

## **Chapter 7: Toleration**

### **Case Study: Abortion**

In many democratic societies, abortion undoubtedly counts among the most contentious and divisive of moral and political issues. Perhaps nowhere is this more true than in the United States, where the ongoing dispute between pro-life and pro-choice camps is often described as a ‘war’ (a key front within the wider ‘culture wars’ between religious conservatives and secular liberals). Indeed, on numerous occasions, that metaphorical war has spilled over into actual violence, with anti-abortion activists perpetrating lethal attacks against doctors and clinics that offer termination services. Most recently, in May 2009, George Tiller, the medical director of an abortion clinic in Wichita, Kansas, and provider of late-term abortions, was shot and killed while leaving his church’s Sunday service. This was the last of a string of attacks that Tiller had survived over the course of his career as an abortionist: in 1986, his clinic was firebombed, for instance, and in 1993, he was shot five times while sitting in his car. Frustratingly, his death came mere days after President Obama delivered a speech to graduating students at the Catholic Notre Dame University in Indiana, during which he addressed the issue of abortion, and called for both sides to deal with one another in a respectful, ‘fair-minded’ fashion.

In light of all this, one might think that abortion is a prime example of an area in which toleration is obviously and urgently needed—specifically, toleration on the part of anti-abortionists towards a practice against which they have moral objections. And, indeed, some political philosophers have attempted to show that the problem of abortion can be alleviated with the aid of principles of toleration. As we shall see, however, whether they have done so successfully is less certain.

#### **Abortion and religious freedom**

The abortion dispute is usually characterized as a dispute over the question of whether a woman’s bringing her pregnancy to an end violates a right to life in the fetus, and therefore constitutes murder. The pro-life movement argues that it does; the pro-choice movement disagrees. Given this interpretation of the substance of the disagreement between pro-lifers and pro-choicers, one might think that the former could never be persuaded to tolerate abortion, or desist from attempting to use their political power to forbid it. For nobody believes that fundamental injustices on the scale of murder ought to be tolerated. But intriguingly, Ronald Dworkin (1994) has argued that, in fact, the abortion dispute is not a dispute over whether or not termination of pregnancy amounts to murder—at least when terminations performed in the earlier stages of pregnancy (and more specifically prior to somewhere around the end of the second trimester) are at issue. Instead, Dworkin

suggests, in the case of those earlier abortions, when we analyse more closely the implicit commitments of the parties to the dispute, we will see that what they are really at odds over is a subtly different question—namely that of whether and under what conditions early prenatal life is *sacred*, and, relatedly, whether respect for whatever sacred value the life of an early fetus may hold is compatible with having an abortion. Dworkin thinks that, once we recognize that the dispute over the morality of early abortion is in truth a dispute about the sanctity of life, rather than the right to life, we will all be able to agree that such abortions should be tolerated. For these abortions (which, incidentally, constitute the vast majority of abortions that actually take place) can then be seen as protected under the general right of citizens in a liberal democracy to freedom of conscience and religious exercise.

Dworkin's argument requires careful explanation on a number of fronts. First, why does he think that people have hitherto misunderstood what the disagreement over early abortion is about? He does so on two grounds. First, because (he thinks) the claim that fetuses throughout pregnancy have rights is obviously defective, such that it would be peculiar if pro-lifers really endorsed it. The purpose of rights, Dworkin says, is to protect the *interests*, or *well-being*, of their bearers. But fetuses—at least until some point between around the 20th to the 28th week of pregnancy—do not have any interests. This is because—again, until somewhere between the 20th and 28th week—they have not yet acquired the *capacity for consciousness*. A being without this capacity has no experiences, desires, aversions, and so on. There is, so to speak, nothing that it is like to live this being's life from the inside. But if this is so then there seems to be nothing that we can do to a non-conscious fetus that would be better or worse for it, and therefore no fetal interests that stand in need of the protection of rights.

Dworkin's second reason for thinking that the debate over early abortion has hitherto been misframed stems from his observation that pro-lifers tend to hold beliefs that are difficult to reconcile with the claim that fetuses from conception onwards have a right to life. In particular, they tend to be prepared to make exceptions to the general rule that abortion is wrong for cases of rape and incest, or for a case where the child if born would be seriously sick or disabled. Nobody thinks that whether or not a person has a right to life depends on whether he or she was the product of a rape or incest, or on whether he or she is healthy and able-bodied. Therefore, Dworkin concludes, even opponents of abortion implicitly reject the claim that fetuses throughout pregnancy have a right to life.

But why, then, do they continue to oppose abortion? Dworkin suggests that they do so because they believe instead in a weaker claim: that prenatal human life, from conception onwards, is *sacred*, and that abortion violates this sanctity. To say that life is sacred, on Dworkin's understanding, is to say that it has *intrinsic value*. For a thing to have intrinsic value means, in turn, that it has value independently of any contribution it might make to serving people's well-being. Thus, an oil painting might have intrinsic value, and

so be worthy of protection, even if nobody enjoys looking at it. Ancient forests, holy texts, and the national flag, are other things that are sometimes said to have intrinsic value. That a thing has intrinsic value can give us moral reasons to treat it in a particular way—for instance, to protect it from destruction, or to dispose of it in a respectful manner. Crucially, an object's intrinsic value might be outweighed by other moral considerations. It might be a shame, for instance, to chop down an intrinsically valuable tree, but doing so would be justified if it would save a life.

If what pro-lifers are committed to is, as in Dworkin's view, not the idea that fetuses from conception have rights, but rather the weaker idea that life from conception has sanctity, then this helps explain how they could grant a few exceptions to the general impermissibility of abortion. For there is no inconsistency in thinking that the intrinsic value of fetal life is occasionally, though rarely, outweighed. How does the idea of the sanctity or intrinsic value of fetal life connect with the case for tolerating abortion? Dworkin's answer is that individual views on whether, when, and to what extent life is sacred are deeply personal, indeed 'essentially religious'. By this he means not that everyone's views on the matter are determined by their religion, for some have no religion at all. Rather, he means that we are guided on this issue by our deepest ethical, spiritual, and/or conscientious commitments. Moreover, whatever we happen to believe about the sanctity of life, Dworkin thinks that we can at least agree that it ought to be left at the discretion of individuals to decide how or whether to respect that value in their reproductive choices. Some women, on the basis of their beliefs about the sanctity of life, might decide never to end a pregnancy. Others may even believe that having an abortion is sometimes *required* by proper respect for the sanctity of life—perhaps because, say, allowing a tragically ill or disadvantaged child to exist and suffer would itself be in violation of that value. The key point is that, on Dworkin's view, even the most ardent anti-abortionist, once they realize what the moral disagreement over early abortion is at base about, ought to be able to accept the justness of laws permitting those abortions, exactly as they accept laws permitting freedom of worship to those whose religious commitments are, in their view, deeply misguided or objectionable.

Whether or not anti-abortionists can be convinced to accept Dworkin's argument that early abortion should be permitted as a matter of religious toleration depends, of course, on whether they can be convinced that the source of their opposition to abortion is not in fact what they had assumed, but rather an implicit commitment to the intrinsic value of early fetal life. Judith Thomson (1995), however, has argued that Dworkin has not managed to demonstrate that the latter is what pro-lifers really care about. First, albeit that Dworkin believes that the view that non-conscious beings can have rights is too odd to take seriously, this doesn't mean that those who profess that belief do not know their own minds. Rather, it may mean only that they take a different view as to what the purpose of rights is, and who can hold them, according to which lacking the capacity for consciousness is no barrier to being a rights-holder. Second, Dworkin's interpretation of

the true basis of pro-lifers' opposition to abortion seems difficult to maintain in the face of their own statements, which clearly and repeatedly assert the view that the right to life begins at conception. As Thomson argues, it seem implausible to suppose that the Pope, for example, in pronouncing that, even at the earliest stages of fetal development, abortion constitutes the murder of a person, meant merely to convey the weaker idea that, during those early stages, abortion wastes something of intrinsic value. It is also worth pointing out that, whilst some anti-abortionists allow exceptions for rape, incest, and fetal disability, not all do, by any means. On all these grounds, it remains far from clear that we will be able to reframe the terms of the moral disagreement over abortion in such a way as to make it easier for protagonists on both sides to see it as falling under the familiar principle of religious toleration.

### **<A>Abortion and public reason**

Dworkin is not the only liberal to have attempted to resolve the abortion controversy by reference to toleration. Another attempt to do so comes from so-called *public reason liberals*, such as John Rawls and Thomas Nagel (Rawls, 2005; Nagel, 2006). Their argument does not require attempting to persuade committed opponents of abortion that they have misunderstood their own view about the moral status of the fetus. But it does involve trying to convince pro-lifers that it is wrong to impose their sectarian beliefs on others who do not accept them.

Now, public reason liberalism argues that given the permanent presence in any democratic society of deep yet reasonable disagreement on a host of moral, philosophical and religious questions, the laws that bind citizens and restrict their liberty should be justified to them on the basis of reasons, values, and principles that all of them, if reasonable, will be able to understand and accept. Thus, in making the case for their favoured laws in the public forum, citizens and legislators should abstain from appealing to elements of a particular theological or philosophical world view that other reasonable citizens would reject. Rather, they should appeal to *public* reasons that can be endorsed any citizen, irrespective of the particular religious or philosophical doctrine to which they subscribe. As applied to abortion, public reason requires that pro-life citizens bracket their religious or metaphysical belief that personhood and the right to life begin at conception, rather than impose it on those who reasonably reject it. Rather, the premises on which citizens should rely in formulating the law are those which all citizens should be able to recognize, such as the importance of securing the autonomy of women, and the importance of ensuring the stability of the family. In relying on only the latter kinds of values, public reason theorists suggest that we can derive a case for pro-choice abortion laws, the legitimacy of which even religious anti-abortionists can accept (insofar as they are committed to the ideal of public reason itself). Rawls, for instance, approvingly cites

Mario Cuomo, the Catholic former governor of New York, who saw himself as obligated to respect and uphold the legal right to abortion, even whilst continuing to believe, on grounds of traditional Catholic dogma, that personhood begins at conception, and that abortion is in general deeply wrong.

Public reason liberals, then, believe that citizens' reasonable disagreements over the moral status of the fetus can be bracketed in public argument over the shape of abortion law. But is that position tenable? On Michael Sandel's view (2005), the public reason liberal's solution is not truly neutral—it implicitly rules that the moral claim that abortion is murder is false. For unless we had already ruled it to be false, he says, it is impossible to see how we could agree to put it to one side, and permit abortion to take place. On Sandel's view, liberals cannot hope to stand aloof from the moral debate over abortion, and the status of the fetus. Indeed, he argues, respect for our fellow citizens requires that we engage with their doctrinal commitments, rather than attempting to rule them out of court in the public sphere.

### **<A>Publicly-funded abortion**

As we have just seen, critics of liberal attempts to resolve the abortion problem using principles of toleration argue that toleration is not an appropriate idea in this context, precisely because of what the abortion controversy is about: namely, whether the termination of a pregnancy amounts to murder. If we are to have pro-choice laws, the criticism goes, they cannot be justified to pro-lifers on grounds of toleration: rather, we must take sides in the debate, and demonstrate that the pro-life case is false. This claim is made by Galeotti in her book, *Toleration as Recognition* (2002). But Galeotti also has another reason for rejecting appeals to toleration in the context of abortion. This is that, unlike in genuine cases of toleration, opponents of abortion are not merely being asked to forebear from using the law to interfere with a practice of which they disapprove. Rather, at least in countries with a national health service or equivalent, they are being asked to subsidise and enable that practice through their taxes. Taking that thought further, feminists such as Catherine MacKinnon (1989) have argued that justice for women is incompatible with regarding abortion as a private matter of conscience that needs merely to be tolerated by others. For so to regard it, they argue, is to suggest that women are entitled to no more than non-interference in having an abortion, rather than to help in accessing abortion services if they cannot afford to pay. According to MacKinnon, the right to choose an abortion should be justified not on grounds of toleration, but rather on grounds of women's *equality*. Women can only enjoy equality with men, she contends, if they control their fertility, and hence if abortion is made available to all, irrespective of means. That last point recalls a familiar theme from the literature on toleration □—namely

that while toleration often seems to ask too much of tolerators, it appears at the same time inadequate from the perspective of the tolerated.

### References

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