems from our sympathy, rather from their rights!
Some persons aren't humans, e.g. aliens, sentient machines, p 208.

We need criteria to determine in all cases what is a person.
Warren argues that we use these five central concepts of personhood:

- 1) Consciousness, ability to feel pain
- 2) Developed capacity for reasoning
- 3) Self-motivated activity
- 4) Communication
- 5) Self-awareness

We don't need all of them to be a person.
The fetus has none of these, so can't be a person, p 207.

The paradigms are us: adult humans.

The fetus isn't any more like an adult human than a fish, so this can't support a right to life.

Even an eight-month old fetus isn't really a lot more like a paradigmatic human than an embryo.

It's not conscious.

It can't really reason or communicate, etc., p 208

But the fetus has a potential.

Warren provides the example of aliens turning all my cells into replicas.

I should be able to escape, so the fetus hasn't a right to life over me.

If every speck of dust were a potential life, as Thomson considered, then we wouldn't think give potentiality so much weight.

Marquis argues that Warren's criteria are too narrow, and that the proper criteria for personhood includes the fetus.

He develops his criteria by considering the following:

When is killing wrong?

We kill plants and (some of us) kill and eat animals.

But killing persons is clearly wrong.

What makes the difference? If we can figure out that, maybe we can apply it to the borderline cases (like the fetus).

To understand a right to life, we have to understand why killing is wrong.

It's wrong, says Marquis, because it deprives the victim of his/her FLO (future like ours).

FLO Theory of why killing is wrong, p 222

1. killing causes premature death
 2. premature death deprives an individual of future value
 3. depriving an individual of future value is wrong
- Therefore, killing is wrong.

Applications of FLO:

AIDS or cancer patients are sad because of the loss of their FLO.

If we ask why they're sad, they say agree.

Marquis calls this the Considered Judgment Argument for the FLO theory.

The Worst of Crimes Argument for the FLO theory.

Compare murder to assault, rape, cutting off a limb.

The loss of a Flo is what makes murder the worst of crimes.

Appeal to Cases Argument for the FLO theory:

Suicides : We stop them because we know they have a FLO, even though they may not know this.

"[I]t is not the mere desire to enjoy a FLO which is crucial to our understanding of the wrongness of killing. Having a FLO is what is crucial to the account..." (223)

Comatose people: Even if they aren't conscious, they have a FLO.

Euthanasia: We permit it if the future looks awful, if they don't have a high probability of a FLO.

By analogy, abortion is wrong because it deprives the individual fetus of a future like ours.

Basically, Marquis is presenting a different set of criteria for personhood.

It's not a biological criterion, so not narrowly chauvinistic.

Aliens and sentient machines can have FLOs too.

Marquis considers some objections:

Potentiality Objection

Fetuses have potential FLOs, but potential presidents aren't presidents, don't have presidential rights, p 225a.

Reply: FLOs are about potential from the start.

It's potential for adults, that makes killing wrong, p 225b

That is, a fetus, if left alone, has a FLO, already.

Argument from Interests Objection

You have to be sentient to have interests, but fetuses aren't, so don't.

Since they don't have a welfare of their own, they have no moral standing.

Reply: Consider the temporarily unconscious patient counter-example, p 226

One can in fact have interests without sentience.

Contraception Objection

Doesn't this make contraception wrong?

It's cutting off the FLO of the potential sperm and egg.

Reply: In the cases of sperm and eggs, there's no individual.

The sperm and egg are two individuals, and no determinate person.

See step 3 in the argument for FLO: Depriving an individual of future value is wrong.

Counter-reply: this is weak - turns on 'individual' and narrow philosophical argument about individuals.

Each sperm may only have a potential FLO, but Marquis rejects potentiality as undermining the FLO.

So, how do we determine whether Warren or Marquis has the correct criterion?

The key is not to make the distinction on the basis of the conclusions they yield.

That is, one should not argue, Abortion is permissible, so Warren's criterion is right; or abortion is impermissible and so Marquis' criterion is correct.

These choices would beg the question.

Here's a non-question-begging point:

How will Marquis explain the notion of a 'future like ours'?

What makes our futures valuable, whereas the future of a rock is only derivatively valuable?

It's likely that he will have to appeal to some criteria like Warren's.

So, his account presumes an account like Warren's, which means that her criteria are primary.

Review of abortion positions:

	Roe v Wade	Thomson	Warren	Marquis
Is the fetus a person?	No	Yes	No	Yes
Are all humans persons?	No	—	No	No
May one terminate a pregnancy in the first trimester because the mother's life and the fetus' life are at stake?	Yes	Yes	Yes	Yes
... because the mother's life is at stake?	Yes	Yes	Yes	Yes

... because of rape?	Yes	Yes	Yes	Maybe, See 219a, 291b
... because of accidental conception?	Yes	Yes	Yes	Maybe in first two weeks
... for any reason?	Yes	No	Yes	Maybe in first two weeks
May one terminate a pregnancy in the third trimester?	See State Law	Yes	Yes	No