

The Conflict of Rights in the Moral Community

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ABSTRACT

This thesis will delve into the moral arguments regarding abortion. I will argue that abortion is morally permissible until the fetus reaches consciousness. Once the fetus has gained consciousness, it has the capacity to develop and become an autonomous person and therefore joins the moral community and has rights.

Autonomy is important, and the respect for autonomy must be extended to conscious fetuses. Individual autonomy is a person's capacity to make decisions for themselves and about live their life according to reasons and motives that are free from external forces (Christman, 2020). Autonomous agency is necessary for equal political standing (Christman, 2020). When an individual lacks autonomy, like a fetus, it allows for paternalism to come into play (Christman, 2020). Paternalistic action is performed with the intent of promoting another's good but occurs against the other's will or without the other's consent (Christman, 2020). This is what allows the government to make rules and regulations regarding abortion.

Additionally, I will argue that there are some instances after consciousness, where abortion is still morally permissible. They are in the event that the mother's life is in danger and when the fetus will not be able to join the moral community. Finally, I will explain how the current laws are problematic and provide how they should be drafted to reflect this point of view.

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CHAPTER ONE

INTRODUCTION

The key to determining whether abortion is morally permissible lies with the question of when entities join the moral community. Individuals who believe that abortion is morally impermissible tend to draw the line closer to the conception of the fetus. On the other hand, people who favor women's autonomous choice in deciding if they want an abortion lean more towards the line being drawn closer to birth. Because the point at which an entity joins the moral community determines when it is morally permissible to have an abortion, that point must be clear. The line must be drawn so that a fetus with consciousness is a part of the moral community.

In this thesis, I will argue that the moral community is made up of two different types of groups, persons and other entities that are non-persons but are still morally considerable. An entity joins this moral community once it has gained consciousness, so once a fetus has gained consciousness, it is a part of the moral community. Furthermore, I will argue that once an entity gains admission to the moral community, it ought to be afforded some of the rights that are afforded to persons. Finally, I will argue that once a fetus becomes a part of the moral community, there are only two circumstances in which abortion is morally permissible. They are if the mother would be seriously injured or die and if the fetus has a disability that prevents it from being conscious.

CHAPTER TWO

THE MORAL COMMUNITY

There are two main members of the moral community: persons and conscious non-persons. Consciousness will be described in more detail in the following section. Persons are inherently socially, politically, and economically situated beings (Kenny et al., 2002). Persons as essentially relational beings who exist and develop within a web of relationships: features such as their identities, perceptions, beliefs, emotions, values, habits of interaction, and connections to the natural and social world are formed within these networks (Kenny et al., 2002). This web is the moral community.

Persons

There is something fundamentally different between entities, like humans, who have personhood, and entities that do not. This fundamental difference is rooted in the way humans can use their autonomy to reflect on their past actions and associate moral worth and consequences with them, as well as think about future actions and what they should and shouldn't do in a moral context. Humans use their autonomy to shape the moral community through religion, art, advanced communication techniques, and different cultures. The autonomy that persons have is intrinsically valuable and allows them to create a moral community that protects that autonomy. The community creates systems that reflect what is moral

or immoral and make systems to help autonomous beings determine if an action is morally permissible. The moral community is large and was created as a way to protect autonomy. As infants grow, they develop more autonomous capacities, like talking and writing. They can communicate more effectively and interact more with other persons and are likely to reach personhood eventually.

These intrinsic capabilities, combined with the ability to create complex moral systems within which persons live, contribute to why personhood is so morally important. Immanuel Kant believes that personhood is morally significant because of human dignity and that morality is objective and rational (Rachels, 1986). Kant believes that the only way moral goodness can exist is for rational beings to comprehend what they should do (Rachels, 1986). To him, this is the only thing that has moral worth. Therefore, there would be no moral worth to consider if there were no rational beings. Because of this, Kant concludes that the value of rational beings is superior to all other beings and things (Rachels, 1986). It follows from this line of thinking that rational beings have rights and must always be treated as ends and never simply as a means. Autonomy could be defined as a specific kind of rationality, as Kant did, or defined more simplistically as self-governed activity. Mary Anne Warren believes five features serve as the criteria for personhood and, therefore, autonomy. They are capacities for reasoning, self-awareness, complex communication, self-motivated activity, and consciousness (Warren, 1973). It is sufficient for an entity to become a person if it

has any combination of these criteria. Although a precise definition of autonomy is useful, it is unnecessary for this thesis. However, the definition must not be too stringent as to exclude people with disabilities.

Kant also believes in the kingdom of ends (Johnson, 2022). The idea for this community is that "our fundamental moral obligation is to act only on principles which could earn acceptance by a community of fully rational agents, each of whom has an equal share in legislating these principles for their community" (Johnson, 2022). In other words, a person ought to act in accordance with moral principles accepted by a community of fully rational agents.

Expanding on Kant's view, humans have autonomy and are therefore afforded rights. Because autonomy is so valuable, those rights and protections ought to be extended to entities that have the ability to become autonomous. In order to respect autonomy, we must respect beings that will become autonomous and allow them to be part of the moral community or the kingdom of ends. Kant's dignity relies on individual rational capacity, and those individuals are a part of the moral community. This dignity is why personhood is so morally significant and why the community is important. It is also why rational agents ought to be extended to conscious entities.

Conscious Non-Persons

Although merely conscious entities are not fully autonomous, they still make up an important part of the moral community. The community is morally obligated to include conscious non-persons in order to respect autonomy.

Autonomy allows persons to create systems that reflect moral rights. The same protections afforded to persons ought to be given to conscious entities like fetuses.

Autonomy is so valuable that beings that have the ability to become autonomous in the future must be protected. If the moral community did not include conscious non-persons and there was a high bar for personhood, infants would not be considered persons and would not have rights that are protected. This cannot be true, given that society currently provides protections for entities that are not autonomous. Therefore, they must be members of the moral community. Once an entity, like a fetus, is a part of the moral community and on its way to becoming an autonomous being, the community must protect it.

The continuation of the moral community is important, and so is treating persons as ends in connection with their moral status. However, at times the persons' rights will be overridden by the community to ensure the rights of the fetus are being protected. A fetus joins the moral community when they obtain consciousness because, at this point, they are now on their way to becoming autonomous. If nothing happens, the fetus will grow and develop and likely reach personhood. Furthermore, they can experience pain and loss, and the community is

harmed whenever a being that could become autonomous is lost. Therefore, there must be a strong morally overriding reason for the mother to terminate her pregnancy at this stage.

In sum, a fetus joins the moral community once it gains consciousness and ought to be awarded the same protections as autonomous persons at this point. It ought to have the same protections because the fetus is likely to become an autonomous being, and the moral community and the fetus can be harmed by abortion. Consciousness is the point at which an entity is on its way to becoming autonomous and has the capability of becoming a person. Therefore, consciousness is necessary to be a part of the moral community.

Consciousness

Cognitive abilities are some of the most important ways to differentiate persons and non-persons, like animals and plants, and one of the most vital cognitive abilities is consciousness. Consciousness is the state of awareness of one's mental and physical existence and the ability to feel. As humans develop, their cognitive abilities grow and advance, and they become autonomous. Although there is continual development, there is still a baseline of cognitive abilities necessary to be part of the moral community. Consciousness happens gradually, so it is difficult to pinpoint the exact time a fetus becomes conscious. However, scientists have determined that consciousness requires many

interconnected components and nerve cells (Koch, 2009). The thalamo-cortical complex, which provides consciousness, starts to be put in place between the 24th and 28th weeks of gestation (Koch, 2009). After another two months, synchrony of the electroencephalographic rhythm across both cortical hemispheres signals the onset of global neuronal integration (Koch, 2009). In sum, most of the elements required for a fetus to be conscious are set by the third trimester. (Koch, 2009). However, fetuses in the third trimester are typically in one of two sleep states, quiet sleep and active sleep (Koch, 2009). A fetus is actively sedated by the low oxygen pressure, the environment in the womb, and a substance that is produced by the placenta to induce sleep (Koch, 2009). This sleep allows the brain to mature and grow (Koch, 2009). However, this sleep means that although the fetus is capable of consciousness, it does not actively experience consciousness (Koch, 2009).

Once the fetus is born, its mental capabilities grow and become more complex. They can recognize other people, have thoughts and emotions, and gain the capacity for self-reflection. Essentially fetuses satisfy the minimum consciousness requirement at around 24 weeks, towards the end of the second trimester and beginning of the third trimester. Because autonomy is so important and conscious non-persons must be protected to respect autonomy, it is best to be cautious and use 24 weeks as the mark for consciousness. Viewing the entry into the moral community as consciousness allows people with cognitive disabilities to

still have the same rights as autonomous persons. Although people who suffer from severe cognitive disorders cannot always express or utilize their autonomy, society still treats them as entities who have that protected status. This is evidenced by laws and systems that are put into place to protect their interest. An example of this is a conservatorship. Individuals who are deemed to not have the capacity to make their own decisions can be placed in a conservatorship where another person has the ability to protect them and their interests.

A potential objection to this view is that if consciousness is the entry requirement for the moral community, it leaves the door open for entities like animals who have consciousness to join. This leads to some interesting philosophical questions. A possible answer could be that there is some aspect that makes the consciousness of humans different from the consciousness of animals. However, this thesis focuses on persons and fetuses that are a part of the moral community in the context of the moral permissibility of abortion.

CHAPTER THREE

THE RIGHTS OF THE MORAL COMMUNITY

To become a part of the moral community, an entity must be conscious. And to have personhood in the moral community, a person must be autonomous. Many rights are gained once an entity joins the moral community and with the status of personhood. These rights stem from the significance of the capacity of autonomy. Essentially, autonomy is so important because it is intrinsically valuable and the foundation of the moral community that these rights must be put in place and protected. The three main rights that are gained concerning the discussion of abortion are autonomy, consent, and life.

Autonomy

Immanuel Kant defines autonomy as the right for one to make their own decisions without interference from others (Johnson, 2022). An autonomous person has the capacity to make a decision through their own independence of mind and, after personal reflection, finally, as an ideal way of living life autonomously (Johnson, 2022). Essentially, Kant believes autonomy is a moral right that people possess, or the capacity people have to think or make decisions about themselves, which provides some form of control over the events that occur in their lives (Johnson, 2022). Autonomy is vital for personhood because it allows persons to utilize their cognitive abilities and control what happens in their lives

and how they affect society. Without autonomy, people would not be able to make their own decisions in life or determine what they believe to be the correct moral course of action.

Making decisions and having control over oneself is how people interact in society. For example, if everybody were required to listen to the same music or have the same religious beliefs, building or maintaining significant relationships would be difficult. Instead, people must choose their likes and dislikes and have differing opinions on things like science and moral beliefs. This is because those differing beliefs and the freedom to challenge them or longstanding societal beliefs allow for growth and new revelations within the moral community. The moral community would cease to exist without autonomy, and therefore it must be protected.

Informed Consent

A right that has stemmed from the importance of autonomy is the right of informed consent. The right of informed consent is important in order to express autonomy. The idea of informed consent has been established in common law, especially regarding medical procedures and ethics. Informed consent is the right a person has to determine what others can do to their body, but they have to be fully informed. A person who is not informed cannot use autonomy to consent. For example, a person going to the hospital to get stitches must be informed of the

relevant risks and benefits associated with that procedure before they can consent. If the person did not know the risks or benefits, they could not autonomously consent to the procedure because they would not know what their choice would entail.

Consent is important because it determines what a person allows other persons to do to them. It is, in a way, a check on autonomy because it does not allow other people's autonomy to be infringed upon. Without consent, autonomy could go unchecked and allow the abuse of other persons. Consent creates a line for how far one person's autonomy can impact another person.

Furthermore, this right is so important that there are consequences when a person does not respect another person's consent or refusal to give consent. For example, if doctors perform surgical procedures on patients without their informed consent, the patient can sue them, and their license to practice medicine could be revoked. This shows just how important the right to consent is in society.

Although the right to consent is highly regarded, it can be overruled. For example, if a person commits murder, the government, with enough evidence, can get a search warrant or an arrest warrant to search a person's house or take them to jail without their consent. This is to protect other people and their autonomy. Protecting people from a person killing other people is more important than that person's right to consent to a search or right to privacy. This is because taking away somebody's autonomy by killing them violates their rights. Certain rights

can be overruled for the good of the moral community. The good of the moral community is served by allowing people to defend themselves and protecting autonomy. Overall, consent is important because it allows people to express autonomy and ensures autonomy is not infringed upon by allowing people to decide what others can or cannot do to them.

Right to Life

The right to life is the belief that a being has a right to live and should not be killed by another entity. Unlike the previous two rights that were mentioned and only apply to autonomous persons, this right applies to all members of the moral community. When discussing issues like abortion, the death penalty, and physician-assisted suicide, the right to life comes into play.

Person's Right to Life

A person's right to life is arguably one of the most protected rights in the United States. This is evidenced by the surplus of laws that protect people from being killed by other people or diseases. These laws regulate what is produced and given to people to ensure it does not kill anybody and the extensive amount of money and research that goes into discovering new medicine and creating new life-saving procedures. A person who is killed loses their autonomy and therefore their personhood status.

There are some exceptions that societies deem reasonable to deny a person the right to life. The main two are the death penalty and war. The idea behind allowing the death penalty is retribution and deterrence. A person who has been given the death penalty is only done so if they are responsible for the death of another person. Retribution is intended for the person to pay for their crimes, and deterrence is to discourage people from killing other people. War is a justifiable reason to kill other people to prevent the mass casualties that may result without a war. All of the reasons for these exceptions still rely on other people's right to life and the importance of autonomy. Essentially, the right to life can be overruled for the good of the moral community, which is done by protecting autonomy.

Non-Person Members of the Moral Community's Right to Life

One thing that must be discussed is the right to life of non-person members of the moral community. As mentioned previously, these entities are so morally significant because they are developing the attributes that are necessary for autonomy that they must have a right to life in addition to persons. An issue arises when attempting to balance the plethora of rights that persons have with the rights of other members of the community, especially regarding a fetus. Still, before I detail that, I will further discuss the non-person's right to life and how it is applied to them specifically.

Non-person entities also have a right to life. Non-persons who are a part of the moral community are still conscious and can be harmed if killed. They just

have not reached the status of personhood, but they are on their way to becoming autonomous beings. A conscious non-person's right to life can be overridden by the rights of a person; in the same way, another person's right to life may be overridden. For example, people can euthanize animals like dogs if they bite persons to ensure that the animal does not harm another person.

CHAPTER FOUR

FETAL RIGHTS VS. PERSON RIGHTS

Once an entity becomes a member of the moral community, it has certain rights that the community is interested in protecting. However, this protection does have limits. At the point before a fetus becomes a member of the moral community, the woman who is pregnant has time to determine if she wishes to continue with the pregnancy. Therefore, they have time to consent to the fetus using their body. This consent can only be revoked under restricted circumstances once the fetus becomes a member of the moral community.

A person might argue that the community has an interest in the fetus from the moment it is conceived. However, as mentioned previously, this is not an actualized interest until the fetus is conscious because this is the point at which it is on its way to becoming autonomous. Therefore, the community cannot step in. Once the fetus becomes a member of the moral community, the woman's autonomy gets restricted because she has consented up until this point. However, this consent is not extended to cases of death or in cases where the fetus would be significantly impaired and not be able to be a part of the moral community.

Unconscious Fetus v. Person

A fetus that is not a member of the moral community is simply a fetus that has not yet reached consciousness. This includes a fetus from the time of

conception to the time before the fetus gains consciousness. At this point, the fetus does not have any rights. This is because the termination would not harm the moral community or the fetus at this point because it has not begun developing capacities to become autonomous. Some people might argue that there is harm to the fetus because it will no longer exist. However, even though there is a living entity, it is not conscious and cannot be harmed.

Harm would occur if a woman were forced against her will to continue carrying a fetus at this point if they have not consented to allow the fetus to use their body. This is because it violates the woman's autonomy and rights that are obtained once a person reaches personhood and has been formally established by the moral community. This establishment is evidenced by laws that have been put in place to protect people's bodily autonomy. The laws regarding rape, assault, and consent to medical treatment are just a few examples of how the moral community protects bodily autonomy. There are also laws regarding self-defense that are most closely related. For example, if person A points a gun and threatens person B, and person B reasonably believes their life is in danger and they kill person A, person B would be found not guilty due to self-defense. It is important to note that the term not guilty does not mean that the person did not commit the act. In this case, person B did kill person A, but the moral community recognizes self-defense as a justifiable exception. Because there is no harm to the fetus or the moral

community and the only person who can be harmed is the woman, the woman is the only entity allowed to dictate if the fetus should be terminated.

Conscious Fetus v. Person

The debate on when abortion is morally permissible gets more complicated when the fetus becomes conscious and is a part of the moral community. Once the fetus gains consciousness, there is harm that occurs to entities other than the woman who is carrying the fetus. The fetus and the moral community can be harmed at this point. The moral community is harmed because they are losing one of the members of the community. Furthermore, the harm would be more expansive if that fetus had the capability of becoming an autonomous person. Again, this is because autonomy is so important that the community ought to protect beings that will become autonomous. The harm gives the moral community an interest in the fetus, which is when laws restricting the woman's choice become relevant and applicable. Ideally, the woman carrying the fetus knew she was pregnant before 24 weeks and could exercise her bodily autonomy and have an abortion before this point if she wanted to or consent to give birth to the baby. Once the fetus reaches the stage of consciousness, the woman can no longer get an abortion for any reason she chooses. This is because it would violate the fetus's right to life. Although most abortions are not morally permissible at this stage, there are certain circumstances in which they are permitted. These limited

circumstances are if the woman could die as a result of giving birth and if the fetus has a severe disability.

Harm to the Woman

In some cases, a woman's life can be put in danger if she gives birth. At this point, the woman's right to life overrides the fetus's right to life. Even though they are both part of the moral community, the fetus's right is overridden because the fetus is harming the woman. The woman, at this point, has the right to defend herself and protect her right to life. As discussed earlier, this right to save one's life that another has threatened is well established in society—the concept of self-defense as a defense to killing a person is one of those examples. The self-defense example involves the killing of one person by another person, and in the case of abortion, it is the killing of a conscious non-person by a person. A closer example would be if a woman was out on a run and a dog started chasing her and began attacking her, causing serious damage and putting her life in danger. As a society, people would agree that in that case, the woman has the right to kill the dog to save her own life. The case involving the dog is closer in comparison because the dog is conscious but does not have autonomy like a person, which puts it closer to the fetus. Therefore, if a fetus is putting a woman's life in danger, it is morally permissible for her to revoke her consent to the fetus using her body and terminate the pregnancy.

Fetal Disabilities

In cases where the fetus would be born with severe disabilities or would likely not survive outside of the womb, abortion is morally permissible. Fetuses are protected and have a right to life because of their membership in the moral community and their potential to become autonomous. Suppose the fetus is sick or injured in a way that prevents them from ever being able to gain consciousness or reach personhood. In that case, abortion is morally permissible because there is no harm to the moral community or the fetus. There is no harm to the moral community because the fetus would not be able to reach the point of consciousness and begin becoming an autonomous being. It would not have the opportunity to become more person like. There is no harm to the fetus because the fetus would die whether it was from the abortion or not and would not become an autonomous person.

A person might argue that this view is wrong because fetuses with down syndrome or fetuses that will be born with other disabilities like being blind should not be able to be aborted. However, those cases do not fall into the previously described scenario. The disability must be of such a nature that it would be impossible for the fetus to be a member of the moral community, which does not require autonomy. Furthermore, the definition of autonomy cannot be too strict. As long as entities can satisfy some of Warren's criteria, they can be considered autonomous persons. An example of when an entity would be unable

to be a part of the moral community would be entities in a coma. In a coma, a being is not conscious and therefore is not a member of the moral community, and other factors come into play when determining the right to life. Because of this, it is morally permissible to abort a fetus that would be born and only experience a coma-like state.

CHAPTER FIVE

THE CURRENT LEGAL STANDARD OF ABORTION

The legal standards for abortion have been challenged and altered many times throughout history. There are varying regulations for abortion in different states across the United States. However, the federal government has established a baseline test that all state regulations regarding abortion must meet in order to satisfy people's constitutional rights.

Roe v. Wade

Roe v. Wade is the leading Supreme Court case that set the course for the right to privacy, protecting a person's right to access abortion (*Roe v. Wade*, 1973). This case came about due to article 1196 of the Texas Penal Code, which restricted legal abortions to only medically advised abortions done or attempted to save the mother's life (*Roe v. Wade*, 1973). The plaintiff, Roe, was a single pregnant woman who filed suit against Wade, a Texas state official, on the grounds that the statute restricted her right to obtain an abortion and was unconstitutional (*Roe v. Wade*, 1973 pg. 113). The federal district court issued declaratory relief but did not grant injunctive relief because the statute was vague and violated Roe's Ninth Amendment and Fourteenth Amendment rights. (*Roe v. Wade*, 1973). Roe appealed the federal district court's denial of injunctive relief, and the Supreme Court granted certiorari (*Roe v. Wade*, 1973).

The Supreme Court held that the constitutional right to privacy, which was established in *Griswold*, protects a women's right to choose to have an abortion. (*Roe v. Wade*, 1973 pg 153). In the opinion written by Justice Blackmun, the Court identified three state interests that it attempted to reconcile with the right to choose an abortion. They are as follows: decreasing illicit sexual activity, concerns over the safety of abortion procedures, and duty to protect prenatal life (*Roe v. Wade*, 1973 pg 148-151). The right to choose an abortion is not unlimited and must be considered along with important state interests in regulating abortions (*Roe v. Wade*, 1973). This is where strict scrutiny comes into play. For a state regulation to be constitutional, there must be a compelling state interest, and it must be narrowly tailored to further that interest (*Roe v. Wade*, 1973).

A person's right to privacy outweighs any state interest during the first trimester when an abortion can be safely performed and the fetus is early in its developmental state (*Roe v. Wade*, 1973). At some point, the state's interest begins to outweigh the privacy rights of the pregnant person (*Roe v. Wade*, 1973). The state's interest continues to grow the further a person gets into their pregnancy (*Roe v. Wade*, 1973). The state's interest in protecting the pregnant person becomes compelling towards the end of the first term when abortion becomes increasingly risky (*Roe v. Wade*, 1973). A state's interest in protecting a fetus and potential life becomes compelling once the fetus is viable or is capable of having a meaningful life outside the womb (*Roe v. Wade*, 1973). Article 1196 of the Texas

Penal Code was overly restrictive by only allowing abortions when necessary to protect the life of the pregnant person and is therefore unconstitutional (*Roe v. Wade*, 1973).

The Supreme Court created the trimester framework to make it easier to determine when a person's right to an abortion is being violated. The trimester framework that the Court adopted is as follows; during the first trimester, the decision on whether to have an abortion is solely the decision of the person who is pregnant; during the second trimester, the state can regulate but not outlaw abortions in the interest of the health of the person who is pregnant; and during the third trimester, if the fetus is viable, the state can regulate or outlaw abortions in the interest of the potential life that will be born except when it is necessary to protect the life or health of the mother (*Roe v. Wade*, 1973 pg 163).

Justice Stewart concurred with the majority opinion, but he believed that the basis for the decision should have been substantive due process instead of the vague right to privacy (*Roe v. Wade*, 1973 pg 167). Substantive due process is that the due process clause protects fundamental rights from the government's interference, so in Justice Stewart's opinion, the right to an abortion itself should have been decided upon liberty interests that are protected by due process, as opposed to being found in the right to privacy (*Roe v. Wade*, 1973). Justice White dissented on the grounds that nothing in the language or history of the Constitution supports the majority's opinion (*Roe v. Wade*, 1973 pg 172).

Justice Rehnquist dissented on the grounds that he believed the constitutional right of privacy was not implicated in this case (*Roe v. Wade*, 1973). He believed that the transaction between a licensed physician and a woman wanting a medical procedure is not private in the traditional sense of the word. Therefore, the Texas statute should be treated like other economic and social regulations and upheld if it has a rational relation to a valid state objective (*Roe v. Wade*, 1973). He also believed that an absolute statute that banned all abortions would likely not be found to be rationally related to a legitimate state objective; however, the majority's opinion invalidating any restrictions on abortion during the first trimester dismissed the state's interest in the potential life of the fetus and would not stand under the rational basis test (*Roe v. Wade*, 1973).

Planned Parenthood v. Casey

Planned Parenthood v. Casey was another landmark case regarding abortion. The Supreme Court reaffirmed the central holding in *Roe v. Wade* but changed the standard used for analyzing the restrictions on a woman's right to access an abortion (*Planned Parenthood v. Casey*, 1992). In this case, Planned Parenthood, the plaintiff, filed suit against Casey, the Governor of Pennsylvania, in federal district court to challenge five specific restrictions on abortion in Pennsylvania law (*Planned Parenthood v. Casey*, 1992). The five restrictions are as follows; a 24 hour waiting period for all women before having an abortion; all

minors seeking an abortion must have the informed consent of at least one parent; a married woman must show that she notified her husband of her intent to have an abortion; women had to give informed consent, women had to receive state-published information about abortion 24 hours before having an abortion; and providers have to keep records and report information (*Planned Parenthood v. Casey*, 1992). The district court ruled in favor of Planned Parenthood, but the court of appeals reversed and upheld the Pennsylvania provisions except for the requirement of spousal notification (*Planned Parenthood v. Casey*, 1992). Planned Parenthood appealed, and the United States Supreme Court granted certiorari. (*Planned Parenthood v. Casey*, 1992).

The Court held that because of stare decisis, the precedent of *Roe v. Wade* should only be overturned if there has been a change in circumstances, but there has not. However, some changes to the contours of the application are necessary (*Planned Parenthood v. Casey*, 1992). The trimester framework was overruled because it was deemed overly rigid when defining states' and women's interests regarding abortion (*Planned Parenthood v. Casey*, 1992). The Court further held that before the end of the first trimester, a state could put in place constitutional regulations to ensure women know the information necessary to make informed and rational choices (*Planned Parenthood v. Casey*, 1992). Instead of using the trimester framework, the Court chose to adopt the undue burden test to take its place in determining whether a regulation impermissibly infringes on a woman's

right to an abortion (*Planned Parenthood v. Casey*, 1992). The undue burden test is as follows: an undue burden exists if the purpose or effect is to place a substantial obstacle in the path of a person seeking an abortion before the fetus is viable (*Planned Parenthood v. Casey*, 1992). The Court found that the spousal notification of the Pennsylvania statute places an undue burden, but the informed consent, parental notification, and the 24 hour waiting period did not create an undue burden; therefore, they affirmed the court of appeals decision (*Planned Parenthood v. Casey*, 1992).

Justice Stevens concurred that stare decisis applied in this case; however, he dissented on the ground that the trimester framework should not have been overruled because both the states' interest and the interest of the woman can be served under the trimester framework (*Planned Parenthood v. Casey*, 1992). Justice Blackmun, who wrote the opinion for *Roe v. Wade*, concurred in part and dissented in part (*Planned Parenthood v. Casey*, 1992). He wrote that the right to an abortion should be established as a fundamental right incapable of being overturned by future decisions or voter initiatives (*Planned Parenthood v. Casey*, 1992). He believed that strict scrutiny should be applied to restrictions on abortion put in place by states (*Planned Parenthood v. Casey*, 1992). Justice Rehnquist also concurred in part and dissented in part (*Planned Parenthood v. Casey*, 1992). He believed that the trimester framework and the undue burden test are incorrect to apply (*Planned Parenthood v. Casey*, 1992). The correct test is the rational

relationship test, which should be the only criteria for determining if a states' restriction on abortion is constitutional (*Planned Parenthood v. Casey*, 1992). His opinion, in this case, is similar to the position that he took in his dissent in *Roe v. Wade*. Finally, Justice Scalia concurred in part and dissented in part (*Planned Parenthood v. Casey*, 1992). He believed that it should be up to the states and voters to decide whether abortion is permissible (*Planned Parenthood v. Casey*, 1992). There is nothing in the Constitution regarding abortion, and traditionally in American society, abortions have been prohibited by states.

Whole Women's Health v. Hellerstedt

In *Whole Women's Health*, the Supreme Court gave more insight into determining if there is an undue burden on a person's right to have an abortion (*Whole Women's Health v. Hellerstedt*, 2016). Texas passed two laws regarding abortion. One of the laws required that doctors who perform abortions have to admit privileges at a hospital no more than thirty miles from where the abortion was to be performed (*Whole Women's Health v. Hellerstedt*, 2016). This was to ensure that people getting an abortion had access to a hospital if something went wrong with the procedure (*Whole Women's Health v. Hellerstedt*, 2016). The second law required that each abortion facility meet the minimum standards for ambulatory surgical centers (*Whole Women's Health v. Hellerstedt*, 2016).

The plaintiff, Whole Women's Health, filed suit against John Hellerstedt, the Texas Department of State Health Services commissioner, on the grounds that the laws were unconstitutional (*Whole Women's Health v. Hellerstedt*, 2016). The district court found that the laws would significantly reduce people's access to abortion because the number of abortion facilities would go from 40 to 7 for the entire state of Texas (*Whole Women's Health v. Hellerstedt*, 2016). The district court also found that abortion was a safe practice in Texas before the laws were adopted, and abortions performed at ambulatory surgical centers were not that much safer than abortions performed at other types of abortion facilities (*Whole Women's Health v. Hellerstedt*, 2016). The district court ruled that the laws were unconstitutional, the court of appeals reversed the decision, and then the Supreme Court granted certiorari (*Whole Women's Health v. Hellerstedt*, 2016).

The Supreme Court reiterated its holding in *Casey* that a law that has the purpose or effect of placing a substantial obstacle in the path of a person seeking an abortion imposes an undue burden on the right of a person to have an abortion and is therefore unconstitutional (*Whole Women's Health v. Hellerstedt*, 2016). The Court held that the Texas laws were unnecessary safety regulations in that their purpose was to create a substantial obstacle for people trying to obtain an abortion (*Whole Women's Health v. Hellerstedt*, 2016). The law regarding admitting privileges did not provide any notable health benefit to a patient because abortion was already a safe procedure in Texas (*Whole Women's Health v.*

Hellerstedt, 2016). The law regarding the surgical-center requirement made it more difficult to obtain an abortion without being necessary to protect patients' health (*Whole Women's Health v. Hellerstedt*, 2016). These laws placed a substantial obstacle in the path of people seeking an abortion in Texas because the laws would have forced the closure of the majority of abortion facilities in Texas (*Whole Women's Health v. Hellerstedt*, 2016). The laws are therefore unconstitutional.

Justice Alito dissented to the opinion based on the doctrine of res judicata and argued that it should have been dismissed because of claim preclusion (*Whole Women's Health v. Hellerstedt*, 2016). Justice Thomas dissented because he believed that the majority opinion misinterpreted the undue-burden test from *Casey* and applied it in a manner that more closely resembles strict scrutiny (*Whole Women's Health v. Hellerstedt*, 2016).

In sum, there is a constitutional right to choose to have an abortion. However, that right is not unlimited. A state may choose to regulate abortion once it has a compelling interest. Even though a state may regulate abortion, the regulation on abortion could be deemed unconstitutional and unenforceable if it has the purpose or effect of placing a substantial obstacle in the path of a person seeking an abortion because it imposes an undue burden on the right of a person to have an abortion.

CHAPTER SIX
HOW THE LAWS SHOULD REFLECT THE MORAL COMMUNITY
VIEW OF ABORTION

Given the continuing developments in science and society, there must be a line drawn at consciousness. Consciousness is not something that, over time, will come to fetuses earlier or later in life. The continuation of scientific advancements would not impact when consciousness arises, which determines at what point a fetus becomes a member of the moral community. In order to reflect the argument above, the laws must be accommodating and applicable to all states in the United States. The moral rights of members of the moral community must be protected. Therefore, the laws must be universal.

The current framework for abortion is flawed. In *Roe*, the Supreme Court focuses on the potential life of the fetus, viability, and grounds the right to abortion in the right to privacy. In order to reflect the argument above, the focus must be on whether the fetus is a part of the moral community. The focus ought to be on whether or not the fetus is in the moral community, not potential life, because, in some ways, a fetus could be considered a potential life from the moment it is conceived. However, the government does not have an interest in the fetus until it has gained consciousness. It is at the point of consciousness that a fetus can become autonomous, and the government can have an interest.

Additionally, the right to an abortion ought to be grounded in the right to liberty, as Justice Stewart mentioned in his concurrence in *Roe*, or the right to life. This right to liberty respects a person's autonomy and allows people to express that autonomy by choosing whether or not to have an abortion, unlike focusing on the right to privacy. The right to life is where the right to abortion should be grounded in cases where the mother's life is in danger after the fetus reaches consciousness because this is the point where abortion is restricted to cases where the mother could die. Furthermore, the right to life would apply to conscious non-persons.

Most states have used the viability point in pregnancy to determine when the state has a compelling interest under the current legal framework. An issue arises from the use of viability as the main distinction between when abortion can be restricted. Using viability as opposed to consciousness is problematic because scientific advancements determine viability. Depending on the advancements, the point at which a fetus becomes viable could get closer in time to conception. If a fetus becomes viable at six weeks, the woman's rights are diminished.

Furthermore, leaving this point up to states to decide can lead to the laws being applied differently, and people in some states would have more rights than others. Letting different states determine if they wish to intervene if there is a compelling interest could lead to the abortion of fetuses after they reach consciousness if the state decides not to get involved. This is because the only

interest that is protected by the Supreme Court is the woman's right to obtain an abortion. The right to life of the fetus is not guaranteed. Because states are allowed to make their own laws, a state could potentially determine that abortions can be permitted at any stage of pregnancy. This factor has not been dealt with in the Supreme Courts' consideration of the constitutionality of abortion laws. As discussed previously, it would be morally impermissible to allow abortions after consciousness except in exigent circumstances.

The statutory framework for abortion ought to be as follows; Any person who is pregnant can consent and obtain an abortion for any reason until the fetus gains consciousness at 24 weeks. Once the fetus gains consciousness, the pregnant person may consent and obtain an abortion if and only if it is necessary to preserve the life and health of the pregnant person or the fetus would be born with severe disabilities. The undue burden test mentioned in the previous chapter would still be applicable in this case. The only differences are that the test would be in regards to consciousness, not viability or potential life, states could not make laws permitting abortions for any reason other than the ones previously mentioned once the fetus has reached the point of consciousness, and the right to abortion would be grounded in the right of liberty and the right of life.

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