HOW CAN WE DEVELOP GUIDELINES FOR DETERMINING MORAL STATUS?

Today, we'll be taking what we've learned so far about moral status and applying them to a real-world case (Roe v Wade). You'll learn to:

1. Explain the background to Roe v Wade.
2. Analyze the trimester-based framework of Roe using the Four Principles approach to ethics.
3. Reflect on the challenges inherent in ethical principles to set legal guidelines and standards.

If what we have said so far is correct, then the common morality provides us with a number of *sufficient* conditions for moral status, but it doesn't provide us with any clear **guidelines** that can be applied to do things like make laws or help medical staff make tough decisions about abortion, medical research on animals or human embryos, euthanasia for brain-dead patients, etc. Developing guidelines concerning moral status is part of particular, professional morality.

B-C offer examples of several different ways you might use the five theories of moral status to set guidelines. As we'll see, most real guidelines end up being a bit more complex:

- **Possible Guideline [based on HUMAN LIFE and SENTIENCE].** All human beings who are sentient or have the biological potential for sentience have some level of moral status; all human beings who are not sentient and have no biological potential for sentience have no moral status."
- **Possible Guideline [based on SENTIENCE and COGNITIVE CAPACTIY].** "All sentient beings have some level of moral status; the level is elevated in accordance with the level of sentience and the level of cognitive capacity."
- **Possible Guideline [based on HUMAN LIFE and MORAL AGENCY].** "All human beings capable of moral agency have equal basic rights; all sentient human beings not capable of moral agency have diminished set of rights."

We also need to develop guidelines for the treatment of **vulnerable persons** who are "incapable of protecting their own interests because of sickness, debilitation, mental illness, immaturity, cognitive impairment, and the like." One question that arises is "When, if ever, is it OK to carry out biomedical research on these populations?"

Why Should I Care About Guidelines Anyway? Shouldn't I Just "Follow My Heart"? Most of us have instinctive **sympathy** for those we have close relationships with—for our family members, friends, and even pets. We (usually) treat these people and animals as morality requires. Part of the reason it's so important to struggle with explicit rules and guidelines (such as those that come up in debates about abortion, animals rights, aid in dying, etc.) is to *broaden* the sphere of our sympathy, so that we can learn to treat *all beings* as morality requires. Of course, most of us (moral saints aside) will never be perfectly impartial. The point is merely to try to do the best we can.

CASE STUDY: ROE V WADE AND DOE V BOLTON[1]

Abortion has been among the most contentious issues in bioethics, and people (both within medicine and outside of it) have radically different ideas on how it ought to be regulated. While there are a variety of theoretical arguments about the morality of abortion, none has achieved widespread acceptance. This has presented a significant challenge for policy makers who try to set down guidelines, since these guidelines need to (1) be workable in the context of actual medical practice, (2) be acceptable to the public at large. In the U.S., *Roe v. Wade* represents the foundation of contemporary legal thought about abortion.

Neat fact: This majority opinion was written by Justice Harry Blackmum, who was chief counsel at Mayo Clinic in Rochester, MN from 1950 to 1959. Before writing the opinion, he went back to Mayo to do research on the history of abortion laws. He said his time in Rochester was the "happiest time" of his life.

Summary: "Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. …

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First [speech, religion,

[1] Roe v. Wade, 410 US 113 (Supreme Court 1971); Doe v. Bolton, 410 US 179 (Supreme Court 1971).

assembly], Fourth [no search and seizure without warrants], Fifth [right to due process of law], Ninth [individual rights not specifically mentioned are still protected], and Fourteenth Amendments [due process applies to state laws, too.]."

BLACKMUN'S DECISION: THREE TRIMESTERS

The U.S. Supreme ruled in favor of Roe, and held that Texas's abortion laws (along with those of many other states) were unconstitutional. They laid out a three-tiered framework for determining laws about abortion. These three tiers corresponded to the three trimesters of pregnancy (in 1992, the trimester framework was thrown out, but the basic structure is still the same).

First Trimester of Pregnancy—During the first 3 months of pregnancy, a woman's right to **privacy** was held to trump all other considerations. So, no laws restricting abortion could be passed. The right to privacy is very similar to what we've called **autonomy**, and it concerns people's rights over their own bodies. The court held that this right was implicit in the US Bill of Rights, which protects the rights to freedom of speech, assembly, religion, and the right to not house soldiers. This right was first recognized in **Griswold v Connecticut (1965),** when the court held that couples had a right to use contraception.

Second Trimester of Pregnancy—During the second 3 months of pregnancy, the right to autonomy must be weighed against the state's legitimate interest in protecting maternal health. This similar to what we have called **beneficence**—the duty to help other people where we can. The state often does this. For example, it makes it illegal to buy or sell many addictive substances (such as heroin or cocaine), tightly regulates others (such as prescription medication), and taxes some (cigarettes, alcohol). The government also forbids people to practice medicine without proper training. While this involves restricting people's autonomy rights, it is done "for their own good." However, restriction here must be based on medical evidence—e.g., there must actually be evidence that abortion procedure in question is unsafe.

Third Trimester of Pregnancy (Viability)—The court held that a fetus was **viable** (able to survive outside the womb) after 6 months. Because of this, they said states could regulate third-trimester abortion for the purposes of protecting potential life. This is a version of the principle of **nonmaleficence,** which holds that it is generally wrong to harm others. The court did NOT hold that a third-trimester fetus had the same rights as a full adult, but they held that states could take account of the fetus's interests. In ***Casey v. Planned Parenthood*[2],** the court revised this requirement to reflect changes in medical technology, which allowed fetuses to become viable before the third trimester.

***Doe v Bolton (1973)*—**In a secondary decision associated with Roe, the court held that states *must* allow abortions necessary to preserve the mother's life or health (even in the 3rd trimester). Their primary grounds for doing so was one of "due process" (which is closely related to "fairness" or **justice).** The basic idea: it would be unfair to make women "jump through hoops" to get a life-saving abortion, since states don't require this for any *other* sort of life-saving medical procedure.

Casey and the "Undue Burden Standard." In 1992, the Supreme Court revised and clarified Roe. Along with getting rid of the strict trimester framework, they proposed a new test. After viability, the state could regulate abortion in order to protect the woman's health and/or the interests of the fetus, but only if this wasn't an **undue burden** to her autonomy or health. This involves what B-C early called **"weighing"** and **"balancing"** of norms, as well as **"specifying"** the scope under which various norms apply.

Common Misunderstandings About Roe v. Wade. Probably because the case concerns a highly controversial subject, there are a number of common misunderstandings of Roe v. Wade.

1. **The decision does NOT legalize "abortion on demand."** It does require that states legalize first-trimester abortion, and they have good reasons for restricting it in the second and third trimester.
2. **The decision does NOT say a fetus has a "right to life."** The decision says that states are allowed to consider a fetus's interests after the point of viability, and that they can prohibit abortion on this basis. However, it does not *require* they do so (so, some states allow late-term abortions, and others do not).
3. **Viability is not the same as "sentience," and both play a distinct role in the abortion debate.** Viability refers to the ability of fetuses to survive outside of the womb. Sentience, by contrast, refers to ability of fetuses to have experiences of pain/pleasure. However, these two things often happen somewhere around the same time (~20 to 28 weeks).

REVIEW QUESTIONS

1. Write a 50-word (or close to 50 as you can get) summary of Roe v. Wade. Don't look at the handout when doing so.
2. Some critics of Blackmum have argued that he should have been more "principled." These critics generally acknowledge that abortion is complex, but think that Blackmun simply made matters worse (and prolonged the debate) by failing to make a "decision." So, they think he should have come down firmly on the side of the woman's right to choose, or the baby's right to life, rather than attempt to "split the difference". What do you think of this criticism?
3. Many contemporary debates on abortion focus on what counts as an "undue burden": Can states require 24-hour-waiting periods? Viewing of pictures of fetuses? Spousal consent for married women? Parental consent for minors? Hospital admitting privileges for abortion clinics (even if doctors carrying out medical procedures of similar risk aren't required to do so?)? What do you think?

[2] Planned Parenthood of Southeastern Pa. v. Casey, 505 US 833 (Supreme Court 1992).

4. The abortion debate has lasted for (at least) 150 years in the U.S., and related debates about infanticide stretch back thousands of years (and across numerous cultures). In 150 years, do you think it will be resolved? Defend your answer.