Rethinking Roe v. Wade

Court found that this group was not “similarly situated” (to use the legal parlance) with terminally ill people who can end their lives by refusing life-sustaining treatment. The omission/commission line also explains why it is currently constitutionally permissible for states to ban postviability abortions, and constitutionally impermissible (according to several courts and many legal commentators) for them to deny pregnant women the right to refuse medical intervention like cesarean sections during all 40 weeks of pregnancy.

The fact that the Supreme Court has found the omission/commission distinction significant in the past does not mean it was correct to do so, or that it could not be convinced to reason differently in future cases. My point is only that for Manninen’s philosophical position to prevail in the legal conversation, she may have to address whether the omission/commission distinction should be erased in all analogous areas of constitutional law as well, or explain how it does not apply to her position.

A second challenge of the author’s approach is that it seems to allow abortion for all 40 weeks of pregnancy. If the abortion right is premised on women’s right to refuse bodily invasion for the benefit of another, why wouldn’t it include viable fetuses in the same way it includes born persons like Mr. Shimp and Jarvis Thomson’s drifty violinist? The author would profit from explaining why this result does not flow from her analysis, or, if it does, how this outcome will convey renewed respect for fetal life and win over conservative justices and disenchanted pro-choice people.

In contrast, although Roe determined that fetuses do not have all the rights of “persons” for purposes of constitutional law, both Roe and Casey respect fetal life so much that they allow states to prohibit women from taking affirmative steps to end it after viability (with the exception of what’s essentially the same self-defense rationale applied to all of us—when pregnancy threatens the life or health of the pregnant woman). The “pro-choice” community might be well served by reclaiming what a tremendous act of respect for fetal life this is: As the author says, according to Roe, once a fetus is viable “she is acknowledged as a moral patient, a being with rights and interests of her own, and therefore she cannot be killed in order to uphold her parents’ right to abstain from procreation” (33). And Manninen’s bodily integrity point could be harnessed to underscore what a tremendous concession and intrusion it is that women can be forced to continue pregnancies against their will for almost half that pregnancy for the benefit of something that is not yet a legal person.

REFERENCES


Abortion and Moral Arguments From Analogy

Nathan Nobis, Morehouse College and Morehouse School of Medicine

Abubakarr Sidique Jarr-Koroma, Morehouse College

Manninen (2010) argues that abortion is morally permissible, indeed that women have a moral right to abortion or, at least, basic moral rights that entail the permissibility of abortion.

She hopes her defense of abortion would “survive” even if a human life amendment passed. Insofar as such an amendment is a legal matter, and her arguments are moral arguments, it is unclear how her arguments would survive except as a resource to try to show that if such an amendment passed and most abortions were legally prohibited (i.e., the amendment did not merely assert that fetuses are legal persons and remain silent on the consequences of such personhood for abortion) then such a law would be an unjust law.

Thus, she seems to argue that abortion is morally permissible, even if (any) fetuses truly are persons or are (correctly or incorrectly) deemed so by the law. To defend such a conclusion, she appeals to this principle:

No one is morally required (and cannot be legally compelled) to submit to unwanted bodily intrusion in order to render aid to another person, even for life itself . . . [i.e.,] no matter how
valuable a person is, forced violation of another’s bodily autonomy or integrity in such a manner is prima facie morally indefensible. (33)

She argues that this principle has support not just from philosophical thought-experiments, but from actual court cases, and that no cases can be found that refute it. However, Marquis convincingly argues (2010) that this failure to find any courts rejecting this principle can be explained, and so this failing to find does not support her position.

The main challenge for Manninen is defending this moral principle, especially in a way that has a chance of convincing someone who believes abortion is prima facie morally wrong. This is especially challenging because the arguments for this principle are largely arguments from analogy and, as many commentators have noted, all the proposed cases that are said to be relevantly similar to pregnancy can also be seen as relevantly different.

On one view about moral arguments from analogy, they involve an initial case(s), a particular moral judgment about the case(s), a general moral principle offered to justify the judgment(s), and then an application of that principle to another, usually more controversial case(s), which is (are) said to fall under that general principle. Insofar as initial judgments can (reasonably) differ, different principles can (reasonably) be offered to justify that judgment, and the cases these principles might be extended to can (reasonably) be judged as relevantly different cases, arguments from analogy are challenging.

This suggests that non-analogical moral arguments might be preferable for anyone, including Manninen, in arguing for controversial moral views.

THE ORIGINAL VIOLINIST CASE

In the original “violinist case” from Thomson (1971), you are asked to consider waking up “plugged into” a famous violinist with a medical ailment who requires the use of your body, your kidneys, to continue living. While it is sometimes said that you are “forced” to be plugged into the violinist, this is not quite correct: There was no struggle to plug you in, since you were sleeping. Thus, the plugging in might be described as nonvoluntary, as opposed to involuntary. Thomson argues that you have a moral right to unplug from the violinist by appealing to a principle like the one already discussed here. She argues that this same principle can justify “unplugging” from fetuses and so abortion is justified, given that it is currently the only medically possible way to do this.

Many people react to the violinist case by pointing out that an important difference between it and most cases of pregnancy is that while you did not choose to be plugged into the violinist, women usually chose to have sex—“indulge in intercourse,” as Thomson puts it—and they understand that, at many times in their lives, there is a chance for pregnancy. It is worthwhile to point out that choosing to have sex is not equivalent to choosing to be pregnant. While intercourse can be chosen or, regrettably, forced, pregnancy is usually neither since it depends on elements of chance that are not present in intercourse, consensual or not.

Thus, many people conclude that the violinist case could, at its strongest, only have implications for rape cases, where the sex is not chosen by the woman and the pregnancy is unsought, unintended, and unwanted; the case has no moral implications for abortions when intercourse is chosen.

A CONSENSUAL, INTENTIONAL VIOLINIST CASE

Some might find it worthwhile to explore what happens if we modify the violinist case so there is an obligation to the violinist that perhaps can arguably be extended to fetuses. Suppose then that you have agreed, with full knowledge and understanding, to help the violinist: You have then given him the right to use your body for nine months. To some this suggests, by analogy, that a woman who has sex and becomes pregnant with the goal and intention of pregnancy has given the fetus a right to use her body.

There are disanalogies here, however, that might undercut the argument. First, unlike with the violinist, no “agreement” or “contract” is made directly with fetuses, although perhaps there can be agreements or contracts with future possible persons. Second, unlike the violinist, who already exists and is certainly a person, the fetus—prior to any intercourse—does not yet exist and, if a person, is not certainly a person. Third, while there are reasonable expectations for what will happen if you plug into the violinist, there are no comparably certain expectations about what will happen as a result of sexual intercourse, including whether it will result in pregnancy.

A second response to this analogizing from the consensual violinist case is that, to many, it seems odd and false that intentions could make such a difference to that being’s moral rights. It is doubtful that fetuses that are, as best can be done, intentionally brought about are prima facie impermissible to destroy, whereas at least some fetuses that are not intentionally brought about are permissible to destroy. Those who react this way will think that the morality of abortion is determined largely by the intrinsic nature of fetuses, which appears to be roughly the same in all cases, whether the sex was consensual or not, pregnancy intended or not.

Thus, differences between this violinist case and pregnancy preclude any moral conclusions about abortion being drawn from it: The analogy is faulty.

THE MUSIC LOVER’S PARTY AND LOTTERY FOR THE VIOLINIST CASE

While the previous case may be interesting to explore, the main, obvious trouble is that most cases of pregnancy and, especially, potential abortion are not like it: Probably few women whose goal and intention is pregnancy seek abortion. However, according to the Centers for Disease Control website (2010), “approximately one-half of pregnancies...
Rethinking Roe v. Wade

[are] unintended,” i.e., “either mistimed or unwanted at the time of conception.” Thus, (far!) more than half the times women of childbearing age and health have intercourse, they do so just for pleasure and related emotional, psychological, relational, and physical benefits, not with the intention of becoming pregnant.

Since we might suspect that abortion is more often considered and done in contexts of unintended pregnancies, we would need a violinist case more analogous to it, something like the following:

The Society for Music Lovers puts on fabulous, often irresistibly pleasurable parties. Admission, however, requires that you put your name into a large lottery, the “winner” of which must let the sick violinist use his or her kidneys for 9 months. You don’t want to “win” though, although the chances of winning are low, but you really want to go to the party. In the heat of desire and passion, you take your chances and buy a ticket to the party and enter.

The case should be further complicated by the addition of some devices to reduce your chances of winning the lottery and your using them in varying consistency. We should also add that some people believe that not attending such parties can make for an unfulfilled life, i.e., that party attendance is, for many people, a necessary part of a good, satisfying life.

The question, of course, is this: If you win, which is unlikely, would it be OK to back out on helping the violinist? Many would find this to be a controversial question. Arguably, the intentions in which one joins the lottery or puts oneself in the position should have an effect on their moral permissibility of choosing not to help the violinist. If one joins the lottery under the motive of the rush or excitement of being part of the party and not the unintended lottery “prize” itself, it changes how one feels about actually receiving the prize. Arguably, it wouldn’t be clearly morally wrong to neglect helping the violinist, if selected, if one never intended to in the first place. The same can, arguably, be said of having sex for the pleasure as opposed to conception.

Thus, this case, although structurally similar to intercourse and potential pregnancy, is controversial as well and so a poor case to argue, via analogy, to a view about abortion.

CONCLUSION

We have said regrettably little about Manninen’s specific claims. We have only highlighted some general challenges for making moral arguments by analogy. Similar challenges would likely arise in arguing for abortion by appealing to the “Shimp” case as well, and any other similar cases: There are differences between the cases and and it’s hard to see how anyone must be unreasonable in thinking some of these differences make a moral difference between the cases. If arguments by analogy can be avoided, it appears desirable to do so, since avoiding them might give us a greater chance for our “reaching a consensus on the issue,” which would surely be a welcome result.

REFERENCES


A Supportive Yet Critical Response to “Rethinking Roe v. Wade: Defending the Abortion Right in the Face of Contemporary Opposition”

Kurt Liebegott, Keystone College

I would like to start by saying that I agree with the majority of Dr. Manninen’s article (2010). I agree with the main points of the paper: Anti-choice advocates are a continual threat to abortion rights, Roe v. Wade came to mostly the right conclusion but didn’t do a great job getting there, and Judith Jarvis Thomson’s violinist argument is the best...