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Philosophy and Theology: Chemerinski and Goodwin on Abortion

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Philosophy and Theology

In the *Washington Post* Fact Checker, Michelle Ye Hee Lee investigates the question, "Is the United States one of seven countries that 'allow elective abortions after 20 weeks of pregnancy?'" Although "this statistic seemed dubious at first, because it seemed extreme for just seven countries out of 198 to allow elective abortions after 20 weeks of pregnancy … upon further digging, the data back up the claim."[1] Abortion law in the United States is more extreme than in almost every nation on earth.

Erwin Chemerinsky and Michele Goodwin make a case in their fifty-nine-page article "Abortion: A Woman's Private Choice" that abortion law in the United States is not radical enough. They hold that legalized abortion in the United States is in "serious jeopardy" and that we need to act now not only to preserve the law as it stands but to expand abortion rights: "So-called 'informed consent' laws, special waiting periods for abortions, and prohibitions of 'partial birth abortions' all should be deemed unconstitutional." Moreover, the government should fund abortions, since failure to pay for abortion is "coercing motherhood upon poor, pregnant women."[2] How do they justify this view?

According to Chemerinsky and Goodwin, there is no consensus on when human life begins, and science does not clarify the matter:

> Why leave the choice as to abortion to the woman rather than to the state? First, there was then, and is now, no consensus as to when human life begins. As Professor Tribe explains: "The reality is that the 'general agreement'

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1. Michelle Ye Hee Lee, "Is the United States One of Seven Countries That 'Allow Elective Abortions after 20 Weeks of Pregnancy?,'" *Washington Post*, October 9, 2017, https://www.washingtonpost.com/.

2. Erwin Chemerinsky and Michele Goodwin, "Abortion: A Woman's Private Choice," *Texas Law Review* 95.6 (May 2017): 1238.

> posited … simply does not exist." In other words, "some regard the fetus as merely another part of the woman's body until quite late in pregnancy or even until birth; others believe the fetus must be regarded as a helpless human child from the time of its conception." Moreover, according to Professor Tribe, "these differences of view are endemic to the historical situation in which the abortion controversy arose." The choice of conception as the point at which human life begins, which underlies state laws prohibiting abortion, thus was based not on consensus or science, but religious views.[3]

Chemerinsky and Goodwin show no awareness of the relevant scientific research on the beginning of an individual human being's life. Patrick Lee and Melissa Moschella summarize the relevant scientific findings:

> The following are typical examples—only three of the many, many we could cite. These are from standard texts by embryologists, developmental biologists, and microbiologists:
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> "Human life begins at fertilization, the process during which a male gamete or sperm unites with a female gamete or oocyte (ovum) to form a single cell called a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual." "A zygote is the beginning of a new human being (i.e., an embryo)." Keith L. Moore, *The Developing Human: Clinically Oriented Embryology*, 7th edition.
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> "Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce a genetically distinct individual." Signorelli et al., Kinases, phosphatases and proteases during sperm capacitation, *Cell Tissue Research*.
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> "Although life is a continuous process, fertilization (which, incidentally, is not a 'moment') is a critical landmark because, under ordinary circumstances, *a new, genetically distinct human organism is formed* when the chromosomes of the male and female pronuclei blend in the oocyte" (emphasis added; Ronan O'Rahilly and Fabiola Mueller, *Human Embryology and Teratology*, 3rd edition. Many other examples could be cited.[4]

The recognition that an individual human life begins at conception is a matter of science, not religious views or political ideology.

In another example, Sarah Knapton, the science editor of the *Telegraph* (London), notes, "Human embryos have been kept alive in a petri dish for an unprecedented 13 days, allowing scientists to finally see what happens in the mysterious days after implantation in the womb."[5] Only if they are *already alive* can human embryos be *kept alive* for longer than ever before. Honest and informed defenders of abortion often concede that an individual living human being comes into existence at completed fertilization. For example, Kate Greasley writes, "All embryos and fetuses are cer-

3. Ibid., 1228.

4. Patrick Lee and Melissa Moschella, "Embryology and Science Denial," *Public Discourse*, November 8, 2017, http://www.thepublicdiscourse.com/, original emphasis.

5. Sarah Knapton, "Human Embryos Kept Alive in Lab for Unprecedented 13 Days So Scientists Can Watch Development," May 4, 2016, http://www.telegraph.co.uk/.

tainly human beings, in that they are all individual human organisms."[6] By contrast, Chemerinsky and Goodwin exhibit science denial. It is not a sign of intellectual rigor to simply ignore scientific evidence.

Neither is it a sign of intellectual rigor to distort your opponents' positions. Chemerinsky and Goodwin write, "Legislatures could cloak religious objections to abortion in secular arguments (and often they do this) by claiming that potential human life exists at the point of conception."[7] They cite no scholar who holds this position. In fact, I am aware of no pro-life advocate who claims that abortion is wrong because it kills *potential* human life. Rather, critics hold that abortion kills an actual human being with potential.

Chemerinsky and Goodwin's misrepresentation continues: "According to this line of argument, absent an abortion, all or the overwhelming majority of pregnancies develop fetuses to term and produce babies. This is woefully misguided and inaccurate."[8] After extensively reading the literature on abortion, I know of no one who holds this position. Chemerinsky and Goodwin go on to critique this straw man by noting,

> Roughly 10%–20% of known pregnancies will spontaneously terminate, resulting in miscarriages. Moreover, two-thirds "of all human embryos fail to develop successfully," and terminate before women even know they are pregnant. Even in the most controlled, hormone-rich circumstances, such as in vitro fertilization—over 65% of the embryos end in demise. According to the most recent Centers for Disease Control and Prevention (CDC) data on this issue, only 23.5% of implanted embryos result in normal live births (for women over thirty-five years old, the chances of pregnancy resulting in live birth are dramatically lower). In other words, there is not a probable chance that but for an abortion there will be a baby resulting from conception. Instead, there may be a reasonable chance—but clearly no more than that—that there will be a baby but for an abortion.[9]

This is a red herring argument. Embryos that spontaneously abort before women even know they are pregnant are completely irrelevant to the abortion debate, since abortion cannot be chosen until pregnancy is known. Likewise, the fact that only 23.5 percent of embryos created through IVF survive to birth after implantation is irrelevant. Women who go to the trouble and expense of IVF want to be pregnant. Might some of these women change their minds mid-pregnancy? Perhaps, but such abortions are possible only if the embryos do not spontaneously miscarry. If Chemerinsky and Goodwin are correct that 10 to 20 percent of known pregnancies spontaneously terminate, that leaves 80 to 90 percent of known pregnancies which continue to live birth. In other words, there is an excellent chance that a known pregnancy will result in a newborn unless an abortion takes place.

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6. Kate Greasley and Christopher Kaczor, *Abortion Rights: For and Against* (New York: Cambridge University Press, 2018), 6.

7. Chemerinsky and Goodwin, "Abortion," 1229.

8. Ibid.

9. Ibid.

Chemerinsky and Goodwin's argument from spontaneous miscarriage is a red herring for another reason. The probability of an individual's survival is irrelevant to the question of whether that individual has the right to live. In some times and places, a majority of newborns died. In some times and places, a majority of AIDS victims did not survive. The likelihood of an individual's survival is irrelevant to the question of whether that individual has basic human rights.

Chemerinsky and Goodwin go on to point out that arguments made against abortion on the basis of "potential life" could just as well apply to contraception, which also acts against potential life: "Arguments framed in protecting 'potential life' to justify a ban on contraceptives make as little sense [as] they do when applied to abortion. However, the Catholic Church takes this position."[10]

In fact, the Catholic Church argues that abortion is wrong because it kills an actual human being, not "potential life." As the *Catechism of the Catholic Church* notes, not potential but actual "human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life" (n. 2270). The Catholic Church does indeed oppose contraception, but not because it prevents "potential life," a term that does not appear in the Catechism. Rather, "this particular doctrine, expounded on numerous occasions by the Magisterium, is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both inherent to the marriage act" (n. 2366). Although the Church condones neither abortion nor contraception, the Church does not hold that they are wrong for the same reason.

After examining a straw man version of one pro-life argument, Chemerinsky and Goodwin conclude, "When examined closely, as we have here, Professor Tribe's argument that there is no secular basis for a prohibition on abortion and contraception makes profound sense."[11] It is not simply that Chemerinsky and Goodwin misunderstand pro-life views articulated in the scholarly literature. Entirely missing from their analysis is any engagement with—indeed they show no awareness of—the many secular arguments against abortion advanced over the decades by scholars such as Don Marquis, Elizabeth Anscombe, Robert George, Patrick Lee, and Francis Beckwith.[12]

10. Ibid., 1229–1230.

11. Chemerinsky and Goodwin, "Abortion," 1230.

12. Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* 86.4 (April 1989): 183–202; Mary Geach and Luke Gormally, eds., *Human Life, Action and Ethics: Essays by G.E.M. Anscombe* (Exeter, UK: Imprint Academic, 2005); Robert P. George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (New York: Doubleday, 2008); Patrick Lee, *Abortion and Unborn Human Life*, 2nd ed. (Washington, DC: Catholic University of America Press, 2010); and Francis J. Beckwith, *Defending Life: A Moral and Legal Case against Abortion Choice* (Cambridge, UK: Cambridge University Press, 2007). See also, for example, Christopher Kaczor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice*, 2nd ed. (New York: Routledge, 2015). Although its publication is too recent for them to have considered it in their original essay, it would be interesting to see how Chemerinsky and Goodwin would respond to Joshua J. Craddock, "Protecting Prenatal

In ignoring such authors, Chemerinsky and Goodwin provide an ostrich defense of abortion. It is easy to think that the conclusion in *Roe v. Wade* is "unquestionably correct" when one simply ignores the questions raised by critics.

Chemerinsky and Goodwin seem to regard the fetus as merely another part of the woman's body.[13] They confuse being *inside* someone's body with being a *part* of someone's body. An embryo in vitro is inside the glass Petri dish but is not a part of the glass petri dish. Similarly, a prenatal human being is inside the woman's body but is not a part of her body. The prenatal human being often has a different blood type, race, and sex than the woman. Are we supposed to believe that the body of a pregnant woman has four legs, two heads, and, half the time, a penis? If the human being in utero is simply a part of the woman's body, how can we account for cases, such as some car accidents, in which the woman dies but her child survives? Barring transplantation, parts of a person's body do not survive her death.

Moreover, our right to decide what happens to our bodies is limited in innumerable ways. We cannot appear naked in public, use methamphetamine, have sex in the street, or sell ourselves into slavery. Our moral and legal rights to use our bodies are limited also by the bodies of other people. There is no right to use our bodies in a way that harms another human being's body. Chemerinsky and Goodwin rightly site the Tuskegee Study of Untreated Syphilis as a shameful experiment on a vulnerable human population. But they are not consistent advocates for vulnerable human populations, since they wish to exclude human beings in utero from legal protection.

Chemerinsky and Goodwin point out that the state cannot compel a person to use her body to keep another person alive. For example, it is illegal to force someone to donate blood or bone marrow, even if it is necessary to keep another person, even one's own son or daughter, alive: "Just as the law does not require individuals to donate body organs to save other people's lives, so should the state not require a woman to donate her body, against her will, to house a fetus."[14] So, they argue, the state cannot force a woman to keep the human being in utero alive by forbidding abortion.

The principle at issue—forcing one person to use her body for the purposes of another person—does not support abortion, unless one assumes that the fetal person is a nonentity. If it is wrong to force one human being to give up some of her blood in order to save the life of another human being, it is even more wrong to force one human being to give up all of her blood, her organs, and her life itself so that another person can be free of pregnancy. The prenatal human being should not have to die so that another person can live as she wants. Abortion is not, after all, just the removal of life support, but the intentional killing of the prenatal human being as a means or as an end.

Persons: Does the Fourteenth Amendment Prohibit Abortion?," *Harvard Journal of Law and Public Policy* 40.2 (May 2017): 539–572.

13. Chemerinsky and Goodwin, "Abortion," 1197, 1200, 1211, 1226.

14. Ibid., 1235.

Moreover, Chemerinsky and Goodwin show insufficient familiarity with the relevant literature defending abortion: "Although everyone can agree that an individual capable of surviving outside the womb should be protected, consensus never will be reached as to the status of the fetus."[15] Many defenders of abortion disagree. Michael Tooley, Peter Singer, Alberto Giubilini, Francesca Minerva, and others have defended both abortion and infanticide on the grounds that both the newborn and the prenatal human being are not "persons" in the ethically relevant sense.[16]

Indeed, many defenses of infanticide over the last forty years suggest that consensus may never be reached on the status of the newborn.[17] If we adopt the principle endorsed by Chemerinsky and Goodwin—that is, lack of consensus grounds the liberty to terminate young human life—then we should endorse both abortion and infanticide. If, on the other hand, the lack of consensus on newborn personhood is irrelevant to respecting the life of every infant and protecting it in law, then lack of consensus would also seem irrelevant to fetal personhood.

Chemerinsky and Goodwin repeat the argument that criminalizing abortion will be especially burdensome for poor women, a disproportionate number of whom are minorities. If abortion is made illegal, rich white women will still be able to obtain abortions by going abroad.[18] Indeed, the rich have an easier time evading all laws than do the poor. If O. J. Simpson had been economically disadvantaged and unknown, he would probably have been convicted of murder. Rich people can fly to other countries for the sake of evading US law against child prostitution, but it hardly follows from this fact that we should decriminalize child prostitution. Rich white women are less likely to get traffic tickets than poor black women, but we should not therefore abolish traffic laws. Legal justice should be blind to race and class, but this is a problem for the legal system in general and, therefore, irrelevant to laws about abortion specifically.

Chemerinsky and Goodwin's defense of legal abortion does not take into account, let alone engage and refute, scholarly pro-life arguments. They highlight the risks that women will encounter if abortion is criminalized and ignore the harms that abortion causes women. They repeat the claim that abortion is less dangerous than childbirth and ignore evidence to the contrary.[19] Chemerinsky and Goodwin's article on abortion attacks straw men, employs red herrings, and ignores relevant evidence. "Abortion: A Woman's Private Choice" is very much in the spirit of *Roe*.

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15. Ibid., 1234.

16. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2.1 (1972): 37–65; Peter Singer, *Writings on an Ethical Life* (New York: Ecco, 2000), 160–161; and Alberto Giubilini and Francesca Minerva, "After-Birth Abortion: Why Should the Baby Live?," *Journal of Medical Ethics* 39.5 (May 2013): 261–263, doi: 10.1136/medethics-2011-100411.

17. To get some sense of the range of debate and the lack of consensus on the issue of newborn personhood, see the May 2013 issue of the *Journal of Medical Ethics*.

18. Chemerinsky and Goodwin, "Abortion," 1191, 1235–1236.

19. See, for example, my Autumn 2014 column, 561–566.