

D&X, which is sometimes used for late second-trimester abortions, as well as for third-trimester abortions, can be understood as a variation on the D&E procedure discussed earlier. In its most notable form, intact D&X involves the partial, feet-first delivery of the fetus, followed by extraction of the brain in order to collapse the skull, so that the head can then pass through the cervix. Whereas standard D&E results in a dismembered fetus, intact D&X results in an "intact" fetus. The history of legislative efforts to ban "partial-birth abortion" is already complex, as is the history of constitutional challenges to such bans. In *Stenberg v. Carhart* (2000), the United States Supreme Court struck down Nebraska's ban on "partial-birth abortion." At the time this case was decided, similar bans existed in about thirty states. Subsequently, Congress passed the Partial Birth Abortion Ban Act of 2003. The Supreme Court upheld this ban in *Gonzalez v. Carhart* (2007), in a five-to-four opinion.

A final development worth noting here in connection with abortion and public policy is increased legislative activity at the state level. Specifically, many states have been passing, or attempting to pass, laws that regulate or restrict abortion. For example, the South Dakota legislature in 2006 overwhelmingly passed a measure that would have outlawed abortion in all cases except where necessary to save the mother's life—only to see voters defeat the referendum at the polls. In 2008, the state attempted to pass a slightly less restrictive measure—which would allow abortion only in cases of rape, incest, or to protect the life or health (as narrowly interpreted) of the mother, but voters rejected this measure as well. In 2010, the Governor of Nebraska signed into law a measure that bans abortions beginning at twenty weeks of pregnancy, a restriction based on the claim that fetuses acquire sentience or the ability to feel pain at that gestational age. Because this claim is scientifically controversial, and because the appeal to sentience is legally unprecedented, at the time of this writing (August 2010) it seems certain that Nebraska's new law will be challenged in court. The ultimate legal outcome, of course, is a matter of uncertainty—as are so many other abortion-related issues.

On the Moral and Legal Status of Abortion

Mary Anne Warren

Warren, defending the liberal view on abortion, promptly distinguishes two senses of the term *human*: (1) One is human in the *genetic sense* when one is a member of the biological species *Homo sapiens*. (2) One is human in the *moral sense* when one is a full-fledged member of the moral community. Warren attacks the presupposition underlying the standard conservative argument against abortion—that the fetus is human in the moral sense. She contends that the moral community,

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the set of beings with full and equal moral rights, consists of all and only people (persons). (Thus, she takes the concept of personhood to be equivalent to the concept of humanity in the moral sense.) After analyzing the concept of a person, she concludes that there is no stage of fetal development at which a fetus resembles a person enough to have a significant right to life. She also argues that the fetus's *potential* for being a person does not provide a basis for the claim that it has a significant right to life. It follows, in her view, that a woman's right to obtain an abortion is absolute. Abortion is morally justified at any stage of fetal development, and no legal restrictions should be placed on a woman's right to abort. In a concluding postscript, Warren briefly assesses the moral justifiability of infanticide.

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*, and it may or may not be fair to suggest that he intended to attribute them *only* to men. Perhaps he ought to have attributed them to all human beings. If so, then we arrive, first, at [John] 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"

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 senses 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.

Thus, (1) is a self-evident moral truth,¹ 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 *any* 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.

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.² 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

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;³ and probably the best way of 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.

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.

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.

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.

I suggest that the traits which are most central to the concept of personhood, or humanity 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);

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3 self-motivated activity (activity which is relatively independent of either genetic or direct external control);

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.

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) are sufficient. Neither do we need to insist that any one of these criteria is *necessary* for personhood, although once again (1) and (2) look like fairly good candidates for necessary conditions, as does (3), if "activity" is construed so as to include the activity of reasoning.

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.

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 senses of "human" have been confused.

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

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 human 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.

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."⁴ 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.

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

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person, then it cannot be said to have any more right to life than, let us say, a new-born 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.

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. 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).

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 since 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 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

We have seen that a fetus does not resemble a person in any way which 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.

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.

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.

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.

Thus, neither a fetus's resemblance to a person, nor its potential for becoming a person provides any basis whatever 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,⁵ 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 may be performed, are a wholly unjustified violation of a woman's most basic moral and constitutional rights.⁶

POSTSCRIPT ON INFANTICIDE

Since the publication of this article, many people have written to point out that my argument appears to justify not only abortion, but infanticide as well. For a newborn infant is not significantly more personlike than an advanced fetus, and consequently it would seem that if the destruction of the latter is permissible so too must

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be that of the former. Inasmuch as most people, regardless of how they feel about the morality of abortion, consider infanticide a form of murder, this might appear to represent a serious flaw in my argument.

Now, if I am right in holding that it is only people who have a full-fledged right to life, and who can be murdered, and if the criteria of personhood are as I have described them, then it obviously follows that killing a newborn infant isn't murder. It does *not* follow, however, that infanticide is permissible, for two reasons. In the first place, it would be wrong, at least in this country and in this period of history, and other things being equal, to kill a newborn infant, because even if its parents do not want it and would not suffer from its destruction, there are other people who would like to have it, and would, in all probability, be deprived of a great deal of pleasure by its destruction. Thus, infanticide is wrong for reasons analogous to those which make it wrong to wantonly destroy natural resources, or great works of art.

Secondly, most people, at least in this country, value infants and would much prefer that they be preserved, even if foster parents are not immediately available. Most of us would rather be taxed to support orphanages than allow unwanted infants to be destroyed. So long as there are people who want an infant preserved, and who are willing and able to provide the means of caring for it, under reasonably humane conditions, it is, *ceteris paribus*, wrong to destroy it.

But, it might be replied, if this argument shows that infanticide is wrong, at least at this time and in this country, doesn't it also show that abortion is wrong? After all, many people value fetuses, are disturbed by their destruction, and would much prefer that they be preserved, even at some cost to themselves. Furthermore, as a potential source of pleasure to some foster family, a fetus is just as valuable as an infant. There is, however, a crucial difference between the two cases: so long as the fetus is unborn, its preservation, contrary to the wishes of the pregnant woman, violates her rights to freedom, happiness, and self-determination. Her rights override the rights of those who would like the fetus preserved, just as if someone's life or limb is threatened by a wild animal, his right to protect himself by destroying the animal overrides the rights of those who would prefer that the animal not be harmed.

The minute the infant is born, however, its preservation no longer violates any of its mother's rights, even if she wants it destroyed, because she is free to put it up for adoption. Consequently, while the moment of birth does not mark any sharp discontinuity in the degree to which an infant possesses the right to life, it does mark the end of its mother's right to determine its fate. Indeed, if abortion could be performed without killing the fetus, she would never possess the right to have the fetus destroyed, for the same reasons that she has no right to have an infant destroyed.

On the other hand, it follows from my argument that when an unwanted or defective infant is born into a society which cannot afford and/or is not willing to care for it, then its destruction is permissible. This conclusion will, no doubt, strike many people as heartless and immoral; but remember that the very existence of people who feel this way, and who are willing and able to provide care for unwanted infants, is reason enough to conclude that they should be preserved.

NOTES

- 1 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.
- 2 John Noonan, "Deciding Who Is Human," *Natural Law Forum*, 13 (1968), p. 135.
- 3 From here on, we will use "human" to mean genetically human, since the moral sense seems closely connected to, and perhaps derived from, the assumption that genetic humanity is sufficient for membership in the moral community.
- 4 Thomas L. Hayes, "A Biological View," *Commonweal*, 85 (March 17, 1967), pp. 677-678; quoted by Daniel Callahan, in *Abortion: Law, Choice and Morality* (London: Macmillan & Co., 1970).
- 5 That is, insofar as the death rate, for the woman, is higher for childbirth than for early abortion.
- 6 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.

QUESTIONS

- 1 Would you endorse Warren's analysis of the concept of personhood?
- 2 Does the fetus, even if it is not an *actual* person, have a significant right to life on the grounds that it is a *potential* person?
- 3 Is a newborn infant a person? In any case, are there any circumstances in which infanticide would be morally permissible?

Why Abortion Is Immoral

Don Marquis

Marquis argues that abortion, with rare exceptions, is seriously immoral. He bases this conclusion on a theory that he presents and defends about the wrongness of killing. In his view, killing another adult human being is wrong precisely because the victim is deprived of all the value—"activities, projects, experiences, and enjoyments"—of his or her future. Since abortion deprives a typical fetus of a "future like ours," he contends, the moral presumption against abortion is as strong as the presumption against killing another adult human being.

The view that abortion is, with rare exceptions, seriously immoral has received little support in the recent philosophical literature. No doubt most philosophers affiliated with secular institutions of higher education believe that the anti-abortion

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