

Drawing a line on the moral and legal permissibility of abortion.

Induced abortion continues to be a subject of ethical and moral debates, with the hope that reaching an agreement on what is deemed morally permissible will guide how the society ought to respond by legislating appropriate legal guidelines. If there is one apparent conclusion which has emerged from all the debates and literature surrounding the issue of abortion, it is that this issue is complex. It is complex in determining both, an ethical and a legal status of the fetus which is consistent with the contemporary views. For any complex issue in society, there never exists a simple answer which is inclusive to all the perspectives (and by extension, the people who hold them). Stating that all abortions are either morally impermissible or morally permissible is that simple answer which avoids the burden of deliberate rationalization on the issue of what makes abortion morally wrong, who deserves moral rights in society and in light of a wide range of competing opinions, views, and perspectives, how must the law respond. The aim of this essay is to examine who constitutes moral privileges in society and more specifically, the criterion on which membership in the moral community is granted. In this paper, I will argue that membership to the human race is not in itself a well supported proposition for accessing moral privileges, but rather, there must be a criterion which forms the basis of this differential treatment. I will endeavour to show that whatever this criterion is set to be, there will be a stage during pregnancy where the fetus will lack that attribute. It is by this deductive reasoning I will demonstrate that terminating pregnancy, before the fetus fulfills the criterion required for gaining moral privileges, is morally permissible. Furthermore, it will be assumed (but not argued) that the individual setting the criterion for access to the moral community is a reasonable and a rational agent. For this essay, with rational arguments which will follow, I set the differentiating criterion to be sentience, the ability for organisms to perceive, interpret and experience subjectively. Holding any philosophical position on the debate inherits the burden to reason how that view will be translated in determining the legal status of abortion. For this, I will demonstrate how it follows that different rational individuals can have varying criterion for determining access to moral community, all of which must be respected by the legal practice. The only way to legally respect these gradation of criteria, and by extension the individual who sets them, is by making all cases of abortion legally permissible.

One of the most common, and often limiting, arguments proposed by the anti-abortionists is to argue that moral personhood is synonymous to, or is granted by, being biologically human. That is to say, just by possessing human genetic capacity, that entity deserves moral privileges in society. It can be quite easily demonstrated that these principles are too broad because following such reasoning, it can be deduced that ending life of human cancer cells (or cancer cell lines) is morally impermissible because they too possess human genetic capacity. Parallel to this, there has been a growing acceptance

towards certain rights and privileges which we deem unalienable even to animals. This ever-evolving acceptance has also been reflected into the legal practice where a certain (but not all) moral privileges are granted to animals when they are subjected to research studies. This topic has also been the subject of Mary Anne Warren's article titled, "On the Moral and Legal Status of Abortion"¹, where she challenges the premise of who qualifies as a human being and through a reasoning similar to the one which will follow, demonstrates that ascription of genetic humanity is not in itself sufficient for establishing moral humanity. This then begs the argument that there has to be a criterion, beyond just membership to a certain specie, which grants an entity access to the moral community. Without a valid basis to show moral significance of being humans, discriminating moral treatment on the basis of species is akin to discriminating on the basis of skin colour within the same specie.

Whether the criteria of differential treatment is a cluster of advanced psychological characteristics (such as creativity, intelligence, self-awareness, etc.), or it's something as simple as sentience, often referred to as a minimalistic way to define consciousness, the point is that there needs to be one. Warren points out that the major discriminating factors can come from attaining consciousness, reasoning, demonstrating self-motivated activity, by acquiring capacity to communicate or perhaps by self-concepts such as self-awareness. The more advanced the criteria is set, the less inclusive the moral community becomes as those who lack it, fail to qualify for moral treatment. In this light, psychological characteristics such as self-awareness become too narrow as it would deprive populations like the mentally ill from receiving moral treatment. For this reason, being sentient (or "qualia"), the state of possessing basic consciousness which is able to perceive subjective experiences such as feel pain, pleasure, hear, smell or taste is argued to be the criterion applied to discriminate between moral treatment. One limitation of this criterion would be that it would make deliberate killing of individuals, including by the means of active euthanasia, morally permissible to individuals deprived of any level of consciousness (either from birth or by reaching a vegetative state). An important implication of this view worth mentioning is that it would grant moral privileges, such as the right to not be sacrificed for another individual's benefit, to sentient animals for the same reasons as why specie-specific moral membership was criticized. By extension, it would also grant animals of all species equal moral rights when subjected to a research study as given to a human test subject. It is crucial to realize, however, that where the criterion is set (and by extension, its limitations and implications) may vary widely for different equally rational individuals. Based on arguments which will be discussed near the conclusion of this essay, I will endeavour to show that in a pluralistic society which seeks to respect a rational individual's ability to make decisions, where this

¹ Warren M. A. (1973). On the moral and legal status of abortion. *The Monist*, 43-61.

differentiating criterion falls on the spectrum of characteristics becomes largely irrelevant when reaching a legal conclusion on the permissibility of abortion.

Due to the complexity in the prenatal physiological development of most animals, and certainly humans, there's an inherent limitation to holding this view. Whichever characteristic is chosen, psychological or biological, the characteristic develops (and continues to develop) gradually throughout the pregnancy. Based on the current state of medical knowledge, it is virtually impossible to pin point the exact time and date the fetus becomes a sentient being. Unfortunately, the best way this issue can be reconciled currently in clinical practice is by referring to the guidelines on the stage of development which follows at each of the three trimesters. It's worth asking what percentage of abortions do in fact happen at the first trimester, the highest criterion which can be set for acquiring moral privilege by following this reasoning. Not surprisingly, on average, one-third of the abortions occur at six weeks of pregnancy, whereas 89% of abortions happen within the first trimester in the United States². This, in part, demonstrates statistical backing to the criterion for determining access to the moral community being set relatively high when women wishing to carry out an abortion are allowed to do so without the interference by the legal guidelines.

Now that the importance of establishing a basis for differential moral treatment is articulated, it's worth analyzing secular and seemingly strong philosophical arguments which place abortion in the same moral category as the deliberate killing of an innocent being. A famous article, titled "Why Abortion is Immoral" by Don Marquis³, makes a strong deprivation argument where it's argued that abortion is morally impermissible because it deprives the fetus with a "future like ours". The emphasis here is first placed on why deliberate killing is morally impermissible by describing killing as depriving an individual of "experiences, activities, projects, and enjoyments that would otherwise have constituted one's future" and then by placing emphasis on the fetus being a potential person, capable of having a future of value like you and me. It is implied by the argument that from the moment of fertilization and zygote formation, there exists the potential for a being who holds a valued future. There are three limiting aspects of these deprivation arguments that pose a problem.

First, a right or a privilege in society isn't granted on the anticipation of acquiring a state, but is rather granted once the actual acquisition is completed. For example, let's consider the right to cast a vote once an individual crosses the classified legal age. This

² Induced Abortion in the United States. (n.d.). Retrieved March 23, 2015, from http://www.guttmacher.org/pubs/fb_induced_abortion.html.

³ Marquis D. (1989). Why abortion is immoral. *The Journal of Philosophy*, 183-202.

right isn't granted to an infant or a teenager because they are potential adults, but rather, it is granted once they cross an arbitrary age threshold, which in this case is set by the legal system in examination. Similar process of reasoning is applied for acquiring a variety of privileges in society such as being able to drive or consume alcohol. The emphasis here is that without showing otherwise, moral rights and privileges should be treated and acquired on the same merits of reasoning as any other human, economic, social and cultural rights and privileges. By this reasoning, granting moral rights to a fetus on the basis of their potential personhood and potential future is impermissible as it would treat the process of acquiring moral rights in a different category from acquiring other sets of rights.

Second, for harm to have occurred on an individual, it is imperative to be able to pin point that someone was in fact in the condition of experiencing that inflicted harm. Regardless of whether the individual is in a condition to articulate or express the inflicted harm, having the capacity to experiencing that harm is the basic requirement which is a consistent philosophical view with contemporary practices. One example of this can be demonstrated in the case of patients in terminal sedation not having the ability to express suffering, yet still being sentient and therefore retaining the moral right of not having harm inflicted. Following a similar reasoning introduced for the question of who acquires membership to the moral community, it can be argued that different individuals can arrive at different biological or psychological criterion which differentiates the kinds of beings worth protecting against harm. It's also consistent with the view that without further support, the argument exclusively based on specie membership provides a biased view and that regardless of the criterion decided, there will be a point during the pregnancy, where the fetus will fail to fulfill it.

Third, when the moral rights of a sentient being is in competition with a non-sentient being, the rights of the sentient being should be *prima facie* protected. Considering the clinical practice of organ donation, especially following immediate death can be used to illustrate this. Even though the object (organ in this case) being isolated is biologically alive, but because it's being extracted from a non-sentient being to benefit a sentient being, it is deemed morally permissible. Based on this reasoning, it follows that the moral rights of a mother, including the right to being an autonomous rational agent whose life has value in the present, must be protected preferentially to the rights of a potential life. It's worth recognizing that there's one significant limitation in adopting this view. If the only moral rights in question are of those beings which can experience harm, it would follow that the rights of those who will exist in future (such as many generations which will follow ours) can be overridden for achieving short term goals. This would imply that sustainable measures to protect the environment or the planet from being harmed is not a moral obligation, but merely a choice.

Holding this view inherits the burden of rationalizing the moral course of action especially in the case of later term abortions where the fetus has acquired the ability which is set as the minimal discriminating factor for receiving moral privileges. This view also begs clarification on post-viability abortions where the fetus has become compatible with life outside the uterus and also requires clarification on whether killing of a new born can be treated in the same moral category as morally permissible abortion (termed as after-birth abortion)⁴ or be assigned to the morally impermissible act of infanticide. The answer to those questions by the view presented is contingent on the leniency of criterion chosen to classify a being as possessing membership to the moral community. It therefore follows that by assigning sentience to be this differentiating factor, like argued for in this essay, any induced abortion after the fetus has acquired sentience will be morally impermissible. I do however recognize that due to the complexity in prenatal development, and in the varying views people come to adopt on this issue, there is no simple answer by universalizing a single trait which marks the entry of a being into the moral community. Among all the competing arguments for and against abortion, from famous contemporary philosophers like J. J. Thompson, L. W. Sumner⁵, Philip Devine and Joel Feinberg, whether their arguments are consistent with the view presented, closely aligned or on the opposite end, they are all rational arguments proposed on the basis of deliberate reasoning. There exists a cohort of philosophers, informed by well reasoned secular arguments, in the western society which deem the entry of a being into the moral community is determined by the unification of the gametes. On the opposite spectrum, there lies a cohort of liberal philosophers which deem after-birth abortion falling in the same moral category as abortion, both of which are morally permissible acts.

The trouble arises when the legal system sets out to establish guidelines on the legal status and permissibility of abortion. To impart insights on how the law must respond, I will endeavour to show that the foundation of many current clinical assessments and treatment plans are based on respecting a patient's autonomy and competence by treating them as rational agents which are actively encouraged to make medical decisions which are in accordance with their long term settled values. From this reasoning, it will follow that establishing a pan legal marker to differentiate beings possessing moral rights, from those who don't, is paternalistic and therefore legal interference by placing a ban on abortion is morally wrong.

⁴ Giubilini A. and Minerva F. (2012). After-birth abortion: why should the baby live?. *Journal of Medical Ethics*, 48-60.

⁵ Sumner L. W. (2014). *Abortion and moral theory*. Princeton University Press.

When evaluating a patient's competence, in cases such as gaining voluntary consent for a treatment, there's growing support towards moving away from paternalistic standards of assessment such as an outcome standard. In their famous article titled, "Standards of Competence", Buchanan and Brock argue for the adoption of a process standard, a standard of competence focusing not on the content of the decision, but rather on evaluating whether the decision reached was reflective of the long term settled values of the patient, to be an ideal standard⁶. By similar reasoning, it can be demonstrated that the the decision which a patient reaches on the issue of setting the discriminating criterion for access to moral community is largely irrelevant. The focus, instead, needs to be emphasized on the decision being reflective of the long term settled values of the patient, for which external support maybe required. It follows from this argument that because these decisions can be diverse, from granting full or partial membership at different stages of biological and psychological development of the fetus, any legal interference in the form of prohibiting abortion, at any stage, would be deemed paternalistic and in direct conflict with the views respected by western medical practices.

Taken together, this analysis resolves a standard problem concerning the ethics of induced abortion. Clearly, reaching a consensus agreement on a complex issue such as what makes abortion morally permissible, who qualifies for moral personhood and with competing views, to what extent should the law respond is an all idealistic fallacy. Of course it's morally impermissible to kill adult human beings and of course it's permissible to kill a cluster of cancer cell lines, but drawing the line on the moral and legal permissibility of abortion remains a challenge. The proposition of this essay is that the issue of abortion, through the involvement of rational individuals and not legal guidelines, is in fact solvable.

⁶ Buchanan A. E. and Brock D. (1989). "Standards if Competence," in *Deciding for Others: The Ethics of Surrogate Decision Making*. Cambridge University Press: Cambridge, 48-57.

References (APA):

1. Buchanan A. E. and Brock D. (1989). "Standards of Competence," in *Deciding for Others: The Ethics of Surrogate Decision Making*. Cambridge University Press: Cambridge, 48-57.
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5. Sumner L. W. (2014). *Abortion and moral theory*. Princeton University Press.
6. Warren M. A. (1973). On the moral and legal status of abortion. *The Monist*, 43-61.