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Procreative Liability and Equality before the Law

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ABSTRACT *Pallikkathayil argues that restrictions on abortion are inconsistent with the usual demands that states place on their citizens. States don't require their citizens to make their bodies available for the protection of other people's interests. Yet, when abortion is restricted, women who can be pregnant are less entitled than other citizens to decide on how their bodies are to be used; then, states fail to treat women as equal before the law. The argument is supposed to hold even if one assumes that fetuses at various stages of development are as morally considerable as (already born) children, and even if, moreover, fetuses have passive citizenship status – that is, if they have claims to state protection. Pallikkathayil's argument comes at excessive theoretical costs, rulling out (a) general duties to help others in the protection of vital interests via relatively non-burdening donation, e.g. of blood, and (b) plausible although demanding special duties of procreative parents. Nevertheless, I agree with Pallikkathayil's conclusion that existing legal restrictions on abortion violate the state's duty to treat its citizens as equal, and are hence illegitimate; namely, because they fail to hold all procreators - whether or not gestational - equally liable.*

It is rare to come across an argument against regulating abortion that is both plausible and new, and which, moreover, doesn't help itself to the assumption that fetuses lack rights. In 'Abortion and Democratic Equality', Japa Pallikkathayil offers all this.[1] Her view, in a nutshell, is that by restricting abortion states demand that pregnant women put their bodies in the service of the fetus, and this is incompatible with citizens' general legal freedom from having their bodies put to the service of others. For instance, laws don't require us to donate a kidney in order to rescue those whose lives depend on receiving one; such donations aren't even mandated from parents on behalf of their children. Instead, states recognize that their citizens' bodies are not to be coercively used to serve others' (be they vital) interests. In restricting abortion, however, states do precisely this: they demand that pregnant women let their bodies be used to fulfill the fetus's interest in remaining alive. Therefore, she argues, restrictions on abortion are inconsistent with the usual demands that states place on their citizens even if one assumes that fetuses at various stages of development are as morally considerable as (already born) children, and even if, moreover, fetuses have passive citizenship status – that is, if they have claims to state protection. States tell women who can be pregnant that they are less entitled than other citizens to decide on how their bodies are to be used and hence fail to treat women as equal before the law. If Pallikkathayil's argument succeeds, states that fall under its incidence violate a very important condition, that is necessary to ensure their own legitimacy. This is a highly attractive view, as far as I can see, but I resist it for a combination of two reasons: first, because it comes at excessive theoretical costs; and second, because there is a less theoretically costly line of reasoning showing that existing legal restrictions on abortion are illegitimate because they violate states' duties to treat their citizens as equals.

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Before detailing my arguments, let me note an implication of Pallikkathayil's strategy to assume that there are duties to protect the vital interests of fetuses when this can be achieved by permissible means – for instance, that 'the state should protect fetuses from Zika virus much like it protects children from other debilitating diseases'.[2] If this is true, and if it extends to fetuses at all stages of development, then states have a *pro tanto* reason to deem miscarriages a public health issue and seek to prevent them. This would make miscarriage a significant public health issue, given how common it is.

I start with a general remark about the overall argument, which relies on a distinction between two ways in which one might think that 'simply having a body that can be used to save another citizen makes one liable for providing one's body'.[3] One is the provision of a person's labor for which she needs to use her body – say, when a rescue requires the victim to be grasped and dragged out of the water by the rescuer – and which can be, as Pallikkathayil acknowledges, legally required by duty to rescue laws. The other is the provision of a bodily part – in her example, donating bone marrow to save another person's life – or, more generally, putting one's body at the disposal of another; I call this 'bodily surrender'. Pallikkathayil notes that states are right to refrain from mandating their citizens to provide vital aid to others when such aid requires bodily surrender. And, since the fetus requires bodily surrender, and not merely labor, from the gestational mother, she concludes that states may not require women to remain pregnant. It seems intuitive that a legal demand to provide services that require the use of one's body is morally different from one to provide bodily surrender; yet, in the absence of a principled reason, one might suspect that the intuition is best explained by incidental features that tell such cases apart. For instance, being required to provide bodily parts or otherwise to put one's body at the disposal of another might be, typically, much more onerous, and a much greater interference with one's autonomy, than being required to provide, say, relatively easy rescue. (Even so, states *do* require bodily surrender in emergency cases when their very survival is at stake – for instance, during wartime, when they draft citizens into the army or forbid those who have enrolled voluntarily to resign while wars are in progress.) Another relevant difference is that less may be typically at stake for recipients in most instances of service provision than in instances of bodily surrender. But there are exceptions: for instance, legally requiring people to work long hours on a construction site is a lot more onerous, and a more significant violation of their autonomy, than legally requiring people to donate blood. And, while legally required blood donation may involve relatively little burden for the donors, much is usually at stake for the recipients. Indeed, I don't find it implausible that sometimes states may mandate the donation of easy-to-transfer and quick-to-regenerate bodily parts to those who would otherwise die. For instance, it seems right that in the middle of a health crisis where large numbers of people needed blood transfusions, those who could donate some blood at reasonable cost to themselves should be legally asked to contribute to the rescue effort in this way.[4] But if mandating the provision of services that require the use of one's body has a different moral significance than mandating bodily surrender due to a difference in some general, yet incidental, features of these different requirements, a defense of Pallikkathayil's view would have to proceed by examining how the morally relevant features apply to pregnancy – for example, its burdens in terms of pregnant women's wellbeing and autonomy and the stakes for fetuses. If it is impermissible to mandate bodily surrender even when it is less burdensome for the donor and more valuable for the recipient than aid which doesn't require bodily surrender, then it appears that the latter kind of aid cannot be mandated either.[5] Duty to rescue

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laws, for instance, could also turn out to be illegitimate. But this conclusion is highly unappealing, at least for pervasively dependent creatures like human beings.

Be this as it may, voluntary pregnancies – to which the remaining discussion is restricted – are unlike general cases of rescue. Voluntary pregnancies result from consensual sex with or without procreative intention and are the most likely candidates for legitimate abortion-restricting legislation, both intuitively and on principled grounds. Assume, with Pallikkathayil, that fetuses have a morally significant interest in continuing to live: their moral status is such that there is a duty to help them stay alive if the burden of doing so is not unreasonable. People who become voluntarily pregnant are not (like) mere bystanders, or even (like) uniquely-placed-to-rescue bystanders. Rather, they are morally liable to meet the need to rescue because they have created it by voluntarily bringing the fetuses into existence. They are, that is, under a special, rather than only general, duty to ensure that the fetus is helped to stay alive. (Such parties include not only the pregnant women, but also – obviously – their procreative partners,[6] and possibly, although less obviously, medical personnel who played a necessary part in establishing the pregnancy, such as, for instance, by providing IVF treatments. The relevance of this observation will become clear in due course.) Insofar as fetuses are passive citizens, states are required to protect their morally relevant interests, that is, to ensure that those who are liable to meet the interest do so. If all this holds, then it is possible that states may not require bodily surrender in fulfillment of general duties to rescue a fetus, but may or ought to require it from those who voluntarily created a need for rescue – for instance, by having voluntarily created it. If so, legal restrictions on abortion do not fall foul of the demand that states treat all their citizens as equals.

Aware of this possibility, Pallikkathayil notes that states do not, in fact, issue such demands. Most relevantly, the law doesn't ask parents to donate life-saving organs or tissue to their children. And if pregnant women have special duties towards fetuses, they have these for the very same reasons why procreative parents have special duties towards their children. I think the case for challenging the law here is stronger than in the above-discussed general protection against a legal requirement to donate, and this is the core of my critical response to the article. I rely on Seana Shiffrin's account of the morality of voluntary procreation which she develops in work on wrongful life suits. Procreation displays the following features, which jointly explain why procreators are liable to incur significant burdens in protection of their progeny.[7] First, procreators impose on their progeny the risk of significant harm – where harm is to be understood not comparatively, relative to a historical or counterfactual baseline, but non-comparatively, as in a state that is harmful in itself. Second, they do this without being able to seek the consent of the progeny. Third, they lack the potential justification of putting the progeny at risk as a means to avert (the risk of) even greater harm; non-existence is not itself a harmed state. The justifiability of imposing, on individuals unavailable for consent, harm that is not required as a form of lesser evil must clear a high bar. Shiffrin thinks that procreative parents are liable to prevent or compensate for non-comparative harms that afflict their children. Premature death, I contend, is harmful, if anything is, to most human beings. I don't believe that fetuses at all stages of development have an interest in continuing to live, and hence that they are harmed by death; but Pallikkathayil's ambition is to offer an ecumenical account that doesn't make any pronouncements about the moral differences between fetuses and children. Her account is therefore vulnerable to the charge that voluntary

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procreators are liable to avert harm from the fetus in virtue of having created it, without consent and lesser evil justification.

Much of Pallikkathayil's argument seeks to establish that voluntary procreators don't become legally liable to bodily surrender by dint of having consented to it (i.e. by consenting to become pregnant). My proposal is that the voluntary undertaking of procreation is morally significant, but not because it is a form of consent; rather it is morally significant because it consists in the imposition of foreseeable harm unless the procreator is available to help. Thus, the strongest reason for an enforceable duty to rescue one's progeny, whether a fetus or a born child, if need be by letting them use parts of one's body, is not that by undertaking voluntary procreation the parent has alienated some of their bodily rights via consent, but that by undertaking voluntary procreation they avoidably and foreseeably created needs, the frustration of which results in grave harms.

Shiffrin's account is about procreative parents' liability to compensation in wrongful life cases. The crucial question for evaluating Pallikkathayil's defense of unrestricted procreation is whether states treating their citizens' *bodies* as available to provide such compensation, including by provision of bodily parts, is consistent with treating them as equals before the law. It seems to me that a positive answer is plausible. This is because, as a general matter, when an individual A's voluntary behavior creates a vital need in individual B, in a foreseeable and avoidable manner, A becomes liable to ensure that the need is met (absent perhaps some special explanation to the contrary; for example, A's behavior might be necessary to avert a great disaster, in which case A would not become liable). Procreative liability is just one case of liability incurred by risk imposition, and liability to bodily surrender seems to apply in other cases as well. Suppose that Annie makes Betty ill through voluntary behavior that is not justified to protect Betty from greater harm, and as a result Betty requires a new kidney to survive. If these facts can be publicly and reliably established, it doesn't seem wrong for the state to mandate Annie to donate one of her two healthy kidneys to Betty.

I think that Pallikkathayil agrees with me about Annie and Betty. She qualifies her thesis that bodily rights are inalienable by saying that the rights are conditional on respecting other people's rights. So, it seems that the crux of the matter is whether fetuses can, at any stage of their development, have rights against being aborted. The question is not whether becoming voluntarily pregnant in itself violates anybody's rights, as Pallikkathayil puts it and answers negatively. The question, rather, is whether becoming voluntarily pregnant and then failing to sustain the life of the fetus is rights-violating. I don't see how this question can be answered without either committing to a view about the moral status of the fetus, or else rejecting the account of procreative liability that I just sketched. The former move is, as I mentioned, ruled out by Pallikkathayil's ecumenical approach. The latter comes at the significant theoretical cost of deeming permissible neglectful procreation.

Although I am not subscribing to the article's argument, I share its conclusion that current regimes restricting abortion fail to treat women as equal citizens. I take it that the most promising grounds for restricting abortion are by appeal to procreative liability (while also thinking that it can only apply to fetuses at advanced stages of development). But pregnant women are not the only procreators, and hence not the only ones who are liable to prevent harm to fetuses that have acquired (sufficient) moral status. Men[8] who engage in voluntary procreation are equally liable, and, as I note above, so are, possibly, some non-procreative parties. If it is permissible (or required) to outlaw some abortions as wrongful

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because procreators have special duties to protect the fetus from the harm of death, then states discriminate against pregnant women when they only bring them, and not their procreative partners, under the purview of the law. Men, of course, cannot be liable to bodily surrender since they lack the ability to have their bodies used to keep the fetus alive. Yet this is not to let them off the legal hook. Recall Annie and Betty, and imagine that Gertie was Betty's voluntary co-participant in the process that made Betty ill. Annie alone has a healthy kidney that can save Betty's life, so only Annie is liable to donate a kidney; but Gertie ought to share equally the cost of rescue, by offering Annie compensation for the burden of donating the kidney. Similarly, women's procreative partners – typically men – can be made legally liable for some of the burdens of pregnancy.

Much legal reform is called for, therefore, if legal bans on abortion are to be justified on grounds of procreative liability. Most importantly, anti-abortion laws should register the liability of pregnant women's procreative partners. On pain of inconsistency, states should also ensure that both procreators share equally the financial and possibly career costs of pregnancy, and not only the material costs of rearing children after they are born.[9] Moreover, states ought to ensure adequate access to reproductive education, contraception, and early abortion in order to make possible voluntary gestation; the high costs of unwanted pregnancies or sexual abstinence vitiate the voluntariness of pregnancy.[10]

Unless and until such changes are enacted, legal restrictions on abortion are indeed a failure to treat women and men as equals before the law. Pallikkathayil's work has the great merit of putting the spotlight on this, so far under-explored, type of concern with the legitimacy of abortion-regulating legislation.

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None.

NOTES

1 Pallikkathayil, "Abortion."
2 Ibid.
3 Ibid.
4 For a detailed defense of a more ambitious account of why states may mandate the provision of services and organs for redistributive purposes, see Fabre, *Whose Body*.
5 At least, absent reasons that explain how the two have different moral significance. The reasons against mandating bodily surrender that Pallikkathayil provides in the article (in her secondary argument) either speak equally against other types of legally required aid, or else are unconvincing against the low-cost types of bodily surrender such as blood donation.
6 Typically a man, but current technology makes possible multiple procreators, such as two gamete providers and a gestational mother who is genetically unrelated to the fetus.
7 In Shiffrin, "Wrongful Life."
8 Procreative partners more generally. See n. 6.
9 Even more reforms might be required. Pallikkathayil wonders if, in case fetuses have a right to life, the public provision of healthcare should include coverage for life-saving surgeries *in utero*. Under the argument I

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sketched, in which the fetus has a right that its procreators engage in reasonable efforts to protect it from death, it might follow, for instance, that procreators who can afford life-saving surgeries *in utero* might have a duty to pay for them.

10 See, for instance, Serena Olsaretti's influential analysis of voluntariness, according to which 'an individual's choice is voluntary if it was not made because no other acceptable alternative was available'. Olsaretti, "Freedom," 54.

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