

AUTONOMY'S DOMINION: RONALD DWORKIN'S ARGUMENTS ON ABORTION

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ABSTRACT

Ronald Dworkin's arguments on abortion are still very *ad rem* to his rights thesis or liberal theory of law which hinges on the jurisprudential position that people should consider rights as trumps, such that the individual liberty protected by the right, trumps the various collective goals with which the right might be in conflict. For Dworkin, the individuals' right to personal autonomy protects their desire to have abortion within the first trimester of pregnancy. The problem that warrants this study is to ascertain the personhood of a foetus, as Dworkin denies that a foetus is a person, especially at its early developmental stage. This study's objective is to analyse Dworkin's arguments on abortion. Significantly, this study will be very important to legal and medical philosophers, legal and medical practitioners, clinical and forensic psychologists, medical physicists, and so on. This research work will help them to do their works better in their different fields. The study adopts the analytic method of philosophical research. Finally, this study submits that foetuses are viable persons from the moment of conception. The newly conceived foetus, the newborn child and the mature adult are all at different stages of development. All, therefore, deserve human dignity. More abortions would be prevented when pregnant women are seen as potential allies of their unborn babies.

Keywords: Dworkin, abortion, autonomy, foetus, human dignity, individual rights.

INTRODUCTION

In *Life's Dominion*, Dworkin makes an elegant attempt to persuade thoughtful opponents of abortion to cease advocating their legal prohibition (Rakowski, 2001, 33). He defines abortion as “a waste of the start of human life. Death intervenes before life in earnest has begun” (Dworkin, 1993, 190). He denies the personhood of a foetus. He argues that women's decision to have abortion should be esteemed as a matter of privacy and personal freedom, therefore, government should not interpose. For him, the insistence that women should carry their pregnancy against their will is tantamount to slavery. Also, the moral weight of a potential life is dependent upon the quality of life the offspring would have. In other words, if the potential life would be subject to a life of suffering, to itself and to the mother, like being born blind or crippled; he argues that terminating the foetus may be morally justifiable. A detailed analysis and criticisms of Dworkin's arguments in this regard is the subject matter of subsequent sections.

ABORTION: DWORKIN'S ARGUMENT IN *LIFE'S DOMINION*

In *Life's Dominion*, Dworkin handles the debates about abortion that have taken a place in the contemporary politics in different countries including his own country. He urges people to

discard portraits of these issues that paint irresolvable conflicts of rights. Instead, he suggests that these debates should be re-conceptualised to reflect a recognition that what propels them is an essentially religious disagreement about the intrinsic value of human life (Shiffrin, 2004, 195). With regard to abortion, John D. Inazu in his 2012 essay, “The Limits of Integrity,” points out that Dworkin identifies three values at issue in the constitutional debate over abortion: (I) law as integrity; (II) the rights and interests of persons; and (III) the sacredness of human life. He applies the first value of law as integrity to any constitutional question. It demands coherence within the ongoing practice of legal interpretation (Inazu, 2012, 191; Dworkin, 1986, 257).

Dworkin's second value, the rights and interests of persons, comes in two forms: the right to procreative autonomy of a woman seeking abortion and the right to equal protection from harm by the foetus if the foetus is a “person” in the constitutional sense, that is, whether the foetus is a helpless unborn child with rights and interests of its own from the moment of conception, such that permitting abortion is permitting murder. The threshold question of whether a foetus is a person to whom rights attach forms the basis of what Dworkin calls the “derivative” objection to abortion (Dworkin, 1993, 11; Inazu, 111). The objection is derived in the sense that the protections it demands from government come from the constitutional rights attributed to the foetus. He disregards the derived objection in his most inclusive consideration of abortion in *Life's Dominion*.

The last value that Dworkin regards in his interpretation of the problem of abortion is the sacredness of human life. He associates this value with the “detached” objection to abortion, by which he means that the responsibility of government to protect the foetus is not derived from constitutional rights. He explains the value of sacredness:

The hallmark of the sacred as distinct from the incrementally valuable is that the sacred is intrinsically valuable because, and therefore only once, it exists. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted (Dworkin, 1993, 73-74).

He goes further to observe that the sanctity of life is a highly contentious value. It is controversial, for example, whether abortion or childbirth best serves the intrinsic value of life when a foetus is deformed, or when having a child would seriously depress a woman's chance to make something valuable of her own life (Dworkin, 151).

ABORTION: RELIGIOUS BELIEFS AND JUDICIAL DECISIONS

Dworkin's appeal to the sacred leads him to conclude that “we may describe most people's beliefs about the inherent value of human life, beliefs deployed in their opinions about abortion, as essentially religious beliefs” (Dworkin, 155). His philosophical authority for this turn to religious belief is the Supreme Court's decision in *United States vs. Seeger*, 380 U.S. 163 (1965), which suggested that an atheist's system of beliefs may have a place in the life of its possessor parallel to that filled by the orthodox belief in God (Dworkin, 184). Dworkin makes a point to which he returns in *Religion Without God*: “once the idea of religion is separated from the idea of a god, however, courts that accept the constraints of integrity face great difficulty in distinguishing between religious and other kinds of conviction” (Dworkin, 2013, 162).

Furthermore, he argues that one constraining principle is content. For instance, he states that a belief in the objective and intrinsic importance of human life has a distinctly religious content. He contends that people should classify a belief as religious by asking whether it is sufficiently similar in content to plainly religious beliefs (Dworkin, 155). For him, the category of religious

belief is expansive. In *Life's Dominion*, therefore, there is an emphasis that religious belief or conviction need not presuppose a god:

Convictions that endorse the objective importance of human life speak to the same issues, about the place of an individual human life in an impersonal and infinite universe, as orthodox religious beliefs do for those who hold them... I can think of no plausible account of the content that a belief must have in order to be deemed religious that would rule out convictions about why and how human life has intrinsic objective importance, except the abandoned notion that religious belief must presuppose a god (Dworkin, 163-164).

Having established his broad interpretation of religious belief, Dworkin sets out to assess the competing interpretive arguments about abortion on the basis of the three values he has identified: integrity, rights and interests, and the sacredness of human life. His value of legal integrity reinforces both the right to procreative autonomy and the rejection of any notion of rights for a foetus. As for procreative autonomy, he writes: "The law's integrity demands that the principles necessary to support an authoritative set of judicial decisions must be accepted in other contexts as well. It might seem an appealing political compromise to apply the principles of procreative autonomy to contraception, which almost no one now thinks states can forbid, but not to abortion, which powerful constituencies violently oppose" (Dworkin, 158). So, he argues that the point of integrity in the legal system is to rule out political compromises of that kind. Law as integrity should represent conviction, not the tactical strategies of justices eager to satisfy as many political constituencies as possible.

Therefore, Dworkin argues that his claim for procreative autonomy takes cognizance of precedent which law as integrity demands. Given that *Griswold vs. Connecticut* and *Eisenstadt vs. Baird* have acknowledged the right to avoid conception when having sex, he argues that the right to terminate pregnancy must follow, because the likelihood of unwanted reproduction is all the greater once pregnancy has begun. Meanwhile, if the right to avoid procreation is deemed fundamental before conception through the use of contraception in certain cases, it should be equally fundamental after conception occurs.

For Dworkin, integrity equally provides a clear answer to the question of the personhood, and, thus, the rights, of the foetus. He believes that precedent interpreting the Equal Protection Clause clearly rejects the idea. He clarifies that his argument accepts the U.S. Supreme Court's decision that a foetus is not a constitutional person "with rights and interests of its own," and instead frames the issue in terms of what governmental regulation is permissible to express respect for the sanctity of human life (Inazu, 160).

Dworkin translates his argument into an account of constitutionally allowable and unallowable governmental standard. He distinguishes between government insisting upon, that is, coercing conformity and encouraging responsibility: government may not compel a woman's abortion decision to further its view about sanctity, but it may regulate in ways that encourage her to 'treat the question of abortion seriously,' because it is a decision implicating the intrinsic value of the sanctity of life (Dworkin, 161; Inazu, 193).

Most of Dworkin's legal arguments track the Supreme Court's controversial progression from *Griswold vs. Connecticut* 381 U.S. 479 (1965), which announced a constitutional right of privacy, to *Eisenstadt vs. Baird* 405 U.S. 438 (1972), which transformed that right to an individual right, to *Roe vs. Wade* 410 U.S. (1973), which applied that right to abortion (Dworkin, 160-168; Inazu, 193). Dworkin admonishes that few people understand the constitutional issues

raised in *Roe*. In a single paragraph in *Life's Dominion*, he identifies three leading features of the decision:

- (1) States may not prohibit abortion at all before the second trimester.
- (2) States may not prohibit abortion before the third trimester except in those rare cases when it would jeopardize the mother's health.
- (3) *Roe* held unconstitutional the anti-abortion laws of most states (McClain, 1998, 91).

Dworkin appends a fourth important feature:

- (4) States may outlaw abortion altogether when the foetus has become viable, that is, in the third trimester of pregnancy (Dworkin, 107).

Dworkin senses he has a “persuasive interest” at hand in his insistence that women have right to abort especially when the foetus has not become viable. He declares that unwanted pregnancies impose a kind of slavery on women, that a woman's life might as well be destroyed. Avoiding slavery and self-destruction would seem to be compelling interests (Dworkin, 103). In establishing a right to abort, he contends that if the state cannot impose the harm of unwanted pregnancy upon women, it follows that the state cannot impose the greater harm of carrying, bearing and caring for that unwanted child (Dworkin, 155). The question now is: would giving out a new born child for adoption not alleviate this burden? Dworkin brushes it aside in a short paragraph. According to him, “many women could suffer great emotional pain for many years if they turned a child over to others to raise and love, even if the only alternative was abortion” (Bradley, 1993, 339).

He observes that the right to procreative autonomy, from which a right of choice about abortion flows, is well grounded in the First Amendment as well as in the best interpretation of constitutional liberty and equality (Dworkin, 106-107). Dworkin also grounds the right to procreative autonomy in “Western political culture more generally,” namely, in its belief in individual human dignity: that people have the moral right and the moral responsibility to confront the most fundamental questions about the meaning and value of their own life for themselves, answering to their own consciences and convictions (Dworkin, 103-104). Moreover, he reiterates the essentially religious nature of the issue, enlisting some of the core tenets of his account of ethical liberalism. He argues:

Tolerance is a cost we must pay for our adventure in liberty. We are committed, by our love of liberty and dignity, to live in communities in which no group is thought clever or spiritual or numerous enough to decide essentially religious matters for everyone else. If we have genuine concern for the lives others lead, we will also accept that no life is a good one lived against the grain of conviction, that it does not help someone else's life but spoils it to force values upon him he cannot accept but can only bow before out of fear or prudence (Dworkin, 166).

In *Religion without God*, Dworkin returns to his argument for a First Amendment grounding for the right to procreative autonomy. Acknowledging the problems with a concept of religion limited to theism, he avers that “if freedom of religion is not restricted to opinions about a god, but embraces all deep convictions about the purpose and responsibilities of life, then it might be

thought an open question whether the right to abortion is a religious issue” (Dworkin, 2013, 107). For Dworkin, “much of the opposition to abortion assumes that a god has forbidden the act; but not all opposition is based on theism, and few women who want an abortion believe that a god has equally ordered them to abort” (Dworkin, 107).

This idea of being “ordered” to abort is not a good way to put the matter; although analysis of women's abortion decisions may indicate that a woman's religious convictions play a role in her decision-making to continue or to terminate a pregnancy. In *Our Right To Choose: Towards A New Ethics of Abortion*, Beverly W. Harrison avers that different religious denominations vary in their ethical teachings about whether and when abortion is morally permissible; even within denominations opposing abortion rights, some dissenting voices argue for protecting a woman's moral and legal right to follow her conscience in matters of sexuality and reproductive health (Harrison, 1983, 117). In this sense, a subtler framing of Dworkin's argument could draw on a spectrum of conscientious religious views to suggest the “essentially religious” nature of the issue for many people.

Also, Dworkin revisits the abortion issue in *Religion without God* to contend that moving away from a special right to religious freedom to a more general right to ethical independence could help to make progress on the “religious wars” that have entered into politics, in which “sexual and reproductive morality,” including the right to abortion, is undoubtedly the most divisive issue of all (Dworkin, 2013, 137). Dworkin observes that when the Supreme Court decided that a state lacks power to criminalize early abortions, the Court had no choice but to locate its opinion doctrinally in “the equal protection and due process clauses” rather than the “First Amendment guarantees of religious freedom” because, while opponents of abortion very often cite a god's will as warrant, few women who want choice in these matters conceive their desire as grounded in religion (Dworkin, 2013, 138).

Meanwhile, Dworkin's sacredness of life language does more work but is ultimately unpersuasive. He classifies all views about the sacredness of life as “religious” because, as one has already quoted, “once the idea of religion is separated from the idea of a god courts that accept the constraints of integrity face great difficulty in distinguishing between religious and other kinds of convictions.” Having framed these arguments as religious arguments whose expression is protected by the Free Exercise Clause, Dworkin declares that they fall beyond the competence of legal interpretation. According to him, any government that prohibits abortion commits itself to a controversial interpretation of the sanctity of life and so limits liberty by commanding one essentially religious position over others, which the First Amendment forbids. He writes:

A state may not curtail liberty, in order to protect an intrinsic value, when the effect on one group of citizens would be special and grave, when the community is seriously divided about what respect for that value requires, and when people's opinion about the nature of that value reflect essentially religious convictions that are fundamental to moral personality (Dworkin, 144).

Dworkin's resolution of the abortion debate thus hinges on two assumptions. First, he classifies secular beliefs “about the intrinsic importance of human life” as religious. Second, he classifies secular beliefs that a foetus lacks personhood as not religious. After this razor-thin difference between religious and non-religious beliefs, his interpretive theory is almost an afterthought: religious arguments are wholly excluded, and the only permissible conclusion under a theory of law as integrity is to embrace *Roe vs. Wade* that considers and rejects the notion that the foetus is a person (Dworkin, 1993, 165).

Dworkin argues that the free exercise of religion should include a broad understanding of what “religious” belief is. The key to resolving the abortion controversy, therefore, is to broaden the scope of this “religious” belief and then discard those beliefs from the argument. Once the debate is recast in these terms, according to him, “we will see that a responsible legal settlement of the controversy, one that will not insult or demean any group, one that everyone can accept with full self-respect, is indeed available” (Bradley, 335-336).

DWORKIN AND INVESTMENT-BASED THEORY OF HUMAN LIFE

In *Life's Dominion*, Dworkin defends what he calls “investment-based theory of inviolability,” that once a human life has begun, it is regrettable when the investment in that life is wasted. He uses this investment theory to explain people's feelings toward human life after as well as before birth. The longer a child has been alive, the more effort invested in her and the more regrettable it is if the child dies prematurely. On the other hand, if the investment in someone's life has largely yielded good results or paid off, as with the elderly, or is destined to be frustrated in any event, as with the severely disabled, then death is not so tragic (Dworkin, 1993, 98). Human life, for Dworkin, is normally most inviolable from early adolescence to early middle-age because people within this range embody great investment and also, if healthy, great promise. As an example of how abortion can actually manifest respect for life's inherent value, he mentions the pregnant teenager who may find a greater investment in her own life wasted if she does not, by abortion, waste a lesser investment she and others may have made in her unborn child (Dworkin, 99; Stith, 310-311). For, Dworkin, the inviolability of life may well require the desolation of life, paradoxically speaking.

It is apparent Dworkin's approach to the issue of abortion is troublesome. He attempts to eliminate the fact that the foetus is a human entity that has vital interests that are worth discussing and protecting (Araujo, 1993, 745). Patricia A. King in her article, “The Juridical Status of the Foetus: A Proposal for Legal Protection of the Unborn,” takes a thoughtful approach in considering how we think and talk about the interests of the foetus. Unlike Dworkin, King asserts that the pre-viable foetus does have interests and those interests merit discussion and protection. She states: “the unborn foetus, the newborn child and the mature adult are all at different stages of development, and the fact that a foetus is not conscious or socially responsive should not preclude all legal protection” (King, 1979, 1673).

REVISITING DWORKIN'S CONCEPT OF ABORTION

In *Life's Dominion*, Dworkin has presented an argument that unborn fetuses do not have equal rights to life. He argues that nothing can have a right without having interests, and nothing can have an interest without having consciousness. Therefore, he reasons that because fetuses at least in the early stages of pregnancy lack consciousness, they do not have interests and rights (Dworkin, 1993, 15-16; Stith, 303). Dworkin's argument is problematic at this point. There are people who, because of illness or misfortune, concede apathy to carry on with life. Would they, therefore, have flimsier rights?

Even more questionable is Dworkin's claim that an entity cannot have interests, and thus cannot have rights, if that entity does not have consciousness (Dworkin, 16-20). The query, therefore, is: Do people's rights become attenuated as they tire and fall asleep at night? He is also not correct when he makes the claim in *Life's Dominion* that a caterpillar has no interest in becoming a butterfly (Dworkin, 16; Stith, 304). These examples could be used against Dworkin to demonstrate that interests without consciousness are indeed quite possible. So, wanton killing of insects or even plants is wrong despite their alleged lack of consciousness. How much more

human beings?

In *Life's Dominion*, Dworkin actually begins with the pro-life thesis that abortion destroys an inviolable human life, but he ends with a pro-choice position even stronger than that of *Roe vs. Wade* and its progeny. Dworkin understands human life to be inviolable only to the extent that killing would result in a net waste of investment: where it produces a net investment gain, killing can be required by people's sense of life's inviolability. Foetuses and infants, because they have less investment in them, are less inviolable than older human beings (Dworkin, 153). Their lives, thus, can be outweighed by others. Infants, for Dworkin, are scarcely more inviolable than foetuses, for little has been invested in "mere biological development: conception, fetal development and infancy. To really count, one's life must have been determined not just by biological formation, but by social, individual training and choice" (Dworkin, 88; Stith, 317). Therefore, the death of an adolescent person is worse than the death of a toddler because the adolescent's death spoils the investments that have been made in his or her life, in Dworkin's conceptual schemes.

Dworkin's theory of investment initially came up from his efforts to mediate and solve the abortion controversy. Reflecting upon common pro-choice and pro-life attitude towards abortion, he comes up with that theory believing that it will make sense to both sides. However, his theory is very pernicious in consequence and very erroneous in concept. The idea of respect for human life expresses much more closely, and safely, how we feel about human life. So, common commitment to respect for life, to the inviolability that undergirds all individuality, may be the safe source of solidarity (Stith, 358). Also, Dworkin rightly lays much emphasis on another explanation of the respect-worthiness of human life: it is made in the "image" of God (Dworkin, 82). However, he fails to understand the biblical or psychological import of the idea of image and representation. He believes it means only that each individual is "a creative masterpiece" treasured fundamentally, for the talent and effort already committed. God's image is not just a divinely great masterpiece, as he believes. It does not just exemplify divine beauty; it exemplifies God Himself to humanity. Reverence and respect for our neighbours is apparently called for because the one God is literally present in them. In the Gospel according to St. Matthew 25.40, Christ can then say: "whatever you do to the least of my brethren that you do unto me."

In *Evangelium Vitae*, that is, *The Gospel of Life*, Pope John Paul II points out that human life is a manifestation of God in the world. Man has been given a sublime dignity based on the intimate bond which unites him to his Creator. In man there shines forth a reflection of God Himself; hence, the life which God offers to man is a gift by which God shares something of Himself with His creature (John Paul II, §65). In what seems almost a direct reply to Dworkin's notion that being an "image of God" means only that each human being is "a creative masterpiece," the Pope adds: "Man and his life appear to us not only as one of the greatest marvels of creation: for God has granted to man a dignity which is near to divine. In every child who is born. . . we see the image of God's glory. We celebrate this glory in every human being, a sign of the living God, an icon of Jesus Christ" (John Paul II, §84).

Also, in *The Problem of Threats to Human Life*, Joseph Cardinal Ratzinger argues that abortion is more than murder because the victim is not an adult, but a helpless child. According to him, "abortion is part of true war of the mighty against the weak. With the complicity of states, colossal means have been used against people at the dawn of their lives" (Ratzinger, 15). Unlike Dworkin's theory of investment, I believe that there is something in every normal human being that responds to weakness with compassion and deference. Those whose lives are diminished or weakened deserve special respect. I am deeply convinced that when a blind man is robbed of a wallet, our humanity is more greatly injured than when a sighted person has his wallet stolen.

Again, Hans Jonas affirms that our treatment of newborn children stands out as a kind of

archetype for decency. He points to the newborn, whose mere breathing unquestionably addresses an “ought” to the world around, namely, to take care of him or her (1985, 131). Dworkin's idea reasons to the contrary: because the unborn child is utterly dependent, he may be killed. Moreover, the human image in an infant elicits from us more than reverence. Unlike some divine presence in a Church or painted icon, the image of God or humanity in a child is dynamic, rather than static. As a “directed power,” it can, therefore, call forth respect as well as reverence. In contrast to Dworkin's position, according to Richard Stith, no distinction should be drawn, with respect to the right to life, between the born and the unborn or between any prenatal stages of human development. To draw such a distinction would be to hold that human nature, the latent but developing human image, is insufficient for human dignity, and some actualised human perfection is needed. By so doing, he undercuts the inherent inviolability of neonatal as well as prenatal human life (Stith, 367).

Furthermore, humanly speaking, most women who commit abortion would not wish to do so if they were fully advised and empowered. The mother-child bond, even in its earliest and weakest stages, can have influence against abortion in favour of active back up for the child. So, unlike Dworkin who argues that laws against abortion impose “a kind of slavery” on women, I really see abortion as a “self-wounding” by the pregnant woman. Therefore, it is a mistake on Dworkin's part to view troubled pregnant women as necessarily unfriendly, unconcerned or nonchalant to the life of the foetus, or as enemies of the foetus who must be retrained by force. More abortions may well be foreclosed by considering pregnant women as prospective friends of their unborn babies, women who would offer support but often have no means to do so. Unlike Dworkin's approval of abortion in order to uphold individual rights and autonomy, Catherine A. Mackinnon points out that abortion often harms women either physically or psychologically (Mackinnon, 1281).

CONCLUSION AND RECOMMENDATIONS

This study proposes that states and their legal systems should approve the substitution of counselling that favours life, especially for women having crisis with their pregnancy, instead of penal threats on them during early pregnancy. In other words, rather than always debating over how many burdens pregnant women can or should be made to bear, the Constitution should stipulate or mandate a regime, that is, organised method, in which the state is required to encourage, mitigate and alleviate maternal self-sacrifice to the extent humanly possible. In this manner and for the most part, abortion remains technically illegal and unsupported by public or private health insurance, in order to teach its wrongfulness. Furthermore, for the state to take any part in abortion, it would implicate it in an “act of killing” (Stith, 378).

In addition, the dignity of the unborn is to be taught in other ways as well. For instance, the constitutional court should indicate that the state has a duty to strengthen the public's will to protect unborn life in its school curricula and in all broadcast media, which are also legally bound to maintain human dignity. Also, the state must proactively keep down coercions to abort by insisting upon a “child friendly” society. For example, it must ban the termination of leases as the result of the addition of a newborn child, as opposed to what is obtainable in some countries like China. More still, it must guarantee that the task of raising children will not lead to discrimination at the workplace (Stith, 378). Again, the state's law should protect the pregnant woman from pressures to abort coming from third parties, like husbands, parents, friends or employers, for instance, by enacting appropriate laws punishing such behaviour, especially when it ends up causing an abortion.

Even the adherents of Dworkin's theory who think abortion justified or excused, and who thus oppose its penalisation, might agree to these measures designed to encourage a choice for life. Furthermore, many of them might concur that birth is too much to expect of a woman only insofar as it requires her to bear burdens that are both “heavy” and “unusual” (Kommers, 32). Aid to

women in defying sexist and other coercions to abort could make childbearing less severely burdensome and so, more expectable. Likewise, demanding greater levels of sacrifice by men and other non-pregnant people, for example, legally required blood or marrow donation by parents to children, would make pregnancy's level of burden less unusual. (Stith, 378). As all these processes heighten, abortion could come to seem less justified or excused to many who endorse it. They might still not consider penalisation the best route to prevent, but they would support other forms of state action solicitously mindful of unborn life.

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