

Intentional Killing or Right to Bodily Integrity: Can We Bridge the Moral Languages of Abortion?

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THE UNITED STATES HAS LONG BEEN AT A STALEMATE about abortion, as a series of Gallup polls show. In 2022, 35 percent of the population said that “abortion should be legal under any circumstances,” 18 percent said it “should be legal under most circumstances,” 32 percent said it should be legal “only in a few circumstances,” and 13 percent said it should be “illegal in all circumstances.” Three percent of the respondents expressed no position. The responses in 1994, the first year Gallup asked the question, were very much alike.¹

Why can’t we make progress discussing the morality and legality of abortion, as we have on so many other issues? In my judgment, it is largely because prolife and prochoice activists continue to talk past each other on a number of key issues. By “talking past” each other, I mean that each party tacitly proceeds from premises the other would contest, as Alasdair MacIntyre pointed out so cogently forty years ago in *After Virtue*. Once the key premises are granted, the argument follows logically as night follows day, or day follows night, as the case may be.

What are these key issues? The first, of course, is the status of the unborn. Prolifers insist that an unborn life counts as an equally protectable person, while prochoicers maintain it is at best a potential person better viewed as part of the mother’s body. The second issue is how to describe the act of abortion. Prolifers describe the act of abortion as intentionally killing an innocent person, which is always wrong, while prochoicers describe the act as vindicating the mother’s autonomy and bodily integrity.

In my view, both of these moral issues play into a third one at once more nebulous and legally relevant. In analyzing abortion for purposes of law and public policy, are we going to give prominence to an “intention based” framework or a “rights” based framework? Both are

¹ These statistics, as well as the response to other poll questions, are available at Gallup, “Abortion,” news.gallup.com/poll/1576/abortion.aspx.

available in our legal system, each emphasizing a different aspect of the moral situation.

Intention-based analysis prioritizes the immediate and remote purposes with which the agent is acting. The crime of first degree murder furnishes a good example. As every first-year law student learns, that crime centrally consists of two elements: 1) *mens rea* (the accused's purpose to cause the death of a person) and 2) *actus reus* (a legally cognizable act that results in the death of a person). One without the other does not suffice.

In contrast, rights-based analysis prioritizes a sphere of influence over which an agent has nearly complete control, no matter what her immediate intention or larger motive in acting. I have absolute decision-making power over who enters my car. In most states, if I see my nemesis in a broken-down car by the side of the road in a blizzard, I can happily drive past—even if my reason for doing so is to cause them to freeze to death. I have no legal duty to rescue them, unless I put them in harm's way in the first place.

How do these two ways of framing acts for legal analysis interrelate? Sometimes, we fold the rights analysis as an exception into the dominant intention-based analysis as a mitigating factor. So, in the case of my freezing nemesis, I had the *mens rea* for murder, but there was no *actus reus*. My driving by was not a legally cognizable bad act, because I had a right to proceed as I did. In other cases, we fold the intention analysis into the rights-based analysis as an exacerbating factor. For example, I have a legal right to refuse to hire someone for almost any reason, including a bad reason, such as they look like the kid who bullied me in third grade. But I do not have the right to refuse to hire someone because I do not like their religion.

In the case of intention-based versus rights-based analysis and abortion, finding a starting point for a common conversation faces two major problems. First, each frame captures something of overriding importance about the issue for those advocating that framing. For many prolife advocates, the act of abortion is not simply an act of intentional killing of the innocent—which is bad enough. It is that of a *mother* killing her *baby*. An infant meets death at the will of the one human being who is supposed to love her unconditionally. For some Christians, especially Catholics, it can communicate a narrative counter to the salvation narrative, inaugurated and encapsulated by the relationship between the Blessed Virgin Mary and the Baby Jesus.

In contrast, for many prochoice advocates, the integrity of a woman's body is of paramount concern. For many centuries and in many cultures, women have had no right to say what happened to their bodies, particularly with regard to sex and its consequences. For example, until the late twentieth century, very few places allowed prosecution for marital rape; it was considered a contradiction in terms, since marriage gave the husband the broad right to use his

wife's body sexually. Even today, in the United States, many women are forced or pressured into sexual relations by partners and acquaintances, as the "Me Too" movement has shown. Against this history of misogyny, protecting a strong right to a woman's bodily autonomy and integrity is a necessary component in the battle against sexism. That right needs to be a sphere of decision-making where the questions of "what" and "why" are left to the woman's own moral judgment. According to a possible Catholic feminist perspective, one might say that the emphasis belongs on Mary's "Fiat"—her own free decision to allow the course of salvation history to proceed with her role at the center of it.

Second, neither the intention-based nor the rights-based legal frame fully captures the phenomenon of abortion. As I noted above, the intention-based legal frame requires both a *mens rea* and an *actus reus*. Certain acts of abortion, which directly attack the fetus, clearly qualify. But others do not, particularly early forms of abortion. As I understand it, medication abortion operates directly on a woman's own uterus rendering it inhospitable to the fetus.² It is not completely clear to me how doing something *to one's own body* can or should count as legally cognizable *actus reus* in someone else's death.

The rights-based frame has operational problems too. The individualism that can characterize rights language is sometimes tempered by the law to take into account important interests of the community and other people. I have a First Amendment right to free speech. That does not mean I can yell "fire" in a crowded theatre. The exercise of a woman's right to bodily self-determination adversely affects another life completely dependent upon her—a life to which she is related as a parent, not a stranger.

Is there a moral language that can help us knit together these two diverging legal conversations? If abortion is not fully conceived or conceivable as intentional killing or as exercising the right to individual bodily autonomy, how should we view it? I am not sure, particularly given the patchwork of different legal approaches to abortion now being constructed throughout the nation.

I do think, though, that the language of discernment and obligation might function to broaden the moral conversation, if not to bridge the two sides. So might a broader view of the situation. What obligations do we assume when we have consensual sex—with or without birth control? How do we balance obligations to children already born versus children in utero? How do women weigh obligations to themselves in the mix? And what is the responsibility of the father?

² Megha Satyanarayana and Mesa Schumacher, "How Medication Abortion with RU-486/Mifepristone Works," *Scientific American*, May 17, 2022, www.scientificamerican.com/article/how-medication-abortion-with-ru-486-mifepristone-works/.

These questions quietly underlie many women's decisions between abortion and childbirth. We need to bring them to full voice, rather than continuing to work exclusively within our well-worn frameworks of intentional killing and the right to bodily autonomy. ^M

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