

# Does access to abortion clash with equality of rights?

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This article was originally submitted as a seminar paper as part of the Philosophy of Law study-unit (CVL1024) and is being reproduced on the OLJ with the author's permission. In it, **Leighton John Demicoli** discusses the philosophical arguments in the abortion debate that can be used to logically support or refute abortion, as well as the clashes between rights and ideals if abortion were to be legalised.

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Leighton John Demicoli is currently a second-year student reading for a Bachelor of Laws (Honours) Degree. Hailing from a family with a legacy of esteemed lawyers, Leighton John inherits a deep-rooted appreciation for the principles of law and a commitment to upholding the honour and integrity of the legal profession.

Every life is inherently precious and has to be protected in every possible way. Hence, the principle defining equality, or *aequalitas*, in the eyes of the law is that all people must be equally protected by the same law. This concept has long been the subject of philosophical and moral controversy, but at its core, it is the notion that everyone should be treated fairly and have access to the same opportunities for development.<sup>1</sup> Yet, one of the most divisive topics in medical ethics and law is the legal standing of the foetus, causing a tug-of-war between maternal rights and foetal claims.

Pregnancy and childbirth raise interesting issues in the philosophy of law and can be approached from many philosophical perspectives. In the debate over abortion, the autonomy and dignity of the pregnant woman are a primary concern because, if the competing rights of the foetus are considered, an adversarial relationship could arise between the mother and her unborn child. Certainly, pregnancy is a significant life event that, even when welcomed, may cause many women a great deal of pain and disruption. The American philosopher Judith Jarvis Thomson, while acknowledging that the foetus is a person and has a right to life, argues that abortion may be justified in many instances because ‘the right to life does not include or entail the right to use someone else’s body’.<sup>2</sup> According to Thomson, a woman’s bodily autonomy takes precedence over the legal rights of the unborn child. This insight, however, denies the fact that most abortion cases involve women who were engaged in voluntary sexual activity rather than being subjected to rape.<sup>3</sup> As a result, the woman has either implicitly consented to the embryo using her body (the tacit consent objection<sup>4</sup>) or bears responsibility for keeping the embryo alive because the embryo relies on her body for its survival (the responsibility objection<sup>5</sup>). Therefore, the claim that access to abortion is necessary to promote gender equality and gender justice must be carefully examined to form a fully educated opinion.

Considering the other side of the perspective, the secular value of human life is one of the arguments used against the right to abortion. The premise is that all human lives, including the foetus, are intrinsically important because they are related to our ideas of family and parenthood. The Maltese Constitution prioritises the rights of the unborn over those of the mother, and considers abortion to be homicide.<sup>6</sup> In protecting the right to life, which is provided for in Article 33 of

<sup>1</sup> Silvio Meli, *The Philosophy of Law: A Brief Introduction* (Kite Group 2020).

<sup>2</sup> Judith Jarvis Thomson, ‘A Defense of Abortion: Philosophy and Public Affairs’ (1971) 1(1) *Philosophy & Public Affairs* 47.

<sup>3</sup> *ibid.*

<sup>4</sup> Mary Anne Warren, ‘On the Moral and Legal Status of Abortion’ (1973) 57(1) *The Monist* 43.

<sup>5</sup> Francis J Beckwith, *Politically Correct Death: Answering the Arguments for Abortion Rights* (Baker Pub Group 1993) Chapter 7.

<sup>6</sup> Criminal Code, Chapter 9 of the Laws of Malta, Articles 241-243(a).

the Maltese Constitution for assessing criminal liability, Maltese law makes no distinction between a foetus and a born child. It protects both equally, at whatever stage of the pregnancy. Moreover, our legislation defines a woman, whether she is one week or nine months pregnant, as a 'woman with child' and therefore harm inflicted on a woman 'with child' is more severe.<sup>7</sup> In contrast, the value of the extreme liberal viewpoint is that its claim that the foetus has no moral status is supported by a typical philosophical interpretation of the concept of 'personhood' because the offspring is significantly more developed than the foetus which lies right in the penumbra. However, the ethically significant distinction between a newborn and a foetus five minutes before birth is far from obvious and has numerous flaws.

In contemporary philosophical literature, the concept of personhood is defined as one's capability to be familiar with the world around them, including the use of language, a sense of self, preferences and desires, plans for the future, and reflections of the past. Therefore, a toddler has not reached personhood until he begins to understand common words and form a sense of self. According to philosopher Mary Anne Warren, a foetus does not have a moral standing independent from its mother, rather, the foetus gains a moral status at birth. Thus, infants, unlike foetuses are a part of the social world.<sup>8</sup>

Ronald Dworkin outlines his opinions on abortion in his book 'Life's Dominion'.<sup>9</sup> The American philosopher examines the inherent worth of all human life, its inviolability, the morality of death and how these concepts relate to the permissibility of abortion. He argues that the question of whether the foetus is a person is irrelevant. Dworkin believes that although newborns lack self-consciousness, which from a philosophical perspective might be a prerequisite for being a person, they should still be considered as individuals from a moral and legal perspective.<sup>10</sup> These two theories of personhood can both be used to determine the moral status of the foetus. One considers the foetus as a person, while the other does not.

Philosophical texts are the main source of arguments for and against whether life starts at conception, birth, or some other time in between, and an analysis from a philosophical perspective can help clarify and resolve the issue. There is, however, a deeper, more controversial challenge in determining precisely when it is reasonable to consider the foetus as a distinct human being rather than as a component of the mother's body. As is the case with any subject under discussion, the author has encountered extreme viewpoints in which the developing foetus is compared, from a biological perspective to an invasive organism or clump of cells and if it weren't for a complex series of compensatory mechanisms, the body of the pregnant woman would reject it exactly like it would a transplanted organ. For instance, the philosopher Michael Tooley argues that a foetus and an infant

<sup>7</sup> *ibid* 218.

<sup>8</sup> Mary Anne Warren, 'The Moral Significance of Birth' (1989) 4(3) *Hypatia* 46.

<sup>9</sup> Alfred A Knopf, 'Life's Dominion: An argument about Abortion, Eutanasia and Individual Freedom, Ronald Dworkin' (1993) 3 *Cambridge Quarterly of Healthcare Ethics* 303.

<sup>10</sup> *ibid*.

lack the characteristics necessary for an entity to have a ‘serious right to life’.<sup>11</sup> Other philosophers apply similar standards and conclude that the embryo has no right to life because it lacks autonomy, reason or self-awareness. In contrast, the Maltese courts determined that the foetus did have the potential to become a Maltese citizen, recognising his civil and constitutional rights,<sup>12</sup> in *Emilio Persiano vs Kummissarju tal-Pulizija noe*.<sup>13</sup> Upon request of any interested party, our courts may appoint a guardian to protect the interests of the unborn child as a holder of prospective rights, rather than the expectations of a clump of cells, putting into practice the ‘potentiality principle’ which holds that the foetus has both the capacity and the potential to become a healthy adult if its growth is unfettered.

Be that as it may, liberal feminists insist that it is still cruel and irrational to force a woman to sacrifice her life to ensure the survival of her unborn child and the present situation is that our legislators are currently drafting a bill to amend Article 241 of the Criminal Code, which addresses miscarriage, to allow abortions when the mother’s life or health is in danger. A case in point is that of Andrea Prudente, a pregnant tourist amid a pregnancy ordeal, who was outraged after she was denied an abortion despite experiencing a partial miscarriage.<sup>14</sup>

The amendment also seeks to ensure the legal protection of our medical professionals, like any other medical or surgical procedure, without being subject to penalties under Maltese law. However, former European Court Judge Giovanni Bonello has slammed the draft. His dissenting opinion is that, as the law stands, when a pregnancy is accidentally ended with the intent of saving the life of a mother whose life is in danger due to the same pregnancy, no crime is committed.<sup>15</sup> The ‘double effect principle’ is put into practice even though it is not explicitly mentioned in any laws. Dubbed the ‘shadow ban’, the double effect doctrine is a common moral rule that is frequently implemented in challenging situations when both the affected parties are innocent, but something has to be done or would happen that would unavoidably endanger one of their lives.<sup>16</sup> As Thomas Aquinas puts it, ‘the deed itself is good or at the very least morally neutral.’<sup>17</sup> More importantly, according to the legal maxim of *actus non facit reum nisi mens sit rea*, an act alone does not constitute criminal responsibility because it requires a guilty thought as well. The crucial element of *mens rea*, which is the intent to perpetrate that crime, is missing. Considering the merits and limitations of the equality arguments, the abortion debate accurately identifies a serious social issue and the solution proposed is quite inadequate. This in addition to putting the nation on a slippery slope toward the widespread legalisation of

<sup>11</sup> Michael Tooly, ‘Abortion and Infanticide’ (1972) 2(1) *Philosophy and Public Affairs* 37.

<sup>12</sup> Tonio Borg, *Leading Cases in Maltese Constitutional Law* (Kite Group 2019) 94-96.

<sup>13</sup> 1790/2000/2 *Emilio Persiano vs Kummissarju tal-Pulizija noe*, Civil Court (First Hall) 1 November 2000.

<sup>14</sup> Ivan Martin, ‘US woman in pregnancy ordeal was never in danger, state argues’ *Times of Malta* (28 November 2022) <<https://timesofmalta.com/articles/view/us-woman-pregnancy-ordeal-never-danger-state-argues.997872>> accessed 9 March 2023.

<sup>15</sup> Interview with Giovanni Bonello, former European Court Judge, (Valletta, 26 March 2023).

<sup>16</sup> Diane N Irving, ‘Abortion: Correct Application of Natural Law Theory’ 2000 67(1) *The Linacre Quarterly* 45.

<sup>17</sup> Thomas Aquinas, *Summa Theologiae* (1274).

abortion.

Pro-choice activist and human rights lawyer Lara Dimitrijevic joins the plethora of feminist philosophers who have argued that a woman's fundamental rights to equality and bodily autonomy are dependent on her capacity to make decisions about her own body and reproductive functions. These rights include the ability to decide for herself if and when she wishes to become pregnant and have children without endangering her chances of thriving and contributing to our community. Consequently, access to safe and legal abortion is tightly linked to the benefits of academic achievement, career advancement, enhanced self-esteem, and better health. Dimitrijevic bases her arguments on the feminist philosophy of law, outlining what equality requires in light of our patriarchal society. She attributes the present issue to a 'dilemma of difference,' which happens when decisions are founded on unstated norms that assume the status quo is universal and unavoidable when in reality these norms reflect a particular point of view.<sup>18</sup> The crux of the dilemma of difference, first raised by Martha Minow, concerns how to mitigate unjust consequences for the vulnerable without further undermining their position.<sup>19</sup>

The commonly held view is that legal restrictions on abortion often lead to a rise in unsafe and sometimes harmful clandestine abortions.<sup>20</sup> However, this is an effort to provide a realistic answer to a moral dilemma. Practical factors can undoubtedly affect our decision to enforce a law or to lessen the punishment when it is violated, but they cannot resolve the morality of the law itself. Aside from that, willfully killing an unborn child violates the principle of natural law. What conditions and situations render it morally acceptable for a woman to have an abortion or for a doctor to carry out a procedure to save the life of an innocent person while allowing or permitting the other to die? However, it is common knowledge that countless unborn children are aborted in the UK every year. It is also common knowledge that women in Malta purchase illegal, safe abortion pills from websites run by women.<sup>21</sup> But, so far, no one has been imprisoned for having an abortion in the past 25 years.

While many countries adopted *Roe v Wade*'s precedent,<sup>22</sup> American states are currently reversing course and pursuing a legislative strategy that aims to protect the foetus. What was regarded as a federal privilege is no longer a right after it was reversed and declared invalid on the 24<sup>th</sup> of June, 2022 and left up to the 50 US states' right to decide. After all, this is the situation and position of the European Convention on Human Rights. The social discussion surrounding equality has intensified radically as we look at how equality also relates to the child in the womb and its protection regarding the right to life. Modern

<sup>18</sup> Interview with Lara Maria Dimitrijevic, Human Rights lawyer, Founding Partner at Sciberras Associates, (Valletta, 25 March 2023).

<sup>19</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press 2016).

<sup>20</sup> Family Planning Advisory Service Malta <<https://www.fpas.mt/>> accessed 9 March 2023.

<sup>21</sup> *ibid*; Women on Web <<https://www.womenonweb.org/>> accessed 09 March 2023; Women Help Women website <<https://womenhelp.org/>> accessed 09 March 2023.

<sup>22</sup> *Roe v Wade* [1973] 410 US 113 United States Supreme Court.

embryology has shown that the embryo starts to exist at conception and has the built-in potential for complex mental abilities. In contrast to Michael Tooley's interpretations of the criteria for granting a living thing the right to life, neurobiological evidence shows that a foetus may experience pain as early as 7 weeks of gestation, making abortion *prima facie* seriously wrong.<sup>23</sup>

Contemporary philosophers have not addressed the fathers' rights in relation to abortion, so there is no theory that serves as a guiding principle for behaviour. Our legislation guarantees parents' equality of rights regarding raising their children. Family law, therefore, starts with the tenet that both parents, mother and father, are fully equal in their rights and obligations concerning their offspring. For instance, when resolving disputes regarding the rearing of children, parents are treated equally by the State. The mother has no advantages concerning children and more often than not, a male must pay child support. Yet the courts have typically ranked fathers' rights about abortion choices below those of mothers, contradicting the strict equality philosophical concept. If women can, one day, choose not to become mothers after conception, then men should also have the option of choosing not to become fathers. Demanding financial or other assistance from a biological father who chooses not to have children is also unfair. While expectant fathers may not want to assume the duties of fatherhood, they may disagree with a pregnant woman's decision to terminate the pregnancy. This is one instance of a dichotomy where the father's equality-protected rights and freedoms are impacted by another person's rights, and this goes against the ideal of equal rights and obligations that contemporary society strives to uphold.

This topic is extremely ambiguous, with consequentialist arguments on both sides frequently fiercely contested. Although secondary considerations must be taken into account including the rights of the father, the fundamental principles of natural law should hold true for all. Allowing human life to be taken under the guise of having the freedom to do with one's body as one pleases would be inhumane and demeaning. This right to equality must never be compromised by the right to life of another person. Therefore, the equality of rights of the unborn child clashes with access to abortion.

The vast array of academic literature on the topic under discussion contains a variety of viewpoints and utilitarian philosophies that seek to improve society as a whole. Once there is a clear understanding of the fundamental moral distinctions, the circumstances will enable the application of a common moral principle to this standoff.

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<sup>23</sup> Michael Tooley (n 11).



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