Restricting Abortions at Eight Weeks Is Consistent with the Legal Principles of Roe *v. Wade*

Michael J. Degnan

ABSTRACT: The principle at work in the Supreme Court's 1997 cases on doctor-assisted suicide can be applied to its abortion cases, provided that the justices agree that eight-week old fetuses are human beings. The application of this principle does not demand renunciation of the claim that women have a right to abortion. It does require a specification about what the right to abortion entails, namely, that a woman has the right to seek to have her unborn offspring separated from her prior to natural term. She has the right to refuse to nourish and sustain the new life within her. The right to seek separation is not, however, the right to seek dismemberment or death of this a human being, for there is a compelling State interest in prohibiting acts that are necessarily the intentional dismemberment or killing of human life.

FOR THE LAST TWENTY-FIVE YEARS Supreme Court cases on State regulation of abortion have preceded and influenced the legal reasoning on State regulation of practices that hasten death at the end of life. For example, in the 1976 *Karen Ann Quinlan* case the New Jersey Supreme Court wrote that the right of privacy was broad enough to encompass a patient's decision to decline medical treatment since it was broad enough to include a woman's decision to abort her pregnancy. In *Washington v. Glucksberg* the Court of Appeals quoted the Supreme Court's reasoning in *Casey v. Planned Parenthood.* In the *Casey* decision the court recognized that "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to a person's dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."

In 1997 the Supreme Court bucked this pattern, for it ruled unanimously in two distinct cases that a right to assistance in

committing suicide is not a fundamental liberty interest protected by the Due Process Clause of the 14th Amendment. Yet, the right to refuse life-saving treatment remains in tact in these two decisions. In this paper I will show that if the Court's reasoning in these two cases is applied to the abortion question, then it is logically consistent for the Court to uphold a woman's constitutional right to abortion and allow State prohibition of nearly 90% of abortions, provided the Court recognizes that human life begins at least by the eighth week after conception. I begin by examining the legal principle enunciated in the 1997 cases, which I will then apply to the abortion issue.

In *Vacco v. Quill* the Supreme Court overturned the Court of Appeals case that had ruled that New York State's ban on assisted suicide violated the Equal Protection Clause of the 14th amendment. The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Court of Appeals concluded that terminally ill people who are on life-support system are treated differently than those who are not, for those on life support may hasten death by ending treatment but those not on life support may not hasten death through physician-assisted suicide. The Supreme Court held that the distinction between withdrawing life-sustaining treatment and assisting in a suicide was widely recognized and endorsed in the medical profession and legal traditions. The Court supported the distinction based on legal principles of causation and intent. Concerning intention, the Court held that in removing treatment the physician need not intend the patient's death, for the physician could simply intend the ceasing of treatment that is useless and futile or degrading to the patient. By contrast, the doctor assisting in a suicide necessarily intends the death of the patient. The Court wrote:

> The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must necessarily and indubitably, intend primarily that the patient be made dead." Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. See, e.g., *Matter of Conroy*: patients who refuse life-sustaining treatment "may not harbor a specific intent to die" and my instead "fervently wish to live, but to do so free of

unwanted medical technology, surgery or drugs."[1]

The Court explained that the law has long used the standard of an actor's intent or purpose to distinguish between two acts that may have the same result. They cite *United States v. Bailey* (1980) where the Court held that the common law of homicide often distinguishes between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. Finally, the Court corrected the Appeals Court reading of the *Cruzan* case where the court affirmed the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. This right was grounded on the well-established traditional rights to bodily integrity and freedom from unwanted touching, not on a general and abstract "right to hasten death," as the Appeals Court had held.

The Court therefore drew a distinction between acts that necessarily intend the death of an individual and those that do not necessarily intend death. The Court acknowledged that some refusals of treatment may in fact be done by patients who intend their own death by this removal. It is, however, very difficult to determine the intention of the person in this case. A person may wish for an early death, but that is not the same as intending death, as anyone who has wished to lose weight without intending to do so can attest. The Court recognized the difficult epistemic conditions for determining the intention of the patient in such cases. But, in cases where it is impossible to do the action without intending death, the Court affirmed the State interest in protecting human life.

The distinction between refusing life-saving treatment and receiving assistance from a doctor in killing oneself is attacked by a friend of the court brief authored by some of our country's most able philosophers: Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson.[2] They argued that

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[1] *Vaco v. Quill* (1997), the majority opinion by W. Rehnquist.

[2] Brief submitted to the U.S. Supreme Court in *Washington v. Glucksberg* and in *Vacco v. Quill*, reprinted in *Today's Moral Issues*, ed. Daniel Bonevac (Mountain View CA: Mayfield Publishing, 1999), p. 465.

the distinction between these cases is based on a misunderstanding of the pertinent moral principles. They agreed that when a patient does not wish to die, different acts (each of which foreseeably results in one's death) may have very different moral status. For example, it is morally permissible for a doctor to deny an organ to one patient even though he will die without it in order to give it to another. But it is not permissible for the doctor to kill one patient in order to use his organs to save another. In the former case the doctor need not intend the death of the one patient, while in the latter case the doctor must intend the one patient's death.

According to these philosophers, when a competent patient wants to die, then there is no difference between actively doing something to bring about the death or refraining from acting that also brings about the death. They write: "From the patient's point of view, there is no morally pertinent difference between a doctor's terminating treatment that keeps him alive, if that is what he wishes, and a doctor's helping him to end his own life by providing lethal pills he may take himself, when ready, if that is what he wishes."[3] They hold that if it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process, then it is equally permissible for her to help her patient hasten his death more actively, if that is the patient's express wish. They take it that the Court's ruling in the *Cruzan* case affirms the antecedent of the conditional. Hence doctor assisted suicide is permissible.

The Supreme Court did not affirm that a doctor might withdraw treatment in order to cause death. The distinction is between acts that necessarily intend death and those that do not necessarily intend death. The Court allowed acts that do not necessarily intend death. Acts that do not necessarily intend death may in fact be performed by individuals with the intention of death. The Court decided in a 9-0 opinion that determination of intent in these areas is too uncertain or too private to disentangle. So, the Court allowed doctors to remove treatment because it is possible that such removal can be done without intending death. Of course, this means that there may be many cases of such removal done with the intention of killing the patient or hastening the patient's death.

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[3] Ibid.

A crucial premise in the philosopher's argument is false. It can be the case that a doctor may be allowed to withdraw medical treatment in order to allow death to result from a natural process, without it being permissible for him to help his patient hasten his own death more actively. The reason is that the withdrawal of treatment is not necessarily an intentional killing while the assistance in a suicide is necessarily intending the death of the patient.

The Court has not applied the distinction between acts that are necessarily intentional killings of humans and acts that are not necessarily intentional killings to the different kinds of abortions, because in *Roe* the Court could not determine when human life began.[4] From the lack of consensus about the beginning of human life the Court concluded that they could not be sure that a human life was present until birth. But it does not follow from a lack of consensus about the beginning of human life that there is no assurance that we have a human life sometime prior to birth. Later, I will support the reasonableness of believing that 8-week-old fetuses are humans. For now, I simply want to apply the distinction between necessarily intentional and not necessarily intentional acts to different kinds of abortions.

The Supreme Court has mistakenly treated all abortions as the same, but they are not. As the abortion-rights advocates correctly point out, abortion is not always murder. Medically speaking, abortion is the expulsion of the unborn organism from its mother before its natural term. In this way it is like the unplugging of oneself from a violinist hooked up to one's kidneys, as Judith Jarvis Thomson has pointed out.

The intrauterine device (IUD), morning after pill, and RU 486 fit the violinist analogy very well. The IUD prevents the unborn organism from even plugging itself into the woman, for it prevents the implantation in the uterus. The means of separation is rendering the uterine wall inhospitable to the pre-embryo. The death of the organism is a by-product of this action. It is foreseen, but not necessarily intended.

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[4] The Court wrote, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is no in a position to speculate as to the answer." *Roe v. Wade* 410 U.S. 113 (1973).

The morning after pill can work in three ways according to its manufacturers. The pill contains ethinyl estradiol and levonorgestrel, which are chemical forms of the female hormones estrogen and progesterone. Together these chemicals prevent ovulation (the release of an egg from an ovary), disrupt fertilization (joining of the egg and sperm), and inhibit implantation (attachment of a fertilized egg to the uterus).[5] The death of the organism is not necessarily sought. It is a by-product of hormonal changes sought to delay ovulation or render the womb inhospitable to any organism that might seek residency there.

RU 486 presents a more complicated situation. While it can be taken before pregnancy, it is usually taken four to six weeks after pregnancy. RU 486 is an anti-hormone, a molecule that interferes with hormonal messages. It binds to the progesterone receptor and blocks the work of the progesterone hormone. Progesterone makes the lining of the uterus able to support a developing embryo. Consequently, if the drug is taken prior to pregnancy, then the fertilized ovum cannot be implanted. On the other hand, if one uses the drug after the embryo has implanted itself in the uterus, then the embryo is expelled with the uterine lining, which allows the embryo to fasten to the uterus. The usual procedure followed by a woman who takes RU 486 is to return to the physician shortly after taking the drug in order to receive an injection of prostaglandin, which causes uterine contractions, thereby ensuring that the embryo is expelled. The effect of this drug is to unplug the embryo from the uterus and then to get the embryo out by inducing uterine contractions. The intention need not be death, even though it is a foreseen consequence.

For many who seek abortions using RU 486 the aim is indeed death of the fetus just as for many who refuse life saving treatment at the end of life death is their aim. The death resulting from RU 486 is not, however, necessarily intended. Even though one knows that death is a result of the action of the drug, it does not follow that death is intended. The situation is comparable to taking chemotherapy for cancer. One knows that one's hair will fall out and that one will suffer indigestion

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[5] "Preven EC," http://www.drugs.com/mtm/preven-ec.html, accessed May 30, 2015.

and other symptoms. But these are not intended as a means or as an end.[6] They are foreseen but unintended consequences of the chemotherapy. Similarly the death of the embryo may be foreseen, but it need not be an intended end or means. Users of the IUD or morning after pill are not intending death of the pre-embryo or embryo, for they do not even know whether there is an embryo to destroy in the first place.

Since these abortions are not necessarily intentional killings, there could be no constitutionally sanctioned State prohibition of such abortions just as there can be no constitutionally sanctioned State prohibition of patient-requested withdrawal of life-saving treatment. Women would retain the right to these abortions, for they are not necessarily intentional killings. Just as the Court holds that the right to die means the right to refuse life-saving treatment, so the right to abort is the right to refuse to be hooked up to a fetus or embryo.

Unlike the case of withdrawing treatment deemed non-beneficial to the patient where death is foreseen but not necessarily intended, both RU 486 and the morning after pill present the woman with a choice: nourish and sustain the life of the organism that is in its natural place or refuse to provide such nourishment. The reason for the latter choice can be lack of consent to the organism's presence that resulted from rape or failed contraception or even voluntary unprotected sex. This is the range of privacy of the woman's choice that *Roe* and *Dolton* protect.

Since the use of RU 486 drug regimen inevitably leads to the death of the unborn human offspring and the administration of the two drugs are causes of the embryo's death, some may insist that this is an

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[6] There are countless examples to buttress this point. Each time I drive my truck I foresee that I will wear down my tires. But I do not intend to wear down my tires when I drive to work. This is foreseen and inevitable, but not intended. Teachers foresee that upon returning exams in which some students did poorly, some students will become distraught. Yet the teacher does not intend to distress her students. One who stutters may foresee with certainty that his speech will sometimes create annoyance or anxiety but it is not necessary that he intend this annoyance or anxiety. See R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford UK: Basil Blackwell, 1990), p. 17; Alan White *Grounds of Liability* (Oxford UK: Clarendon Press, 1985), p. 8; and Mark Aulisio, "On the Importance of the Intention/Foresight Distinction," *American Catholic Philosophical Quarterly* 70 (1996): 191-92.

intentional killing. The fact that the mother is intentionally refusing to nourish the human embryonic life within her others will insist is evidence that this is necessarily an intentional killing of a human being. While it is indeed possible that a woman using RU 486 intends the separation of her embryonic offspring from her as a means of intentionally killing the embryo, it is not necessary that the mother intend the embryo's death or the infliction of a lethal wound. The mother necessarily intends to separate the unborn from her uterus. The death is neither a means nor the goal of this removal. The mother has clearly violated her parental obligation to feed her child when he or she is in its natural place. The action is immoral for that reason. But it is not necessarily an intentional killing.

Not all means of separating the fetus from the mother are like the unplugging, for most abortions performed in this country are necessarily intentional infliction of wounds known to be lethal. The suction-curetage method (used in nearly 95% of abortions) produces vacuum pressure to aspirate the fetus out of the uterus so that it can be collected in a bottle. Often before the suctioning, the fetus is dismembered, so that the parts can fit through the suction tube.[7] Some vacuums have sharp edges to them so that the cutting can be done with one tool. Although the intended end may be simply the separation of the fetus from the mother, the intended means to achieve this end is dismemberment via cutting or vacuuming. Hence such abortions are necessarily intentional infliction of lethal wounds. Nothing in *Roe* sanctions intentional infliction of lethal wounds on non-life-threatening human beings.

In the saline method a salt solution is injected into the womb to kill the fetus and stimulate contractions. Since saline is slow at inducing labor, prostaglandins are frequently administered as well to speed up the contractions, which result in the delivery of a dead fetus.[8] In partial-birth

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[7] See *The Harvard Guide to Women's Health*, edited by Karen J. Carlson, Stephanie Eisenstat and Terra Ziporyn (Cambridge MA: Harvard Univ. Press: Cambridge MA, 1996), p. 7.

[8] See *Harvard's Guide to Women's Health*, p. 10. Abortions using saline also present serious risk to the mother, for if the salt enters a blood vessel there is a risk of fluid retention, shock, or even death. Prostaglandins or oxytocins may be administered without the saline solution. Here the contractions come more quickly and the fetus is not killed prior to being expelled. Live births

abortions the brains of the fetus are suctioned out. Hence a lethal wound is inflicted upon the individual. Once the brain is out the rest of the body is extracted from the womb. These last two methods of abortion are necessarily intentional killings of human beings since the means of separating the unborn from its mother are the infliction of lethal wounds.

If we adopt the principle in the Supreme Court's 1997 cases on doctor-assisted suicide, then these abortions that are necessarily intentional infliction of lethal wounds could be prohibited by the State, provided that fetuses at these stages are considered human beings. Just as the Court holds that the right to die does not entail a right to have someone assist you in killing yourself, the right to abort does not entail a right to an action that necessarily aims at the dismemberment of the fetus.

Since suction abortions are not performed before eight weeks and saline and partial-birth abortions are performed late in the third trimester, the Court will not apply this principle to abortions, unless there is good reason to believe that an eight-week-old fetus is a human being. In fact, there is near unanimous consensus among embryologists that a human life is present by two weeks. Prominent zoologists Anne McLaren and P.S. Timiras argue that a human individual is present at the primitive streak stage, around two weeks after conception.[9] The

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frequently result from using prostaglandins. If one uses only the protaglandins this type of abortion need not be an intentional killing. When a live birth occurs, the newborn can be treated as a patient. In 1977 the policy statement of the American College of Obstetricians and Gynecologists affirmed that "the physician does not view the destruction of the fetus as the primary purpose of abortion." The College recognized a "continuing obligation on the part of the physician towards the survival of a possibly viable fetus where this can be discharged without additional hazard to the health of the mother."

[9] See Ann McLaren, "The Embryo" in *Embryonic and Fetal Development, Reproduction in Mammals*. See also her "Where to Draw the Line," *Proceedings of the Royal Institution* 56 (1984): 101-21, where she writes, "The primitive streak stage is a vitally important landmark in development because it marks the onset of *individuality*,… once the primitive streak has formed, we can for the first time recognize and delineate the boundaries of a discrete coherent entity, an individual, that can be transformed through growth and differentiation into an adult human being. If I had to point to a stage and say, 'This was when I began being me,' I think it would have to be here.'" See also Timiras, *Developmental Physiology and Aging* (New York NY: Macmillan,

Australian Committee of Inquiry on Human Fertilization and Embryology reached a similar result.[10] If the evidence is good for two weeks, then *a fortiori* it is even stronger at eight weeks. In fact, no embryologist denies that an eight-week old fetus is a human being. By eight weeks all the organ systems characteristic of a human being are present in all healthy fetuses.[11] Electrical encephalograms can record brain activity. Hence the Court has compelling evidence as its reason for admitting that by eight weeks the fetus is a human being without denying the point that there is disagreement about the beginning of human life.

The Court's argument for the right to abortion rests on the 14th Amendment's Due Process clause, which provides that no State shall "deprive any person of life, liberty or property, without due process of law." This clause provides a special degree of protection for fundamental rights: the government must demonstrate that any burden it imposes upon a fundamental right be a necessary means of promoting

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1972).

[10] Mary Warnock, Chairwoman of the Australian Committee of Inquiry on Human Fertilization and Embryology, reached a similar conclusion: "We, the majority of the Inquiry, recommend that research on the human embryo should be brought to an end on the fourteenth day because of the development then of the primitive streak. Up to that time it is difficult to think of the embryo as an individual, because it might still become two individuals. None of the criteria of identity that apply to me, or 'tom or Dick or Harry, and distinguish one of us from the others, are satisfied by the embryo at this very early stage. The collection of cells, though loosely strung together, is hardly yet one ting, nor is it several. It is not yet determined to be either one or several. But from the fourteenth or fifteenth day onwards, there is no doubt that it is Tom or Dick or Harry that is developing, or all three of them, but as three individuals. At this stage, then the embryo proper has become distinct from those cells, which will become its protective cover in the uterus, the placenta. Up to this time as I have said the whole collection of cells may be thought of, not as an embryo, but as a pre-embryo." Warnock, "Do Human Cells Have Rights?" *Bioethics* 1 (1987): 11-12.

[11] By 31 days after conception the heart has settled into rhythmic contractions. By day 20 the foundations of the central nervous system including brain and spinal cord are established. By day 30 three parts of the brain are present and the eyes, ears and nasal organs begin to form. By the sixth week the five primary regions of the brain are evident.

a compelling governmental interest. The Court holds that the right to have an abortion is fundamental and it recognizes a compelling state interest in protecting human life. So, if it were to recognize that the fetus at eight weeks is a human being, then it could support State laws that restricted acts that were necessarily intentional dismembering of eight-week-old fetuses on the ground that the protection of human life is a compelling State interest. Yet if such dismemberments or killings were not necessarily intentional, the State could not restrict those any more than it can restrict people's refusal of life-saving treatment at the end of life.

The distinction between necessarily intentional killing and not necessarily intentional killing allows the Court to respond to an important equal protection argument for a broader reading of the abortion right. The equal protection defense is well expressed by Jeffrey Rosen:

> Restrictions on abortion and contraception are a form of sex discrimination since they place the risks and burdens of pregnancy and child-rearing on women but not on men. Government does not require fathers to devote their bodies to save their children, even when a kidney transplant is necessary to prevent the child's death. By conscripting women's bodies into service, forcing them to conceive, to bear and to raise unwanted children the state perpetuates constitutionally unacceptable stereotypes of women as incubators. And the wave of late nineteenth-century abortion restrictions, at least, was unambiguously motivated by discriminatory ideas about the proper role of women in society.[12]

Notice that the example of what the government does not require of men fits the violinist case exactly. The father is not compelled to be heroic. The father's refusal to offer his kidney will foreseeably result in the child's death, but it is not necessarily an intentional killing. Since the abortions caused by the morning after pill and RU 486 protect the woman's right not to come to the aid of her child, just as the father is not compelled to give his born child a kidney, no sex discrimination is allowed. By contrast, the State does prohibit fathers from actions that necessarily intend the death or dismemberment of their offspring. So,

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[12] Jeffrey Rosen, "Womb with a View," *The New Republic* (14 June 1993): 40.

there is no denial of equal protection if the law prohibits women from actions that necessarily intend the dismemberment or death of their unborn offspring.

I have argued that the principle at work in the Supreme Court's 1997 cases on doctor-assisted suicide can be applied to its abortion cases provided that the justices agree that eight-week old fetuses are human beings. The application of this principle does not demand renunciation of the claim that women have a right to abortion. It does require a specification about what the right to abortion entails. It entails that a woman has the right to seek to have her unborn offspring separated from her prior to natural term. She has the right to refuse to nourish and sustain the new life within her. The right to seek separation is not, however, the right to seek dismemberment or death of this a human being, for there is a compelling State interest in prohibiting acts that are necessarily the intentional dismemberment or killing of human life. Thus, women would have the right to use the IUD, the morning after pill and RU 486 to separate themselves from their offspring. Such a right would not extend to abortions done by suction-curettage, saline or partial birth abortions, for these are necessarily intentional killings.