

On the Moral and Legal Status of Abortion

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[notes not included]

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,' 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 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.' 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,' 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.) Image 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);
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 sense 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." 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 recognizable 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 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.

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, 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 .

POSTSCRIPT ON INFANTICIDE, FEBRUARY 26, 1982

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.

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 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."

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.

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.)

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.

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.

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.

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.

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.