

Discussion Notes

METHODS OF ABORTING

Elective abortions became legally permissible in the United States on January 22, 1973.¹ The Supreme Court in the *Roe v. Wade* decision argued that a pregnant woman enjoys a constitutional right of personal privacy. Although the Constitution does not explicitly mention “privacy,” such a right may be inferred, it was argued, from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The so-called penumbra right, which entails that two conditions must be satisfied if the right is to be overridden, is fundamental. First, the government (state or federal) must have a compelling, as opposed to an important or legitimate, reason for overriding personal privacy, i.e., the governmental goal is perforce. Second, the means by which the governmental goal is achieved must be essential and least restrictive, as opposed to being substantially or merely rationally related to the goal. Under such “strict scrutiny” analysis it was determined that the government had no compelling interest in proscribing elective abortions. Such abortions, so long as they are performed within the first trimester, place in jeopardy only the life of the fetus. Only if the fetus enjoys a constitutionally protected right to life will there obtain sufficiently compelling grounds to abate the pregnant woman’s right of privacy.

The fetus was argued not to enjoy such a right largely because the fetus is not considered a “person” under the Constitution.² The Court noted that the right of privacy enjoyed by the pregnant woman was not absolute and that the government may regulate and even proscribe abortion in accordance with the government’s interest in protecting the health of the pregnant woman and fostering prenatal life. Consequently, it was determined that it is not unconstitutional to regulate the abortion procedure in ways that are reasonably related to the woman’s health during that period when the abortion procedure poses a threat to such, namely, after the first

trimester.³ Furthermore, except where necessary, it was deemed permissible to proscribe abortions to protect the viable fetus from harm.

The decision of the Supreme Court fares well with the position of one pro-choice group according to whom the fetus, at least to the point of viability, is merely a potential person and thus, merely the potential holder of the right to life. Under normal circumstances, it might be argued, the potential to do or be X is never by itself sufficient to grant to the potential X, the status of X.⁴ If the Constitution does not appraise the fetus as a person, then to treat the fetus as a person on the basis that it has the potential to be such, is to do something that is ruled out by the preceding argument.

There is at least one way in which pro-life advocates might respond.⁵ They might suggest the introduction of a constitutional amendment granting personhood and a full right to life to the fetus. It is argued that such an amendment would supply the compelling state interest necessary for proscribing elective abortion. There is, however, one pro-choice position which maintains that even if the fetus were to enjoy a full right to life, abortions would be permissible since they would not violate said right. To inquire into the relationship between a fetal right to life and abortion and to note some possible unhappy ramifications with that relationship shall be the purpose of this note.

According to Judith Jarvis Thomson, a woman's right to an abortion need not conflict with the fetus's right to life.⁶ First, the intention in having an abortion is merely to terminate the pregnancy or the physical dependency of the fetus upon the mother, not the life of the fetus. If the fetus could survive the separation from the mother within the first two trimesters, it would not be acceptable to kill it. Unfortunately, the fetus usually cannot survive the separation. The termination of the fetus's life is not, however, the purpose of the abortion, even though fetal death is an expected result of terminating a pregnancy.⁷

Second, a right to life requires only that the dutyholder not endanger the rightholder's life. It does not by itself require the dutyholder to save the rightholder's life.⁸ In the case of a pregnancy, the body inhabited by the fetus rightfully belongs to the mother.⁹ The mother merely wishes to reclaim her body from the fetus, and thus, fails to save the fetus. Even though the fetus dies as a result of not being saved, the failure to save does not violate the fetus's right to life.¹⁰

Whatever else might be proffered regarding Thomson's argument,¹¹ it seems unlikely that all abortions are merely cases of not saving.¹² Vaginal evacuation by either dilation and curettage or endometrial aspiration kills the fetus (in fact, although not in principle) in the process of separating it from the mother. Killing the fetus in

the process of separating it from the mother is quite different from separating it from the mother with ensuing fetal death. One cannot kill another in the process of not saving them unless saving them would result in the saver's death. For instance, assume that both A and B are diabetics, that the only supply of insulin belongs to A, but that it is in the possession of B and that without insulin each will die. If A reclaims the insulin he merely fails to save B. If he cannot reclaim the insulin without killing B in the process, then B's death is justified only if A's life is also in jeopardy. If A is not himself in danger of dying, he cannot kill B in the process of reclaiming what is his, although he still may reclaim what is his. Consequently, killing the fetus in the separation would only be justified if the mother's life were itself in jeopardy. The mother's life is not in question in elective abortions, but the mother is not justified in killing the fetus in the process of freeing herself from (not saving) the fetus.

It will be to no avail to argue that the previable fetus will die after the separation anyway, as it makes little difference if the fetus is killed in order to effect the separation. It does not follow that one may be killed if one is going to die. After all, one is not entitled to kill the terminally ill patient or kill the prisoner prior to his execution. It seems highly unlikely, therefore, that the ensuing death of the fetus could be used to justify the use of an abortion procedure that killed the fetus in the process of terminating the pregnancy.

Along with the surgical removal of the fetus and the placenta a somewhat different verdict befalls some abortion procedures that initiate uterine contractions. Prostaglandin, but not saline, abortions might prove morally acceptable, since they merely expel the fetus from the uterus with ensuing fetal death. In this case the fetus is merely "not saved" by the mother and this lack of saving is compatible with the fetus's right to life. However, such abortions can only be easily performed toward the end of the second trimester (approximately the 24th week), because instilling the material into the amniotic sac is different prior to that period of gestation. This would mean that unless vaginal evacuation abortions can be perfected so as to eliminate the killing of the fetus in the abortion procedure, it would be morally preferable to have an abortion during the second rather than the first trimester. This conclusion is all the more difficult to accept when it is realized that, not only is the fetus's development approaching viability, but in terms of danger to the mother, second-trimester abortions present higher-complication risks than first-trimester abortions. Both considerations run counter not only to the spirit of the *Roe v. Wade* decision but also to prudent medical judgment.

Nevertheless, if the fetus is granted a full right to life and the arguments presented above are sound and until abortions by vaginal evacuation are perfected so as to circumvent killing the fetus,

second-trimester abortions will be morally preferred to first-trimester abortions, the increased danger to the mother and the near-completed development of the fetus notwithstanding.

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1. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147.
2. The Court looked at the use of "person" in Article I, sections 2,3, and 9; Article II, section 1; Article IV, section 2; and the Fifth, Twelfth, Fourteenth, and Twenty-Second Amendments. Prior to 1946, courts denied tort recovery to a child or his/her estate for prenatal injuries, one of the reasons being that there could be no duty posed by one who was not in existence at the time of a defendant's action. See *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, R 50 N.W. 2d 229.
3. Although a saline abortion also initiates uterine contractions (and thereby expels the uterine contents), it does so by destroying the placental and fetal action that inhibit uterine contractions. Thus a saline abortion tends to kill the fetus which is dissimilar to a prostaglandin abortion. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, (1976) the U.S. Supreme Court invalidated a Missouri provision proscribing saline abortion in favor of the prostaglandin method, the greater likelihood of saving the previable fetus with the latter method notwithstanding. This was due to the Court's reasoning that this provision was not a *reasonable* regulation.
4. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2 (Fall 1972): 47-66.
5. See Senate Joint Resolution 119 (1973) and 130 (1973). There is at least one other way in which prolife members of Congress have endeavored to respond to *Roe v. Wade* besides the one mentioned. The second is based upon States' Rights and notes that abortion will be countenanced or not depending upon the will of the people of a state. See, for instance, House Joint Resolution 527 (1973) and Senate Joint Resolution 110 (1982) and 3 (1983). The problem with this endeavor is that without a new constitutional amendment, the violation of fundamental rights is not something open to democratic votes. If an elective abortion is protected by one's right of privacy, then a majority vote will not make legal the transgression of the right.
6. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (Fall 1971): 47-66.
7. Consider recent litigation concerning the killing of live abortuses, e.g., Tennessee Code section 39-306. See also, *Planned Association of Kansas v. Ashcroft* (1983), 462 U.S.
8. This same type of argument was utilized to restrict fundings for abortion. See, *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484.
9. This contention has recently been questioned. See Mark Wicclair's "The Abortion Controversy and the Claim that this Body is Mine," *Social Theory and Practice* 7 (Fall 1981): 337-346.
10. With identical intentions, "not saving" and "killing" might be argued to be morally equivalent. See James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine* 292 (September 1975): 78-80. Thus, if the intention in separating the mother and fetus is to ensure fetal death, it would be morally equivalent to killing the fetus and would consequently violate the fetus' right to life. But since the intended death of the fetus may be absent in abortion, such a separation may not be morally equivalent to killing the fetus.

11. It might be wondered if the mother's special relationship to the fetus does not present the mother with a positive duty to the fetus. If so, not saving would be morally blameworthy unless the limits to positive obligations are satisfied in the case of elective abortions. For example, while a mother could not allow her child to starve to death, i.e., she suffers a positive obligation to feed the child, it is not similarly clear that she could not allow the child's death or need of an organ only she could supply, i.e., she does not suffer a positive obligation to save her child's life by donating one of her own organs. Although the child would die in each case without the mother's intervention, the second might be allowed as there are limits to positive duties.

12. Even if all abortions were cases of "not saving," it might be questioned whether abortions would be palpably permissible, notwithstanding the doubts raised in note 11. In tort law, the doctrine of necessity allows defendants to escape liability if during an emergency, e.g., when life threatens, the defendant trespasses upon the plaintiff's property or chattels. In a personal or private emergency the defendant is only liable for damage suffered by defendant but not for the trespass, and this is due to the defendant's right to the ephemeral use of the property during such an emergency. The differences between one's property, both real and personal, and one's body notwithstanding, might the fetus be analogous to the defendant in the above case and the mother analogous to the plaintiff?