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# On the Moral and Legal Status of Abortion

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*The Monist*, Vol. 57, No. 4, 1973. Part II reprinted, with postscript, in *The Problem of Abortion*, 1984, Joel Feinberg, ed., Belmont: Wadsworth

<sup>1</sup> We will be concerned with both the moral status of abortion, which for our purposes we may define as the act that a woman performs in voluntarily terminating, or allowing another person to terminate, her pregnancy, and the legal status that is appropriate for this act. I will argue that, while it is not possible to produce a satisfactory defense of a woman's right to obtain an abortion without showing that a fetus is not a human being, in the morally relevant sense of that term, we ought not to conclude that the difficulties involved in determining whether or not a fetus is human make it impossible to produce any satisfactory solution to the problem of the moral status of abortion. For it is possible to show that, on the basis of intuitions which we may expect even the opponents of abortion to share, *a fetus is not a person, hence not the sort of entity to which it is proper to ascribe full moral rights.*

<sup>2</sup> Of course, while some philosophers would deny the possibility of any such proof,<sup>1</sup> others will deny that there is any need for it, since the moral permissibility of abortion appears to them to be too obvious to require proof. But the inadequacy of this attitude should be evident from the fact that both the friends and foes of abortion consider their position to be morally self-evident. Because proabortionists have never adequately come to grips with the conceptual issues surrounding abortion, most if not all, of the arguments which they advance in opposition to laws restricting access to abortion fail to refute or even weaken the traditional antiabortion argument, i.e., that a fetus is a human being, and therefore abortion is murder.

<sup>3</sup> These arguments are typically of one of two sorts. Either they point to the terrible side effects of the restrictive laws, e.g., the deaths due to illegal abortions, and the fact that it is poor women who suffer the most as a result of these laws, or else they state that to deny a woman access to abortion is to deprive her of her right to control her own body. Unfortunately, however, the fact that restricting access to abortion has tragic side effects does

not, in itself, show that the restrictions are unjustified, since murder is wrong regardless of the consequences of prohibiting it; and the appeal to the right to control one's body, which is generally construed as a property right, is at best a rather feeble argument for the permissibility of abortion. Mere ownership does not give me the right to kill innocent people whom I find on my property, and indeed I am apt to be held responsible if such people injure themselves while on my property. It is equally unclear that I have any moral right to expel an innocent person from my property when I know that doing so will result in his death.

<sup>4</sup> John Noonan is correct in saying that "the fundamental question in the long history of abortion is, How do you determine the humanity of a being?"<sup>2</sup> He summarizes his own antiabortion argument, which is a version of the official position of the Catholic Church, as follows:

... it is wrong to kill humans, however poor, weak, defenseless, and lacking in opportunity to develop their potential they may be. It is therefore morally wrong to kill infants. Similarly, it is morally wrong to kill embryos.<sup>3</sup>

<sup>5</sup> Noonan bases his claim that fetuses are human upon what he calls the theologians' criterion of humanity: that whoever is conceived of human beings is human. But although he argues at length for the appropriateness of this criterion, he never questions the assumption that if a fetus is human then abortion is wrong for exactly the same reason that murder is wrong.

<sup>6</sup> Judith Thomson is, in fact, the only writer I am aware of who has seriously questioned this assumption; she has argued that, even if we grant the antiabortionist his claim that a fetus is a human being, with the same right to life as any other human being, we can still demonstrate that, in at least some and perhaps most cases, a woman is under no moral obligation to complete an unwanted pregnancy.<sup>4</sup> Her argument is worth examining, since if it holds up it may enable us to establish the moral permissibility of abortion without becoming involved in problems about what entitles an entity to be considered human, and accorded full moral rights. To be able to do this would be a great gain in the power and simplicity of the proabortion position, since, although I will argue that these problems can be salved at least as decisively as can any other moral problem, we should certainly be pleased to be able to avoid having to solve them as part of the justification of abortion.

<sup>7</sup> On the other hand, even if Thomson's argument does not hold up, her insight, i.e., that it requires arguments to

<sup>1</sup> For example. Roger Wertheimer, who in "Understanding the Abortion Argument" (*Philosophy and Public Affairs* 1:1) argues that the problem of the moral status of abortion is insoluble, in that the dispute over the status of the fetus is not a question of fact at all, but only a question of how one responds to the facts.

<sup>2</sup> John Noonan, "Abortion and the Catholic Church: A Summary History," *Natural Law Forum*, 12 (1967).

<sup>3</sup> John Noonan, "Deciding Who Is Human," *Natural Law Forum*, 13 (1968), 134.

<sup>4</sup> "A Defense of Abortion."

show that if fetuses are human then abortion is properly classified as murder, is an extremely valuable one. The assumption she attacks is particularly invidious, for it amounts to the decision that it is appropriate, in deciding the moral status of abortion, to leave the rights of the pregnant woman out of consideration entirely, except possibly when her life is threatened. Obviously, this will not do; determining what moral rights, if any, a fetus possesses is only the first step in determining the moral status of abortion. Step two, which is at least equally essential, is finding a just solution to the conflict between whatever rights the fetus may have, and the rights of the woman who is unwillingly pregnant. While the historical error has been to pay far too little attention to the second step, Thomson's suggestion is that if we look at the second step first, we may find that a woman has a right to obtain an abortion *regardless* of what rights the fetus has.

<sup>8</sup> Our own inquiry will also have two stages. In Section I, we will consider whether or not it is possible to establish that abortion is morally permissible even on the assumption that a fetus is an entity with a full-fledged right to life. I will argue that in fact this cannot be established, at least not with the conclusiveness which is essential to our hopes of convincing those who are skeptical about the morality of abortion, and that we therefore cannot avoid dealing with the question of whether or not a fetus really does have the same right to life as a (more fully developed) human being.

<sup>9</sup> In Section II, I will propose an answer to this question, namely, that a fetus cannot be considered a member of the moral community, the set of beings with full and equal moral rights, for the simple reason that it is not a person, and that it is personhood, and not genetic humanity, i.e., humanity as defined by Noonan, which is the basis for membership in this community. I will argue that a fetus, whatever its stage of development, satisfies none of the basic criteria of personhood, and is not even enough *like* a person to be accorded even some of the same rights on the basis of this resemblance. Nor, as we will see, is a fetus's *potential* personhood a threat to the morality of abortion, since, whatever the rights of potential people may be, they are invariably overridden in any conflict with the moral rights of actual people.

## Part I

<sup>10</sup> We turn now to Professor Thomson's case for the claim that even if a fetus has full moral rights, abortion is still morally permissible, at least sometimes, and for some reasons other than to save the woman's life. Her argument is based upon a clever, but I think faulty, thinking. She asked us to picture ourselves waking up one day, in bed with a famous violinist. Imagine that you have been kidnapped, and your bloodstream hooked up to that of the violinist, who happens to have an ailment that will certainly kill him unless he is permitted to share your

kidneys for a period of nine months. No one else can save him, since you alone have the right type of blood. He will be unconscious all that time, and you will have to stay in bed with him, but after the nine months are over he may be unplugged, completely cured, that is provided that you have cooperated.

<sup>11</sup> Now then, she continues, what are your obligations in this situation? The antiabortionist, if he is consistent, will have to say that you are obligated to stay in bed with the violinist: for all people have a right to life, and violinists are people, and therefore it would be murder for you to disconnect yourself from him and let him die.<sup>5</sup> But this is outrageous, and so there must be something wrong with the same argument when it is applied to abortion. It would certainly be commendable of you to agree to save the violinist, but it is absurd to suggest that your refusal to do so would be murder. His right to life does not obligate you to do whatever is required to keep him alive; nor does it justify anyone else forcing you to do so. A law that required you to stay in bed with the violinist would clearly be an unjust law, since it is no proper function of the law to force unwilling people to make huge sacrifice for the sake of other people toward whom they have no such prior obligation. Thomson concludes that, if this analogy is an apt one, then we can grant the antiabortionist his claim that a fetus is a human being, and still hold that it is at least sometimes the case that a pregnant woman has the right to refuse to be a Good Samaritan towards the fetus, i.e., to obtain an abortion. For there is a great gap between the claim that x has a right to life, and the claim that y is obligated to do whatever is necessary to keep x alive, let alone that he ought to be forced to do so. It is y's duty to keep x alive only if he somehow contracted a special obligation to do so; a woman who is unwillingly pregnant, e.g., who was raped, has done nothing which obligates her to make the enormous sacrifice which is necessary to preserve the conceptus.

<sup>12</sup> This argument is initially quite plausible, and in the extreme case of pregnancy due to rape, it is probably conclusive. Difficulties arise, however, when we try to specify more exactly the range of cases in which abortion is clearly justifiable even on the assumption that the fetus is human. Professor Thomson considers it a virtue of her argument that it does not enable us to conclude that abortion is always permissible. It would, she says, be "indecent" for a woman in seventh month to obtain an abortion just to avoid having to postpone a trip to Europe. On the other hand, her argument enables us to see that "a sick and desperately frightened schoolgirl pregnant due to rape may of course choose abortion, and that any law which rules this out is an insane law" (p. 65). So far, so good, but what are we to say about the woman who

<sup>5</sup> Judith Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1:1.

becomes pregnant not through rape but as a result of her own carelessness, or because of contraceptive failure, or who gets pregnant intentionally and then changes her mind about wanting a child? With respect to such cases, the violinist analogy is of much less use to the defender of the woman's right to obtain an abortion.

<sup>13</sup> Indeed, the choice of a pregnancy due to rape, as an example of a case in which abortion is permissible even if a fetus is considered a human being, is extremely significant; for it is only in the case of pregnancy due to rape that the woman's situation is adequately analogous to the violinist case for our intuitions about the latter to transfer convincingly. The crucial difference between a pregnancy due to rape and the normal case of an unwanted pregnancy is that in the normal case we cannot claim that the woman is in no way responsible for her predicament; she could have remained chaste, or taken her pills more faithfully or abstained on dangerous days, and so on. If on the other hand, you are kidnapped by strangers, and hooked up to a strange violinist, then you are free of any shred of responsibility for the situation, on the basis of which it would be argued that you are obligated to keep the violinist alive. Only when her pregnancy is due to rape is a woman clearly just as nonresponsible.<sup>6</sup>

<sup>14</sup> Consequently, there is room for the antiabortionist to argue that in the normal case of unwanted pregnancy a woman has, by her own actions, assumed responsibility of the fetus. For if x behaves in a way which he could have avoided, and which he knows involves, let us say, a 1 percent chance of bringing into existence a human being, with a right to life, and does so knowing that if this should happen then that human being will perish unless x does certain things to keep him alive, then it is by no means clear that when it does happen x is free of any obligation to what he knew in advance would be required to keep that human being alive.

<sup>15</sup> The plausibility of such an argument is enough to show that the Thomson analogy can provide a clear and persuasive defense of a woman's right to obtain an abortion only with respect to those cases in which the woman is in no way responsible for her pregnancy, e.g., where it is due to rape. In all other cases, we would almost certainly conclude that it was necessary to look carefully at the particular circumstances in order to determine the extent of the woman's responsibility and hence the extent of her obligation. This is an extremely unsatisfactory outcome, from the viewpoint of the

<sup>6</sup> We may safely ignore the fact that she might have avoided getting raped, e.g., by carrying a gun, since by similar means you might likewise have avoided getting kidnapped, and in neither case does the victim's failure to take all possible precautions against a highly unlikely event (as opposed to reasonable precautions against a rather likely event) mean that he is morally responsible for what happens.

opponents of restrictive abortion laws, most of whom are convinced that a woman has a right to obtain an abortion regardless of how and why she got pregnant.

<sup>16</sup> Of course, a supporter of the violinist analogy might point out that it is absurd to suggest that forgetting her pill one day might be sufficient to obligate a woman to complete an unwanted pregnancy. And indeed, it is absurd to suggest this. As we will see, the moral right to obtain an abortion is not in the least dependent upon the extent to which a woman is responsible for her pregnancy. But unfortunately, once we allow the assumption that a fetus has full moral rights, we cannot avoid taking this absurd suggestion seriously. Perhaps we can make this point more clear by altering the violinist story just enough to make it more analogous to a normal unwanted pregnancy and less to a pregnancy due to rape, and then seeing whether it is still obvious that you are not obligated to stay in bed with the fellow.

<sup>17</sup> Suppose, then, that violinists are peculiarly prone to the sort of illness the only cure for which is the use of someone else's bloodstream for nine months, and that because of this there has been formed a society of music lovers who agree that whenever a violinist is stricken they will draw lots and the loser will, by some means, be made the one and only person capable of saving him. Now then, would you be obligated to cooperate in curing the violinist if you had voluntarily joined this society, knowing the possible consequences, and then your name had been drawn and you had been kidnapped? Admittedly, you did not promise ahead of time that you would, but you did deliberately place yourself in a position in which it might happen that a human life would be lost if you did not. Surely, this is at least a *prima facie* reason for supposing that you have an obligation to stay in bed with the violinist. Suppose that you had gotten your name drawn deliberately; surely that would be quite a strong reason for thinking that you had such an obligation.

<sup>18</sup> It might be suggested that there is one important disanalogy between the modified violinist case and the case of an unwanted pregnancy, which makes the woman's responsibility significantly less, namely, the fact that the fetus comes into existence as the result of the woman's actions. This fact might give her a right to refuse to keep it alive, whereas she would not have had this right had it existed previously, independently, and then as a result of her actions become dependent upon her for its survival.

<sup>19</sup> My own intuition, however, is that x has no more right to bring into existence, either deliberately or as a foreseeable result of actions he could have avoided, a being with full moral rights y, and then refuse to do what he knew beforehand would be required to keep that being alive, than he has to enter into an agreement with an existing person, whereby he may be called upon to save that person's life, and then refuse to do so when so called

upon. Thus x's responsibility for y's existence does not seem to lessen his obligation to keep y alive, if he is also responsible for y's being in a situation in which only he can save him.

<sup>20</sup> Whether or not this intuition is entirely correct, it brings us back once again to the conclusion that once we allow the assumption that a fetus has full moral rights it becomes an extremely complex and difficult question whether and when abortion is justifiable. Thus the Thomson analogy cannot help us produce a clear and persuasive proof of the moral permissibility of abortion. Nor will the opponents of the restrictive laws thank us for anything less; for their conviction (for the most part) is that abortion is obviously *not* a morally serious and extremely unfortunate, even though sometimes justified act, comparable to killing in self-defense or to letting the violinist die, but rather is closer to being a morally neutral act, like cutting one's hair.

<sup>21</sup> The basis of this conviction, I believe, is the realization that a fetus is not a person, and thus does not have a full-fledged right to life. Perhaps the reason why this claim has been so inadequately defended is that it seems self-evident to those who accept it. And so it is, insofar as it follows from what I take to be perfectly obvious claims about the nature of personhood, and about the proper grounds for ascribing moral rights, claims which ought, indeed, to be obvious to both the friends and foes of abortion. Nevertheless, it is worth examining these claims, and showing how they demonstrate the moral innocuousness of abortion, since this apparently has not been adequately done before.

## Part II

<sup>22</sup> The question which we must answer in order to produce a satisfactory solution to the problem of the moral status of abortion is this: How are we to define the moral community, the set of beings with full and equal moral rights, such that we can decide whether a human fetus is a member of this community or not? What sort of entity, exactly, has the inalienable rights to life, liberty, and the pursuit of happiness? Jefferson attributed these rights to all men ... If so, then we arrive, first, at Noonan's problem of defining what makes a being human, and, second, at the equally vital question which Noonan does not consider, namely, *What reason is there for identifying the moral community with the set of all human beings, in whatever way we have chosen to define that term?*

### 1. On the Definition of "Human"

<sup>23</sup> One reason why this vital second question is so frequently overlooked in the debate over the moral status of abortion is that the term "human" has two distinct, but not often distinguished, senses. This fact results in a slide of

meaning, which serves to conceal the fallaciousness of the traditional argument that since (1) it is wrong to kill innocent human beings, and (2) fetuses are innocent human beings, then (3) it is wrong to kill fetuses. For if "human" is used in the same sense in both (1) and (2) then, whichever of the two uses is meant, one of these premises is question-begging. And if it is used in two different senses then of course the conclusion doesn't follow.

<sup>24</sup> Thus, (1) is a self-evident moral truth,<sup>7</sup> and avoids begging the question about abortion, only if "human being" is used to mean something like "a full-fledged member of the moral community." (It may or may not also be meant to refer exclusively to members of the species *Homo sapiens*.) We may call this the *moral* sense of "human." It is not to be confused with what we will call the *genetic* sense; i.e., the sense in which a member of the species is a human being, and no member of any other species could be. If (1) is acceptable only if the moral sense is intended, (2) is non-question-begging only if what is intended is the genetic sense.

<sup>25</sup> In "Deciding Who Is Human," Noonan argues for the classification of fetuses with human beings by pointing to the presence of the full genetic code, and the potential capacity for rational thought (p. 135). It is clear that what he needs to show, for his version of the traditional argument to be valid, is that fetuses are human in the moral sense, the sense in which it is analytically true that all human beings have full moral rights. But, in the absence of any argument showing that whatever is genetically human is also morally human, and he gives none, nothing more than genetic humanity can be demonstrated by the presence of the human genetic code. And, as we will see, the *potential* capacity for rational thought can at most show that an entity has the potential for becoming human in the moral sense.

### 2. Defining the Moral Community

<sup>26</sup> Can it be established that genetic humanity is sufficient for moral humanity? I think that there are very good reasons for *not* defining the moral community in this way. I would like to suggest an alternative way of defining the moral community, which I will argue for only to the extent of explaining why it is, or should be, self-evident. The suggestion is simply that the moral community consists of all and *only* people, rather than all and only human beings,<sup>8</sup> and probably the best way of

<sup>7</sup> Of course, the principle that it is (always) wrong to kill innocent human beings is in need of many other modifications, e.g., that it may be permissible to do so to save a greater number of other innocent human beings, but we may safely ignore these complications here.

<sup>8</sup> From here on, we will use "human" to mean genetically human, since the moral sense seems closely connected to, and

demonstrating its self-evidence is by considering the concept of personhood, to see what sorts of entity are and are not persons, and what the decision that a being is or is not a person implies about its moral rights.

<sup>27</sup> What characteristics entitle an entity to be considered a person? This is obviously not the place to attempt a complete analysis of the concept of personhood, but we do not need such a fully adequate analysis just to determine whether and why a fetus is or isn't a person. All we need is a rough and approximate list of the most basic criteria of personhood, and some idea of which, or how many, of these an entity must satisfy in order to properly be considered a person.

<sup>28</sup> In searching for such criteria, it is useful to look beyond the set of people with whom we are acquainted, and ask how we would decide whether a totally alien being was a person or not. (For we have no right to assume that genetic humanity is necessary for personhood.) Imagine a space traveler who lands on an unknown planet and encounters a race of beings utterly unlike any he has ever seen or heard of. If he wants to be sure of behaving morally toward these beings, he has to somehow decide whether they are people, and hence have full moral rights, or whether they are the sort of thing which he need not feel guilty about treating as, for example, a source of food.

<sup>29</sup> How should he go about making this decision? If he has some anthropological background, he might look for such things as religion, art, and the manufacturing of tools, weapons, or shelters, since these factors have been used to distinguish our human from our prehuman ancestors, in what seems to be closer to the moral than the genetic sense of "human." And no doubt he would be right to consider the presence of such factors as good evidence that the alien beings were people, and morally human. It would, however, be overly anthropocentric of him to take the absence of these things as adequate evidence that they were not, since we can imagine people who have progressed beyond, or evolved without ever developing these cultural characteristics.

<sup>30</sup> I suggest that the traits which are most central to the concept of personhood, or humanity<sup>31</sup> in the moral sense, are, very roughly; the following:

1. consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain;
2. reasoning (the *developed* capacity to solve new and relatively complex problems);
3. self-motivated activity (activity which is relatively independent of either genetic or direct external control);

perhaps derived from, the assumption that genetic humanity is sufficient for membership in the moral community.

4. the capacity to communicate, by whatever means, messages of an indefinite variety of types, that is, not just with an indefinite number of possible contents, but on indefinitely many possible topics;

5. the presence of self-concepts, and self-awareness, either individual or racial, or both.

<sup>31</sup> Admittedly, there are apt to be a great many problems involved in formulating precise definitions of these criteria, let alone in developing universally valid behavioral criteria for deciding when they apply. But I will assume that both we and our explorer know approximately what (1)-(5) mean, and that he is also able to determine whether or not they apply. How, then, should he use his findings to decide whether or not the alien beings are people? We needn't suppose that an entity must have all of these attributes to be properly considered a person; (1) and (2) alone may well be sufficient for personhood, and quite probably (1)-(3), if "activity" is construed so as to include the activity of reasoning.

<sup>32</sup> All we need to claim, to demonstrate that a fetus is not a person, is that any being which satisfies none of (1)-(5) is certainly not a person. I consider this claim to be so obvious that I think anyone who denied it, and claimed that a being which satisfied none of (1)-(5) was a person all the same, would thereby demonstrate that he had no notion at all of what a person is—perhaps because he had confused the concept of a person with that of genetic humanity. If the opponents of abortion were to deny the appropriateness of these five criteria, I do not know what further arguments would convince them. We would probably have to admit that our conceptual schemes were indeed irreconcilably different, and that our dispute could not be settled objectively.

<sup>33</sup> I do not expect this to happen, however, since I think that the concept of a person is one which is very nearly universal (to people), and that it is common to both proabortionists and antiabortionists, even though neither group has fully realized the relevance of this concept to the resolution of their dispute. Furthermore, I think that on reflection even the antiabortionists ought to agree not only that (1) - (5) are central to the concept of personhood, but also that it is a part of this concept that all and only people have full moral rights. The concept of a person is in part a moral concept; once we have admitted that x is a person we have recognized, even if we have not agreed to respect, x's right to be treated as a member of the moral community. It is true that the claim that x is a *human being* is more commonly voiced as part of an appeal to treat x decently than is the claim that x is a person, but this is either because "human being" is here used in the sense which implies personhood, or because the genetic and moral sense of "human" have been confused.

<sup>34</sup> Now if (1)-(5) are indeed the primary criteria of personhood, then it is clear that genetic humanity is

neither necessary nor sufficient for establishing that an entity is a person. Some human beings are not people, and there may well be people who are not human beings. A man or woman whose consciousness has been permanently obliterated but who remains alive is a human being which is no longer a person; defective human beings, with no appreciable mental capacity, are not and presumably never will be people; and a fetus is a human being which is not yet a person, and which therefore cannot coherently be said to have full moral rights. Citizens of the next century should be prepared to recognize highly advanced, self-aware robots or computers, should such be developed, and intelligent inhabitants of other worlds, should such be found, as people in the fullest sense, and to respect their moral rights. But to ascribe full moral rights to an entity which is not a person is as absurd as to ascribe moral obligations and responsibilities to such an entity.

### 3. Fetal Development and the Right to Life

<sup>35</sup> Two problems arise in the application of these suggestions for the definition of the moral community to the determination of the precise moral status of a human fetus. Given that the paradigm example of a person is a normal adult being, then (1) How like this paradigm, in particular how far advanced since conception, does a human being need to be before it begins to have a right to life by virtue, not of being fully a person as of yet, but of being like a person? and (2) To what extent, if any does the fact that a fetus has the potential for becoming a person endow it with some of the same rights? Each of these questions requires some comment.

<sup>36</sup> In answering the first question, we need not attempt a detailed consideration of the moral rights of organisms which are not developed enough, aware enough, intelligent enough, etc., to be considered people, but which resemble people in some respects. It does seem reasonable to suggest that the more like a person, in the relevant respects, a being is, the stronger is the case for regarding it as having a right to life, and indeed the stronger its right to life is. Thus we ought to take seriously the suggestion that, insofar as "the human individual develops biologically in a continuous fashion ... the rights of a human person might develop in the same way".<sup>9</sup> But we must keep in mind that the attributes which are relevant in determining whether or not an entity is enough like a person to be regarded as having some of the same moral rights are no different from those which are relevant to determining whether or not it is fully a person—i.e., are no different from (1)-(5)—and that being genetically human, or having recognizably human facial and other physical features, or detectable brain activity, or

the capacity to survive outside the uterus, are simply not among these relevant attributes.

<sup>37</sup> Thus it is clear that even though a seven- or eight-month fetus has features which make it apt to arouse in us almost the same powerful protective instinct as is commonly aroused by a small infant, nevertheless it is not significantly more personlike than is a very small embryo. It is *somewhat* more personlike; it can apparently feel and respond to pain, and it may even have a rudimentary form of consciousness, insofar as its brain is quite active. Nevertheless, it seems safe to say that it is not fully conscious, in the way that an infant of a few months is, and that it cannot reason, or communicate messages of indefinitely many sorts, does not engage in self-motivated activity; and has no self-awareness. Thus, in the relevant respects, a fetus, even a fully developed one, is considerably less personlike than is the average mature mammal, indeed the average fish. And I think that a rational person must conclude that if the right to life of a fetus is to be based upon its resemblance to a person, then it cannot be said to have any more right to life than, let us say, a newborn guppy (which also seems to be capable of feeling pain), and that a right of that magnitude could never override a woman's right to obtain an abortion, at any stage of her pregnancy.

<sup>38</sup> There may, of course, be other arguments in favor of placing legal limits upon the stage of pregnancy in which an abortion may be performed. Given the relative safety of the new techniques of artificially inducing labor during the third trimester, the danger to the woman's life or health is no longer such an argument.

<sup>39</sup> Neither is the fact that people tend to respond to the thought of abortion in the later stages of pregnancy with emotional repulsion, since mere emotional responses cannot take the place of moral reasoning in determining what ought to be permitted. Nor, finally, is the frequently heard argument that legalizing abortion, especially late in the pregnancy, may erode the level of respect for human life, leading, perhaps, to an increase in unjustified euthanasia and other crimes. For this threat, if it is a threat, can be better met by educating people to the kinds of moral distinctions which we are making here than by limiting access to abortion (which limitation may, in its disregard for the rights of women, be just as damaging to the level of respect for human rights).

<sup>40</sup> Thus, since *the fact that even a fully developed fetus is not personlike enough to have any significant right to life on the basis of its personlikeness* shows that no legal restrictions upon the stage of pregnancy in which an abortion may be performed can be justified on the grounds that we should protect the rights of the older fetus. And once there is no other apparent justification for such restrictions, we may conclude that they are entirely unjustified. Whether or not it would be indecent (whatever that means) for a woman in her seventh month

<sup>9</sup> Thomas L. Hayes, "A Biological View," *Commonweal* 85.

to obtain an abortion just to avoid having to postpone a trip to Europe, it would not, in itself, be immoral, and therefore it ought to be permitted.

#### 4. Potential Personhood and the Right to Life

<sup>41</sup> We have seen that a fetus does not resemble a person in any way that can support the claim that it has even some of the same rights. But what about its *potential*, the fact that if nurtured and allowed to develop naturally it will very probably become a person? Doesn't that alone give it at least some right to life? It is hard to deny that the fact that an entity is a potential person is a strong *prima facie* reason for not destroying it, but we need not conclude from this that a potential person has a right to life, by virtue of that potential. It may be that our feeling that it is better, other things being equal, not to destroy a potential person is better explained by the fact that potential people are still (felt to be) an invaluable resource, not to be lightly squandered. Surely, if every speck of dust were a potential person, we would be much less apt to conclude that every potential person has a right to become actual.

<sup>42</sup> Still, we do not need to insist that a potential person has no right to life whatever. There may well be something immoral, and not just imprudent, about wantonly destroying potential people, when doing so isn't necessary to protect anyone's rights. But even if a potential person does have some *prima facie* right to life, such a right could not possibly outweigh the right of a woman to obtain an abortion, since the rights of any actual person invariably outweigh those of any potential person, whenever the two conflict. Since this may not be immediately obvious in the case of a human fetus, let us look at another case.

<sup>43</sup> Suppose that our space explorer falls into the hands of an alien culture, whose scientists decide to create a few hundred thousand or more human beings, by breaking his body into its component cells, and using these to create fully developed human beings, with, of course, his genetic code. We may imagine that each of these newly created men will have all of the original man's abilities, skills, knowledge, and so on, and also have an individual self-concept, in short that each of them will be a *bona fide* (though hardly unique) person. Imagine that the whole project will take only seconds, and that its chances of success are extremely high, and that our explorer knows all of this, and also knows that these people will be treated fairly. I maintain that in such a situation he would have every right to escape if he could, and thus to deprive all of these potential people of their potential lives; for his right to life outweighs all of theirs together, in spite of the fact that they are all genetically human, all innocent, and all have a very high probability of becoming people very soon, if only he refrains from acting.

<sup>44</sup> Indeed, I think he would have a right to escape even if it were not his life which the alien scientists planned to take, but only a year of his freedom, or, indeed, only a day. Nor would he be obligated to stay if he had gotten captured (thus bringing all these people-potentials into existence) because of his own carelessness, or even if he had done so deliberately knowing the consequences. Regardless of how he got captured, he is not morally obligated to remain in captivity for any period of time for the sake of permitting any number of potential people to come into actuality, so great is the margin by which one actual person's right to liberty outweighs whatever right to life even a hundred thousand potential people have. And it seems reasonable to conclude that the rights of a woman will outweigh by a similar margin whatever right to life a fetus may have by virtue of its potential personhood.

<sup>45</sup> Thus, neither a fetus's resemblance to a person, nor its potential for becoming a person, provides any basis whatsoever for the claim that it has any significant right to life. Consequently, a woman's right to protect her health, happiness, freedom, and even her life,<sup>10</sup> by terminating an unwanted pregnancy will always override whatever right to life it may be appropriate to ascribe to a fetus, even a fully developed one. And thus, in the absence of any overwhelming social need for every possible child, the laws which restrict the right to obtain an abortion, or limit the period of pregnancy during which an abortion maybe performed, are a wholly unjustified violation of a woman's most basic moral and constitutional rights.<sup>11</sup>

#### Postscript on Infanticide, February 26, 1982

<sup>46</sup> One of the most troubling objections to the argument presented in this article is that it may appear to justify not only abortion but infanticide as well. A newborn infant is not a great deal more personlike than a ninemonth fetus, and thus it might seem that if late-term abortion is sometimes justified, then infanticide must also be sometimes justified. Yet most people consider that infanticide is a form of murder, and thus never justified.

<sup>47</sup> While it is important to appreciate the emotional force of this objection, its logical force is far less than it may seem at first glance. There are many reasons why infanticide is much more difficult to justify than abortion, even though if my argument is correct neither constitutes the killing of a person. In this country, and in this period of history, the deliberate killing of viable newborns is virtually never justified. This is in part because neonates are so very close to being persons that to kill them requires a very

<sup>10</sup> That is, insofar as the death rate, for the woman, is higher for childbirth than for early abortion.

<sup>11</sup> My thanks to the following people, who were kind enough to read and criticize an earlier version of this paper: Herbert Gold, Gene Glass, Anne Lauterbach, Judith Thomson, Mary Mothersill, and Timothy Binkley.

strong moral justification as does the killing of dolphins, whales, chimpanzees, and other highly personlike creatures. It is certainly wrong to kill such beings just for the sake of convenience, or financial profit, or "sport."

<sup>48</sup> Another reason why infanticide is usually wrong, in our society, is that if the newborn's parents do not want it, or are unable to care for it, there are (in most cases) people who are able and eager to adopt it and to provide a good home for it. Many people wait years for the opportunity to adopt a child, and some are unable to do so even though there is every reason to believe that they would be good parents. The needless destruction of a viable infant inevitably deprives some person or persons of a source of great pleasure and satisfaction, perhaps severely impoverishing their lives. Furthermore, even if an infant is considered to be adoptable (e.g., because of some extremely severe mental or physical handicap) it is still wrong in most cases to kill it. For most of us value the lives of infants, and would prefer to pay taxes to support orphanages and state institutions for the handicapped rather than to allow unwanted infants to be killed. So long as most people feel this way, and so long as our society can afford to provide care for infants which are unwanted or which have special needs that preclude home care, it is wrong to destroy any infant which has a chance of living a reasonably satisfactory life.

<sup>49</sup> If these arguments show that infanticide is wrong, at least in this society, then why don't they also show that late-term abortion is wrong? After all, third trimester fetuses are also highly personlike, and many people value them and would much prefer that they be preserved; even at some cost to themselves. As a potential source of pleasure to some family, a viable fetus is just as valuable as a viable infant. But there is an obvious and crucial difference between the two cases: once the infant is born, its continued life cannot (except, perhaps, in very exceptional cases) pose any serious threat to the woman's life or health, since she is free to put it up for adoption, or, where this is impossible, to place it in a state-supported institution. While she might prefer that it die, rather than being raised by others, it is not clear that such a preference would constitute a right on her part. True, she may suffer greatly from the knowledge that her child will be thrown into the lottery of the adoption system, and that she will be unable to ensure its well-being, or even to know whether it is healthy, happy, doing well in school, etc.: for the law generally does not permit natural parents to remain in contact with their children, once they are adopted by another family. But there are surely better ways of dealing with these problems than by permitting infanticide in such cases. (It might help, for instance, if the natural parents of adopted children could at least receive some information about their progress, without necessarily being informed of the identity of the adopting family.)

<sup>50</sup> In contrast, a pregnant woman's right to protect her own life and health clearly outweighs other people's desire that the fetus be preserved—just as, when a person's life or limb is threatened by some wild animal, and when the threat cannot be removed without killing the animal, the person's right to self-protection outweighs the desires of those who would prefer that the animal not be harmed. Thus, while the moment of birth may not mark any sharp discontinuity in the degree to which an infant possesses a right to life, it does mark the end of the mother's absolute right to determine its fate. Indeed, if and when a late-term abortion could be safely performed without killing the fetus, she would have no absolute right to insist on its death (e.g., if others wish to adopt it or pay for its care), for the same reason that she does not have a right to insist that a viable infant be killed.

<sup>51</sup> It remains true that according to my argument neither abortion nor the killing of neonates is properly considered a form of murder. Perhaps it is understandable that the law should classify infanticide as murder or homicide, since there is no other existing legal category which adequately or conveniently expresses the force of our society's disapproval of this action. But the moral distinction remains, and it has several important consequences.

<sup>52</sup> In the first place, it implies that when an infant is born into a society which—unlike ours—is so impoverished that it simply cannot care for it adequately without endangering the survival of existing persons, killing it or allowing it to die is not necessarily wrong—provided that there is no *other* society which is willing and able to provide such care. Most human societies, from those at the hunting and gathering stage of economic development to the highly civilized Greeks and Romans, have permitted the practice of infanticide under such unfortunate circumstances, and I would argue that it shows a serious lack of understanding to condemn them as morally backward for this reason alone.

<sup>53</sup> In the second place, the argument implies that when an infant is born with such severe physical anomalies that its life would predictably be a very short and/or very miserable one, even with the most heroic of medical treatment, and where its parents do not choose to bear the often crushing emotional, financial and other burdens attendant upon the artificial prolongation of such a tragic life, it is not morally wrong to cease or withhold treatment, thus allowing the infant a painless death. It is wrong (and sometimes a form of murder) to practice involuntary euthanasia on persons, since they have the right to decide for themselves whether or not they wish to continue to live. But terminally ill neonates cannot make this decision for themselves, and thus it is incumbent upon responsible persons to make the decision for them, as best they can. The mistaken belief that infanticide is always tantamount to murder is responsible for a great deal of unnecessary suffering, not just on the part of

infants which are made to endure needlessly prolonged and painful deaths, but also on the part of parents, nurses, and other involved persons, who must watch infants suffering needlessly, helpless to end that suffering in the most humane way.

<sup>54</sup> I am well aware that these conclusions, however modest and reasonable they may seem to some people, strike other people as morally monstrous, and that some people might even prefer to abandon their previous support for women's right to abortion rather than accept a theory which leads to such conclusions about infanticide. But all that these facts show is that abortion is not an isolated moral issue; to fully understand the moral status of abortion we may have to reconsider other moral issues as well, issues not just about infanticide and euthanasia, but also about the moral rights of women and of nonhuman animals. It is a philosopher's task to criticize mistaken beliefs which stand in the way of moral understanding, even when—perhaps especially when—those beliefs are popular and widespread. The belief that moral strictures against killing should apply equally to *all* genetically human entities, and *only* to genetically human entities, is such an error. The overcoming of this error will undoubtedly require long and often painful struggle; but it must be done.



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