

Chapter 1

Framing the Debate

1.0. OVERVIEW

The moral problem of abortion is difficult because it is unusual. It is unusual both because the human fetus is so unlike other individuals and because the relationship between fetus and pregnant woman is so unlike other relationships. Its unusualness makes it difficult because we are accustomed to settling particular moral disputes by appealing to general moral principles, a procedure that presupposes a substantial degree of similarity between the question we wish to answer and other questions we feel we have, at least tentatively, resolved. As a result, people who find themselves substantially in agreement about what their moral duties to each other are often find themselves not only sharply divided over the problem of abortion, but uncertain about how to bridge the divide.

This feature of the abortion debate can give rise to the impression that the problem cannot be resolved rationally. If what is meant by this claim is that reasonable people will continue to disagree about abortion, then the claim is surely true. But the claim that the abortion controversy cannot be settled rationally is often taken to mean more than this. It is often taken to mean, as one writer has put it, that “each side of the abortion debate has an internally coherent and mutually shared view of the world that is . . . completely at odds with the world view held by their opponents,” and that “the two sides share almost no common premises” (Luker 1984: 159, 2). On this view, the question of the moral status of abortion is so far removed from any other moral question about which the two sides agree that neither side’s position can be shown to be more reasonable than the other’s on terms that the other side can accept. The debate about the morality of abortion, then, boils down

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to a mere exchange of conflicting normative assertions or to a clash of fundamental, and incommensurable, values.

If this is what is meant by the claim that the moral problem of abortion cannot be resolved rationally, then I believe that the claim is false. Most arguments against abortion rest on claims that defenders of abortion are unlikely to reject, such as the claim that killing people like you and me is wrong and the claim that the zygotes that are formed by the fusion of a sperm and an egg at conception eventually develop into people like you and me. If one or more of these arguments is successful, then critics of abortion can justifiably claim that their position has been shown to be more reasonable than the other's on terms that the other side can accept. And if none of these arguments are successful, then defenders of abortion can justifiably claim that they have successfully defended abortion from the challenge that its critics have mounted against it. I believe that many such arguments against abortion are substantially stronger than they are typically recognized to be, and that many people who argue in defense of abortion have failed to respond to them adequately. But I also believe that these arguments against abortion, although at times quite powerful, are ultimately unsuccessful. Indeed, it is the central thesis of this book that the moral case against abortion can be shown to be unsuccessful on terms that critics of abortion can, and already do, accept. I attempt to defend this thesis in the chapters that follow.

Before turning to this task, however, I must first say something about how a discussion of abortion must be framed in order to argue on terms that the critic of abortion accepts. Doing so is the purpose of this brief, introductory chapter. In Section 1.1, I specify what it means to call a practice morally permissible, and I explain why a defense of abortion that seeks to address critics of abortion on their own terms should focus on defending the claim that abortion, at least in typical cases, is permissible in this sense. In Section 1.2, I briefly describe the method of moral reasoning that I make use of in this work and attempt to show why it is not only a reasonable approach to addressing moral problems in general but, more importantly, why it is especially well suited to a discussion of abortion that attempts to engage critics of abortion on their own terms. In Section 1.3, I distinguish between two kinds of arguments that critics of abortion have offered, those that are based on the claim that the fetus has a right to life and those that are not, and emphasize that a satisfactory defense of abortion must address both.

In Chapters 2 and 3, I take up the central claim made by the first, rights-based, kind of argument against abortion: the claim that the fetus

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has a right to life. In Chapter 2, I consider those arguments that have been offered in defense of the claim that the fetus acquires this right at the moment of its conception, and argue that none of them are successful. In Chapter 3, I examine arguments that have been offered in defense of the claim that the fetus acquires this right at various points after its conception, and argue that, by the abortion critic's own standards, the most reasonable view is the one in which the fetus acquires this right when its brain reaches a certain level of maturity. Since it turns out that the vast majority of abortions occur well before this point, the result of the discussion in Chapters 2 and 3 is that the central claim needed to sustain the rights-based argument against abortion must be rejected on the abortion critic's own terms.

In Chapter 4, I turn to the second claim needed to sustain the rights-based argument against abortion: the claim that if the fetus does have a right to life, then abortion is morally impermissible. I present an argument, first proposed by Judith Jarvis Thomson, that attempts to demonstrate that this claim is false. The argument compares a woman with an unwanted pregnancy to one who may permissibly refuse to perform an act of good samaritanism that is needed to keep an innocent person alive. Although the argument has been subject to a number of important objections, I argue that all of these objections ultimately fail on the abortion critic's own terms. The result of Chapter 4, then, is that even if my analysis in Chapters 2 and 3 is rejected, the rights-based argument against abortion must still be deemed unsuccessful for most (but not all) cases of abortion. Finally, in Chapter 5, I turn to those arguments against abortion that do not fit the model of the rights-based argument, including those that appeal to some version of the golden rule or to claims about our lack of certainty about the morality of abortion, as well as those that underlie the position that has come to be known as pro-life feminism. These arguments do not rely on either claim made by the rights-based argument, and so are not undermined by anything said in Chapters 2–4. I argue, however, that these arguments, too, can be shown to be unsuccessful on the abortion critic's own terms.

1.1. THE QUESTION

1.1.1. *Framing the Question*

There are two different kinds of questions about which critics and defenders of abortion disagree: "Is abortion moral or immoral?" and

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“Should abortion be legal or illegal?” In principle, these are importantly distinct questions. There are actions, such as jaywalking, which we may think to be justifiably illegal and yet not immoral, and there are actions, such as adultery, which we may think to be immoral and yet not justifiably illegal. Still, as a practical matter, it is difficult to avoid the conclusion that, at least in the case of abortion, the moral question is the more fundamental. If almost everyone believed that abortion was perfectly moral, it is unlikely that there would be much public demand for laws criminalizing abortion or that such laws would be effectively enforced if they were passed.¹ And if almost everyone believed that abortion was morally on a par with murder, it is unlikely that women wishing to have abortions would find that they were easily available, even if they were technically legal.² Since the moral question of abortion is the more fundamental in this respect, an inquiry into the subject should begin with it. And since the moral question of abortion is a difficult enough question on its own, I will limit my focus in this book to it alone.

To refer to *the* moral question of abortion, however, is misleading. There is more than one moral question that can be asked. One can ask “Is abortion morally impermissible?” and “Is abortion morally criticizable?” Like many distinctions in ethics, this one is easier to recognize when it is seen than to characterize adequately in general, formal terms. So let me begin with an example: Consider an imaginary billionaire named Donald who has just unexpectedly won a million dollars from a one-dollar lottery ticket. He is trying to decide what to do with the money and has limited himself to the following options: (1) donating the money to several worthy charities, (2) putting it in his savings account, (3) buying a gold-plated Rolls Royce, (4) putting up billboards across the country that read “I hate Ivana,” and (5) hiring a hitman to kill Ivana. One thing we are likely to say about this list is that there is a morally relevant sense in which the choices become progressively worse. We would be entitled to aim more moral criticism at Donald for choosing (4), for example, than for choosing (3). This is what I mean by calling an action morally criticizable. But most of us will be inclined

¹ For evidence that abortion remained widespread in many communities in the United States when it was illegal, see Reagan (1997: esp. Chap. 2).

² Indeed, legalized abortion does not ensure availability of abortion even where moral opposition is far short of unanimous. Although abortion is legal in the United States, 83 percent of all counties in the United States have no abortion providers (cited by Hadley [1996: 15]).

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to say something more than this: It isn't just that (5) is worse than (4), which is worse than (3), which is worse than (2), which is worse than (1); it is that there is a difference in kind between (5) and the others. The difference might be put like this: Even though it is his money, and so there is some sense in which he is entitled to spend it in any way he wants, still he is not entitled to spend it in *that* way. This is the distinction I have in mind in saying that (5) is impermissible while (1)–(4) are permissible. I am not at all confident that I can provide a fully satisfactory formal account of this distinction, but for the purposes of this book, the following should suffice: To say that an action of mine is morally permissible is to say that no one has a valid claim against my doing it, that doing it violates nobody's moral rights. And in the case of (5), we presumably believe that there is someone, namely Ivana, who has such a claim against Donald's using his money in this way.

The question that this book addresses concerns the moral permissibility of abortion, not its moral criticizability. In claiming that it constitutes a defense of abortion, I mean that it offers a defense of the claim that abortion, at least in typical cases, is morally permissible, that, morally speaking, a woman's having an abortion violates no rights. The reason for this focus is simple: Virtually everyone who is morally opposed to abortion claims that abortion is morally impermissible in this sense, that it does violate rights, not merely that it is morally criticizable. Suppose that a woman is pregnant, does not wish to carry her pregnancy to term, and knows a couple who want very much to adopt and provide a secure, loving home for her child. Then the claim of such critics is not that her having an abortion rather than bringing her unwanted pregnancy to term is like Donald's buying a gold-plated car rather than contributing his winnings to charity; it is that it is like his hiring a hit-man to kill his ex-wife. Since the claim that abortion is morally impermissible is clearly the central claim made by critics of abortion, and since calling a practice morally impermissible is qualitatively stronger than calling it morally criticizable, this is the claim that the defender of abortion must attempt to rebut. Since not all critics of abortion maintain that abortion is morally impermissible in all cases, the claim that the defender of abortion must attempt to rebut is the claim that abortion is morally impermissible at least in typical cases. And since critics of abortion attempt to press their case by appealing to claims that defenders of abortion are likely to accept, the defender of abortion must attempt to construct this rebuttal by appealing to considerations that

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critics of abortion can and do accept. Doing so is the central task of this book.

1.1.2. Three Objections

Three objections, however, might be raised against framing the moral question of abortion in this way. One is that in defining the moral problem of abortion in terms of its permissibility and then defining the permissibility of an action in terms of someone's having a valid claim against its being done, it may seem that the deck has been stacked in favor of the defender of abortion. The fetus, after all, is in no position to stake a claim against anyone, and if the claim that abortion is a wrong against the fetus is ruled out ahead of time, then how can an argument against the permissibility of abortion be expected to get off the ground? This objection rests on a confusion between having a valid claim and making a valid claim. If Donald died and left all of his money to his six-week-old niece, then she would have a valid claim to the money even if she was not capable of demanding that the claim be respected. If the money was legitimately Donald's and was transferred to his niece in an appropriate manner, these facts would provide sufficient grounds for a third party or custodian to make the claim on her behalf, and this would be enough to warrant the conclusion that depriving her of the money would be morally impermissible. Similarly, if there is something about the act of aborting a human fetus that deprives the fetus of something to which the fetus is entitled, then the critic of abortion can use this to establish that the fetus has a valid claim against the abortion's taking place without having to maintain that the fetus itself is capable of making this claim, and this will suffice for establishing that the abortion would be morally impermissible.

A second concern that might be raised is that this formulation of the question blurs the distinction between abortion as a moral problem and abortion as a legal problem, a distinction that I said should remain in principle clear. If someone does have a valid claim against an abortion's being performed, after all, doesn't that simply amount to saying that the law should prevent it from taking place? And if no one has a valid claim against its being performed, then what grounds could there be for criminalizing it? But this objection is also misguided. The conclusion that no one has a valid claim against an abortion's being performed would undermine one kind of argument in favor of laws against abortion. But other sorts of considerations would remain open. Arguments can be

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made for laws restricting such forms of behavior as gambling, pornography, and drug use and for laws requiring such forms of behavior as jury duty or military service even if no one has a valid moral claim against one's engaging in (or refraining from engaging in) such activities. And the conclusion that someone (presumably the fetus) does have a valid moral claim against an abortion's being performed need not entail that abortion should be illegal. Not every valid moral claim is one we would wish to see enforced by the law. If I promise to help you move next week, or not to see anyone else while we are dating, then this provides you with a legitimate moral claim against me, but we may nonetheless think there is good reason not to treat it as one that the courts may enforce. My formulation of the moral question is thus compatible with acknowledging that although an argument against the moral permissibility of abortion may provide sufficient reasons for believing that abortion should be illegal, it need not do so, and that although an argument in defense of the moral permissibility of abortion may provide sufficient reasons for believing that abortion should be legal, it need not do so.

Finally, it may be complained that to limit the moral problem of abortion to the question of its moral permissibility renders the discussion unacceptably narrow. Indeed, at least one writer has gone so far as to insist that even if we grant that it is morally permissible for a woman to have an abortion, if we agree, that is, that her having an abortion is within her moral rights, "*nothing* follows from this supposition about the morality of abortion, . . . once it is noted . . . that in exercising a moral right I can do something cruel, or callous, or selfish, light-minded, self-righteous, stupid, inconsiderate, disloyal, dishonest – that is, act viciously" (Hursthouse 1991: 235). And if this objection is sustained, then even if the defense of abortion offered in this book is successful, it will do relatively little to vindicate the moral record of those who have and who perform abortions.

I believe that in one important respect this objection must be accepted, and for two reasons. The first is that it follows from the way that I have framed and analyzed the question that the claim that an action is permissible does not justify the conclusion that it should be performed. So even if we conclude that it is morally permissible for a woman to have an abortion, it will not follow that having an abortion is what she ought to do. The second is that it also follows from my analysis that the claim that an action is permissible does not justify the conclusion that it is not morally criticizable. To say that an action is permissible is not to say that there are no moral reasons against doing the action, but only

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that it is a candidate from which one is morally permitted to choose. In then choosing from the set of permissible possibilities, there may well be moral reasons to refrain from doing the act. The reasons may include such considerations as that doing the act would produce less overall happiness or social equality than some alternative, or would disappoint someone, or leave someone worse off, and so on. If you choose to do the action, no one will be able to say that they (or anyone else) had a legitimate claim against your doing it, or that you had violated their (or anyone else's) rights, but they may be entitled to aim moral criticism at you nonetheless.³ To say that an action is impermissible, on the other hand, is to say that it is not one of the eligible candidates for consideration. If torturing an innocent person is impermissible, for example, then even in cases where torturing someone would be ranked higher than not torturing him by such standards as promoting overall happiness, still you must not choose to torture him.

The moves from "I have the right to do it" to "It is right for me to do it" or to "I cannot be morally criticized for doing it" are simply invalid. This is an elementary point, but one that is frequently overlooked in popular discussions of moral issues. It is all too common to hear people defend their decision to do something by insisting that they had the right to do it: the right to broadcast their sleazy shows, to take advantage of their neighbors' misfortunes, to exclude women from their private clubs, and so on, as if their having the right to do something ensures that their doing it is not only permissible but immune to moral criticism.⁴ But establishing that an action would be morally permissible should represent only the beginning of one's moral deliberation, not the end it is too often taken to represent. And in this sense, the objection to focusing exclusively on the permissibility of abortion is an important one. Even if we end up

³ Similarly, if Donald chooses (4), we may well be right to call him cruel, mean, nasty, vindictive, and hateful; and if he chooses (3), we may be right to call him selfish, insensitive, and vain, all of which are terms of moral criticism.

⁴ Relatedly, when critics of abortion complain about those who want abortion to be "safe, available, and rare," they proceed as if those who believe that abortion is permissible must also believe that it is never a bad thing that an abortion occur. How, they ask, can you think that abortion should be rare if you think it is morally defensible? If a practice is morally defensible, then one shouldn't care how often it occurs. But this, too, is to overlook the distinction between an act's being permissible and its being criticizable. It is perfectly consistent to believe that abortion (or prostitution, or pornography, and so on) should be safely available because it is permissible, but rare because it is (or is often) criticizable (though one could, of course, also believe that it is not morally criticizable either, but should be rare merely because it is undesirable from a purely prudential point of view).

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agreeing that abortion is morally permissible, much more would need to be said about when, if ever, abortion is the morally best course of action available and when, in those cases in which it is not, it is not only *not* the morally best course of action but a morally criticizable one as well.

But even though all of this is true, there is nonetheless good reason to focus in great detail on what is admittedly this relatively narrow question. For even if relatively little about the morality of abortion follows from concluding that it is permissible, something absolutely crucial about the morality of abortion would follow from concluding that it is impermissible. If a particular abortion would be impermissible, then it follows that a woman would have no moral right to choose to have it performed even if having the abortion would rank high by other morally relevant standards of evaluation such as promoting overall happiness or equality. It is the claim that abortion is impermissible in this sense that is advanced by virtually every critic of abortion, and, as we will see, attempting to respond to this claim on the abortion critic's own terms is a difficult enough task in itself.

1.2. THE METHOD

Let us now assume that we are clear about the question I pose in this book. How should we go about answering it? The method of moral argument I propose to employ is a version of the method made famous by John Rawls as "reflective equilibrium" (1971: 20ff.), which has since been embraced in one form or another by writers on both theoretical issues (e.g., Gowans 1994: Chap. 2) and such specific issues as the moral status of animals (e.g., Reagan 1983: 133ff.; Carruthers 1992: 6–8, 21–4), though it may differ from Rawls's approach in some ways that are not trivial. A detailed explanation and defense of this method must remain beyond the scope of this work, but in this section I will offer a brief account of reflective equilibrium, at least as I understand it, and will explain why it seems to be an appropriate method for addressing moral problems in general, and, more importantly, why it is particularly well suited to constructing a defense of abortion that seeks to address critics of abortion on their own terms.

1.2.1. *Reflective Equilibrium*

The method of reflective equilibrium, at least as I mean to be using this term, can be described roughly as follows: We begin by accepting, at

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least provisionally, our moral intuitions about a variety of types of actions, giving more initial weight to those which seem especially clear or forceful. We then attempt to develop a credible moral theory that would serve to unify and underwrite these various judgments. We ask: What sort of more basic principle or set of principles would have to be true in order for these sorts of more particular judgments to prove to be correct? This procedure can appear to be circular, and in its most naive application it would be. For we could easily generate a basic principle that would match all of our judgments about more specific classes of actions by simply inventing a complex principle that endorsed the conjunction of all the particular judgments. And inventing such a convoluted principle would of course do nothing to provide support for those judgments. But the method of reflective equilibrium does not warrant such a move. In seeking principles to underwrite our considered moral judgments about particular types of actions, the method directs us to give preference to those principles that are more general and more fundamental and which more fully exemplify the general theoretical virtues. I cannot provide an exhaustive list of those virtues here, or present a formula for weighting them, but they would include, at the least, such factors as parsimony, salience, coherence, and explanatory power, and they would be constrained by an overriding requirement of logical consistency.

Of course, it is unlikely that a theory will be found that does perfectly well by all such standards while at the same time accommodating every single one of our initial moral judgments about the entire range of specific types of actions about which we have moral intuitions. So the process to this point produces only what we might think of as our first candidates for an acceptable moral position. We may identify moral principles that provide a better or worse fit, but not a perfect fit, with our initial judgments. And in those cases in which our theory fails to conform to our intuitions, the intuitions themselves will seem to constitute counterexamples to the theory. A theory that does a generally satisfactory job of accounting for our obligation to keep our promises, for example, might fail to justify an obligation to keep our promises to those who have since died; and to the extent that we think it is still wrong to break our promises in such cases, this will seem to demonstrate that the theory itself is flawed.

When confronted with an apparent counterexample of this sort, there are essentially two options, each of which can be thought of as providing some benefit in terms of rendering our system of thought as a whole more consistent and coherent, but at some cost. One option is to revise