

On the Moral Injustice Behind Criminalizing Abortion

In considering whether abortion should be criminalized or penalized, I will first evaluate the reasons for which it should not: an unwanted fetus can violate a pregnant individual's right to bodily autonomy, and consent is thus necessary for the fetus's use of the woman's body. Then, I will evaluate the arguments for which it should be criminalized, considering the fetus's perceived rights and the harm-based approach to criminalization. Consistent with a rights-based approach, this essay will ultimately attest that despite conflicting rights of woman and fetus, due to the woman's right to bodily autonomy, and the associated norm of consent, it is unjust for the practice of abortion to be criminalized or penalized.

Premises

This essay will assume the premise that the right to bodily autonomy does in fact exist as a moral principle. Similarly to Thomson's approach, for centralizing of argument, this essay will also assume that life begins at conception.¹ I acknowledge the scientific uncertainty of this, and I do not believe this to be true. If the fetus is actually not viable at the earlier stage of pregnancy, it has no current right to life, and it is just to mitigate the current violation to the woman's body over the *possible* right to life of a non-living subject. As such, since the woman's action would not be in conflict with another's right to life, abortion is justified. However, I assume this premise to emphasize that even if life does begin at conception, the presence of life alone does not justify criminalization in the case a woman decides to terminate pregnancy.

Considerations Against Criminalization

A woman's right to bodily autonomy indicates that she has the right to determine whether another being may physically encroach on or use her body for its own gain—this I establish as the norm of consent. I have assumed that the fetus is a living subject. However, it cannot survive independently, and relies on the sustenance and protection provided by the woman's body. As her body belongs to her, the woman who has involuntarily become pregnant must decide to consent to the fetus's usage of her body for survival. In the case that she does not consent—within her right due to autonomy—her decision to partake in the practice of abortion is justified. Thus, it should not be penalized.

Furthermore, the woman's engagement in sexual intercourse does not necessarily equate to a decision to consent to pregnancy. Thomson evaluates the counterargument that engaging in sex voluntarily calls a fetus into existence.² This is a reasonable notion, as sex can subsequently bring about pregnancy. But she refutes this, focusing on how this counterargument weakens if the woman has been raped: because rape is involuntary, consequent fetuses have "no right to the use of their mothers' bodies, and thus that aborting them is not depriving them of anything they have a right to."³ I agree with this, and I attempt to further her point into the sphere of consensual sex: in some cases, even having consented to sex, a woman has not necessarily consented to pregnancy. In consenting to sex, she has consented to the "usage" of her body by solely her

¹ Thomson, Judith Jarvis. "A Defense of Abortion." *Philosophy & Public Affairs*, Vol. 1, No. 1, Page 47. Wiley.

² Thomson, Judith Jarvis. "A Defense of Abortion." *Philosophy & Public Affairs*, Vol. 1, No. 1, Page 58. Wiley.

³ Thomson, Judith Jarvis. "A Defense of Abortion." *Philosophy & Public Affairs*, Vol. 1, No. 1, Page 58. Wiley.

sexual partner(s). Assuming her awareness of typical reproductive processes, it is perhaps also arguable that she has consented to the *risk* of pregnancy. However, she may not have consented to the presence of the fetus *itself*, which differs from the risk alone in that her body is now being used by a third-party individual not previously involved, and potentially harmful. To illustrate, I use the example of one who, in the act of smoking, consents to the risk of cancer. However, this person has not consented to the presence of the cancerous tumor itself, and as such, they are justified in trying to have it medically removed. This example is not to heedlessly equate fetuses and tumors, but to show that while related, agreeing to the risk is distinct from agreeing to the harmful agent's presence. Assuming—as stated above—that her lack of consent to the fetus's presence justifies abortion, even having engaged in consensual sex, she should not be criminalized for it.

Considerations for Criminalization and Rebuttals

As this essay assumes immediate viability, one may assert that the fetus has an unassailable right to life. Consistent with Mill's harm principle, that "the only purpose for which power can be rightfully exercised over any member of a civilised community... is to prevent harm to others," one can see that abortion should be criminalized in order to prevent the inherent harm caused by the fetus's loss of life.⁴ "The loss of one's life is one of the greatest losses one can suffer."⁵

However, the harm in violating the fetus's right to life can only be considered in relation to the harm done—physical, financial, mental, social, potentially lethal—through violating the mother's bodily autonomy: the two rights conflict. As the woman's body would provide life in the first place, and her body is the "system" to be used, her will regarding her body must be prioritized, even if it constitutes infringement upon the fetus's right to life. Furthermore, as the woman chooses to infringe on the fetus's right to defend the integrity of her bodily autonomy—possibly to defend her own life, in the case that the pregnancy is dangerous for the woman—aborting the fetus can be viewed as an act of self defense. As the self defense principle is protected in other circumstances, if the practice of abortion can be considered self defense, it too should be protected, as opposed to criminalized.

Additionally, given that the fetus naturally develops within the woman, one may argue that the woman is obligated to allow the use of her body for gestation. Thomson instead argues that allowing the fetus to use a woman's body is a "kindness" on her part, and not something she owes to it.⁶ I add that such expectations can be viewed as the imposition of the socially constructed, gendered notion of "motherly duties" onto an internal system. The woman's body and her reproductive system—despite naturally supporting the fetus—belong to her first, and thus can only be "shared" if she chooses.

Conclusion

In conclusion, protecting the practice of abortion is most just, despite the potential for harm brought upon the—presumably viable—fetus, as its presence infringes upon a woman's right to bodily autonomy, as well as possibly her *own* right to life. If she does not consent to another's "use" of her body, she must be able to claim a right to abortion. If protected, receiving a liberty right alone—the right to seek abortion without punishment—could be considered unjust, as it

⁴ Mill, John Stuart. Chapter I: Introductory. *On Liberty*, Page 13.

⁵ Marquis, Don. "Why Abortion is Immoral." *The Journal of Philosophy*, Vol. 86, No. 4, Page 189. Journal of Philosophy, Inc.

⁶ Thomson, Judith Jarvis. "A Defense of Abortion." *Philosophy & Public Affairs*, Vol. 1, No. 1, Page 55. Wiley.

could be significantly harder for certain geographic and economic areas to access. Consequently, if abortion was considered a liberty right, minority access may be disproportionately limited. As a claim right which the state is obligated to provide to all abortion-seekers, abortion would be more equitably accessible, making a claim right more just. Not all medical professionals should be legally obligated to perform an abortion, if that is not the position they have consented to. However, if this is the case, the state must ensure the accessible presence of state-funded professionals who specifically perform abortions.