Ignorance, Indeterminacy, and Abortion Policy

It is commonly assumed in discussions of abortion that the moral question and the policy question coincide, that a legal prohibition of abortion is justified if and only if abortion is morally wrong. But it should be noted that even if this bi-conditional holds in the special case of abortion, moral questions and policy questions do not generally coincide. Lying and promise-breaking, for example, are morally wrong, but a legal prohibition of these activities is unlikely to be justified. More controversially, Sunday shopping prohibitions might be justified by appeal to the detrimental effects on families that ensue when parents are forced to work on the days their children are home from school. But it would be difficult to establish that buying and selling goods on Sundays, as opposed to Saturdays or Mondays, is morally suspect.

The lesson that can be drawn here is that the connection between moral questions and policy questions is loose enough that they can at least in principle be answered independently. This is important because abortion policies have serious consequences for numerous women and yet the moral question increasingly appears to be intractable. In this paper, the extent to which justification can be found for policies governing abortion in the absence of any definitive answer to question of the morality of abortion will be investigated. This paper consists of four parts. First, reasons for thinking the moral problem is intractable will be sketched. Second, general conditions under which policies regulating or prohibiting activities of various sorts are justified will be considered. Third, some general principles governing the justification of such policies under conditions of ignorance will be developed and applied to abortion policy. Finally, the difference it
makes if the intractability of the moral question of abortion reflects genuine moral indeterminacy, rather than merely a state of current ignorance, will be considered.

1. The Moral Question

The most prominent approach to the moral question centers around the notion of moral personhood. According to advocates of this approach, the moral question reduces to the question of whether or not the biologically human organism – which comes into existence at conception – acquires the status of moral personhood before birth. If the unborn human being is, at some time, a person with a right to life, then *ceterus paribus* abortion is seriously morally wrong at that time; and if the unborn human being is not a person at some time, then abortion is at more or less morally unproblematic at that time. Broadly speaking, there are three positions someone can take vis-à-vis personhood: the conservative position, the liberal position, and the moderate position. According to conservatives, unborn human beings acquire personhood at or soon after conception. According to liberals, human beings become persons only at or after birth. According to moderates, unborn human beings acquire personhood gradually, starting out as non-persons at conception and ending up as persons by the time they are born. Each of these views will be considered in turn.

The conservative position on personhood faces two serious difficulties: it is far too inclusive; and it leaves open an insurmountable explanatory gap between the physical or biological properties of the entities to which personhood is attributed and the moral properties that come with having this status. First, if human beings at or near conception
are persons, then all relevantly similar entities are persons as well. But since human beings at this stage are merely integrated clusters of cells, the conservative position seems to imply that all equally integrated clusters of cells are persons. Moreover, the only available strategies to restrict personhood are either chauvinistic – only biologically human cell-clusters count – or empirically suspect – appealing to non-natural properties or processes such as souls or ensoulment. Second, an explanation is required as to why entities of this kind are persons with a right to life and other moral entitlements, and no such explanation is forthcoming. What we find in the literature are equivocations between biological humanity and moral personhood and obscurities, as well as various theological appeals. ¹ This paucity of plausible explanation is not surprising: there is simply no reason to believe that anything about a small cluster of cells entitles it to the protection that comes with personhood.

The liberal position runs into related difficulties: it is too exclusive; and although plausible explanations of the possession of moral properties are given in core cases, an explanatory gap emerges in important residual cases. First, liberals normally take the mark of personhood to be the possession of certain higher-order cognitive capacities which can be roughly characterized as rational self-consciousness. The trouble is some human beings that are normally thought of as entitled to the moral protection which comes with personhood – such as infants and small children, the severely developmentally challenged, those suffering from extreme senility – lack these capacities. The standard liberal strategy for handling such cases is to take the moral protection to which these human beings are entitled to stem from the value placed upon them by other persons.² But not only does this render these otherwise vulnerable human beings morally
vulnerable to the vicissitudes of the human heart, it also yields moral protection for at least some unborn human beings. Moreover, any attempt to exclude unborn human beings from such protection will likely prove *ad hoc*.

Second, liberals typically analyze personhood in terms of the possession of a desire or interest in continued existence, or in terms of actual or hypothetical contractual agreements into which persons have entered to refrain from killing each other. Both approaches require higher order cognitive capacities including, among other things, the possession of a self-concept and the concept of this self existing in the future. But there are human beings who possess the relevant capacities who do not desire continued existence or have not, and would not, enter into contractual agreements of that kind. This includes not only those who are depressed, unconscious, or indoctrinated, but also people who just happen to be dark or angry or uncooperative. Moreover, liberal attempts to explain why such human beings are nevertheless persons remain unpersuasive.

The moderate position on personhood does better than both liberals and the conservatives on the extension of the concept of a person, excluding many of the entities conservatives include and including many which liberals exclude. Typically moderates identify personhood with sentience – being conscious, having the capacities to feel pleasure and pain and to perceive. They also take the moral protection afforded by personhood to come in degrees: unborn human beings acquire minimal protection at the onset of sentience and come to have quite strong protection as a result of their rather more complex conscious states at the time of birth. As a result, most simple cell-clusters turn out not to be persons, and infants and the senile turn out to possess personhood. Nevertheless the moderate position does run afoul of the explanatory gap problem. It is quite plausible that an entity
with even minimal sentience has interests which entitle to it to some kind of moral protection. An entity with the capacity for pleasure and pain, for example, has an interest in not suffering pain, and this may well obligate others to refrain from any course of action that would cause it pain. But the issue here is with abortion, which kills unborn human beings. The fact that an entity has an interest in not undergoing pain does not entail that it has an interest in continued existence. Hence any moral protection it is entitled to as a result of this former interest does not protect it from being killed, as long as it is killed painlessly. More generally, it is far from clear how a moderate could explain why an entity which is sentient but lacking higher order cognitive capacities could have the kind of interests that would ground a right to continued existence, regardless of what other interests it might have.

There have been a number of solutions offered to the moral question of abortion which do not strictly speaking hang on the issue of personhood. One prominent approach appeals to the potential properties of unborn human beings rather than their currently actualized properties. Underlying such appeals to potentiality is a basic strategy shared by valuable-future accounts of the wrongness of killing, latent-capacity accounts of unborn persons, and some conservative, and even some liberal, accounts of personhood. The strategy proceeds by first identifying a diachronic relation of some kind, and then claiming that whenever a non-person stands in this relation to a future person, the non-person inherits the moral protection to which the future person is entitled. The diachronic relation can be taken to be an identity relation – being the same human organism or the same subject of consciousness – or a continuity relation – in which two entities stand just in case they are parts of the same continuous process. Moreover, since the future is
uncertain, the non-person is typically required only to likely stand in this relation to a future person – or to so stand in the normal course of events – in order to inherit the desired moral protection.

This diachronic strategy, however, runs into the same sorts of difficulties that infected the various positions on personhood. First, there is reason to believe that at least some diachronic relations are too inclusive, yielding moral protection to the material precursors to conception and other entities subjected to currently hypothetical technological interventions. Attempts to exclude such entities by appeal to substantial change or the absence of a subject of harm, while not entirely implausible, nevertheless do have an air of *ad hoc*-ness to them. Second, an analogue of the explanatory gap problem arises for the diachronic strategy. Just as an explanation is needed from advocates of various positions regarding personhood as to why their favored entities are entitled to the moral protection that comes with this status, an explanation is needed from advocates of the diachronic strategy as to why standing in some such diachronic relationship to a person enables an entity to inherit the moral protection due a person. No such explanation, however, is forthcoming. There is simply no reason to think that non-persons who happen to stand in such diachronic relations to future persons thereby acquire interests that can be frustrated by being killed or otherwise treated as a non-person. Without the acquisition of such interests, the inheritance of moral protection is simply mysterious.

Finally, Thomson has attempted to avoid the personhood argument by arguing that abortion is permissible in most cases even if the unborn human being is a person. According to Thomson, a right to life does not entitle a person to the bare minimum
needed to survive: in depriving someone of what she needs to survive, a person does not thereby violate her right to life. Since what abortion does is merely deprive an unborn human being of what it needs to survive – continued use of the pregnant woman’s body – abortion does not violate its right to life, although in some circumstances it may nevertheless be morally indecent. The trouble with Thomson’s argument is that many abortion techniques involve killing the unborn rather than merely removing it from the woman’s body. Hence, by Thomson’s own lights, many abortions violate the unborn human being’s right to life. More to the point, Thomson attaches far too much moral significance to the distinction between killing and letting die. Someone could, for example, imagine circumstances in which the bare minimum someone needs to survive is continued use of a ledge high up on a skyscraper. Thomson’s view seems to imply that someone with proprietary rights over this ledge could permissibly push the interloper off to her death if there was no other available exit, but it would be a serious rights violation to stab her to death. The distinction between killing and letting die may not be as morally flimsy as Rachels would have us believe, but it could not be as load-bearing as all that. Finally, since Thomson’s argument entails that a pregnant woman has the right to remove the unborn human being from her body but not to secure its death, it does not fully address the moral question of abortion. The point of having an abortion is not merely to terminate a continued state of pregnancy, or even to avoid a life path encumbered by the responsibilities of parenthood. It is to prevent the existence of a person to whom the woman stands in a special biological relationship. Only given the contingencies of current fetal-removal techniques and incubator technology does Thomson’s argument secure rights for pregnant women that will satisfy most abortion rights advocates.
The lesson of this discussion is that the moral problem of abortion increasingly appears to be intractable. The fact that there is no currently adequate solution to it does not by itself show this problem to be intractable. After all, advocates of the various views considered here might eventually be able to solve the difficulties they face, or some other less problematic solution might be developed. But there are few grounds for optimism on this count. Not only is it far from clear how someone might go about solving these difficulties, or what shape a novel solution might take, the fact that the vast amount of intellectual labor that has thus far been spent on the moral problem has yielded so little progress suggests that further attempts to solve it may prove futile.

Even if the considerations raised here fall short of establishing the intractability of the moral problem, they do suffice to show that we currently lack knowledge as to the morality of abortion. In particular, they show that we currently lack sufficient justification for our moral beliefs about abortion for moral knowledge, even if these beliefs are true. Nevertheless there still might be some evidence that counts more weakly in favour of one or more views concerning the status of unborn human beings or the morality of abortion. Someone might, for example, point to the putative fact that one of the views considered here coheres better with our background moral knowledge than the alternatives – or that there is greater promise of finding a solution to the difficulties that arise for it – as evidence for the view. Whether or not there is any weak evidence of this kind regarding the morality of abortion will not be adjudicated here. Instead, a preliminary assumption will be made to the effect that we are in a state of complete ignorance, and an account of what kind of abortion policy would be appropriate under
such conditions will be developed. Subsequently, the issue of what difference it makes if we have some such weak evidence will be considered.

2. Justifying Policy

Before going on to discuss the justification of abortion policy under conditions of ignorance, it is worth pausing to say a few things about the justification of policy more generally. The kinds of policies at issue are those which prohibit or place restrictions on classes of behavior, which are normally backed by the threat of legal sanction for failure to comply. What is important to note about such policies is that they restrict people’s liberty to engage in behavior in which they otherwise might be inclined to engage. For present purposes it will simply be assumed that *ceterus paribus* restricting liberty in this way is seriously wrong and, hence, that justifying such policies is a matter of justifying the restrictions on liberty that they require.\(^\text{13}\)

There are three central kinds arguments are used to justify policies which restrict liberty: harm arguments, paternalistic arguments, and utilitarian arguments. Advocates of harm arguments attempt to justify restrictions on behavior by appeal to the detrimental effects of such behavior on people other than the agents who engage in it.\(^\text{14}\) Harm arguments are clearly relevant to abortion policy. Since abortion kills the unborn human being, if this entity is a person, then this behavior causes serious harm to a moral person. As a result, if the unborn human being is a person, policies prohibiting or severely restricting abortion are presumably justified, even though they place significant
restrictions on the liberty of pregnant or, more generally, fertile women. This will be discussed in more detail below.

Paternalistic and utilitarian arguments are, however, less relevant to abortion policy. Advocates of paternalistic arguments attempt to justify restrictions on behavior by appeal to the detrimental effects of the behavior on the agents who engage in it. Normally paternalistic considerations are persuasive only when the restrictions on liberty are quite minimal and the harm risked by the restricted behavior is severe, or when the policy in question applies only to those who are not competent to make decisions regarding the behavior in question. Legislation requiring seat belt use, or prohibiting underage drinking, for example, might be justified on paternalistic grounds. In the case of abortion, such considerations might justify requiring that abortions be done by licensed practitioners, or requiring that legal proxies make abortion decisions on behalf of those deemed incompetent. But given the significant effect on women’s life paths that carrying a child to term can have, as well as the increased health risks, paternalistic considerations are unlikely to justify substantial restrictions on abortion.

Advocates of utilitarian arguments attempt to justify restrictions on behavior by appeal to the societal benefits that will likely ensue, rather than by appeal to the effects of such behavior on those directly involved in it. As with paternalism, utilitarian considerations are persuasive only when the restrictions on liberty in question are quite minimal and the societal benefits are significant. So, for example, given that being prohibited from shopping is for most of us merely a minor inconvenience, a Sunday shopping ban might be justified on utilitarian grounds. But, as above, prohibitions of
abortion place a significant restriction on women’s freedom, and it remains unclear what sort of societal benefit such a restriction would accrue.

Given their importance to the justification abortion policy, it is worth pausing for a moment to look at harm arguments in more detail. The question that needs to be addressed is what kinds of behavior-restricting policies can be justified by appeal to such arguments. In general, this is a function of three factors: the nature and severity of the harm caused by the behavior; the intimacy of the connection between the behavior and the harm; and the extent to which the behavior-restricting policy would interfere with people’s pursuit of their central goals and life paths.

The kinds of behavioral effects that count as harms include both physical damage and psychological damage to an organism, as well as interference with autonomy and the deprivation of property. Because these sorts of behavioural consequences come in degrees, the harmfulness of a species of behavior can be loosely measured in terms of the severity of its effect upon its victim, where *ceterus paribus* the limiting case is causing death. What is important to note, however, is that, for the purpose of harm arguments, such effects count as harms only if the victim is entitled to moral protection from that sort of treatment. If, for example, rats are not entitled to moral protection from psychological damage, then a policy prohibiting the use of rodent repellents that emit high frequency screeching noises cannot be justified on harm grounds, even if the noises do severe damage to rat minds.

The behavior a legislator might want to restrict or prohibit can be more or less intimately connected to the harm which justifies restricting or prohibiting it. The most intimate connection is a definitional connection. In such cases, the criteria for
successfully engaging in the behavior are such that an agent cannot do so without causing
the harm. For example, a person cannot commit homicide without causing someone’s
death. A strong but less intimate connection exists in cases in which the behavior in
question generates a high risk of harm. A person can, for example, successfully perform
the act of driving drunk without harming anyone, but in so doing generates an
unacceptably high risk of harm to others, at least under normal circumstances. The
connection between the behavior and the risk of harm might be thought of as more or less
direct if little can feasibly be done to reduce the risk to acceptable levels short of
prohibiting the behavior altogether. There are, however, cases in which the connection
between some species of behavior and the risk it generates is more or less indirect. In
such cases, the risk of harm is somewhat causally downstream of the behavior which
generates it. For example, alcohol consumption generates a risk of harm to others; people
under the influence of alcohol are much more likely to commit assaults of various kinds,
as well as being more dangerous when operating heavy machinery. But while the risks
generated by drunk driving cannot be alleviated without prohibiting it, the risks generated
by alcohol consumption can arguably be adequately reduced without prohibiting
drinking, by instead prohibiting public drinking and drunkenness.

The final factor in harm arguments for behavior-restricting policies is the
significance of the behavior at issue to those who engage in it. Although no precise
measure of behavioral significance can be made, there are a few general things that can
be said. First, we can distinguish between behavior which is an end in itself and behavior
which is engaged in as a means to some further end. Normally, behavior whose value is
instrumental is less significant than behavior whose value is intrinsic. After all, any other
behavior which yielded the ultimately desired outcome would serve as well. Shopping on Sunday, for example, is a means of acquiring goods whose use may be intrinsically valuable; but Saturday or Monday shopping would serve just as well. The main exception occurs when the behavior in question is the only readily available means to achieve the end at which it is directed. In such circumstances, the significance of the behavior approaches the significance of the end at issue. Second, we can distinguish between intrinsically valuable behaviors which correspond to central ends and those which correspond to peripheral ends. Even if, for example, many people value driving without wearing a seatbelt as an end in itself, for most of them this is a much more peripheral end than those connected with their personal relationships, their careers, and their hobbies. Third we can distinguish between discrete ends, such as having a vacation in Cuba, and valued life paths, such as being a philosopher. In general, policies which prevent someone from pursuing a valued life path place a more significant restriction on freedom than do policies which prevent the satisfaction of more discrete ends.

In order to justify behavior-restricting policies by appeal to harm arguments it has to be established that the expected harm of the behavior in question sufficiently outweighs its typical significance. The expected harm of species of behavior is, roughly, the product of the severity of harm the behavior could cause and the likelihood it will cause such harm. Given that a number of different harms of varying likelihoods might ensue from any given type of behavior, a more accurate formula for expected harm is the sum of the products of the severity and likelihood of each possible harm. By itself, however, that the expected harm of some behavior is high does not justify a policy prohibiting it. For example, the expected psychological harm of breaking off romantic
relationships is reasonably high, but a policy prohibiting break-ups would nevertheless remain unjustified. Whether or not some such policy is justified depends also on the significance of the behavior to those who would otherwise engage in it. Most behavior varies in its significance to members of a population; as a result, the justification of policy prohibiting that behavior will have to be framed in terms its significance to the average or typical member of that population. Only when the expected harm of a species of behavior sufficiently outweighs its significance to the typical member of a population is a policy prohibiting or restricting that behavior by members of the population justified. If the behavior is more or less directly connected to the harm, a policy prohibiting it would be justified; if the behavior is more or less indirectly connected to the harm, only a policy regulating it is likely to be justified.

Let us consider, by way of comparison, drunk driving and breaking off romantic entanglements. The expected harm of both sorts of behavior is relatively high: the potential harm of the former is very severe, but its occurrence is only somewhat likely; the potential harm of the latter is somewhat less severe but a lot more certain. Nevertheless prohibitions of drunk driving are justified on harm grounds whereas prohibitions against ending romantic relationships on the same basis would not be. The central difference is that ending romantic relationships is of far greater significance to typical members of society than is driving drunk. Driving drunk is for most people merely a means of returning home or to some other desirable location after a bout of drinking. Not only are there normally other available means to this end, such as taxis, the end itself can hardly be counted among the most important ends for typical people, although it is not entirely insignificant. In contrast, romantic relationships are among the
most important aspects of the lives of typical people, and being able to break off relationships is essential to their ability to shape and nurture this central facet of their lives. Given this difference in significance, a much higher expectation of harm would be required to justify prohibiting break ups than is required to prohibit drunk driving.

3. Ignorance and the Policy Question

Let us consider harm arguments for the prohibition. The first thing to note is that the significance of this activity is very high. It is the only effective means available to a pregnant woman of avoiding the disruptions to her life that may occur during the nine month period of pregnancy, disruptions which may interfere with valued relationships, her chosen career, and other things of importance to her. Moreover, it is most effective means of avoiding the whole scale usurpation of a valued life path by the responsibilities of parenthood that could ensue were the pregnancy carried to term. This could also be avoided by putting the child up for adoption. But it can be very difficult for a woman to bring herself to give away a child to which she has given birth, and in so doing she risks feelings of guilt and remorse, as well as other more serious psychological problems. In addition, adoption – unlike abortion – yields the existence of a person to which the woman stands in a unique biological relationship; thus a woman who chooses the adoption route thereby risks future interference in her chosen life path as a result of demands for a personal relationship or claims made on her resources, for example, which the existence of such a person might yield.
Given that abortion is a species of behavior with a high degree of significance, the expected harm of this behavior would have to be very high in order for it to be justifiably prohibited on harm grounds. The outcome of abortion which might count as a harm is the death of the unborn human being, which is a near certainty. But whether or not this yields a high enough expectation of harm to justify an anti-abortion policy – or any expectation of harm at all – depends on the moral status of unborn human being. If it is a moral person with a full right to life then expected harm of abortion is certainly high enough to justify a policy prohibiting it. If it is not a person, then there is no expected harm at all; hence a policy prohibiting abortion could not be justified. The problem is that, as argued above, we simply do not know whether or not the unborn human being is a person.

Nevertheless an abortion policy must be adopted, even if it is a policy of refraining from placing any restrictions on access to abortion. Given the effect of abortion policy on the interests of women and its possible effect on the interests of unborn human beings, inaction is not morally neutral. Moreover, policy is regularly – and perhaps even of necessity – formed under conditions of at least partial ignorance. The standard against which such policy is appropriately evaluated is not the judgement of a transcendent omniscient legislator of some kind. Rather, it should be evaluated by the standard of some similarly situated, epistemically responsible legislator. In what follows, a number of cases in which policy might be required under conditions of ignorance will be considered. From these cases a number of general principles will be derived which can then be applied to the case of abortion policy. For present purposes, it will be assumed that newborn babies are persons with a full right to life and that the precursors to conception are morally insignificant. Initially it will also be assumed that we are completely ignorant
of the moral status of the unborn human being throughout the whole period from conception to birth, that at no point during gestation do we have any evidence one way or the other as to whether this entity is a person. Subsequently the difference it makes if at various points during this period if we take ourselves to have some reason to believe the unborn human being is or is not a person will be considered.

Let us consider first the following case which is modelled on the market in artworks in post World War II Europe, many of whose exchanges involved works plundered from museums and private collections during the war. Let us suppose that a couple of generations after a major conflict, a large body of artworks produced prior to the conflict are in the possession of a number of museums, private collectors and art dealers. Moreover, let us suppose that there are few if any records establishing ownership of these works immediately prior to or during the conflict and, hence, that there is no evidence that some, all, or none of the artworks came into the possession of their current possessors by means of theft or plunder. Finally, let us suppose that as a matter of law, any artworks that were plundered during the conflict are the property of the legal heirs of those from who they were taken, rather than their current possessors.

The question to be raised here is whether or not a policy prohibiting the buying and selling of these artworks would be justified under these circumstances. The first thing to note is that if the artworks were known, as a matter of fact, to belong to their current possessors, such a policy would not be justified; people are, after all, entitled to buy and sell their property more or less as they choose. If the artworks were known not to belong to their current possessors, this prohibition would be justified; it would, in effect, simply be a prohibition against buying and selling a class of stolen goods. But in the case at hand
the artworks are neither known to belong to their possessors nor known not to belong to their possessors: there is simply no evidence one way or the other. Given the epistemological situation in which legislators in our hypothetical society find themselves, a prohibition of market transactions involving the artworks in question cannot be justified. A policy prohibiting this behavior would involve a restriction of people’s freedom to engage in a species of behavior without any evidence that this behavior harms anyone else’s interests. There is not any evidence that it does not harm the interests of third parties. But, on the view being defended here, this is not relevant. What is, in effect, being suggested is that there is an epistemic presumption in favor of freedom: behavior-restricting policies are justified only if there is evidence that the behavior is harmful.

If this presumption is applied to the case of abortion policy and, as we have been assuming, we are completely ignorant of the status of the unborn human being from conception to birth, then it follows that any policy prohibiting abortion is unjustified. There are, however, at least three ways someone might go about resisting this conclusion. First, she might deny that there is any presumption in favor of freedom, even in the hypothetical artwork case. Second, she might appeal to dissimilarities between the artwork example and the case of abortion and argue that they show that the presumption does not apply to the latter, or is overridden by other considerations. Third, she could argue that, despite the arguments presented above, we have at least some evidence concerning the status of the unborn human being and that this evidence suffices for at least some restrictions to abortion. The first strategy is a non-starter: to say that the freedom to engage in a species of behavior can be justifiable restricted in the absence of
any evidence of harm is incompatible with any claim of the substantive value of freedom. The other two strategies are more promising. Each will be considered in turn.

One disanalogy between the artwork example and abortion is that even if it turns out that the possessor of a work is not its real owner, by selling the work the possessor does not undermine the owner’s interests in any substantial way. After all, the legitimate owner is not any worse off when her artwork comes to be newly in the possession of a buyer than she was when it was previously in the possession of the seller. But if it turns out that an unborn human being is a person, an abortion seriously undermines this person’s interests. It might be argued on this basis that the possibility of genuine harm to the interests of affected parties by a species of behavior overrides any epistemic presumption there might be in favor of the freedom to engage in that behavior.

This sort of concern can be addressed by changing our hypothetical case as follows. Instead of artworks, let us suppose that a couple of generations after the conflict a large quantity of fine wine of a pre-conflict vintage is in the possession of a number of high end retailers, fancy restaurants, and individual wine connoisseurs. Assume again that few if any records establishing ownership of these works immediately prior to or during the conflict exist and, hence, that there is no evidence that some, all, or none of the wine came to be possessed by their current possessors as a result of the wartime plunder of wine cellars. Moreover, let us suppose that the behavior we might want to prohibit is not buying and selling the wine, but rather consuming it.

It is pretty clear that even a prohibition of the consumption of the wine in question would be unjustified in these circumstances. Prohibiting those, who for all anyone knows are the legitimate possessors of some good, from enjoying the benefits of that good
without any evidence that in so doing they are harming others – or depriving them of benefits to which they are entitled – is simply unjustifiable. Someone might urge a course of caution and defend a prohibition of consuming the wine until such a time as all the evidence comes in. But a policy of this kind risks overgeneralization. For example, from time to time people come home with extra bags of groceries belonging to other customers. A similar course of caution might count in favor of holding off eating any groceries, even when there is no reason to suppose they have been misdirected, until clear title has been established. Moreover, in the case at hand, there is no reason to suppose that any new evidence is forthcoming. Under such circumstances, waiting for the evidence to come in might require waiting indefinitely, in effect depriving the possessors of the wine of its central benefit. Finally, if the goods in question are perishable – and even fine wine has a best before date – merely temporarily delaying consumption can deprive their possessors of their benefits. It is worth reiterating that the policy of caution at issue has this effect in the absence of any evidence that the goods do not belong to their possessors.

Another disanalogy between the hypothetical cases discussed thus far and abortion is that even if the possessor of an artwork or some wine is not its owner, the behavior at issue only has the effect of depriving the real owner of some property. But if an unborn human being is a person, an abortion severely harms the person herself. Someone might argue that the possibility of serious harm to a person overrides any epistemic presumption in favor of freedom, even if the possibility of harm to a person’s property does not.
There is, however, another kind of case which may shed some light here. Let us suppose that there is a tissue transplant technique which can be used not only to cure conditions which risk harm to a patient’s life or health, but also to rectify defects of various kinds which impede her pursuit of valued life paths. Let us suppose also that living donors could not survive the tissue-extraction process; hence, ignoring the possibility of volunteers, the only sources of the tissue are cadavers and people killed for the purpose. Finally, let us suppose that, for whatever reason, there are no records or any other evidence of the origin of the tissue in any given case, or evidence of other facts – such as a scarcity of cadaveric donors – that would indicate the general likelihood of one or the other source of tissue. There is simply no reason to believe that that some, all, or none of the tissue used in the various instances of the procedure was procured from people murdered for this purpose.

The question is whether or not a policy of prohibiting this tissue transplant technique would be justified under these circumstances. Again, a policy of this sort would involve restricting people’s freedom to engage in a species of behavior without any evidence that it is harmful. As a result, such a policy would be suspect for the reasons advanced above. It might be objected that because the possible harm of the procedure is so severe and because typical patients value undergoing the procedure only as a means to achieve some further end, it is reasonable to permit people to use only alternate means to the same end. But appeals to possible harm – as opposed to expected harm – cannot reasonably be used as a basis for justifying behavior-restricting policies. If a person is unlucky enough, practically any course of action – even something so innocent as flushing a toilet – could cause severe harm to others. This is why the likelihood of harm
has to be sufficiently high before a policy restricting the behavior is appropriate. Moreover, while it could be conceded that an unknown expectation of harm suffices to justify prohibiting behavior with mere instrumental value as long there are there are equally effective and accessible alternatives available, if there are no effective alternative procedures – or if the only alternatives are effective but inaccessible – it certainly does not do so. It would, in effect, amount to requiring people to forgo the benefits of a procedure which, for all anyone knows, is entirely harmless; and this is especially unpalatable when the benefits in question – such as, such as prolonged life, improved health, and unimpeded pursuit of a chosen life path – are highly significant to the typical patient.

Finally, it might be objected that, unlike the hypothetical cases we have been considering, we are not in a state of complete ignorance regarding the moral status of unborn human beings. Someone might, for example, present an argument along the following lines. We know that normal newborn human beings are persons, even if we do not know why they are persons. It is unlikely that birth marks a morally significant transition in the life of a human organism; after all, there are no typical differences between human beings just before birth and just after birth that are likely to support the difference in moral status that exists between persons and non-persons. Hence, it is reasonably likely that unborn human beings near the point of birth are persons. An analogous argument which appealed to the similarity between unborns immediately after conception and either the precursors of conception or non-human cell-clusters could be taken to establish the unlikelihood that early-term unborns are persons.
This is not an implausible argument, although some might balk at the suggestion that we know newborn human beings are persons. After all, if we do not know what features make newborns persons, whatever reasons we have for thinking they nonetheless are persons likely do not provide sufficient justification to yield knowledge. Nevertheless if we do assume that newborns are persons with a full right to life, the high degree of similarity between newborns and unborn human beings immediately prior to birth and the near certainty that an abortion procedure will result in the death of an unborn human being together render the expected harm of late-term abortions quite high. This is because behavior that, for example, has an even chance of killing what is definitely a person has the same expected harm as behavior that will certainly kill what has an even chance of being a person. But even given this assumption, the radical dissimilarity between newborns and newly conceived human beings renders this argument impotent to establish that earlier term abortions have any expected harm. Similarity considerations – tenuous as they are – presumably establish that at some point mid-term abortions begin having increasing degrees of expected harm, again given our assumption about the moral status of newborns.

In absence of any other putative evidence for or against the personhood of unborn human beings, these sorts of considerations have the following implications for the justification of abortion policy. First, since no reason has been provided for thinking newly conceived human beings are persons, there is no more justification for prohibiting early-term abortions than there is for prohibiting the behavior discussed in the hypothetical cases above. Second, given the typical significance of abortion to pregnant women, relatively high levels of expected harm must be tolerated before a policy
prohibiting it would be justified. As a result, any prohibition of mid-term abortions is unlikely to be justified. Finally, given the higher degree of expected harm from late term abortions, a policy placing broad restrictions on it – perhaps prohibiting it except to protect the life or health of the pregnant woman – would likely be justified. But it is worth emphasizing that this is all premised on the assumption that newborn human beings are persons: if reasonable grounds can be found to deny personhood to newborns, all bets are off.

4. From Ignorance to Indeterminacy

It may prove fruitful to conclude with a discussion of the possibility that it is simply indeterminate whether or not unborn human beings are persons: not only is indeterminacy the metaphysical analogue of that epistemic vice ignorance, one tempting explanation of our failure to determine the moral status of unborn human beings is because their moral status is indeterminate. Since the jury is out – or, perhaps, still in the courtroom listening to opening arguments – on the inference from ignorance to indeterminacy, this suggestion does not yet provide any grounds for rethinking the conclusions drawn above regarding abortion policy. But there are some interesting parallels between the effect of ignorance on the policy question and the effect of indeterminacy on the moral question.

To say that the moral status of unborn human beings is indeterminate is to say that neither the criteria for being a person nor the criteria for being a non-person apply to unborn human beings. It is useful to distinguish here to distinguish between what might
be called complete and graduated indeterminacy. If the indeterminacy is complete, then no sense can be attached to the idea that some unborn human beings are more or less person-like and others are more or less non-person-like, or even that they are all equally person-like and non-person-like. The idea here is that to have any degree of personhood an entity must meet all of the personhood criteria and to have any degree of non-personhood an entity must meet all of the non-personhood criteria, but unborn human beings meet neither set of criteria. If the indeterminacy is graduated, then an unborn human being can fail to be either a person or non-person, but nevertheless can have a high degree of personhood by meeting a large number of the personhood criteria or a high degree of non-personhood by meeting a large number of the non-personhood criteria.

If the status of the unborn human being is completely indeterminate, the morality of abortion, arguably at least, is indeterminate as well. After all, abortion is morally permissible if and only if the reproductive rights of the pregnant woman outweigh the putative right to life of the unborn human being, assuming the life or health of the woman is not at risk. If the unborn is a person then its right to life outweighs reproductive rights, and if it is not a person, it does not have a right to life and reproductive rights trump. But if there is no fact of the matter as to whether the unborn is a person with a right to life, then there is no fact of the matter whether reproductive rights are outweighed by a right to life. Someone might appeal to a moral analogue of the epistemic presumption invoked above and argue that exercising reproductive rights is impermissible only if in so doing a woman violates the determinate moral entitlements of other parties. For present purpose, the defensibility of some such manoeuvre will not be addressed.
If, however, the indeterminacy in the status of the unborn human being is graduated, then there is, at least in principle, a determinate answer to the moral question of abortion. Because recently conceived unborn human beings presumably have a low degree of personhood, if any, women’s reproductive rights are trumping; hence early-term abortions are morally unproblematic. Moreover, because unborn human beings just prior to birth presumably have a high degree of personhood, late-term abortions are impermissible except to preserve the woman’s life or health. And, again presumably, although unborn human beings come to have a non-negligible degree of personhood by the mid-point of pregnancy, given the importance of reproductive rights, they presumably outweigh the relatively weak right to life that comes with low to medium degrees of personhood.

This is, in effect, the solution to the moral question endorsed by advocates of the moderate position on personhood, and it coheres nicely with the solution to the policy question defended on epistemic grounds above. In my experience, there is a reasonably broad consensus that there ought to be few or no restrictions on early-term abortions and fairly serious restrictions on late-term abortions. As a result, many people find the moderate position intuitively very appealing. But as we have seen, this view, along with its competitors, runs into serious difficulties. The advantage of the approach defended here is that it retains the intuitive appeal of the moderate position but provides these intuitions with a firmer theoretical basis.

Notes:


14. Ibid.
