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Do We Know Enough Morally to Make Abortion Laws?

by Larry R. Churchill

Do we know enough morally to make abortion laws which would distinguish "good" from "bad" abortions? The question has two parts. First, can we distinguish between "good" and "bad" abortions at all? Is it within our capacity to say anything about this? And if we can say something, how much can we say? Second, if we can distinguish between abortions we think permissible and those we think morally suspect, can this distinction be formulated in terms of law? And if it can be so formulated, should it be?

Though it would be simpler to address each question separately, in this society we seem determined to address the moral and the legal dimensions of abortion in tandem. I will follow suit in my remarks here, exploring the implications of several ways to yoke the moral and legal domains.

The term "good abortion" simply means one that is justifiable given all the circumstances. I do not imply that abortions can be self-consciously sought as intrinsic goods, or as ends in themselves. Yet denying that abortions can constitute an intrinsic good does not mean that abortions are always or necessarily wrong. I assume that a choice for abortion is sometimes the right choice. Those who are convinced that no abortion choice could ever be "good," even in this modified sense, will have no interest in my remarks. Likewise, by the term "bad" abortions I do not imply evil, but simply those abortions which cannot stand up under

ethical scrutiny.

I assume here that any laws about abortion should reflect moral values, that public policies should be grounded in substantial moral insights and not simply in power, or solely in the will of the majority.

Do we know enough morally to make abortions laws which would distinguish "good" from "bad" abortions?

Do we possess enough moral wisdom about abortion to make a law which would reflect moral insights, that is, permit those which are justified and prohibit the morally illicit ones? The question is meant to apply to anyone and everyone. Does the Supreme Court possess such wisdom? Do state legislatures? Do physicians? Does the President, or the Pope?

There are many positions one might take in response. I will discuss five, garnered from a variety of sources.

1. Moral Certainty and Legal Feasibility

This position is the most revisionary. It holds that "good" vs. "bad" abortions are morally distinguishable, and that these differences should be reflected in public policy. Ronald Reagan and George Bush have both endorsed this position, and in a similar way. All abortions are unjustified except for those subsequent to rape or incest, or those pursuant to saving the life of the woman. Abortions which do

not satisfy these criteria would be legally prohibited.

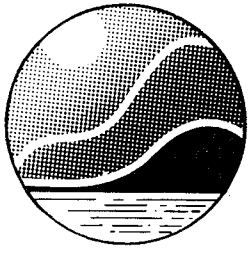
Yet one could distinguish between "good" and "bad" abortions at different points and with different agendas in mind. For example, one might hold that we can be certain that nothing of value exists in the womb prior to the end of the first trimester, or prior to cerebral development, or some other point, and therefore conclude that laws should be made which would govern abortion only after that point. Note here that although the posture toward abortion differs from that espoused by right-to-life advocates, the way moral certainty leads to a legal resolution is similar. Both groups believe a clear determination of the moral issue can be made, and that moral knowledge should translate into law at some point in the prenatal period.

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2. Moral Certainty and Legal Infeasibility

This position retains the moral certainty about our ability to distinguish "good" from "bad" abortions, but here the conviction is that legal enforcement would be impractical, or counterproductive, or perhaps even morally wrong.

The argument is usually consequentialist. Well-intended laws based on moral insight sometimes turn into bad policies. A favorite example is Prohibition, which—because unenforceable—had the effect of corrupting law enforcement officials and helping to create organized crime. "We can't legislate morality" is a slogan that captures some of this sentiment. It is frequently expressed by liberal Protestants who express regret over what are thought to be "convenience" abortions or over the number of abortions, but believe we must accept some tragic mistakes, some "bad" abortions, as the price of tolerance and non-coercive policies.

3. Moral Agnosticism and Legal Skepticism

This position is roughly as follows: It is impossible to differentiate "good" from "bad" abortions, not because all are wrong or all are acceptable, but because we can't ever know enough to pass judgment. About most or all abortions we are morally agnostic, and therefore legal skepticism is the appropriate response. What it would take to know a "good" from a "bad" abortion requires more than we are capable of. Theoretically, judgment is still possible, for one might hold that God can judge, or that a properly equipped ideal observer could judge, if one could be located. Persons who hold this position are cautious about moral knowledge generally and are skeptical of human abilities to be morally certain enough to establish legal policies.

A variation on this position is moral opacity and agnosticism for most of us, but epistemic privilege for a few. Here the idea is that persons in special positions may possess moral insight because of their experience or their proximity to the issues. Thus, some males seem content to let females, or women of childbearing age, be the privileged persons on the morality of abortion. Only women can bear children, or undergo an abortion, so they may know something men do not and cannot know. It would follow from this logic that women should determine if there should be any laws, and what kinds of laws these would be. This view

is attractive because it pays respect to qualitative experiential differences among people. It becomes unattractive when it elevates these experiential differences to the status of absolute thresholds in access to moral knowledge.

4. Moral Privatism and Legal Irrelevance

This view is, I believe, widely held though infrequently advocated. It goes like this. Moral matters—like whether to have an abortion—are private, personal matters. There is no "right" or "wrong" to such choices except in the privacy of each person's judgment. An abortion which is "wrong" for one person could, in identical circumstances, be "right" for someone else. Each person becomes her own Supreme Court. "Public policy" is, then, an oxymoron, for there is no public, or shared facet

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of moral choices. All choices are exhaustively private ones. Frequently this takes a Sartrean turn. Each of us must **make** morality for herself with each choice. We create ourselves, our moral essence, as we choose (among other things) to have abortions or not. Moral privatism in its extreme form is equivalent to ethical relativism, since the possibility of moral argument is precluded. There are no standards except what each chooser establishes in the individual moment of choice. In its extreme form this makes standards external to the decision-maker, and even moral identity over multiple choices, problematic.

This view is, in my experience, most often encountered among college undergraduates anxious to disaffiliate their own moral views from (what are perceived as) the repressive moral orthodoxies of their families of origin. And this is understandable, since part of the attractiveness of this view is its portrayal of moral life as flexible and dynamic rather than static and fixed. But even more sophisticated advocates of privacy rights, who should know better, sometimes slip into the rhetoric of moral privatism. Yet these are not the

same. A person can feel absolutely certain about the wrongness of abortion and still advocate privacy rights as a higher principle. Abortions are wrong but invasions of privacy even worse. By contrast moral privatism is not a position on the law, but a position on the status of moral knowledge and the nature of moral judgments. Those who affirm privacy rights are deeply invested in the law and its moral status. Those who adhere to moral privatism believe that law has no moral standing whatever.

5. Moral Particularism and Legal Restraint

I save this position for last because, too obviously I fear, it is this view which seems most cogent to me. Unlike those who believe that moral certainty is at hand, I am not confident that anyone can specify general types of abortion (for example, subsequent to rape or incest, or prior to the end of the first trimester) as categorically wrong or right. This would be to assume that there are single, salient, and overriding features which, when known, will make moral categorization possible. I believe it is rare that there is ever any such superordinate feature which settles moral judgments. But neither can I accept the extreme opposite position, that in the absence of single-item-sponsored, universal typologies for good and bad abortions, we are reduced to either agnosticism or privatism.

I call this fifth position moral particularism because it takes as its beginning point the conviction that moral judgments are always particular. That is, they are judgments made by particular persons in particular times and

If we want to judge an act morally, we must know its motives and intentions, its outcomes, its means, its place in the life of the person whose act it is, its style and its symbolic valence.

circumstances. There are no general moral judgments, only particular ones. There are, of course, general rules, principles or maxims that can be used in making choices. Yet the decision to employ some rules or maxims rather

than others, and the skill to apply them judiciously, always calls for a particular judgment, not a generalizable exercise of logic or a deductive scientific procedure. This is a position at least as old as Aristotle. It does not mean that the moral goodness of any particular act is either knowable or unknowable. It only means one cannot determine moral goodness by knowing the kind of action it is. Clarity and confidence in moral judgments can come, if at all, only after an arduous search for the characteristics of an action in detail, not from identifying its type.

Let me put this another way. The ideal of moral certainty is based, in part, on the conviction that it is possible to isolate and specify in advance the right-making or wrong-making characteristics which are definitive. For example, some persons have the view that all abortions sought because of economic duress are wrong. Such a view expresses a profound mistake about ethics, for it assumes that there are generic and conclusive right-making or wrong-making characteristics of acts that can be specified in advance and in separation from knowledge of other factors. Yet, from knowing only that an abortion was sought due to economic duress nothing follows, except regret that persons find themselves in such straits. If we had to stop at this superficial level of knowing only one motive or one feature of a choice, opacity would indeed reign, and moral agnosticism would be the position to adopt.

Yet we need not and should not stop at this preliminary level of understanding. The right-or-wrong-making facets of most human choices are not confined to a single factor, but must be discerned in multiple factors at play across a variety of dimensions. If we want to judge an act morally, we must know its motives and intentions (these are not the same), its outcomes, its means, its place in the life of the person whose act it is, its style and its symbolic valence, among other things.

Moral choices can go wrong in many different ways. For example, some choices are flawed by corrupt motives or perverse appetites, others because they issue from stunted character development, or rely on provincial sentiments. Still others reflect a self-serving or distorted reasoning pattern. Conversely, choices may be good or right because of a wide array of factors, any of which could be the crucial one. In the real world, hardly any choices are ever completely good or

bad on all counts. And this is no less true for choices about abortion than for any choice which worries humankind.

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A recognition that moral choices are inexhaustibly particular, always situated, always the choice of some discrete and particular moral actor, means we will have to forego the ambition to possess a formula which will universally circumscribe either "good" or "evil." We can place no assurance in the zeal to hermetically seal "good" abortions from (what are thought to be) corrosive influences, or to confine "bad" abortions to certain types.

Some will undoubtedly be distressed by my emphasis here on the plurality of factors that make for sound moral choices, and by my insistence that one cannot choose which factors will be right-or-wrong-making features in advance. This will be interpreted by some as relativism, though it is not. For my claim is not that there is no right or wrong, but that we cannot tell, in general or in advance, or for all times and all persons, what "right" or "wrong" will entail. That right and wrong can be distinguished I do not doubt. I only contest the idea that it is easy to do so. This is not to deny that some acts, such as holding slaves or torturing innocent persons, are categorically wrong, so that judgments about them can be safely encapsulated in general rules to a high degree of moral certainty. It is far from evident, however, that abortion is the kind of act that lends itself to a prima facie, single-rule assessment. Making single-rule assessments about the morality of abortions simply begs the question, that is, it takes for granted in the rule the insight sought in the judgment.

Another way to express moral particularism is to say that the term "abortion" describes not one act, but many different sorts of actions, each with peculiar moral weights and meanings. To know that a person has had an abortion is to know next to nothing about her morally. Only knowledge of the particulars would allow us even to approximate a moral assessment.

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What am I saying? I am saying that the effort to unify and harmonize most or all acts of abortion under single, general rubrics which will safeguard our certainty about whether these acts are right or wrong is untenable. We must work, inevitably, with a variety of moral criteria and a complex history of moral perceptions, with many, sometimes conflicting, emphases. Does this make confidence in moral judgment unattainable? No. But it does make it difficult, because it cannot be had as a result of possessing the right rule or principle, but only from wise and judicious inquiry which examines each case on its own merits. Whatever moral certainty we can have comes from sustained attention to the particulars of living a life. It is an achievement of practice, not of theory, not of knowing types of acts or being able to categorize according to general rules.

Thomas Nagel has put it sharply in his book *The View From Nowhere* (Oxford, 1986).

It is evident that we are at a primitive stage of moral development. Even the most civilized human beings have only a haphazard understanding of how to live, how to treat others, how to organize their societies. The idea that the basic principles of morality are known, and that the problems all come in their interpretation and application, is one of the most fantastic conceits to which our conceited species has been drawn. (The idea that if we cannot easily know it, there is no truth here is no less conceited.) (p.186)

What this means for the possibility of devising a law distinguishing good from bad abortions should now be clear. Laws are by definition things which apply to all persons equally. Justice, when personified in American culture, is blindfolded—blind to the socio-economic differences which distinguish persons, but also blinded to the nuanced particulars which go into the moral assessment of actions. What is absent legally in order to sustain impartiality is an essential part of moral judgment. A law which took off the blinders of generality to try to build in all the concrete specifics which characterize moral activity would be incredibly cumbersome. It would be useless in the same way that a map which is as large as the territory it represents is useless. On the other hand, a legal map for abortion which

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omits the details and concentrates on what are thought to be salient general features would be morally arbitrary. Only knowledge of the specifics, the moral particulars, can tell us what the salient features of any action are.

We are a society that frequently thinks of law and ethics as synonymous. Because of this, we may be tempted to believe that if laws do not speak to something then it isn't morally important. In fact, many of the most important moral choices people make are unregulated by law, sometimes to protect individual freedoms, sometimes because the law is too blunt an instrument to speak cogently to persons as they contemplate those choices. Persons who are wrestling with reproductive choices are in this situation.

Conclusion

Supporters of reproductive choice may find my analysis frustrating and beside the point. I have not argued directly for a retention of *Roe v. Wade*, though I agree that advocacy for and protection of reproductive rights are needed. My interest here, however, are not in what the law should specifically be, but in the moral standing of any law which seeks to regulate abortion choices. The relevance of these concerns for *Roe v. Wade*, or any subsequent ruling or statute is, I hope, clear.

I am skeptical of anyone's ability to construct laws which would validly reflect moral distinctions between "good" and "bad" abortions. To answer the question of the title, we do not know enough and we cannot know enough to make well-conceived laws regulating abortion. My skepticism is

grounded—not in an ideology or theoretical system—but in a realistic assessment of human capabilities. We are creatures of limited moral insight, and there are some matters about which no moral generalizations are possible. Abortion is one such matter. In the face of this moral opacity, a strong endorsement of the rights of individuals to decide for themselves is best. The maximum legitimate restrictions over abortion choice are laws designed to protect fetal life late in pregnancy. Any other laws are exercises in moral hubris, for they pretend to a knowledge no human being can possess. At best such laws will be arbitrary exercises in power, at worst destructive of freedom and perhaps also of our willingness to attend carefully to the particulars of our moral experience.

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