

Incoherent Abortion Exceptions

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1. Introduction

In 2019 there was a spate of new anti-abortion measures enacted across the United States. The anti-abortion movement that spurred these new measures was divided over whether exceptions should be made for pregnancies resulting from rape. This division is evident in the fact that some recent legal measures allow for such exceptions (e.g., those in Arkansas, Georgia, Utah). But many recent legal measures do not (e.g., those in Alabama, Ohio, Kentucky, Louisiana, Mississippi, Missouri).¹ Though these are all legal measures, this paper asks what moral justification might underlie these two different positions. My focus below is on the normative structure of competing moral claims commonly invoked in debates about abortion. So one might ask here: what is the relationship between legal measures and morality? Though arguing for it is outside the scope of this paper, I will be presuming that if a particular legal restriction rests upon an underlying moral incoherency, then, we at least have a *prima facie* reason (though not necessarily an *all things considered* reason) to make an adjustment to the law. In what follows, I am presuming that the law should not rest on incoherent moral claims.²

Call an anti-abortion position *moderate* if it allows some exceptions to the moral impermissibility of abortion. Usually such exceptions are permitted where the pregnancy puts the mother's life in danger, where the pregnancy is the result of incest, or where the pregnancy is the result of rape. My focus in this paper is primarily on the last of these exceptions. And call an anti-abortion position *extreme* if it does not provide exceptions for cases of incest or rape, even if such positions do typically make an exception where the mother's life is at risk.³

While I do not think that the moral permissibility of abortion is qualified, my aim here is to explore the underlying structure of the moderate anti-abortion position (in Sections 2 and 3). I argue (in Section 4) that, within the regnant liberal morality framework, this position is incoherent by its own lights. Some have argued that abortion is morally impermissible even in cases of rape because a fetus's manner of conception is irrelevant to its purported right to life. But the way this is usually argued turns on controversial claims about the metaphysics of personhood and fetuses (e.g., that a fetus is a person from the moment of conception). It is also a response typically marshalled in favor of an anti-abortion

position. Instead, I argue against the moderate position in a much different way, one that can ultimately be used in service of a pro-choice position. I explain how the moderate anti-abortion position makes a hidden appeal to the priority of bodily autonomy over the right to life. As we will see, it is this hidden appeal that makes the view internally incoherent. On the contrary, and unfortunately, the extreme position fares much better in terms of internal coherency. But as I suggest (in Section 5), this is not a reason to prefer or move to this position. Indeed, the fact that of the two the extreme anti-abortion position fares better is in part why the anti-abortion movement should be considered dangerous. As defenders of anti-abortion measures come to recognize the incoherency of moderate positions, this might lead them to push for ever more extreme and pernicious anti-abortion measures. In light of that, I end by suggesting that those sympathetic to the moderate anti-abortion position could be persuaded to adopt a pro-choice position rather than the more extreme one. Because autonomy considerations are already being acknowledged within the moderate anti-abortion position, the space between the moderate and the pro-choice positions might be easier to bridge than that between the moderate and the extreme positions.

2. What is at Issue

In May 2019, a coalition of anti-abortion activists sent a letter to Republican National Committee (RNC) chairperson Ronna McDaniel urging the Republican Party to formally oppose any exception for rape within new abortion laws. They wrote that “it is our view that the value of human life is not determined by the circumstances of one’s conception or birth.”⁴ The letter to McDaniel went on to state that the RNC’s central position should be that “a child conceived in rape is still a child.” These statements in support of the extreme anti-abortion position urge a policy that echoes a refrain common among some anti-abortion defenders. We hear it espoused by former Senator Rick Santorum when he said that rape victims “have to make the best out of a bad situation.”⁵ Bonnie Steinbock captures this line of thought with the following question: “How can it be right to kill the fetus because its father is a rapist?” (Steinbock 2011, 94). In slogan form, the extreme anti-abortion position says that “all abortions are equal” (Cohen 2015, 88).

The extreme view here is not the only anti-abortion position within the Republican Party. In the same month that the letter was sent to the RNC chairperson, President Donald Trump attempted to distance himself from the slew of extreme anti-abortion measures, tweeting “I am strongly Pro-Life, with the three exceptions—Rape, Incest and protecting the Life of the mother.”⁶ This is a common trend among Republican presidents. Former President Ronald Reagan, who is largely responsible for the Republican Party coming to self-identify as “the party of life,” also favored these exceptions.⁷ This sort of qualification of one’s anti-abortion position is also widely shared among the general public. Roughly 75 percent of Americans think that abortion should be *legally* permissible in cases of rape, and given that Americans are just about split between pro-choice and

anti-abortion positions, we can safely assume that many anti-abortion defenders are among those who think these sorts of abortion exceptions are justified.⁸ But on what *moral* grounds can one hold this sort of moderate anti-abortion position?⁹

The philosophical literature regarding abortion is extraordinarily large and stretches back many decades (for an overview, see Kukla and Wayne 2018). But it is not my aim to speak about such debates on the whole, or even about the morality of abortion in general. Rather, my focus is targeted: to explore the underlying normative structure of the moderate anti-abortion position. To do so, I will focus on two key ideas that are often appealed to by those in favor of anti-abortion positions: one regarding the moral status of fetuses, the other regarding the weight of the moral principles in play. These two ideas are central to much of the literature on reproductive ethics, especially within the framework of liberal morality.

The first key idea involves the personhood of fetuses. Usually this is cashed out in the following way:

- (1) A fetus is a human being, a person, from the moment of conception, or else at some point during gestation.

Much ink has been spilled either defending or opposing (1) (Tooley 1972; Warren 1973; Schwartz 1990; Kaczor 2011; Greasley 2017; Greasley and Kaczor 2017). As we will see below, the moderate anti-abortion position usually accepts (1). But some well-known arguments regarding the (im)morality of abortion do not turn on defending or opposing (1). Both Judith Jarvis Thomson's defense of the moral permissibility of abortion and Don Marquis's defense of the moral impermissibility of abortion attempt to skirt past the issue of fetal personhood. Thomson argues that even if a fetus *is* a person, from the moment of conception or at some later time during gestation, abortion is still morally permissible (Thomson 1971). Similarly, Marquis argues that even if a fetus *is not* a person, abortion is nevertheless morally impermissible (Marquis 1989). As such, neither spends time debating the metaphysics of fetal personhood.

Likewise, I will not explore (1). Instead, I will grant it for the sake of argument. Importantly, accepting or rejecting (1) does not yet tell us anything about whether abortion is morally permissible or not. Missing here is any mention of the *wrongness* of abortion or killing, any indication of the *rights* of the gestating mother or the fetus, any discussion of the *relationship* between the fetus and the gestating mother, and so on.¹⁰ In short, (1) does not itself contain any moral claim; it is simply a claim about the metaphysics of persons. It tells us that if we are canvassing the world for persons, we should include fetuses since personhood attaches to them as well.¹¹ But how we should view personhood, morally speaking, is a separate matter.

In light of that gap, the second key idea often appealed to in favor of an anti-abortion position regards *moral weighing*. There is no sense in taking seriously any position in this debate that does not explicitly recognize that fetal gestation happens *inside* a gestating person. The often ignored issue of "fetal geography"

has direct bearing on the moral status of abortion (Little 1999). Indeed, this is what renders the debate particularly vexed. *Given* that fetal gestation occurs inside of someone else's body, how should we parse the relationship between two moral claims: the right to life of the fetus, and the right to bodily autonomy of the gestating mother?

It is here that a claim about moral weighing is often invoked. This key idea can be characterized in the following way:

(2) A right to life is stronger than, or outweighs, a right to bodily autonomy.

In many anti-abortion arguments, (2) typically relies on (1). It is usually first argued (or granted for the sake of argument) that a fetus is a person. Persons, we typically think, enjoy a right to life. And what (2) suggests is that the right to life has significant moral weight—it is weightier than any right to bodily autonomy that the mother of the fetus might have. I.G. Cohen writes that “those who think that abortion is morally wrong and should be criminalized do not need to give no value to the mother's interests, only to claim that the fetus's right to inviolability trumps that interest” (Cohen 2015, 88).¹² And unlike (1), (2) does indeed contain a moral claim. Not only does it make explicit reference to two different rights, but it is also itself a claim about which rights are morally weightier than others.

Though I am following the literature by adopting the language of “outweighing” rights here, perhaps a better understanding would be that rights are *circumscribed* by other considerations. Margaret Little explains that while oftentimes we hear it suggested that “my right to extend my fist ends at your nose,” she says “the point is not that I have a right to punch you, which must then be weighed against a claim of yours not to be harmed; I have no right, so specified, to begin with” (Little 1999, 298). In this way, my right to extend my fist is *circumscribed* by your nose, not *outweighed* by it. There is no right to punch you in the face at all, so the language of “outweighing” is perhaps inadequate. But settling this particular conceptual debate is outside my scope here.

While (1) and (2) are the key claims regarding most (good faith) anti-abortion positions, the moderate anti-abortion position stands as a particular gloss on those claims.¹³ Recall that what makes the position “moderate” is that it allows for certain exceptions to the immorality of abortion. Here is one way of cashing this out:

(3) Abortion is morally permissible for a pregnancy caused by rape.

So stated, (3) is an excusing condition on (2): it allows for a right to life to be outweighed by something else. It is important here that (3) is not understood as simply a descriptive claim, as saying that, *as a matter of fact*, women impregnated by rape will or are likely to have an abortion. Rather, the moderate anti-abortion position has to be understood as taking a normative stand: it says that it is *morally permissible* to have an abortion in such cases.

Some anti-abortion responses to Thomson's violinist case toe this moderate anti-abortion line. They agree that unplugging from the violinist is morally permissible, but they suggest that the violinist case only parallels pregnancy caused by rape and not pregnancy caused by consensual sex (Warren 1973; Steinbock 2011). This line of argument appears to be the same as the one that motivates the moderate anti-abortion position. Only some exceptions are warranted, but by and large abortion is morally impermissible.

With these pieces in place, we can see a more precise formulation of my concern in this paper: how can the moderate anti-abortion position morally justify (3)? Steinbock notes that many who morally object to abortion "wish to make such an exception, but they have been hard-pressed, on their own argument, to account for it" (Steinbock 2011, 94). Indeed, we can see that (3) does not follow in any straightforward way from (1) or (2); it is not a derived conclusion, but a stipulated excusing condition. But this does not mean that (3) is unjustified. It just means that there needs to be a clearer case made for it. In order to understand what that case might be, in the next section I will unpack (2) so that we can see how (3) operates as an excusing condition for it. There are going to be three embedded notions in need of explanation: "the right to life," "the right to bodily autonomy," and the idea of one right "morally outweighing" another. In the next section I spell out each of these.

3. Life, Autonomy, and Weighing

When one says that there is a right to life, one is usually saying that life has inherent value.¹⁴ Why we should think that life does indeed have inherent value changes depending on whether our inquiry concerns religion or philosophy (Wicks 2010). As a religious matter, the major monotheistic religions each assert a right to life.¹⁵ Usually, the right to life is respected by these religions in the form of prohibitions against both killing and suicide. For example, if God creates life, then, God alone has authority to take life; to interfere in life by killing others or oneself "would cause offence to God" (Wicks 2010, 24).

But a religious basis is obviously not necessary for accepting and explaining why life might have inherent value. A prohibition against killing and suicide, for example, also makes its way into philosophical arguments. Kant famously argues that persons are not ends to be used however we see fit, but rather are *ends in themselves* (Kant 1785/2005). This, in turn, limits how we should treat each other. To murder would be to treat *another* human being as a mere means, and to commit suicide would be to treat *yourself* as a mere means. Both of these actions are prohibited by a moral injunction to treat human beings as ends in themselves.

In (2), the right to life (whether it is religiously or philosophically motivated) is stacked up against the right to bodily autonomy. Bodily autonomy is a species of autonomy in general, but it is no easy matter to characterize autonomy. Historically, philosophers have thought of autonomy as having to do with personal decision making, where this is generally characterized in terms of rational

agents giving to themselves the moral law (Kant 1785/2005; O'Neill 2002). But this is not the sort of autonomy that is usually considered germane to debates in applied ethics or about the morality of abortion. Rather, the relevant conception of autonomy here has more to do with decision making that is free from a certain sort of undue or unjust interference (Stirrat and Gill 2005). Among bioethicists in particular, autonomy is typically characterized as individuals being able to make decisions “free from both controlling interference from others and limitations that prevent meaningful choice” (Beauchamp and Childress 2013, 101).

More precisely, however, the relevant notion of autonomy in (2) is *bodily* autonomy. Catriona Mackenzie identifies two traditional embedded rights that are central to the right to bodily autonomy (Mackenzie 2001, 420). The first is a right of *noninterference*, which captures the idea that one may not physically interfere with another person’s body unless that person has consented. The second embedded right is *self-determination*, which captures the important idea that it is up to each person alone to decide what happens in and to their body, and no one else may make such decisions for them.¹⁶

What (2) acknowledges is that a pregnant woman has a right to bodily autonomy. But it also claims that this right is, perhaps unfortunately when the pregnancy is caused by rape, *outweighed* by the fetus’s right to life. Of course, fetuses do not have a right to bodily autonomy. Even if one thinks that fetuses enjoy a right of noninterference, they will of course lack a right of self-determination. But a fetus does (we are assuming) have a right to life. On the contrary, a pregnant woman does enjoy both a right of noninterference and a right of self-determination, and thus, a right to bodily autonomy. Hence, the apparent conflict between the fetus’s right to life and the pregnant woman’s right to bodily autonomy.

How we should weigh the right to life against the right to bodily autonomy is fundamentally a moral claim. It does not fall out of simply knowing what a right is. One might, however, think that it falls out of knowing what each of these respective rights is: perhaps genuinely understanding what the right to life is and what the right to bodily autonomy is will, therefore, reveal to us which has priority over the other (and why). But it is more commonly thought that various rights at least appear to conflict with each other (Dworkin 1977; Kamm 2007; Thomson 1990). Consider the following situation: an attacker who threatens someone is killed by their would-be victim (Kamm 2007, 286). One way to characterize this is as a conflict of rights, where the attacker has a *right not to be killed* and the would-be victim has a *right not to be attacked*. Probably we want to say that the would-be victim’s right is stronger than or outweighs the attacker’s right (i.e., when one attacks another their right not to be killed is outweighed). So even when rights appear to conflict, we might still be able to find a solution.¹⁷ How we should ultimately resolve conflicts among these various rights is a matter of normative theorizing.

With the three pieces briefly explained, we can turn back to (2). Our focus is on the moderate anti-abortion position, which says that abortion is morally

impermissible except in certain cases (when the mother's life is at risk, or when the fetus is conceived via incest or rape). The important question is now: can the moderate anti-abortion position accept (2) and yet, also coherently defend an exception in the case of rape, that is (3)?

4. Altering the Normative Landscape

Rape is of course an extreme violation of a person. There is no need to rehearse or list details. Those who defend a moderate anti-abortion position already accept the heinousness of such acts. This can be seen in the fact that they acknowledge how that violation can serve as the grounds for the permissibility of abortion. It is this acceptance that seems to generate the need for (3). What (3) suggests is that while *ordinarily* a right to life outweighs a right to bodily autonomy, nevertheless this ordinary moral weighting is distorted in cases of rape.

That ordinary moral weighting can be altered or shifted like this is not itself unusual. We typically think that the normative landscape is altered when consent is provided, for example (Westen 2004; McLean 2010; Dougherty 2013, 2018). That consent has this so-called "normative power" helps explain a number of features of our everyday lives: why surgery can be morally acceptable, but merely cutting a stranger is not; why gift-giving can be morally praiseworthy, but theft is morally wrong; why the absence of words or attitudes can change an act from sex into rape, and so on. What we typically think here is that *ordinarily* it is morally wrong to cut people, and so on, but if one consents to surgery then the normative landscape is altered and that action has a much different moral valence.

One plausible way of understanding (3), and how it is supposed to excuse (2), is as saying that the act of rape significantly alters the normative landscape. While ordinarily the right to life of the fetus is stronger than or outweighs a right to bodily autonomy for the mother, the heinous act of rape serves as a kind of moral reset or restructuring of that landscape. After that restructuring, the mother's right to bodily autonomy comes to outweigh the right to life of the fetus.

But how this sort of moral reset is supposed to work is unclear. As we have seen, it is not obvious why the act of rape is supposed to serve as grounds for morally justifying violations of the right to life. As Thomson recognizes, "[s]urely the question of whether you have a right to life at all, or how much of it you have, shouldn't turn on the question of whether or not you are the product of a rape" (Thomson 1971, 49). Cohen says that "from the perspective of violating the rights of a rights bearing entity, all abortions are equal" (Cohen 2015, 89; see also Wreen 1992). The extreme anti-abortion position, which makes no exceptions in cases of rape, insists on this very claim. Thomson then finds a strange bedfellow in those anti-abortion activists urging the RNC to formally oppose any exception for rape within new abortion laws. Both seem to think that a "child conceived in rape is still a child."

Though justifications of the moderate anti-abortion position are uncommon within the philosophical literature, there are nevertheless two extant proposals

that try to explain why (3) significantly alters the normative landscape.¹⁸ The first is the suggestion that because rape brings extreme psychological trauma, it is morally permissible to abort fetuses conceived in that way. Susan Sherwin highlights that when “the fetus is the result of rape... the psychological pain of carrying it may be unbearable, and the woman may recognize that her attitude to the child after birth will be tinged with bitterness” (Sherwin 1992, 101). The idea here seems to be that extreme psychological trauma acts as a moral reset on (2).

While we should agree that trauma does indeed change the normative landscape, the moderate anti-abortion position cannot appeal to trauma to properly justify (3). First, notice that (3) is a specific exception to (2), one that picks out rape as having significant normative power, and (3) does not make any reference to trauma. Perhaps the reason for this is that rape is *necessarily* traumatic. But if so, is it the *trauma* or the *rape* that is doing the excusing work? If it is the trauma that is crucial, then, the source seems irrelevant regarding whether an abortion exception is warranted. Appealing to the fact that trauma can change the normative landscape will not allow the moderate anti-abortion defender to pick out rape (or incest) as the *only* type of action that warrants an abortion exception. Hence, appealing to psychological trauma proves too much.

We can see this more clearly by adjusting Sherwin’s point. First, let us agree that rape is necessarily psychologically traumatic. Second, consider a situation where a fetus is conceived consensually, but where a week later the same father rapes the gestating mother (set aside any problem in figuring out which act caused the conception). Here there is a pregnancy, there is extreme psychological trauma, and moreover, the psychological trauma has been caused by rape. By the moderate anti-abortion position’s own lights, this circumstance would not seem to warrant an abortion exception. If even a slight temporal disconnect is possible between the conception and the traumatic experience, an appeal to psychological trauma cannot explain how (3) excuses (2).

Because appeals to psychological trauma will overgeneralize, this helps show that the sought-after explanation here must be in terms of the act of rape *itself* undermining (2). Toward this end, let us turn to the second suggestion for why (3) significantly alters the normative landscape. Some philosophers argue that abortions are permissible in pregnancies caused by rape because such pregnancies do not generate a so-called “duty to gestate” (McMahan 2002). Steinbock summarizes this line of argument:

it may be objected that the fetus does have a right to use the pregnant woman’s body because she is (partly) responsible for its existence. By engaging in intercourse, knowing that this may result in the creation of a person inside her body, she tacitly gives the resulting person a right to remain. This argument would not apply in the situation most closely aligned with [Thomson’s] violinist example—pregnancy due to rape. A woman who is pregnant due to rape does not voluntarily engage in sexual intercourse, and so she cannot be said to have given the fetus even tacit permission to use her body. (Steinbock 2011, 94)

But Margaret Little shows that even consensual sex does not necessarily generate a duty to gestate (Little 1999). This is because consenting to sex is much

different than consenting to gestation. Consenting to sex involves consenting to a particular partner. Assuming that we accept the view of fetal personhood in (1), the gestating fetus would have to be considered some as-yet-unknown third party. Therefore, if we assume that consenting to sex entails consenting to gestation, the consent clearly seems to have been given to *the wrong person*. It would have to be the fetus who is given consent to occupy a woman's body and not the sexual partner.

At issue, here, is that we ordinarily think that certain act-types generate duties. For example, promising to help an acquaintance move generates a duty for you to help them, where there is no duty absent the act of promising. Similarly, some philosophers think that becoming pregnant via consensual sex generates a duty to gestate (which entails a duty *not to* abort), but that becoming pregnant via rape does not generate that duty. In the same way, someone else volunteering you to help an acquaintance move does not generate a duty for you to do so.

Just as we agreed above that psychological trauma alters the normative landscape, so too should we agree that pregnancies caused by rape fail to generate any duty to gestate. But this cannot be what justifies (3) within the moderate anti-abortion position. Recall that (3) is an excusing condition on (2): it explains why in certain circumstances one may override a fetus's right to life. Above we saw how the position was characterized not by who and who does not have a duty to gestate, but by whether or not the right to life was stronger than the right to bodily autonomy. In appealing to a failure to generate a duty to gestate, one would be explaining why (2) is inadequate. This may well be right, but recall that we are seeking grounds for (3) and not an alternative reading of (2). As such, the moderate anti-abortion position cannot appeal to the duty to gestate as doing the needed explanatory work here.

So while adjustments to the normative landscape are not unusual, the way in which the moderate anti-abortion position accounts for how (3) modifies (2) is most unusual indeed. This can be brought out by unpacking what (3) actually says. It says that a right to life is morally weightier than a right to bodily autonomy, except when that right to life (purportedly) attaches to a fetus that was conceived as a result of rape. I think that spelling out that excusing condition reveals the incoherency within that position. Here's how.

Rape is of course an extreme violation of someone's autonomy.¹⁹ And when the moderate anti-abortion position introduces (3) as an excusing condition on (2) it seems to recognize this. But on what grounds can moderate anti-abortion defenders accept (3) as an excusing condition on (2)? It seems that it can only be because of the type of act that rape is. That is why acts of rape, but not other acts, have this peculiar normative power. But spelling out what rape is in more (but not too much) detail gives us the following:

- (3*) A right to life is stronger than, or outweighs, a right to bodily autonomy, except when the organism that has that right to life is created by a violation of bodily autonomy.

Notice that the excusing condition here now makes an appeal to the importance of violating bodily autonomy. What (3*) says is that a violation of bodily autonomy can indeed outweigh a right to life. But spelling things out in this way gives us a direct conflict with (2), which said that a right to life outweighs a right to bodily autonomy. While altering the normative landscape is not unusual, altering it in this specific manner is. If a right to life ordinarily outweighs a right to bodily autonomy, one cannot coherently say that this does not hold if there is a right to bodily autonomy that has been violated. To do so is flatly incoherent, and as such reveals why the moderate anti-abortion position is incoherent by its own lights.

So once we do some work to unpack (3) we can see that it actually makes a hidden appeal to the moral significance and weight of bodily autonomy. More importantly, it makes this hidden appeal in service of explaining why bodily autonomy is supposedly not morally significant enough to override a right to life. Therefore, if a defender of a moderate anti-abortion position makes an exception for abortion in cases of rape, they are acknowledging that there are indeed violations of autonomy which can be grounds for abortion. And if some violations of autonomy are grounds for abortion then it cannot be true that a right to life is morally weightier than a right to bodily autonomy.

One way to respond to this is by suggesting something like the following: while *most* autonomy considerations cannot override the right to life, *extreme* autonomy violations (such as rape) can. In this way, moderate anti-abortion defenders would be attempting to make room for some autonomy violations, but without going all in for autonomy in general having sufficient power to override the right to life. But where is the dividing line? Which violations of bodily autonomy are relevant, and which are not? It seems to me that any line here will be arbitrary. There may be a way to satisfactorily explain this. In any case, that is for defenders of the moderate anti-abortion argument to explain.

Those familiar with philosophical arguments regarding abortion might notice that the argument here is structurally similar to a “continuous development view” of fetal personhood. The continuous development view is an explanation of why we should accept:

(1*) A fetus is a human being, a person, from the moment of conception

Many defenses of anti-abortion arguments defend (1*) by arguing that any line after conception introduces an arbitrary stipulation of what is and is not a human being. In addition to it being an arbitrary line, it also seems to be by turns over- and under-inclusive. I do not take a stand on such views here, because (recall) I have granted that fetuses are persons. Nevertheless, those who are sympathetic to (1) or (1*) might be persuaded by structurally similar arguments regarding autonomy. The moderate anti-abortion position seems to face a similar problem regarding inclusivity. Which violations of autonomy override the right to

life? Either any such violation of autonomy does so, or else an arbitrary dividing line is introduced. Because we should not use arbitrary dividing lines here, we should conclude that any violations of autonomy are sufficient to override the right to life. So, no one should adopt the moderate anti-abortion position.

5. Moving Forward

Though the moderate anti-abortion position attracts considerable attention and support among the general public, it receives very little philosophical attention. If the argument I have made above is correct, one reason for this absence might be because the view is incoherent. But this cannot be the sole explanation. Many philosophical views are *prima facie* incoherent yet receive philosophical defenses. Philosophers will happily defend solipsism, even though they would have to think there are no other readers (Hare 2009). They will also defend the idea that there are no reasons for belief, even though they would have to think that there is no reason to believe their own argument (Streumer 2017). *Prima facie* incoherency is usually no obstacle; indeed, sometimes that provides the interesting philosophical challenge.

Another explanation for the absence here might be specifically *moral*. Either one thinks that a pregnant woman's bodily autonomy overrides any right to life of the fetus (either because of some particular moral calculus or else because the fetus has no right to life), or else one thinks that a fetus's right to life always outweighs the bodily autonomy of a pregnant woman. This binary seems to push out the moderate anti-abortion position. Yet, this position remains popular among the general public. Perhaps they are simply confused about the plausibility of their preferred position.

I think those who either accept or are sympathetic to the moderate anti-abortion position can be receptive to the argument I have offered here. I think they would have some motivation to move over to a pro-choice position for the following important reason: the moderate anti-abortion position already acknowledges the significant moral importance of bodily autonomy. If an appeal to bodily autonomy is already thought to be capable of changing the normative landscape in some way, then moving further in that direction is a live option. But there does not seem to be a similar motivation to move toward the extreme anti-abortion position. Notice that the extreme position rejects the idea that bodily autonomy can ever outweigh a right to life. The gap then seems to be smaller between a pro-choice position that accepts that bodily autonomy can outweigh a fetus's right to life and the moderate anti-abortion position that accepts that bodily autonomy only outweighs a fetus's right to life in cases of rape.

The hard part, I think, is convincing someone that autonomy considerations have any bearing at all. Extreme anti-abortion positions reject autonomy considerations entirely. Moderate anti-abortion positions, however, are already at least somewhat sympathetic to autonomy considerations. This daylight should not go to waste. It will, I suspect, be fruitful to press on this very point.

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Notes

- ¹Because abortion laws in the US change State-to-State, and with increased frequency, see the following for the most up-to-date regulations: <https://www.gutmacher.org/state-policy/explore/overview-abortion-laws>
- ²Since the Hart-Devlin debate of the 1960's, many have supposed that the law and morality are two importantly separate normative domains, but also that purported conflicts between them are to be resolved in favor of morality. On this understanding, the relationship between the law and morality is "competitive" (Cane 2006, 48). But the competitive view, especially where it resolves in favor of morality, is but one way to view the relationship between law and morality. Alternatively, one might stress the social value of law, or one might adopt a strategic approach to the law - for an example of the latter with respect to reproductive ethics, see Wolf-Devine and Devine (2009). Weighing in on debates about this relationship would bring me too far afield. In what follows, I presume a moderate form of the competitive view: I hold that recognizing an underlying moral incoherence presents us with some reason to reevaluate the law. I thank a referee for urging me to make explicit this commitment.
- ³There is a straightforward explanation for this continued exception within the extreme anti-abortion position. As I explain below, many anti-abortion positions rely on a combination of two claims: one to the effect that "the fetus is a person" and the other to the effect that "a right to life is stronger than a right to bodily autonomy." An exception for abortion in cases of incest or rape relies on bodily autonomy outweighing a right to life. But an exception for abortion in cases where the pregnancy puts the mother's life in a case where there are two competing "right to life" claims. Hence, the extreme position can make room for an exception where the mother's life is at stake.
- ⁴<https://studentsforlife.org/2019/05/22/read-letter-to-gop/>
- ⁵<http://transcripts.cnn.com/TRANSCRIPTS/1201/20/pmt.01.html>
- ⁶<https://twitter.com/realdonaldtrump/status/1129954110747422720?lang=en>
- ⁷<https://www.nytimes.com/1976/02/08/archives/reagan-affirms-antiabortion-stand.html>
- ⁸<https://news.gallup.com/poll/1576/abortion.aspx>
- ⁹Again, I am supposing that where legal restrictions rest on a moral incoherency we have a *prima facie* reason to adjust the legal restrictions.
- ¹⁰Regarding the last of these, one might suppose that the issue of fetal personhood should not be of central concern, and that instead the focus should be on the relationship between the mother and the fetus. Care ethicists might wish to stress this particular point. Because such positions are not strongly committed to (1), they are not my focus in what follows.
- ¹¹However, a minority of philosophers have argued that "person" is not a metaphysical category but rather itself an ethical one. See Rovane (2006).
- ¹²Notice here that Cohen appears to subtly invoke a particular relationship between the law and morality. The phrasing in his quote suggests that abortion should be criminalized because it is morally wrong. This seems to presuppose a competitive view of the relationship between law and morality, and moreover, one where conflicts are to be resolved in favor of morality. This is the same view of the relationship between law and morality that I am operating with here (though my conclusion differs from his), and indeed it seems to be the standard approach in the literature.
- ¹³There are other arguments one can offer here. Rather than appealing to the two key claims above, one might instead say that abortion is typically morally impermissible because women "deserve" pregnancy. As Naomi Wolf wryly puts it, "Antiabortion activists often make exceptions for rape and incest, which suggests that it is her desire for sex for which a woman must pay with her pain. And many women, from a memory that extends back through endless mothers, are inclined to

consciously or not agree” (Wolf 1991, 220). The basic idea here might be that consenting to sex entails consenting to pregnancy. On this sort of desert view, not only do women “deserve” or are responsible for any pregnancy that results from consensual sex, abortion can also be thought permissible in cases of rape precisely because one has not in the first place consented to sex. But as I note below, these sort of views face problems. They typically rely on a presumed “duty to gestate,” but such a duty cannot be what explains (2). More importantly, as with the point made in note 10, this line of argument here stands outside the typical framing being discussed in this paper.

- ¹⁴This presupposes that the notion of inherent or intrinsic value is cogent. Some philosophers argue that all value is instead instrumental. See for example Theunissen (2018).
- ¹⁵In the Christian tradition, for example, see: http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.
- ¹⁶Mackenzie also argues for a third embedded notion within the right to bodily autonomy: an *integrated bodily perspective* (2001, 425). This is characterized as “the meaning or significance of one’s body for oneself.” I set aside this condition in what follows and focus on the two traditional rights within bodily autonomy.
- ¹⁷There are two other positions one could take here. One might think that there are in fact no genuine conflicts among rights, only apparent conflicts that are in principle resolvable. Another thing one might think is that while there are genuine conflicts, there is in fact no way to resolve them.
- ¹⁸As highlighted in notes 10 and 14, there could be ethical frameworks that make the focus of this paper a nonstarter. If one denies either (1) or (2), the way in which (3) is supposed to offer an excusing condition upon them does not need answering in the way I suggest here.
- ¹⁹A referee points out that this claim is predicated on understanding the wrongness of rape within the framework of liberal morality, wherein the wrongness is tied to autonomy. At other times in history, and within other frameworks, the “wrongness” might have been viewed differently: for example, as a violation of honor, as a violation of the husband’s property, and so on. See for example Feinstein (2019).

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