

• **The Aborted Contract**

By guest writer Dr. Sam Vaknin PhD

I. The Right to Life

It is a fundamental principle of most moral theories that all human beings have a right to life. The existence of a right implies obligations or duties of third parties towards the right-holder. One has a right AGAINST other people. The fact that one possesses a certain right - prescribes to others certain obligatory behaviours and proscribes certain acts or omissions. This Janus-like nature of rights and duties as two sides of the same ethical coin - creates great confusion. People often and easily confuse rights and their attendant duties or obligations with the morally decent, or even with the morally permissible. What one MUST do as a result of another's right - should never be confused with one SHOULD or OUGHT to do morally (in the absence of a right).

The right to life has six distinct strains:

- IA. The right to be brought to life
- IB. The right to be born
- IC. The right to be maintained
- ID. The right not to be killed
- IE. The right to have one's life saved
- IF. The right to save one's life (erroneously limited to the right to self-defence)
- IG. The Right to terminate one's life
- IH. The right to have one's life terminated

IA. The Right to be Brought to Life

Only living people have rights. There is a debate whether a fetus is a living person - but there can be no doubt that it exists. Its rights - whatever they are - derive from the fact that it exists. The right to be brought to life (the right to become or to be) pertains to a yet non-existent entity and, therefore, is null and void. Had this right existed, it would have implied an obligation or duty to give life to the unborn and the not yet conceived. No such duty or obligation exist.

IB. The Right to be Born

The right to be born crystallizes at the moment of voluntary and intentional fertilization. If a woman knowingly engages in sexual intercourse for the explicit and express purpose of having a child - then the resulting fertilized egg has a right to mature and be born. Furthermore, the born child has all the rights a child has against his parents: food, shelter, emotional nourishment, education, and so on. It is debatable whether such rights of the fetus and, later, of the child, exist if the fertilization was either involuntary (rape) or unintentional ("accidental" pregnancies). It would seem that the fetus has a right to be kept alive outside the mother's womb, if possible. But it is not clear whether it has a right to go on using the mother's body, or resources, or to burden her in any way in order to sustain its own life (see IC

below).

IC. The Right to be Maintained

Does one have the right to maintain one's life and prolong them at other people's expense? Does one have the right to use other people's bodies, their property, their time, their resources and to deprive them of pleasure, comfort, material possessions, income, or any other thing? The answer is yes and no.

No one has a right to sustain his or her life, maintain, or prolong them at another INDIVIDUAL's expense (no matter how minimal and insignificant the sacrifice required is). Still, if a contract has been signed - implicitly or explicitly - between the parties, then such a right may crystallize in the contract and create corresponding duties and obligations, moral, as well as legal.

Example:

No fetus has a right to sustain its life, maintain, or prolong them at his mother's expense (no matter how minimal and insignificant the sacrifice required of her is). Still, if she signed a contract with the fetus - by knowingly and willingly and intentionally conceiving it - such a right has crystallized and has created corresponding duties and obligations of the mother towards her fetus.

On the other hand, everyone has a right to sustain his or her life, maintain, or prolong them at SOCIETY's expense (no matter how major and significant the resources required are). Still, if a contract has been signed - implicitly or explicitly - between the parties, then the abrogation of such a right may crystallize in the contract and create corresponding duties and obligations, moral, as well as legal.

Example:

Everyone has a right to sustain his or her life, maintain, or prolong them at society's expense. Public hospitals, state pension schemes, and police forces may be required to fulfil society's obligations - but fulfil them it must, no matter how major and significant the resources are. Still, if a person volunteered to join the army and a contract has been signed between the parties, then this right has been thus abrogated and the individual assumed certain duties and obligations, including the duty or obligation to give up his or her life to society.

ID. The Right not to be Killed

Every person has the right not to be killed unjustly. What constitutes "just killing" is a matter for an ethical calculus in the framework of a social contract.

But does A's right not to be killed include the right against third parties that they refrain from enforcing the rights of other people against A? Does A's right not to be killed preclude the righting of wrongs committed by A against others - even if the righting of such wrongs means the killing of A?

Not so. There is a moral obligation to right wrongs (to restore the rights of other

people). If A maintains or prolongs his life ONLY by violating the rights of others and these other people object to it - then A must be killed if that is the only way to right the wrong and re-assert their rights.

IE. The Right to have One's Life Saved

There is no such right as there is no corresponding moral obligation or duty to save a life. This "right" is a demonstration of the aforementioned muddle between the morally commendable, desirable and decent ("ought", "should") and the morally obligatory, the result of other people's rights ("must").

In some countries, the obligation to save life is legally codified. But while the law of the land may create a LEGAL right and corresponding LEGAL obligations - it does not always or necessarily create a moral or an ethical right and corresponding moral duties and obligations.

IF. The Right to Save One's Own Life

The right to self-defence is a subset of the more general and all-pervasive right to save one's own life. One has the right to take certain actions or avoid taking certain actions in order to save his or her own life.

It is generally accepted that one has the right to kill a pursuer who knowingly and intentionally intends to take one's life. It is debatable, though, whether one has the right to kill an innocent person who unknowingly and unintentionally threatens to take one's life.

IG. The Right to Terminate One's Life

See "[The Murder of Oneself](#)".

IH. The Right to Have One's Life Terminated

The right to euthanasia, to have one's life terminated at will, is restricted by numerous social, ethical, and legal rules, principles, and considerations. In a nutshell - in many countries in the West one is thought to have a right to have one's life terminated with the help of third parties if one is going to die shortly anyway and if one is going to be tormented and humiliated by great and debilitating agony for the rest of one's remaining life if not helped to die. Of course, for one's wish to be helped to die to be accommodated, one has to be in sound mind and to will one's death knowingly, intentionally, and forcefully.

II. Issues in the Calculus of Rights

IIA. The Hierarchy of Rights

All human cultures have hierarchies of rights. These hierarchies reflect cultural mores and lores and there cannot, therefore, be a universal, or eternal hierarchy.

In Western moral systems, the Right to Life supersedes all other rights (including the

right to one's body, to comfort, to the avoidance of pain, to property, etc.).

Yet, this hierarchical arrangement does not help us to resolve cases in which there is a clash of EQUAL rights (for instance, the conflicting rights to life of two people). One way to decide among equally potent claims is randomly (by flipping a coin, or casting dice). Alternatively, we could add and subtract rights in a somewhat macabre arithmetic. If a mother's life is endangered by the continued existence of a fetus and assuming both of them have a right to life we can decide to kill the fetus by adding to the mother's right to life her right to her own body and thus outweighing the fetus' right to life.

IIB. The Difference between Killing and Letting Die

There is an assumed difference between killing (taking life) and letting die (not saving a life). This is supported by IE above. While there is a right not to be killed - there is no right to have one's own life saved. Thus, while there is an obligation not to kill - there is no obligation to save a life.

IIC. Killing the Innocent

Often the continued existence of an innocent person (IP) threatens to take the life of a victim (V). By "innocent" we mean "not guilty" - not responsible for killing V, not intending to kill V, and not knowing that V will be killed due to IP's actions or continued existence. It is simple to decide to kill IP to save V if IP is going to die anyway shortly, and the remaining life of V, if saved, will be much longer than the remaining life of IP, if not killed. All other variants require a calculus of hierarchically weighted rights. One form of calculus is the utilitarian theory. It calls for the maximization of utility (life, happiness, pleasure). In other words, the life, happiness, or pleasure of the many outweigh the life, happiness, or pleasure of the few. It is morally permissible to kill IP if the lives of two or more people will be saved as a result and there is no other way to save their lives. Despite strong philosophical objections to some of the premises of utilitarian theory - I agree with its practical prescriptions.

In this context - the dilemma of killing the innocent - one can also call upon the right to self defence. Does V have a right to kill IP regardless of any moral calculus of rights? Probably not. One is rarely justified in taking another's life to save one's own. But such behaviour cannot be condemned. Here we have the flip side of the confusion - understandable and perhaps inevitable behaviour (self defence) is mistaken for a MORAL RIGHT. That most V's would kill IP and that we would all sympathize with V and understand its behaviour does not mean that V had a RIGHT to kill IP. V may have had a right to kill IP - but this right is not automatic, nor is it all-encompassing.

III. Abortion and the Social Contract

The issue of abortion is emotionally loaded and this often makes for poor, not thoroughly thought out arguments. The questions: "Is abortion immoral" and "Is abortion a murder" are often confused. The pregnancy (and the resulting fetus) are discussed in terms normally reserved to natural catastrophes (force majeure). At times, the embryo is compared to cancer, a thief, or an invader: after all, they are both growths, clusters of cells. The difference, of course, is that no one contracts

cancer willingly (except, to some extent, smokers --but, then they gamble, not contract).

When a woman engages in voluntary sex, does not use contraceptives and gets pregnant - one can say that she signed a contract with her fetus. A contract entails the demonstrated existence of a reasonably (and reasonable) free will. If the fulfilment of the obligations in a contract between individuals could be life-threatening - it is fair and safe to assume that no rational free will was involved. No reasonable person would sign or enter such a contract with another person (though most people would sign such contracts with society).

Judith Jarvis Thomson argued convincingly ("A Defence of Abortion") that pregnancies that are the result of forced sex (rape being a special case) or which are life threatening should or could, morally, be terminated. Using the transactional language: the contract was not entered to willingly or reasonably and, therefore, is null and void. Any actions which are intended to terminate it and to annul its consequences should be legally and morally permissible. The same goes for a contract which was entered into against the express will of one of the parties and despite all the reasonable measures that the unwilling party adopted to prevent it. If a mother uses contraceptives in a manner intended to prevent pregnancy, it is as good as saying: " I do not want to sign this contract, I am doing my reasonable best not to sign it, if it is signed - it is contrary to my express will". There is little legal (or moral) doubt that such a contract should be voided.

Much more serious problems arise when we study the other party to these implicit agreements: the embryo. To start with, it lacks consciousness (in the sense that is needed for signing an enforceable and valid contract). Can a contract be valid even if one of the "signatories" lacks this sine qua non trait? In the absence of consciousness, there is little point in talking about free will (or rights which depend on sentience). So, is the contract not a contract at all? Does it not reflect the intentions of the parties?

The answer is in the negative. The contract between a mother and her fetus is derived from the larger Social Contract. Society - through its apparatuses - stands for the embryo the same way that it represents minors, the mentally retarded, and the insane. Society steps in - and has the recognized right and moral obligation to do so - whenever the powers of the parties to a contract (implicit or explicit) are not balanced. It protects small citizens from big monopolies, the physically weak from the thug, the tiny opposition from the mighty administration, the barely surviving radio station from the claws of the devouring state mechanism. It also has the right and obligation to intervene, intercede and represent the unconscious: this is why euthanasia is absolutely forbidden without the consent of the dying person. There is not much difference between the embryo and the comatose.

A typical contract states the rights of the parties. It assumes the existence of parties which are "moral personhoods" or "morally significant persons" - in other words, persons who are holders of rights and can demand from us to respect these rights. Contracts explicitly elaborate some of these rights and leaves others unmentioned because of the presumed existence of the Social Contract. The typical contract assumes that there is a social contract which applies to the parties to the contract and which is universally known and, therefore, implicitly incorporated in every contract. Thus, an explicit contract can deal with the property rights of a certain person, while

neglecting to mention that person's rights to life, to free speech, to the enjoyment the fruits of his lawful property and, in general to a happy life. There is little debate that the Mother is a morally significant person and that she is a rights-holder. All born humans are and, more so, all adults above a certain age. But what about the unborn fetus? One approach is that the embryo has no rights until certain conditions are met and only upon their fulfilment is he transformed into a morally significant person ("moral agent"). Opinions differ as to what are the conditions. Rationality, or a morally meaningful and valued life are some of the oft cited criteria. The fallaciousness of this argument is easy to demonstrate: children are irrational - is this a licence to commit infanticide? A second approach says that a person has the right to life because it desires it.

But then what about chronic depressives who wish to die - do we have the right to terminate their miserable lives? The good part of life (and, therefore, the differential and meaningful test) is in the experience itself - not in the desire to experience. Another variant says that a person has the right to life because once his life is terminated - his experiences cease. So, how should we judge the right to life of someone who constantly endures bad experiences (and, as a result, harbors a death wish)? Should he better be "terminated"?

Having reviewed the above arguments and counter-arguments, Don Marquis goes on (in "Why Abortion is Immoral", 1989) to offer a sharper and more comprehensive criterion: terminating a life is morally wrong because a person has a future filled with value and meaning, similar to ours. But the whole debate is unnecessary. There is no conflict between the rights of the mother and those of her fetus because there is never a conflict between parties to an agreement. By signing an agreement, the mother gave up some of her rights and limited the others. This is normal practice in contracts: they represent compromises, the optimization (and not the maximization) of the parties' rights and wishes. The rights of the fetus are an inseparable part of the contract which the mother signed voluntarily and reasonably. They are derived from the mother's behaviour. Getting willingly pregnant (or assuming the risk of getting pregnant by not using contraceptives reasonably) - is the behaviour which validates and ratifies a contract between her and the fetus. Many contracts are by behaviour, rather than by a signed piece of paper. Numerous contracts are verbal or behavioural. These contracts, though implicit, are as binding as any of their written, more explicit, brethren. Legally (and morally) the situation is crystal clear: the mother signed some of her rights away in this contract. Even if she regrets it - she cannot claim her rights back by annulling the contract unilaterally. No contract can be annulled this way - the consent of both parties is required. Many times we realize that we have entered a bad contract, but there is nothing much that we can do about it. These are the rules of the game.

Thus the two remaining questions: (a) can this specific contract (pregnancy) be annulled and, if so (b) in which circumstances - can be easily settled using modern contract law. Yes, a contract can be annulled and voided if signed under duress, involuntarily, by incompetent persons (e.g., the insane), or if one of the parties made a reasonable and full scale attempt to prevent its signature, thus expressing its clear will not to sign the contract. It is also terminated or voided if it would be unreasonable to expect one of the parties to see it through. Rape, contraception failure, life threatening situations are all such cases.

This could be argued against by saying that, in the case of economic hardship, for instance, the damage to the mother's future is certain. True, her value- filled,

meaningful future is granted - but so is the detrimental effect that the fetus will have on it, once born. This certainty cannot be balanced by the UNCERTAIN value-filled future life of the embryo. Always, preferring an uncertain good to a certain evil is morally wrong. But surely this is a quantitative matter - not a qualitative one. Certain, limited aspects of the rest of the mother's life will be adversely effected (and can be ameliorated by society's helping hand and intervention) if she does have the baby. The decision not to have it is both qualitatively and qualitatively different. It is to deprive the unborn of all the aspects of all his future life - in which he might well have experienced happiness, values, and meaning. The questions whether the fetus is a Being or a growth of cells, conscious in any manner, or utterly unconscious, able to value his life and to want them - are all but irrelevant. He has the potential to lead a happy, meaningful, value-filled life, similar to ours, very much as a one minute old baby does. The contract between him and his mother is a service provision contract. She provides him with goods and services that he requires in order to materialize his potential. It sounds very much like many other human contracts. And this contract continue well after pregnancy has ended and birth given.

Consider education: children do not appreciate its importance or value its potential - still, it is enforced upon them because we, who are capable of those feats, want them to have the tools that they will need in order to develop their potential. In this and many other respects, the human pregnancy continues well into the fourth year of life (physiologically it continues in to the second year of life - see "Born Alien"). Should the location of the pregnancy (in uterus, in vivo) determine its future? If a mother has the right to abort at will, why should the mother be denied her right to terminate the " pregnancy" AFTER the fetus emerges and the pregnancy continues OUTSIDE her womb? Even after birth, the woman's body is the main source of food to the baby and, in any case, she has to endure physical hardship to raise the child. Why not extend the woman's ownership of her body and right to it further in time and space to the post-natal period?

Contracts to provide goods and services (always at a personal cost to the provider) are the commonest of contracts. We open a business. We sell a software application, we publish a book - we engage in helping others to materialize their potential. We should always do so willingly and reasonably - otherwise the contracts that we sign will be null and void. But to deny anyone his capacity to materialize his potential and the goods and services that he needs to do so - after a valid contract was entered into - is immoral. To refuse to provide a service or to condition it provision (Mother: " I will provide the goods and services that I agreed to provide to this fetus under this contract only if and when I benefit from such provision") is a violation of the contract and should be penalized. Admittedly, at times we have a right to choose to do the immoral (because it has not been codified as illegal) - but that does not turn it into moral.

Still, not every immoral act involving the termination of life can be classified as murder. Phenomenology is deceiving: the acts look the same (cessation of life functions, the prevention of a future). But murder is the intentional termination of the life of a human who possesses, at the moment of death, a consciousness (and, in most cases, a free will, especially the will not to die). Abortion is the intentional termination of a life which has the potential to develop into a person with consciousness and free will. Philosophically, no identity can be established between potential and actuality. The destruction of paints and cloth is not tantamount (not to say identical) to the destruction of a painting by Van Gogh, made up of these very elements. Paints and cloth are converted to a painting through the intermediacy and

agency of the Painter. A cluster of cells a human makes only through the agency of Nature. Surely, the destruction of the painting materials constitutes an offence against the Painter. In the same way, the destruction of the fetus constitutes an offence against Nature. But there is no denying that in both cases, no finished product was eliminated. Naturally, this becomes less and less so (the severity of the terminating act increases) as the process of creation advances. Classifying an abortion as murder poses numerous and insurmountable philosophical problems.

No one disputes the now common view that the main crime committed in aborting a pregnancy - is a crime against potentialities. If so, what is the philosophical difference between aborting a fetus and destroying a sperm and an egg? These two contain all the information (=all the potential) and their destruction is philosophically no less grave than the destruction of a fetus. The destruction of an egg and a sperm is even more serious philosophically: the creation of a fetus limits the set of all potentials embedded in the genetic material to the one fetus created. The egg and sperm can be compared to the famous wave function (state vector) in quantum mechanics - the represent millions of potential final states (=millions of potential embryos and lives). The fetus is the collapse of the wave function: it represents a much more limited set of potentials. If killing an embryo is murder because of the elimination of potentials - how should we consider the intentional elimination of many more potentials through masturbation and contraception?

The argument that it is difficult to say which sperm cell will impregnate the egg is not serious. Biologically, it does not matter - they all carry the same genetic content. Moreover, would this counter-argument still hold if, in future, we were be able to identify the chosen one and eliminate only it? In many religions (Catholicism) contraception is murder. In Judaism, masturbation is "the corruption of the seed" and such a serious offence that it is punishable by the strongest religious penalty: eternal ex-communication ("Karet").

If abortion is indeed murder how should we resolve the following moral dilemmas and questions (some of them patently absurd): Is a natural abortion the equivalent of manslaughter (through negligence)?

Do habits like smoking, drug addiction, vegetarianism - infringe upon the right to life of the embryo? Do they constitute a violation of the contract?

Reductio ad absurdum: if, in the far future, research will unequivocally prove that listening to a certain kind of music or entertaining certain thoughts seriously hampers the embryonic development - should we apply censorship to the Mother? Should force majeure clauses be introduced to the Mother-Embryo pregnancy contract? Will they give the mother the right to cancel the contract? Will the embryo have a right to terminate the contract? Should the asymmetry persist: the Mother will have no right to terminate - but the embryo will, or vice versa?

Being a rights holder, can the embryo (=the State) litigate against his Mother or Third Parties (the doctor that aborted him, someone who hit his mother and brought about a natural abortion) even after he died? Should anyone who knows about an abortion be considered an accomplice to murder?

If abortion is murder - why punish it so mildly? Why is there a debate regarding this question? "Thou shalt not kill" is a natural law, it appears in virtually every legal

system. It is easily and immediately identifiable. The fact that abortion does not "enjoy" the same legal and moral treatment says a lot.

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