

Spring 2024

Abortion: Law, Policy, and Ethics

STEPHEN E. SACHS

AMANDA SCHWOERKE

Harvard Law School

1L Reading Group

F 10:15–12:15

WCC Room 3012

<https://bit.ly/48oQRIn>

Contact information:

Lewis 311

ssachs@law.harvard.edu

aschwoerke@law.harvard.edu

Faculty Assistant:

Emma Reilly

Griswold 4N

ereilly@law.harvard.edu

Welcome! With the law of abortion in flux, it's worthwhile for future lawyers to study the issue in detail and to decide what they think. This seminar is intended to give students a chance to discuss, in an academic setting, the difficult and important questions of ethics, policy, and law raised by abortion. These include questions of human personhood and futures of value; of autonomy and sex equality; of politics and history; of unenumerated rights and judicial power; and of federal and state regulation.

Many of these questions are both highly abstract and deeply personal. While they're the subject of intense and heartfelt commitment on both sides, this course is offered in the belief that they're also a proper subject for intellectual inquiry. Within each unit, the assigned readings are roughly balanced as to viewpoint; they take deeply conflicting positions, and you'll cer-

tainly disagree with some of them. Students will write occasional short papers in response to the readings, and each student is expected to participate fully in the discussions.

SESSIONS

This course meets on **Fridays**, starting promptly at **10:15 a.m.** Please have the assigned readings with you. The **first response paper**, discussed below, is due from each student by **11:59 p.m.** on **January 25**, the evening before the first class session. After class on Friday, you should schedule your remaining response papers by that evening. (There are also two Friday afternoon makeup sessions, indicated below.)

MATERIALS

Readings for this class will be released in stages on the website. (Some of them involve pending court cases, for which the briefs aren't yet written!) The schedule at the end of this syllabus indicates the topics that we'll address each week.

RESPONSE PAPERS

As mentioned above, each student is to submit a response paper, uploaded to the "Discussion" section of the website, by **11:59 p.m. on the evening before the first class**. This first paper's topic is very open-ended: you can discuss the first week's readings if you like, but the only requirement is that you discuss some aspect of the topic that's of interest to you. To standardize length and appearance, as well as to help with semi-anonymous grading at the end of the semester, please use the word-processing **template available online** (under "Files"), filling the appropriate information into the header. Your response paper should be **750 to 1000 words long**, roughly three to four pages.

Each student will then write seven elective papers tied to a particular week's readings. To select which seven weeks you'd like to write your elective papers, please use the Doodle poll that's linked from the website by the

evening of the first class day. (Don't use the "if-need-be" option, which might take up slots for others; just sign up for the seven classes you most prefer.)

These seven response papers shouldn't just summarize the assigned readings—which everyone will already have read, including us! Instead, present a *single sustained argument* for or against some position expressed in that week's readings. Write your papers as straightforwardly as you can: citations, Bluebooking, footnotes, and the like are strictly forbidden.¹ These papers are due by **11:59 p.m. on the evening before class** of whichever weeks you've chosen. You are, of course, free to turn them in early! Your papers will be available for your classmates to read online and will serve, along with the assigned readings, as a basis for that week's discussion.

Half credit is available for late papers uploaded within a day of the deadline, and one-quarter credit is available for papers submitted before the end of the exam period. (In case of unusual circumstances, or if you'd like to switch weeks after signing up, just email us.)

A final response paper, discussing the course materials as a whole—or any other course-related subject of interest to you—is due by **4:30 p.m. on Friday, May 3**, the last day of the upper-level exam period. Please consult the Registrar's Office regarding eligibility if you'd like this series of response papers to satisfy a written work requirement.

CLASS PARTICIPATION

Each student is expected to participate in the discussion; class participation will be part of your grade. To encourage free-flowing discussion and to avoid distractions (including, but not limited to, <https://goo.gl/0l9Wzy>), laptops aren't to be used during class. We'll arrange for hard-copy versions of the readings, so as to save you the need to print everything out.

For emergencies or other special circumstances, just contact us. In particular, no one should feel obliged to come to class unwell, so just let us know if you're feeling ill. (And make sure to contact the Dean of Students' Office to see if your absence qualifies for a class recording.) Because you

¹ Seriously, no footnotes.

couldn't have known about the makeup sessions when scheduling your classes, if you have a preexisting conflict with either of them, just email us in advance to explain the conflict and you'll be excused.

OFFICE HOURS

Please feel free to attend our office hours! Just email one of us to arrange a time. Each of us will be holding separate office hours via Zoom.

Don't worry about a question sounding silly. If it's troubling you enough for you to send an email or to sign up for office hours, it's worth asking and getting cleared up!

(Also: HLS will pay for lunches for faculty members and groups of four students or more. While you should feel no obligation to see us any more than is required by the prescribed number of credit-hours, each of us is always happy to meet for lunch. Just email one of us to propose a time.)

GRADING

Grades for the course will be based on your written work and class participation, following the Law School's standard grading rules for seminars.

Abortion: Law, Policy, and Ethics

ETHICS

1 Jan. 26: Personhood

- 1.1 John T. Noonan, Jr., *An Almost Absolute Value in History*, in *The Morality of Abortion: Legal and Historical Perspectives* 51, 51–59 (John T. Noonan ed. 1970).
- 1.2 Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *Monist* 43 (1973).
- 1.3 Peter Singer, *Germ of a New Debate on the Ethics of Life*, *The Australian* (Canberra), Dec. 23, 2005, at 10.
- 1.4 Patrick Lee & Robert P. George, *Human-Embryo Liberation*, *Nat'l Rev. Online* (Jan. 25, 2006, 1:29 p.m.).
- 1.5 Sherry F. Colb & Michael C. Dorf, *Beating Hearts: Abortion and Animal Rights* ch. 1 (2016).

2 Feb. 2: Futures of value

- 2.1 Don Marquis, *Why Abortion Is Immoral*, 86 *J. Phil.* 183 (1989).
- 2.2 Colb & Dorf, *Beating Hearts* ch. 4.
- 2.3 J Savulescu, *Abortion, Embryo Destruction and the Future of Value Argument*, 28 *J. Med. Ethics* 133 (2002).
- 2.4 D Marquis, *Savulescu's Objections to the Future of Value Argument*, 31 *J. Med. Ethics* 119 (2005).
- 2.5 David Boonin, *A Defense of Abortion* 56–57, 64–85 (2003).
- 2.6 Pedro Galvão, *Boonin on the Future-Like-Ours Argument Against Abortion*, 21 *Bioethics* 324 (2007).

Feb. 9: No class

3 Feb. 16: Autonomy

- 3.1 Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971)
- 3.2 John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 Phil. & Pub. Aff. 117 (1973)
- 3.3 Judith Jarvis Thomson, *Rights and Deaths*, 2 Phil. & Pub. Aff. 146 (1973)
- 3.4 Margaret Olivia Little, *Abortion, Intimacy, and the Duty to Gestate*, 2 Ethical Theory & Moral Prac. 295, 295–304 (1999)
- 3.5 I. Glenn Cohen, *Artificial Wombs and Abortion Rights*, Hastings Ctr. Rep., July 1, 2017

Feb. 23: No class

4 Mar. 1: Equality

- 4.1 Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904 (2017)
- 4.2 Sally Markowitz, *Abortion and Feminism*, in *The Problem of Abortion* 194 (Susan Dwyer & Joel Feinberg eds., 3d ed. 1997)
- 4.3 Rhonda Copelon, *Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy*, in *Judging the Constitution: Critical Essays on Judicial Lawmaking* 287 (Michael W. McCann & Gerald L. Houseman eds., 1989)
- 4.4 Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995)
- 4.5 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 365 (1985)

POLICY

- 5 **Mar. 1 (3:45–5:45 p.m.): Rights and responsibilities**
- 5.1 Int'l Planned Parenthood Fed'n, *Exclaim! Young People's Guide to 'Sexual Rights: An IPPF Declaration'* (Apr. 2011), https://www.ippf.org/sites/default/files/ippf_exclaim_lores.pdf
 - 5.2 Margaret Olivia Little, *Abortion, Intimacy, and the Duty to Gestate*, 2 *Ethical Theory & Moral Prac.* 295, 305–12 (1999)
 - 5.3 Don Marquis, *Manninen's Defense of Abortion Rights Is Unsuccessful*, 10 *Am. J. Bioethics* 56, 57 (2010)
 - 5.4 FindLaw, *Father's Rights and Abortion* (July 22, 2023), <https://www.findlaw.com/family/paternity/fathers-rights-and-abortion.html>
 - 5.5 Anne L. Alstott, *What Does a Fair Society Owe Children—and Their Parents?*, 72 *Fordham L. Rev.* 1941, 1941–42, 1944–46, 1950–52, 1962–79 (2004)
 - 5.6 Saul Smilansky, *Is There a Moral Obligation To Have Children?*, 12 *J. Applied Phil.* 41 (1995)
 - 5.7 George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 109 *Q.J. Econ.* 277 (1996)

6 Mar. 8: Exceptions

- 6.1 Pew Research Center, *America's Abortion Quandary* (May 2022)
- 6.2 Mabel Felix, Laurie Sobel & Alina Salganicoff, Kaiser Family Found., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services* (May 18, 2023)
- 6.3 Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an 'Impossible Choice' When Providing Care*, NPR (June 24, 2022)
- 6.4 Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. Times, Jan. 21, 2023
- 6.5 Nada Hassanein, *Medical Exceptions to Abortion Bans Often Exclude Mental Health Conditions*, 19th News (Oct. 24, 2023, 6:00 AM)
- 6.6 *In re State of Texas*, No. 23-0994 (Tex. Dec. 11, 2023) (slip op.)
- 6.7 Michelle Alexander, *My Rapist Apologized*, N.Y. Times (May 23, 2019)
- 6.8 I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J.L. Med. & Ethics 87 (2015)
- 6.9 Ariana Eunjung Cha, *Babies with Down Syndrome Are Put on Center Stage in the U.S. Abortion Fight*, Wash. Post, Mar. 5, 2018
- 6.10 Lee A. Hasselbacher, *Factors Influencing Parental Involvement Among Minors Seeking an Abortion: A Qualitative Study*, 104 Am. J. Pub. Health 2207 (2014)

Mar. 15: Spring Break

7 **Mar. 22: Agreement and disagreement**

- 7.1 Gallup, Abortion, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 16, 2024)
- 7.2 Pew Rsch. Ctr., Views About Abortion Among Adults in Mississippi, <https://www.pewresearch.org/religion/religious-landscape-study/state/mississippi/views-about-abortion/> (last visited Mar. 16, 2024)
- 7.3 Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. Times (Jan. 8, 2024, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>
- 7.4 Judith Jarvis Thomson & Peter de Marneffe, *Abortion: Whose Right?*, Bos. Rev., Summer/Fall 1995
- 7.5 Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 Harv. L. Rev. 728, 728–31, 760–66, 768–72, 774–76 (2024)
- 7.6 Jeremy Waldron, *Deliberation, Disagreement, and Voting*, in *Deliberative Democracy and Human Rights* 210 (Harold Hongju Koh & Ronald C. Slye eds., 2008)
- 7.7 Amy Gutmann, *Deliberative Democracy and Majority Rule: Reply to Waldron*, in *Deliberative Democracy and Human Rights* 227 (Harold Hongju Koh & Ronald C. Slye eds., 2008)
- 7.8 Doug Walker, *Why We Must Legislate Morality*, Claremont Inst. Ctr. for the Am. Way of Life (Aug. 22, 2022), <https://dc.claremont.org/why-we-must-legislate-morality/>

LAW

8 **Mar. 22 (3:45–5:45 p.m.): Unenumerated rights**

- 8.1 William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 *Stan. L. Rev.* (forthcoming 2024), <https://ssrn.com/id=4604902>
- 8.2 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)
- 8.3 *Lochner v. New York*, 198 U.S. 45 (1905)
- 8.4 *Meyer v. Nebraska*, 263 U.S. 390 (1923)
- 8.5 *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)
- 8.6 *Buck v. Bell*, 274 U.S. 200 (1927)
- 8.7 *Griswold v. Connecticut*, 381 U.S. 479 (1965)
- 8.8 *Eisenstadt v. Baird*, 405 U.S. 438 (1972)
- 8.9 *Bowers v. Hardwick*, 478 U.S. 186 (1986)
- 8.10 *Washington v. Glucksberg*, 521 U.S. 702 (1997)
- 8.11 *Lawrence v. Texas*, 539 U.S. 558 (2003)

9 **Mar. 29: History and tradition**

- 9.1 *Lawrence v. Texas*, 539 U.S. 558 (2003) (second excerpt)
- 9.2 *Roe v. Wade*, 410 U.S. 113 (1973)
- 9.3 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)

10 **Apr. 5: Abortion and the judiciary**

- 10.1 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)
- 10.2 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (second excerpt)

11 Apr. 12: Abortion federalism: state and nation

- 11.1 18 U.S.C. §§ 1461–1462
- 11.2 Application of the Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortions, 46 Op. O.L.C. __ (Dec. 23, 2022)
- 11.3 Brief of Ethics and Public Policy Center as *Amicus Curiae* in Support of Respondents, *FDA v. Alliance for Hippocratic Medicine*, Nos. 23-235, 23-236 (U.S. cert. granted Dec. 13, 2023)
- 11.4 Edward C. Liu & Wen W. Shen, Cong. Rsch. Serv., *The Hyde Amendment: An Overview*, In Focus (IF12167, July 20, 2022)
- 11.5 Brief for Petitioners, *Moyle v. United States*, No. 23-726 (U.S. cert. granted Jan. 5, 2024)
- 11.6 Brief for the Respondent, *Moyle v. United States*, No. 23-726 (U.S. cert. granted Jan. 5, 2024)
- 11.7 John Finnis, *Abortion Is Unconstitutional*, First Things, Apr. 2021, at 29
- 11.8 Edward Whelan, *Doubts About Constitutional Personhood*, First Things (Apr. 8, 2021)

12 Apr. 19: Abortion federalism: state to state

- 12.1 William Baude, *States of Confusion*, N.Y. Times, Jan. 22, 2006, at 17
- 12.2 Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451 (1992)
- 12.3 Complaint for Declaratory and Injunctive Relief, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450 (M.D. Ala. filed July 31, 2023)
- 12.4 Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450 (M.D. Ala. filed Aug. 28, 2023)

- 12.5 Yellowhammer Fund's Response in Opposition to Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450 (M.D. Ala. filed Sept. 28, 2023)
- 12.6 Reply in Support of Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450 (M.D. Ala. filed Oct. 12, 2023)
- 12.7 Statement of Interest of the United States in Support of Plaintiffs' Right to Travel Claim, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-450 (M.D. Ala. filed Nov. 9, 2023)
- 12.8 David S. Cohen et al., *Understanding Shield Laws*, 51 J.L. Med. & Ethics 584 (2023)