INFORMATION TO USERS

This material was produced from a microfilm copy of the original document. While the most advanced technological means to photograph and reproduce this document have been used, the quality is heavily dependent upon the quality of the original submitted.

The following explanation of techniques is provided to help you understand markings or patterns which may appear on this reproduction.

1. The sign or “target” for pages apparently lacking from the document photographed is “Missing Page(s)”. If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting thru an image and duplicating adjacent pages to insure you complete continuity.

2. When an image on the film is obliterated with a large round black mark, it is an indication that the photographer suspected that the copy may have moved during exposure and thus cause a blurred image. You will find a good image of the page in the adjacent frame.

3. When a map, drawing or chart, etc., was part of the material being photographed the photographer followed a definite method in “sectioning” the material. It is customary to begin photoing at the upper left hand corner of a large sheet and to continue photoing from left to right in equal sections with a small overlap. If necessary, sectioning is continued again — beginning below the first row and continuing on until complete.

4. The majority of users indicate that the textual content is of greatest value, however, a somewhat higher quality reproduction could be made from “photographs” if essential to the understanding of the dissertation. Silver prints of “photographs” may be ordered at additional charge by writing the Order Department, giving the catalog number, title, author and specific pages you wish reproduced.

5. PLEASE NOTE: Some pages may have indistinct print. Filmed as received.

Xerox University Microfilms
300 North Zeeb Road
Ann Arbor, Michigan 48106
THE MORALITY OF ABORTION

by

James Richard Greenwell

A Dissertation Submitted to the Faculty of the
DEPARTMENT OF PHILOSOPHY
In Partial Fulfillment of the Requirements
For the Degree of
DOCTOR OF PHILOSOPHY

In the Graduate College
THE UNIVERSITY OF ARIZONA

1975
I hereby recommend that this dissertation prepared under my direction by James Richard Greenwell, entitled The Morality of Abortion, be accepted as fulfilling the dissertation requirement of the degree of Doctor of Philosophy.

Dissertation Director  May 24, 1975

After inspection of the final copy of the dissertation, the following members of the Final Examination Committee concur in its approval and recommend its acceptance:

 forwarding signature  5/24/75

 forwarding signature  5/20/75

 forwarding signature  5/24/75

*This approval and acceptance is contingent on the candidate's adequate performance and defense of this dissertation at the final oral examination. The inclusion of this sheet bound into the library copy of the dissertation is evidence of satisfactory performance at the final examination.
This dissertation has been submitted in partial fulfillment of requirements for an advanced degree at The University of Arizona and is deposited in the University Library to be made available to borrowers under rules of the Library.

Brief quotations from this dissertation are allowable without special permission, provided that accurate acknowledgment of source is made. Requests for permission for extended quotation from or reproduction of this manuscript in whole or in part may be granted by the copyright holder.

SIGNED: James C. Greenwell
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>v</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. THE ANTI-ABORTION SPECTRUM</td>
<td>6</td>
</tr>
<tr>
<td>III. THE PRO-ABORTION SPECTRUM</td>
<td>27</td>
</tr>
<tr>
<td>IV. MEDICAL CONSIDERATIONS</td>
<td>49</td>
</tr>
<tr>
<td>V. LEGAL CONSIDERATIONS</td>
<td>64</td>
</tr>
<tr>
<td>VI. PERSONHOOD OF THE FETUS</td>
<td>89</td>
</tr>
<tr>
<td>VII. RIGHTS AND RESPONSIBILITIES</td>
<td>121</td>
</tr>
<tr>
<td>VIII. THE SANCTITY OF LIFE OR THE QUALITY OF LIFE</td>
<td>153</td>
</tr>
<tr>
<td>IX. THE MORALITY OF ABORTION</td>
<td>180</td>
</tr>
<tr>
<td>REFERENCES</td>
<td>204</td>
</tr>
</tbody>
</table>
ABSTRACT

This work is primarily an examination of the moral problems associated with abortion. To set the stage for this examination, two chapters are devoted to a presentation of the principal positions in the contemporary abortion dispute. Chapter II is devoted to a survey of some traditional views opposing abortion, from the Catholic extreme to the moderate position of the Protestants. Chapter III relates some of the main pro-abortion thinking. It will be clear in examining these views just how crucial are the questions of the personhood of the fetus and the various moral principles that are resorted to.

It is not possible to get clear answers to the important questions unless there are some data to work with. So the first part of this work includes an examination of what some relevant areas of study have to say about the nature of the fetus, as well as about abortion itself. Chapter IV relates what medical science can tell us about the nature of the fetus. Chapter V includes a consideration of what the recent Supreme Court decision has to say about the nature of the fetus and the act of abortion, as well as the basic reasoning behind the decision. This discussion will point up the need for a thorough examination of the problem of the personhood of the fetus.

Chapter VI is a consideration of various views on fetal personhood and reasons for and against accepting them. This topic is taken after the chapters on medical and legal considerations for two reasons.
First, much of the discussion on the nature of the fetus and criteria of personhood will depend on an understanding of fetal development. And as noted above, the discussion of legal considerations shows the need for a clear criterion of personhood in the fetus.

Chapter VII relates the views of four contemporary philosophers on the question of rights and responsibilities. The rights in question are the right to life that the fetus may have and the mother's right to decide what happens in and to her body. If the fetus has rights, then what responsibilities does the mother have toward the fetus? What is the source of these rights and responsibilities? These are some of the problems that are considered.

Chapter VIII consists of a discussion of moral principles relevant to abortion. Just what these principles are and which of them takes moral priority when they conflict are the main problems. There is also an examination of the relationship between the Catholic position on abortion and Christian theology.

It will be evident from the earlier chapters that most of the important questions are not yet answered. The traditional solutions to the abortion problem all suffer from the same weakness. Regardless of how good the arguments are, they reason from premises that are uncertain, and hence the conclusions are suspect. In Chapter IX a different kind of solution is offered. Instead of arguing from some particular set of questionable premises, their uncertainty is taken account of in a procedure assigning degrees of probability to various possible outcomes. By considering this, one will be able to determine what is the most reasonable and moral thing to do about abortion.
CHAPTER I
INTRODUCTION

This will be an examination of the moral problems associated with abortion. Abortion is no longer a serious medical problem, for early in pregnancy abortion is relatively safe and in some cases not much more inconvenient than a regular doctor's office call. Since the Supreme Court decision of 1973 legalizing abortion, it has not been difficult to obtain an abortion under the best medical conditions. In other words, now a woman can obtain a completely legal abortion in early pregnancy and be assured that from the medical point of view this will be a relatively convenient and safe procedure.

Even though abortion is not now a serious legal or medical problem, in a society like ours where life is revered, it will continue to be a moral issue. It will be a moral issue because of one inescapable fact. Whatever we say about abortion in medical, legal, or other terms, it involves the killing of the fetus, and many people in our society regard the fetus as a full-fledged human being. In this work we will examine arguments for and against this belief.

There are several questions that are of central importance to the abortion problem. What is the nature of the fetus? Which moral principles are relevant to abortion? What conditions, if any, would justify abortion? The first question is basic in the following way.

1 In this work the term "fetus" will be used for all stages of development from conception to birth.
Unless we have some idea about the nature of the thing that we kill, we cannot decide the moral issue. For example, if we could decide that the fetus is just a piece of tissue, like an appendix or a mole, then there would seem to be no moral reason why we should not abort it. After all, we have no moral qualms about killing the appendix when we remove it from the patient, so if the fetus is nothing more than a piece of tissue, there would seem to be no reason for moral qualms here either. If, on the other hand, we decide that the fetus is to be considered a person and to be accorded the rights of persons, then to kill it would seem to be morally the same kind of act as killing any other human being and require the same kind of justification.

It will not be possible to get clear answers to these questions unless we have some data to work with. So the first part of this work will include an examination of what some relevant areas of study have had to say about the nature of the fetus, as well as about abortion itself. It should be kept in mind that when we are asking the question about the nature of the fetus we want an answer that will be relevant to the moral question of abortion. What we want is an answer that will tell us whether the fetus is a person, with rights, especially the right to life.

In Chapter IV we will consider what medical science can tell us about the nature of the fetus. In examining what medicine has to

---

1 Perhaps it seems odd to speak of killing an appendix when we remove it, but it is alive before and dead after removal. We often speak of x-ray treatments, for example, as killing healthy tissue surrounding the diseased tissue that is the target of the x-rays.
say about the fetus, we must be careful to consider only facts known to medical science rather than the opinions of various doctors. It is very easy to find doctors whose opinion it is that the fetus is a person and should be treated as such, and just as easy to find doctors who believe that the fetus is just a piece of tissue and ought to be treated as such. Doctors' views on abortion will be considered, but we must avoid thinking that just because these people are experts on the medical aspects of abortion they are also authorities on the morality of it.

Since in our system of government the decisions of the Supreme Court become the law of the land, a consideration of the January 22, 1973, Supreme Court decision will give us the current status of abortion from the legal point of view. In Chapter V we will consider what the Supreme Court decision has to say about the nature of the fetus and the act of abortion, as well as the basic reasoning behind the decision. Certain criticisms of the Supreme Court decision will be raised, criticisms of the Court's view on the fetus and the act of abortion. This discussion will point up the need for a thorough examination of the problem of the personhood of the fetus.

In Chapter VI we will consider various views on fetal personhood and reasons for and against accepting them. This topic is taken after the chapters on medical and legal considerations for two reasons. First, much of the discussion on the nature of the fetus and criteria of personhood will depend on an understanding of fetal
development. And as noted above, the discussion of legal considera-
tions will show the need for a clear criterion of personhood in the
fetus. There has been much popular discussion in recent years on this
issue, and some of the more important contributions to this discussion
will be examined. We will also see what some philosophers have to say
respecting the personhood of the fetus.

In Chapter VII we will turn our attention to the views of four
contemporary philosophers on the question of rights and responsibili-
ties. The rights in question are the right to life that the fetus may
have and the mother's right to decide what happens in and to her body.
If the fetus has rights, then what responsibilities does the mother
have toward the fetus? What is the source of these rights and responsi-
sibilities? These are some of the problems to be considered.

Chapter VIII will include a discussion of moral principles
relevant to abortion. Just what these principles are and which of
them takes moral priority when they conflict are the main problems.
There will also be an examination of the relationship between the
Catholic position on abortion and Christian theology.

It will be evident from the earlier chapters that most of these
questions are not yet answered. The traditional solutions to the abor-
tion problem all suffer from the same weakness. Regardless of how good
the arguments are, they reason from premises that are uncertain, and
hence the conclusions are suspect. In Chapter IX a different kind of
solution will be offered. Instead of arguing from some particular set
of questionable premises, their uncertainty will be taken account of in
a procedure assigning degrees of probability to various possible
outcomes. By considering the principles and other factors offered as evidence, one will be able to determine what is the most reasonable and moral thing to do about abortion.

To set the stage for the philosophical discussion just outlined, two chapters will be devoted to a presentation of the principal positions in the contemporary abortion dispute. Chapter II will be devoted to a survey of some traditional views opposing abortion, from the Catholic extreme to the moderate position of the Protestants. Chapter III will relate some of the main pro-abortion thinking, including the recent women's liberation movement. It will become clear in examining these views just how crucial are the questions of the personhood of the fetus and the various moral principles that are resorted to. In these two chapters no attempt will be made to criticize the views or decide who is right. This will be done in later chapters.
CHAPTER II

THE ANTI-ABORTION SPECTRUM

The expression "Anti-abortion Spectrum" refers to a whole range of views, from the Catholic extreme to the moderately liberal views of the Protestant Churches and other anti-abortion groups. What these groups have in common is the belief that the fetus is a person and hence has rights which must be considered. The approach in this chapter will be to set forth the position of the Catholic Church and then indicate where others agree or disagree. This procedure seems justified because the Catholic argument is the most detailed in its premises and the most extreme in its conclusion, and the less extreme positions can be seen as differing only in not accepting some details of the Catholic rationale. Leading Protestant scholars like Paul Ramsey and James Gustafson make this point in their acknowledgment of debt to Catholic thinking on the subject.¹

Perhaps this procedure will be made clear by anticipating the discussion of the Catholic view somewhat by showing how a modification yields the Protestant view. The position of the Catholic Church is that under no circumstances is abortion morally justified, and it is derived from the following:

(1) The assumption that the fetus is a person.

(2) The belief in the sanctity of life and the concomitant prohibition against killing persons.

(3) The doctrine of the double effect, which accounts for the absolutist extreme.

The Protestant view accepts all of these reasons except the doctrine of the double effect. So by removing one of the Catholic premises, we get the Protestant view, which is a moderate position within the overall anti-abortion category.

If one has read the popular literature on the Catholic position, he might question putting it in the category of assuming that the fetus is a person. Is it not, he might ask, the position of the Church that it is certain that the fetus is a person? This is indeed the view that is commonly held, and there are some very definite statements by popes and others which seem to indicate it. Consider, for example, the 1930 statement of Pius XI in his encyclical "Casti Connubii":

We must also allude to another very serious crime, Venerable Brethren: that which attacks the life of the offspring while it is yet hidden in the womb of its mother. Some hold this to be permissible, and a matter to be left to the free choice of the mother or father; others hold it to be wrong only in the absence of very grave reasons, or what are called "indications," of the medical, social, or eugenic order. . . . As for the "medical and therapeutic indications," we have already said, Venerable Brethren, how deeply we feel for the mother whose fulfillment of her natural duty involves her in grave danger to health and even to life itself. But can any reason ever avail to excuse the direct killing of the innocent? For this is what is at stake. The infliction of death whether upon mother or upon child is against the commandment of God and the voice of nature: "Thou shalt not kill." The lives of both are equally sacred and no one, not even public authority, can ever have the right to destroy
them. It is absurd to invoke against innocent human beings the right of the State to inflict capital punishment, for this is valid only against the guilty. Nor is there any question here of the right of self-defense, even to the shedding of blood, against an unjust assailant, for none could describe as an unjust assailant an innocent child. Nor, finally, does there exist any so-called right of extreme necessity which could extend to the direct killing of an innocent human being.¹

John Noonan points out, however, that while this is "the strongest and most comprehensive denunciation of abortion made by papal authority" it did not in fact constitute infallible teaching.² Pius XII reaffirmed this view in his 1951 address to the Italian Catholic Society of Midwives:

> The baby in the maternal breast has the right to life immediately from God.—Hence there is no man, no human authority, no science, no medical, eugenic, social, economic or moral 'indication' which can establish or grant a valid juridical ground for a direct deliberate disposition of an innocent human life, that is a disposition which looks to its destruction either as an end or as a means to another end perhaps in itself not illicit.—The baby, still not born, is a man in the same degree and for the same reason as the mother.³

These statements are definite enough and set the stage for decision making at the practical level. However, there is still room for doubt about the Church position with respect to the personhood of the fetus. In the Catholic view, to be a person is equivalent to having a rational soul which comes from God at the time of the event

3 In Ibid., 45.
known as ensoulment.¹ That there is still doubt as to the precise
time of ensoulment, and hence when the fetus becomes a person, is
evidenced by three considerations. First of all, if one examines the
historical debate within the ranks of Catholic theologians and
philosophers, he will find some saying that ensoulment takes place at
fertilization, with others, including Thomas Aquinas, putting it at
various times after fertilization. One thing is clear, however, and
that is that there is neither any rational proof of any particular
view nor a final consensus.² The second consideration is the
conspicuous absence of any revelation or "infallible" statement by a
pope on the time of ensoulment. It is this factor which explains at
least in part why the historical debate persisted without reaching
agreement, and more significantly why it even continued into the
deliberations of the latest of the great Church councils, Vatican II.
This, the third consideration, refers to the situation which arose as
the Council Commission dealt with the problems of marriage. The final
position the Council took on abortion is expressed in its declaration:
"Life from the moment of its conception is to be guarded with the
greatest care. Abortion and infanticide are horrible crimes."³ When
the question was raised as to the meaning of "conception," the
Commission responded that the expression "from the moment of its

¹ See Ibid., 51, 129.
conception" was not meant to determine the time of ensoulment. The situation is further confused by the Commission's refusal to provide a precise definition of the term "abortus" when it was requested by three Council members. Father Bernard Haring, in his commissioned commentary on this part of the proceedings, explains this situation:

There are in fact marginal cases where no unanimity as yet prevails whether an "abortus" is involved or not, e.g. when the foetus certainly has no further prospect of life, while the mother's life can still be saved. It may be disputed whether in a particular case an attack on a human life is involved.

In the absence then of either a rational proof or a revelation on the subject, what is the Church's reason for assuming the fetus is a person? Father Haring puts it this way: "In the end it must be said that the question about the precise moment after which we are faced with a human being in the full sense is not yet settled and will probably not easily be determined. For this the Magisterium relies on the data of science and on philosophical thought." Father Haring then discusses some of the scientific data he has in mind, which include facts drawn from the field of human embryology such as those presented in the chapter on medical considerations. He then makes this rather interesting proposal:

---

1 On this point, Noonan cites: Second Vatican Council, Schema Constitutionalis Pastoralis, De ecclesia in mundo temporis: Expensio modorum, part II, notes 101a, b, and c, with response, p. 36. Noonan, being somewhat less than candid, relegates this to a footnote in his discussion of the Council. See Noonan, The Morality of Abortion, 46.


From all this we do not derive a knowledge that before a certain day or moment the embryo is not yet a human being. In my view, however, it does follow that we must confess that we are not so sure about the time of animation or endowment of the embryo with a human soul. Though we are not sure whether we are already faced with a fully-human being, the development of this individual toward an ever clearer appearance of all the characters of the human person may be compared with the marvelous "miracle" of evolution up to the first break toward hominization.1

The Protestants do not claim scriptural proof on this point but rely on the scientific data. Notice how the Protestant Paul Ramsey puts it in his article "The Morality of Abortion": "Indeed, microgenetics seems to have demonstrated what religion never could; and biological science, to have resolved an ancient theological dispute."2 That the issue is resolved is certainly not true, but this shows that the Protestant position, as well as the Catholic, does not rely on internal religious considerations but rather on the data of science. And, as Father Haring points out, and as will be clear from the sixth chapter, the scientific facts do not establish with certainty the personhood of the fetus.

It seems clear, then, from these considerations that even though in practice the fetus is regarded as a person from conception on there is no theoretical certainty of this. The rationale for making this assumption in practical matters is simply this. Since the time of ensoulment is an event that cannot be verified either rationally or by revelation, the only morally safe procedure is to assume that

1 Ibid., 130-131.
ensoulment occurs at conception and behave accordingly.\(^1\) In other words, only if we assume that the newly-conceived fetus is a person and because of that not abort it can we be sure we are not killing a person in the act of abortion. As Father Haring puts it in his Commentary:

"At all events it is clear that in case of doubt whether a real human life is yet present, nothing may be done which might possibly put an end to a human being."\(^2\) In a later essay, Father Haring expressed the same idea in more religious language: "To interrupt such a process of growing life is not only to destroy a hope for human life but also to risk destruction of what is already created as a person made to the image and likeness of God."\(^3\)

If we assume that the fetus is a human being, there remain at least two questions. First, why should we refrain from killing it just because it is a human being? And second, are there exceptions to this prohibition? That is, are there conditions where it would be permissible to kill this fetal human being? The answer to the first question is provided by the Christian belief in the sanctity of human life and the related prohibition against killing. The answer to the second is provided by the doctrine of the double effect, where acceptance of the doctrine yields a no answer and rejection of it a yes answer. This

---

\(^1\) Whether this is indeed the only morally safe thing to do will be discussed later. See Chapter IX.


acceptance or rejection accounts for the difference between the Catholic and Protestant Churches, respectively. The belief in the sanctity of human life is shared by both Catholics and Protestants, as well as others of different religions or no religion at all. However, the basis for the belief within the Christian context grows specifically out of Christian scripture and theology.

Perhaps a useful way to see the Catholic position is to refer to a view of that position that has caused some consternation among Catholics. In his book *The Sanctity of Life and the Criminal Law*, Glanville Williams says this of the Catholic reason for prohibiting abortion: "The historical reason for the Catholic objection to abortion is the same as for the Christian Church's historical opposition to infanticide: the horror of bringing about the death of an unbaptized child."1 Noonan rejects this claim of Williams and finds it especially repugnant since the American Law Institute seemed to accept it in preparation of its Model Penal Code.2

What then is the basis for the Catholic prohibition against killing the fetus? It is simply that life has an absolute value. Life is sacred. There are several sources of this value, both theological and secular. Several of these are suggested in the 1961 words of Pope John XXIII: "Human life is sacred: from its very inception, the creative action of God is directly operative. By violating His laws, the Divine Majesty is offended, the individuals themselves and humanity


degraded, and likewise the community itself of which they are members is enfeebled.™ Three points in the foundation of the sanctity of life are clear in this statement: (1) Since God is the giver of life, to take life is to move against God, (2) To kill is to degrade humanity, and (3) Killing of this sort weakens the community itself. Father Haring puts it this way: "The whole argumentation derives its vigor from our belief in the dignity of each human being, created to the image and likeness of God, and in man's calling to universal brotherhood in mutual love, respect, and justice."™ Norman St. John-Stevas sees two factors as the basis for the Christian doctrine that life is sacred. The first is that man is the creation of God, and so to attack man is to attack God. The second is that man as a creation of God has an eternal God-given destiny, so to kill a man is to thwart God's purposes. His view of man and man's relationship to God is that "Man is not absolutely master of his own life and body. He has no dominium over it, but holds it in trust for God's purposes.™

While this view is authoritative in the sense of papal teaching, Noonan shows how it originated in the beginning days of the Christian movement.™ According to John 15:12, Jesus said: "This is my commandment: love one another as I have loved you."™ To Noonan the expression

1 Quoted in Callahan, Abortion: Law, Choice and Morality, 415.
5 Biblical references are to The New American Bible, the latest Catholic version of the Holy Bible (New York: World, 1970).
"As I have loved you" gets its meaning from the sacrifice Jesus made out of his love for man. What seems to follow from this is that we should love our fellowmen enough to die for them, and if they are that important we surely should not kill them.

Noonan puts together an interesting argument to show that Jesus regarded fetuses as having human value. In the story about the meeting between then-pregnant Mary and her cousin Elizabeth, Luke 1:41 says: "When Elizabeth heard Mary's greeting, the baby leapt in her womb." The Greek word used here for baby is the singular "brephe." He then refers to Luke 18:15 which says: "They even brought babies to be touched by him." Jesus then invited them to him saying "The reign of God belongs to such as these." The Greek word for babies in this passage is the plural "brephe." So apparently Jesus also wanted babies to come unto him, and he included fetuses in this category. From this it follows that Jesus must have been opposed to abortion.

Noonan employs another argument of this sort. In Galatians 5:19-21, St. Paul lists certain abominations, to wit: "lewd conduct, impurity, licentiousness, idolatry, sorcery, hostilities, bickering, jealousy, outbursts of rage, selfish rivalries, dissensions, orgies, and the like." Noonan says that "sorcery" is translated from the Greek word "pharmakeia" which is better translated "medicine," in the sense of the Indian medicine man: "It is the employment of drugs with occult properties for a variety of purposes, including, in particular, contraception or abortion." Noonan admits that this is not sufficient.

grounds to claim St. Paul meant abortion by this term but contends that because he associated pharmakeia with other sexual sins the term could include abortion. For unequivocal prohibitions against abortion, Noonan turns to other early but non-Biblical texts such as the Apocalypse and the Didache, both written no later than 100 A.D., and the writings of the early Church fathers such as Jerome and Augustine. These scriptural references are Christian rather than Catholic, since there was just one Christian Church then and Protestants have never repudiated the teachings of either the scriptures or the early Church fathers. So aside from accepting the papal statements as authoritative, the Protestant Churches would agree with the basic rationale set forth so far. They would, of course, agree with the papal view that life is sacred, a gift of God, etc., but would not accept the Pope as any more of an authority than anyone else in Christendom. As pointed out earlier, both Paul Ramsey and James Gustafson acknowledge their agreement with the basic view of the Catholic Church on the sanctity of life. Notice how similar to the Catholic writers is the language of Ramsey's "The Morality of Abortion." After citing several scriptures, he says:

Thus, every human being is a unique, unrepeatable opportunity to praise God. His life is entirely an ordination, a loan, and a stewardship. His essence is his existence before God and to God, as it is from Him. His dignity is "an alien dignity," an evaluation that is not of him but placed upon him by the divine decree.¹

Ramsey cites the view of Karl Barth, whom he refers to as "the greatest Protestant theologian of this generation." Barth thinks a man

should "treat as a loan both the life of all men with his own and his own with that of all men."¹ Barth offers an interesting view about man's place in nature. Referring to the fact that God was made man in Jesus Christ, it follows: "This decides that it is an advantage and something worthwhile to be as man. This characterized life as the incomparable and non-recurrent opportunity to praise God."²

Within the Christian community it is not controversial that life is sacred and that scripture and interpretative statements do indicate why it is sacred, but whether these statements would make any impression on the non-Christian is a different matter. However, other arguments for the sanctity of life have been offered where there is no reference to theological considerations. While the rights of the fetus as human being are a part of these, the stress of the arguments is with the harm to society that would result from an acceptance of killing as a legitimate solution to the problem.

The view that rejection of the belief that life is sacred would have dire results can perhaps be expressed as it is by sociologist Edward Shills: "If life were not viewed as sacred, then nothing else would be sacred."³ And, the argument goes, if nothing is held as sacred, then morality will vanish, and the consequences of that would indeed be dire. More specifically to abortion, however, the argument is sometimes run as follows. If we do not hold fetal life sacred and

¹ Ibid., 75.
² Ibid., 76.
³ Quoted in Callahan, Abortion: Law, Choice and Morality, 313.
so kill fetuses because they are a hardship on their mothers, then we will more easily move to old people who are a hardship on their children or any number of others who are hardships on society, etc. Once the killing starts there will be no stopping it. Rudolf Gerber gives this account of the potential danger:

The real danger lies in the diminution of value and humanity in the socially-deprived among the born: of the infant of six months, of the spastic teenager, of the adult in an iron lung, of the woman in a wheelchair, of the lunatic in an asylum, the criminal, the recluse, the hermit. On the scales of social intercourse these individuals either do not register or do so only at inferior levels. If a little legal logic goes a long way, it seems possible that the practical as well as the logical distinctions may shortly disappear among abortion, infanticide, and the various sociological conveniences called "mercy killing," to the detriment of the extra- as well as of intra-uterine life.¹

While dealing with the question of killing the innocent in war, but with this deterioration of morality in mind, Jeffrie Murphy suggests it is really a short step from sacrificing a few babies in medical research that will eventually save many babies, certainly something of utilitarian value, to obliteration bombing of civilian centers to destroy the enemy's morale, again something of utilitarian value. Murphy puts his view as follows:

No matter how good the consequences, is there not some point in saying that we simply do not have the right to do it? For there is, I think, an insight of secular value in the religious observation that men are the "children of God." For this means, among other things, that other people do not belong to me. They are not mine to be manipulated as resources in my projects. It is hard to imagine all that

we might lose if we abandoned this way of thinking about ourselves and others.\footnote{Jeffrie Murphy, "The Killing of the Innocent," \textit{The Monist}, October 1973, 550.}

While secular in its approach, Murphy's position agrees with the theologians discussed, to wit we do not have the right to sacrifice someone else's life no matter how great the utilitarian value of sacrificing it. While the theologians see this as flowing from man's relationship to God, the secularists see it as flowing from man's obligation to his fellow man. In both cases it yields at least the prima facie rule: do not kill human beings. This together with the premise that fetuses are human beings yields the prima facie prohibition against abortion.

The sense of a prima facie rule is that one is obligated to perform according to the rule unless there are more powerful considerations which would dictate another course of action. For example, self-defense is usually regarded as a justification for not behaving according to the rule against killing human beings. The question we now need to answer is whether there are any considerations powerful enough to justify not following the rule prohibiting abortion. In other words, under what conditions if any is abortion morally justified?

It is at this point that the anti-abortion spectrum splits into two main categories. The first category is the Catholic Church, whose position is that there are no exceptions to the rule, that is under no circumstances is abortion morally justified. This absolutist
extreme is derived from consideration and acceptance of a principle
called the doctrine of the double effect. The second category is made
up of the other anti-abortion groups, including the Protestants, who
hold that there are exceptions to the rule, that is more powerful
considerations ranging from a direct threat to the mother's life to
considerations of her family, the prospects of a healthy newborn,
conditions of conception like rape or incest, and others. We will
first consider the doctrine of the double effect and see how the
Catholic extreme is derived from it and then examine the Protestant's
refusal to accept it with the more moderate view that that refusal
generates.

As with the discussion of the Catholic view on the sanctity
of life, the Catholic extreme on abortion can perhaps be explained
by pointing out what Catholics regard as a gross misunderstanding of
their position. It is frequently said that the Catholic Church always
favors the fetus over the mother in abortion cases. That is, whenever
there is a situation where either the life of the fetus or the life of
the mother can be saved, but not both, then the Catholics always save
the fetus. Worse yet, even in those cases where both will die if the
fetus is not killed, abortion is not permitted. Whatever the circum­
stances, there is never a situation where the mother is saved by
killing the fetus. The problem is sometimes seen as an inconsistency
with Catholic pronouncements. Consider, for example, the words of
Pope Pius XI quoted earlier: "The infliction of death whether upon
mother or child is against the commandment of God and the voice of
nature: 'Thou shalt not kill.' The lives of both are equally sacred."
If the lives of both are equally sacred, why are there never any cases where the mother is saved by sacrificing the fetus?

All of the above is true, but to the Catholic it is not favoring the fetus and to think it is is to overlook a very important factor, namely the sort of act that would have to be committed in order to save the mother in these cases of conflict. Abortion of any kind would require a direct homicidal attack on an innocent human being, the fetus, and there is no circumstance that would morally justify that sort of act. One might reply that the mother is also an innocent human being, so is not the fetus being favored? The Catholic would respond to this by pointing out that while abortion involves a direct attack on the fetus, failing to abort does not involve a direct attack on the mother. It is rather a case of passively letting her die. It is the moral distinction between directly killing and passively letting die that is clarified by the doctrine of the double effect, and to those who accept the doctrine, justified as well.

The double-effect idea involved here is derived from the fact that sometimes an act can have more than just its intended effect. There is usually one intended effect for a given act and some possible side effects, which while not intended or desired are nonetheless foreseen as inevitable consequences of the act. For example, a physician will prescribe aspirin to reduce fever knowing that the use of aspirin will also damage the lining of the stomach. From the physician's point of view, the reduction of the fever was the intended effect and the stomach damage was the unintended-but-foreseen effect.

1 Hereafter referred to as DDE.
The DDE utilizes this distinction between intended and unintended-but-foreseen effects to make some important points in the abortion problem, as well as many others.¹ In Catholic morality one important consideration is the intention of the agent, so the intended effect becomes of crucial importance in deciding cases where there is more than one effect.

In his 1930 encyclical "Casti Connubii" Pope Pius XI claims St. Paul as the source of the DDE. While allowing that sometimes the reasons for abortion may be great and that good would come of solving these problems, abortion is not a proper solution, for "...the killing of the innocent is unthinkable and contrary to the divine precept promulgated in the words of the Apostle: Evil is not to be done that good may come of it."² In the case of abortion, to kill the fetus in order to save the mother would involve the intention to kill an innocent human being, an act which is a certain evil, in order to save the mother, likewise a certain good. But from the teaching of St. Paul, which Noonan³ says was given the status of a divine command in the Pope's use of it, regardless of how good the one effect might be, there is unquestionably the intention to kill the fetus, which is an unequivocally evil act. Hence, abortion is never permitted.

But consider the situation in not aborting, but letting the mother die instead. Here the passive behavior of the physician is not

¹ For example, self-defense and the just war.
³ Noonan, The Morality of Abortion, 44.
intended to kill the mother even though he knows that her death will be an inevitable consequence of it. So in this situation there is no evil that is intended, the badness of the situation being unintended but foreseen. Since the physician intends nothing and does nothing to bring about the mother's death, it follows that he does no evil. In this case the deaths are natural, and as David Granfield says "Two natural deaths are a lesser evil than one murder." Since abortion always involves the intention to kill the fetus to bring about a good, it is never morally justified.

A consideration of the DDE also explains why there are a few cases where abortion apparently is permitted. In fact it is never permitted, but because of the other procedures that are permitted, there is the appearance that abortion is what is being done. For example, in the case of a pregnant woman with a cancerous uterus, the physician is permitted to remove the uterus to save the mother even though he knows that the fetus in the uterus will surely perish. This is not abortion, however. Rather it is hysterectomy, which is the standard procedure in cases of cancer of the uterus. The physician does no evil here because the death of the fetus is not intended or desired but just foreseen as an inevitable consequence of the removal of the uterus. Saving of the mother through removal of the uterus is what is desired and intended, the death of the fetus being an unfortunate side effect. Since the physician does not intend the death of the fetus, this is not a case of doing an evil to bring about a good.

The other situation where the mother can be saved is an ectopic pregnancy. This is treated as a problem of the fallopian tube requiring its removal, the death of the fetus being an unintended side effect.

The essence, then, of the Catholic position is that since life is sacred the intended taking of life is a great evil. Add to this the commandment prohibiting the doing of evil to bring about good and we have the extreme conclusion prohibiting abortion for any reason. Those apparent exceptions are in fact not abortions, so they do not constitute actual exceptions. In both theory and practice, abortion is not permitted for any reason whatsoever.

Protestants and other non-Catholic, anti-abortion groups generally do not accept the moral force of the Catholic distinction between killing and letting die, and this yields certain cases where abortion is permitted. The approach here is to stress the fact that there are at least two lives involved, those of the mother and the fetus, and frequently of course the mother's husband and other children with a whole host of relevant conditions. James Gustafson, in his article "A Protestant Ethical Approach," suggests that the notion of a double effect, one good and one evil, is not valid. The situation could better be described as multiple effects none of which are totally evil and none of which are totally good.¹

To refuse to abort for the reason given by the Catholics is not justified when the life of the mother is given at least equal

¹ Gustafson, "A Protestant Ethical Approach," 115.
consideration. Here it is not the nature of the act that is stressed but rather the results of the act.¹ When one considers the results of not aborting on the mother and her husband and children, then abortion becomes the "lesser of two evils" and hence is permitted.

The theoretical difference between the Catholic and Protestant approaches can be seen in Gustafson's summary of his position:

In place of the determination of an action as right or wrong by its conformity to a rule and its application, I have stressed the primacy of the person and human relationships and the concreteness of the choice within limited possibilities. There can be no guarantee of an objectively right action in the situation I have discussed, since there are several values which are objectively important, but which do not resolve themselves into a harmonious relation to each other. Since there is not a single overriding determination of what constitutes a right action, there can be no unambiguously right act.

Whereas the moral theology manuals generally limit discussion to the physical aspects of the human situation, I have set those in a wider context of human values, responsibilities, and aspiration.²

Conditions generally considered to justify abortion include threat to the mother's physical or mental health, conception due to rape or incest, and possible deformity of the fetus. Even though abortion involves killing, it is generally thought that on balance it would be better to kill the fetus than to allow some of these other bad consequences to come about.

As a point of contrast between the Protestant position, which reluctantly allows abortion in some cases, and the pro-abortion position to be discussed in the next chapter, it is important to realize that to the Protestant and others discussed in this chapter, 

¹ This distinction will be elaborated on in a later chapter.

² Gustafson, "A Protestant Ethical Approach," 119.
abortion is never good but at best just the lesser of two evils. Gustafson puts it quite clearly in the last paragraph of his article: "As the morally conscientious soldier fighting in a particular war is convinced that life can and ought to be taken, 'justly' but also 'mournfully,' so the moralist can be convinced that the life of the defenseless fetus can be taken, less justly, but more mournfully."¹

In this chapter we have surveyed some anti-abortion views. No attempt has been made to evaluate them, but this will be done in later chapters. In the next chapter we will consider some positions holding that liberalized abortion is a positive good, given the need for it in our society. To advocates of this view, the Supreme Court decision of January 22, 1973, was, in the words of Paul Blanshard and Edd Doerr, "A Glorious Victory."² For want of a better name, this will be called the pro-abortion spectrum.

¹ Ibid., 122.
CHAPTER III

THE PRO-ABORTION SPECTRUM

As in the case of "Anti-Abortion Spectrum," the expression "Pro-Abortion Spectrum" represents a number of different views. These views emphasize different aspects of the problem, but they all share the opinion that abortion should be permitted without legal restriction or any other kind of social sanction.

It is important to emphasize a major difference between this range of views and the view of the Protestant's and other moderate anti-abortion groups discussed in the last chapter. There it was held that abortion is basically a bad thing, a lesser of two evils, to be utilized only as a last resort. But even as a last resort, abortion is a regrettable event which brings no joy with it. As Gustafson put it, while it may be justified in some cases, it is nonetheless mournful. With those discussed in this chapter, it is not regrettable at all. The outlook of those discussed here is similar to the moderates discussed in the last chapter in that they consider the overall results of aborting or not aborting in justifying a particular action. To the Catholics, on the other hand, the results are only incidental, it being the nature of the act of intentionally killing a human being that establishes their extreme prohibition.

It should also be pointed out that most of the pro-abortion advocates discussed in this chapter, unlike the moderates discussed in the last chapter, do not regard the fetus as a full-fledged human
being. This, probably more than any other single factor, accounts for their not viewing abortion as a mournful lesser of two evils. It is not that they have some additional facts or logic to tell them the fetus is not a person. It is just that they look at the facts available and do not see any compelling reason to regard the fetus as a full-fledged human being.

On this point of seeing things differently it is interesting to consider what a pro-abortion advocate thinks science tells us. This is obviously quite different from the way the Catholic views the fetus. This will also show how most of the positions in this chapter regard the fetus. In his widely-read article "Abortion--Or Compulsory Pregnancy," Garrett Hardin, a Professor of Biology, makes several relevant points:

People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact; and we can define any way we wish. In terms of the human problem involved, it would be unwise to define the fetus as human (hence tactically unwise ever to refer to the fetus as an "unborn child"). Analysis based on the deepest insights of molecular biology indicates the wisdom of sharply distinguishing the information for a valuable structure from the completed structure itself. It is interesting, and gratifying, to note that this modern insight is completely congruent with common law governing the disposal of dead fetuses. Abortion-prohibitionists generally insist that abortion is murder, and that an embryo is a person; but no state or nation, so far as I know, requires the dead fetus to be treated like a dead person. Although all of the states in the United States severely limit what can be done with a dead human body, no cognizance is taken of dead fetuses up to about five months prenatal life. The early fetus may, with impunity, be flushed down the toilet or thrown out with the garbage--
which shows that we never have regarded it as a human being. Scientific analysis confirms what we have always known.

These different outlooks are easy to detect in the contenders' language. Compare the earlier attitude of gloom with that of some of the pro-abortion advocates expressing themselves after the Supreme Court decision of January 1973. In the opening paragraph of their article entitled "A Glorious Victory," Paul Blanshard and Edd Doerr have this to say:

We feel like a champagne dinner in honor of the United States Supreme Court for its January decision on abortion. It isn't often that there is cause for unrestrained jubilation in the troubled area of church and state. This is the once-in-a-lifetime exception. We salute Lawrence Lader whose victory message is printed elsewhere in this issue, and we add a toast to the dean of the Planned Parenthood movement, Dr. Alan Guttmacher. Dr. Guttmacher was saying as early as 1947 that the next necessary reform in family law in the United States, after birth control, was legalized and regulated abortion for both rich and poor. He was right then, and oh how right he is today!

While not quite so festive in its mood, Lawrence Lader's characterization of the abortion revolution is far from mournful:

Surely, this has been a humanitarian revolution of staggering dimensions. It went to the core of our most sensitive ethical and religious beliefs—the right of a woman to control her fertility, the right of a family to determine its size, its very mode of life. It produced a popular revolt against a system that has increasingly made the voter impotent to control his destiny. It offered hope and idealism in a democratic process grown flaccid from lack of commitment. We were determined to prove that radicalism hadn't been eliminated from the American dream, and that ethical objectives—despite seemingly impossible

---


obstacles in 1966--could be fought for and won in the courts and legislatures.

To get back to the "glorious victory," what, we might ask, is all the cheering about? Let us now examine some of the main reasons offered by its advocates for liberalized abortion. These can be roughly broken down into four categories: (1) Reasons in the interest of the fetus, (2) Reasons in the interests of the mother and her family, (3) Reasons in the interests of society, and (4) Women's rights. As will be seen there is a great deal of overlap in these categories, and there are some arguments which do not fit comfortably in any category. While all of the reasons that have been offered in the controversy are relevant to women's rights, this is offered as a separate category to emphasize the view of many that a woman should be able to have an abortion for no reason other than she just does not want to continue the pregnancy.

It is paradoxical to talk about abortion in the interest of the fetus, since abortion involves its death. The rationale here is that the life of the child would be so unhappy that it would be better to prevent that life in the first place. We sometimes say a person who is suffering greatly would be better off dead. To abort in this case is justified in the same way; the child would be better off not to live at all. It is obvious why this approach is sometimes called fetal euthanasia. The two conditions generally offered to justify this prevention of life are possible deformity of the fetus and the expected treatment of an unwanted child.

---

While exposure of the mother to rubella during the early weeks of pregnancy now offers the greatest threat to the fetus, the thalidomide tragedy of the early 1960s is one of the most dramatic examples of the danger of deformity to the fetus. Thalidomide was widely prescribed in Europe as a tranquilizer. The fetal deformities were the result of the mother taking the drug during the early months of pregnancy. The deformities usually consisted of the fetuses being born with flaps instead of arms, or no arms at all, malformed legs, and incomplete and deformed faces. It is estimated that approximately seven thousand infants were born with these characteristic deformities before the drug was banned. While the drug was not cleared for use in the United States, there were a few cases of infant deformity due to experimental and unauthorized use. The most famous of these cases in America was that of Sherri Finkbine, who could not obtain a legal abortion in this country but had to go to Sweden to have it. The Finkbine case drew worldwide attention with even the Vatican condemning the action.¹

Pro-abortion advocates argue that the infant born with these gross deformities cannot possibly have a satisfying life, nor can its parents and siblings, so it is better on balance to prevent its life. In addition, it is pointed out that studies show that at least twenty-five percent of spontaneous abortions are due to fetal abnormalities, and probably most of the remaining seventy-five percent are similarly caused. Since nature spontaneously aborts many if not most deformed

¹ For a more detailed account of the thalidomide problem and the Finkbine case, see Lawrence Lader, Abortion (Indianapolis: Bobbs-Merrill, 1966), 10-16.
fetuses, it would not be wrong for men to abort those deformed fetuses that nature misses.¹

In a situation of this sort, Jimmie Kimmey, executive director of the Association for the Study of Abortion, claims the mother "...should be allowed to choose not to carry that pregnancy to term; especially since she can almost always, if she chooses, later replace that pregnancy with one carrying only normal risks."² If the situation is one where the defective fetus can later be replaced by a normal one, then all involved including the aborted fetus will be better off, so the argument goes.

The only widespread threat of this kind today is due to the mother being exposed to rubella in the early weeks of pregnancy. The defects here are usually internal causing such things as mental retardation, blindness, deafness, and heart trouble rather than the gross outward deformities as in the thalidomide case. It would seem that the rationale discussed above, and especially Kimmey's replacement point, would apply here. There is no reason to suppose that the mother's next pregnancy would be a deformity risk, so why proceed with one that is? Advocates of this view also point out that the problems for the infant born deformed do not stop at the deformities themselves. There will also be the possible resentment of the other members of the


² Jimmie Kimmey, "The Abortion Argument: What It's Not About," in a series of articles published by the Association for the Study of Abortion, New York. This series will be referred to as the ASA Series. ASA Series, 2.
family and psychological trauma of the mother causing even worse
treatment of the deformed child. As these problems multiply throughout
life, the possibility of a decent life becomes more and more remote.

The second reason often given for abortion in the interest of
the fetus relies on what we know about and hence can expect regarding
the treatment that unwanted children frequently suffer. Let us begin
this discussion by looking at some very passionate remarks by Marya
Mannes in her article "A Woman Views Abortion." She suggests:

... visit a Harlem tenement, as I have, where a pregnant
woman lives with nine children on relief, most of whom should
never have been born into the kind of world they inhabit
there. And would not have been, had society not left such
women in a swamp of ignorance about their bodies, their
lives, their road to survival.

The sanctity of life. Whose life? The child's? The
child of poverty and squalor and disease and crime? The
child without a father, the child of a mother so overburdened
that she has nothing left to give him? The child of a rapist,
a degenerate, and incestuous father, a mental retardate?¹

Aside from the deplorable life of the children described in
Mannes' paper, perhaps the most visible evidence of distressed children
is seen in the case of the battered child. The term "distressed"
rather than "unwanted" is used here because there has been no proof that
all or most battered children were in fact unwanted children. However,
many sociologists think it is a safe inference from some facts that are
available. It is a fact that many children are seriously abused by
their parents. For example, in a 1963 paper it was pointed out that
in a study of 662 cases of child abuse 178 died as a result of their
injuries, and in 78 percent of the cases the fatal injuries were

inflicted by the parents. It seems reasonable to suppose that these children were unloved and unwanted. Of the nearly half-million children under the care of foster parents, public, and private agencies, almost half are there "because of parental neglect, abuse or exploitation."^2

Add to these data the results of several studies, and a prima facie case emerges that the unwanted fetus becomes the unwanted and misused child. In a 1965 study, H. Forssman and I. Thuwe followed the progress of 120 children born to mothers who had previously requested and been refused abortions. In other words, if their mothers had had their way, these children would never have been born. They were studied until age twenty-one and compared to a control group of children born in the same hospitals to willing mothers. It was found that more than twice as many of the unwanted children had "insecure" childhoods. More of the unwanted group were involved in antisocial and criminal behavior while fewer of them attained an education beyond the requirements of the law.^3

---


Beck discusses a study done by G. Caplan in 1954 on a group of sixteen mothers who had children under psychological treatment. The unusual situation in these cases was that while the mother cared for all of her other children well the one under treatment was abused. Beck sums up the outcome of the study:

After many months of treatment, these tormented women finally disclosed the fact that they not only had strongly wanted to abort this particular child but had made numerous attempts to do so. The mothers' attitude that evidently emerged, in effect was: "From the moment of birth, the baby seemed to know what I had done to him. In fact, I think he may have been damaged somehow. Anyway, from the beginning he has rejected me—that is, refused to take the breast, to eat, to respond to any parental wish or requirement." These mothers ranging from adequate to "good" with the patients' siblings, were otherwise inexplicably cruel and damaging to the patient.1

Richard Jenkins, who was chief of research of the Psychiatry and Neurological Division of the Veterans Administration when he wrote this article, sums up this problem as follows:

The beginning of the whole process of socialization in the infant is dependent upon his acceptance by a mother person. There is no emotional deprivation more severe than the rejection of a young child by the mother or mother person who takes care of him. Such rejection may be overt or covert. Overt rejection may be expressed in infanticide or abandonment. It is more frequently expressed by some half-hearted attempt at maternal behavior despite the fact that hostility, rather than affection, is overtly and glaringly dominant.2

Again not asserting that there is a causal connection between the abused child and unwanted pregnancy, Jenkins holds that the capacity

---


for maternal support is an important consideration in questions of therapeutic abortion.¹

Abortion advocates go further. They maintain that these battered and abused children would be better off not to have been born in the first place. They are not only a hardship on their parents and society, but their chance for happiness is extremely remote. And as Mannes suggests, were it not for ignorance and oppressive laws, these children would not have been born, and there would have been that much less misery in the world.

With respect to abortion in the interests of the mother, there are two main goals of the abortion advocates. The first of these is to protect the mother from dangerous illegal abortions by making safe ones available without any unnecessary difficulty. Many writers on the subject feel that most women who need abortions are going to get them regardless of what law and society say about it. If this is so, it would be better to make these available under proper conditions. Alan Guttmacher, who was president of Planned Parenthood until his recent death and a long-time advocate of liberalized abortion, tells an interesting story of how he came to his views:

My attitude toward abortion is the result of 50 years of medical practice, 45 of them as an obstetrician-gynecologist. Upon graduation from the Johns Hopkins Medical School in 1923, I did not question the wisdom of the restrictive abortion statute of the State of Maryland. But as soon as I began residency training and dealt with human beings and their medical problems, my attitude changed. In short sequence, I saw three women die of illegal abortions, one a 15-year old child and another the mother of four children.

¹ Ibid., 275.
Throughout my medical career as chief of an obstetric-gynecologic service, I saw the senseless carnage of abortions, many of them probably self-induced. Years later, on my ward at the Mt. Sinai Hospital in New York City, I witnessed within the same week the death of two Puerto Rican mothers, 14 to 16 weeks pregnant, from bungled abortions. And, although I know they infrequently occur, I have never seen a fatality from abortion on the private service.¹

It is estimated that prior to the liberalization of abortion laws in some states in the late 1960s there were anywhere from 200,000 to 1,200,000 illegal abortions performed per year in the United States, with anywhere from five hundred to five thousand resultant deaths. The reason no firm figures are possible is because of the illegal nature of the procedure and doctors¹ reluctance to report these deaths as due to abortion.² If one takes a figure somewhere near the middle of this range, it is clear that the problem of illegal abortions was serious.

The second reason for abortion in the woman's interest is to protect her from harm resulting from a continuation of the pregnancy. This does not stress the good of legal over illegal abortions but rather the need for available abortion in the first place. With the exception of Catholic institutions and doctors, abortion to save the mother from permanent physical or psychological damage has generally been available, albeit after considerable red tape. As seen in the last chapter, even basically anti-abortion Protestants and others have condoned this. What the pro-abortion advocate wants here is the


² For a more complete survey of these figures, see Callahan, *Abortion: Law, Choice and Morality*, 132-136.
inclusion as legitimate reasons for abortion numerous conditions that are problematic for the mother but not actually threatening to her life or sanity. The emphasis is on health rather than just life. Robert Hall, a Columbia University obstetrician writing before the 1973 Supreme Court decision, puts it this way:

Fifty years ago, most therapeutic abortions were performed for such conditions as diabetes, tuberculosis, and heart disease. But as the medical profession has learned how to protect the life of pregnant women with these complications, it has at the same time learned more fully how to protect their health--both mental and physical. Most hospital abortions nowadays are done for mental health reasons or for fear of the results of German measles, and most of these abortions are, strictly speaking, illegal.1

It becomes clear what these advocates want when the conditions of "health" are specified. This group favors the definition of health offered by the World Health Organization which includes "physical, mental, and emotional well-being." If emotional well-being is accepted as a part of health and abortion to preserve the mother's health is acceptable, it follows that anything that would seriously upset her emotional well-being is a ground for abortion. Thus factors like the family's social conditions, conception due to rape or incest, abnormal fear, and a host of others are seen as legitimate reasons for abortion. This applies to the married as well as the unmarried, as Callahan suggests:

The psychological impact of pregnancy on an unmarried girl, which in most societies could induce fear and uncertainty because of social disapproval, can easily be matched in power in a married woman already overburdened with a number of small children and a precarious financial situation:

the reactions may be different because of these different situations, but may be equally strong and equally fearful.

This view of total health has been accepted by large segments of the medical profession for some time, but the controversy is over what should be included. For example, should economic factors be included? It is certainly the case that a pregnant woman with several children she cannot now afford to care for will be emotionally distressed by another child. If she wants an abortion on this ground, should she get it? Apparently many have thought so. Consider what Harold Rosen says about the role of the psychiatrist in deciding what to count as a valid reason for abortion:

Professionally, he can recommend termination of pregnancy only if, in his opinion, psychiatric factors are involved. It is, of course, exceedingly difficult, and at times impossible, to demarcate socioeconomic and emotional factors so as to state that one has no psychiatric basis while the other has. The total marital situation, the environment in which the child is to be reared, and the financial status of the family all have profound emotional repercussions.

While socioeconomic conditions per se never legally warrant therapeutic abortion, socioeconomic status frequently determines whether or not an abortion will be performed and, if performed, whether that abortion will be therapeutic or criminal.

Pregnancy due to rape is an interesting case. Just because it is due to rape, it does not mean that there will be any more than normal physical or "textbook" psychiatric problems. But consider the emotional impact of this on the woman. She is to be constantly reminded of the original harrowing experience and forced to give birth to the result of that outrage, unless she can be aborted. Under these circumstances...
circumstances, should she be? As many women writers have pointed out, it is probably not possible for a man to understand how a woman is affected by being raped, probably because women are always the victims while men are always the rapists. That rape alone can cause serious emotional trauma is undeniable and provable from several studies.¹ So it would seem that rape plus a pregnancy resulting from it would be that much more emotionally traumatic.

Consider the way Ray Schenk puts it in an article in The Catholic World:

In the case of a woman made pregnant by rape, for example, removal of the unwanted fetus seems far less cruel than forcing the woman to carry this unwelcome burden for nine months. Indeed the carrying of any unwanted fetus for nine months can and probably invariably does have serious emotional and psychological effects on the mother, as well as the child. I am not sure that an ethic of love, which Christianity claims to be, can justify or even continue to tolerate such exquisite torture.²

That this "torture" should be prevented by abortion goes without saying for the abortion advocate. Again, it is a case of preventing a large amount of human misery.

The case of a possibly deformed fetus presents an interesting situation, one that Callahan calls "double jeopardy." On the one hand, if the fetus has a strong chance of being deformed, then it would be advisable to abort. But what if abortion is unavailable? The mother


then would go through many months of fear that the fetus would be born deformed, and that surely would be a serious emotional strain. Here, it would seem, is a double reason for abortion.

There are social effects that have to be taken into consideration in evaluating the pro-abortion position. First of all, as suggested in the earlier quotations regarding unwanted children, these children will not only be unhappy but they will also be burdens on society because of the prevalence of antisocial and criminal behavior in this group. To some, this adds an additional justification for abortion in those cases where the mother does not want the child.

The social relevance of these two problems is really an outgrowth of the original problems of deformity and unwantedness. There are in addition two other aspects of the abortion problem that some see as key ingredients of the "glorious victory." The first of these is to see the victory in terms of the rich and the poor with the poor finally coming out on equal terms with the rich. The second is to regard the abortion controversy as an aspect of the church/state dispute where non-church forces finally have a victory. These will be discussed in turn.

There are some interesting statistics to demonstrate an aspect of the abortion problem that Guttmacher calls "socio-ethnic discrimination." For the period 1965-1967, before the liberalized abortion law went into effect, the following figures represent the ratios of hospital abortions to one-thousand live births in New York City:
Whites, 4.2; Non-white, 1.8; and Puerto Rican, 0.9.\(^1\) In the period from July 1970 to March 1971, after abortion was liberalized, the ratios were: White, 422.4; Non-white, 594.0; and Puerto Rican, 257.7.\(^2\)

While the number went up significantly in all three categories, what is important to notice with regard to "socio-ethnic discrimination" is how much more balanced the later ratios are between white, non-white, and Puerto Rican. Prior to the liberal law, four times as many whites as Puerto Ricans had hospital abortions. After the law, less than twice as many had. Prior to the law, more than twice as many whites as non-whites had hospital abortions. After the law, the non-whites had almost half-again as many as whites. Since the non-whites and Puerto Ricans generally are the poorer people, the law did a great deal to equalize the rich and poor with respect to abortion. This point is made by Guttmacher in the account of his conversion to the pro-abortion ranks:

Previous to liberalization, abortion, whether illegal or legal, was drastically discriminatory. In my Baltimore days, if one had the fee and the sophistication, two excellent full time physician-abortionists were available. Their names were equally well-known to the shopkeeper and the policeman. One of the doctors spoke in defense of the illegal physician-abortionist at a public meeting in Washington claiming there had been only four deaths in the seven thousand abortions with which he had been associated. In New York, a respected senior physician on the visiting staff of Mt. Sinai was found by the police to be doing abortions on the side. Then, too, affluent patients could always be referred to ethical physicians in Japan for legal

---


abortion. The non-affluent woman had no such opportunities. She could use the services of an ill-prepared paraprofessional, or the aid of a neighbor, or she could abort herself.¹

In their remarks quoted earlier, Blanshard and Doerr allude to the "troubled area of church and state." To many the abortion decision was a victory of secular forces over the "tyranny" of the Catholic Church. It is certainly true that the strongest opposition to abortion has come from the Catholic Church, and understandably so since the Church regards abortion as homicide. Lader characterizes the situation in this way:

By 1970, the abortion movement had become a critical challenge to the authoritarianism of the Roman Church. It synthesized the struggle between individual rights and an institution that has controlled much of society's religious and ethical choices for two thousand years. Having lost its fight against birth control, and stalled in its drive for parochial aid, the Church hierarchy seemed determined to make abortion the ultimate testing ground of its power. Our legislative success in New York and other states, enlarged by the Supreme Court's decision, stymied this attempt by one religious block to force its will and dogma on the rest of the country.²

This will be discussed more in the next section, since some women feel a special resentment toward the Catholic Church, special because it opposes abortion and because it is run exclusively by men.

What about the woman who is in good health, would be emotionally able to go through a pregnancy, would love and care for the child after it was born, but got pregnant accidentally and finds it inconvenient to have a baby now? An abortion in this sort of case does


not seem justifiable on the criteria discussed so far in this chapter, but it is just this sort of case that women's rights advocates think must be acceptable if women are going to be truly liberated. We will now turn to this interesting social phenomenon.

One of the heroines of the women's liberation movement is tennis star Billie Jean King. In tennis, King has long been an advocate of equality in pay and opportunity for women tennis players, and of course she defeated Bobby Riggs whose public image is the epitome of male chauvinism in tennis. In her autobiography she says:
"To me, Women's Liberation means that every woman ought to be able to pursue whatever career or personal lifestyle she chooses as a full and equal member of society without fear of sexual discrimination."

What makes King special in women's eyes is that she practiced what she preached by publicly proclaiming that she had an abortion at a time when continued pregnancy would have interfered with her career. This is her account of the decision:

I got pregnant in late February, 1971—dollars to donuts, the night before the finals of the Women's National Indoors in Winchester, Massachusetts. I am positive it was then because the next day I started getting hot flashes on the court. I thought—I hoped—I was getting sick. No such luck. When we got to New York three weeks later, I knew. I just knew... I took the usual tests, and when they came out positive, there was absolutely no question about what I would do. We agreed on an abortion from the beginning, and there was very little thinking about the morality involved in our decision... I mean I did believe strongly that inexpensive, legal abortions ought to be available to every woman, and since I was only about a month pregnant I didn't feel I was killing a life or anything like that.1

King gives an account of the criticism she received from many sides, from her parents to the Washington Post article under the headline "Abortion Made Possible Mrs. King's Top Year." On the other hand, she says: "But, overall, I've seen a lot of good come from it. Several women have told me that just knowing I'd had an abortion and was willing to speak out about it--however reluctantly at first--made it easier for them to have theirs, and that's a really big plus." To advocates of completely free abortion, abortion in this kind of case must be available before the victory is final. Legally, of course, it is available, but to many minds, King's use of abortion went beyond the bounds of moral justification. But, to whose minds?

According to women's liberation writings, opposition to liberal abortion stems from two main sources, male domination and the Catholic Church. Consequently the abortion victory is seen by many as a defeat of the attempt by the "male power structure" both in and out of the Church to dominate women. Consider the remarks of Professor Mary Daly, written prior to Supreme Court decision liberalizing abortion:

...I'm proposing that the issue of the repeal of anti-abortion laws should be seen within the wide context of the oppression of women in sexually hierarchical society. Women--many of them victims also of economic and racial oppression--have just begun to cry out publicly about their rights over their own bodies. That academics find this language unsatisfactory as a complete moral methodology is understandable. Their inability to listen to what is being

---

1 Ibid., 160.

2 This theme is found in men's writings as well.
said, however, is deplorable. Women are making explicit the dimension that traditional morality and abortion legislation simply have not taken into account: the realities of their existence as an oppressed caste of human beings.¹

As women are fond of pointing out, men make the laws prohibiting abortion, but women are the ones who have to bear the children. What women want is simply control over their own bodies including the reproductive function. As Mannes says:

But in the last analysis, it is still the responsibility and right of the woman to decide; and a private affair between woman and doctor. No priest, no minister, certainly no committee, can assume this right.

Women have been told by others, through long centuries, what they should be and do, what rights they should have, or be denied. Bit by bit, and with the great help of courageous and enlightened men, (for without your kind we could never move ahead) we have gained civic and legal rights long withheld.

But this most important one of all has so far been denied us: the right to control what takes place within our own body. This is our citadel, our responsibility, our mental, emotional, and physical being.²

The Supreme Court decision was to many women a long awaited acknowledgment of the right of self-determination in the use of their bodies. To some women, restrictive abortion was like rape, in both cases the woman's freedom to choose being denied her. As Daly³ suggests, the rapist manipulates her body, the Priest manipulates her mind. And is rape of the mind any less immoral than rape of the body? If anything it is worse, in the eyes of many women.

¹ Mary Daly, "Abortion and Sexual Caste," Commonweal, February 4, 1972. ASA Series, 1, 3.


³ Daly, "Abortion and Sexual Caste," ASA Series, 2.
The best example of this attempt at dominance is the exclusively male hierarchy of the Catholic Church, what Daly calls "Machismo," that is "Heman," religion. It strikes women as odd that a group of men who by their vows of chastity cannot even become fathers and certainly cannot appreciate the woman's feeling in pregnancy should think themselves so wise in family matters. They reason together and decide that abortion should not be permitted. But why not?

In their terms, for the good of society. For the sake of the soul. For the preservation of the family, the state, the agriculture, the economy, the wars of conquest.

But whose society? Whose land? Whose state? Whose markets? Whose wars? Not women's. Through all these thousands of years, with a handful of exceptions, the laws that governed the lives of women were never written by women; and the matter of life never held subject to the decision of the bearers of life. That a man should be master of his own body was never questioned. That a woman should be mistress of hers was out of the question. She was a vessel to be filled, a field to be planted. Such was the natural law, such was the will of God -- such was the convenience (couched in the loftiest, most spiritual terms) of men.1

As suggested in Gayle Rubin's article "Woman as Nigger,"2 this attempt at this male dominance of women is like slavery all over again. What women's liberationists want to remind women of is the fact that they, unlike the Negro slaves in our past, have the power to change things. To them the abortion victory is a giant step in the right direction.

In this and the last chapter, we have considered some of the reasons that have been offered for and against liberal abortion without trying to decide who is right. The spokesmen have not been


professional philosophers\(^1\) but rather doctors, clergymen, scientists, professors, lawyers, etc. In a later chapter we will examine the views of some contemporary professional philosophers, some who argue for and some who argue against the legitimacy of abortion.

We will now turn our attention to the philosophical problems relevant to these views, beginning with the question of the personhood of the fetus. This will be done by first examining what medicine and law have had to say about the fetus to establish some data to work with. Then we will consider some of the views that have been offered concerning the status of the fetus. Specifically, we will be trying to find something about the fetus that can be accepted as a valid criterion of personhood.

\(^1\) Except Jeffrie Murphy, but in his paper "The Killing of the Innocent," he is not discussing abortion.
CHAPTER IV
MEDICAL CONSIDERATIONS

"Medical considerations" in this work will refer primarily to what science has to tell us about fetal development.¹ There will also be some discussion of what the medical profession has had to say about abortion.

This section will be rather detailed and extensive for two reasons. First of all, an understanding of fetal development will be essential in understanding the problem of abortion from any of the various points of view discussed. Secondly, one particular argument against abortion at any stage of fetal development relies on the fact that it is impossible to draw a morally significant distinction between any two stages of fetal development. The extensive discussion of fetal development here will tend to confirm at least the view that fetal development is a gradual process from conception to birth. Whether this factual claim justifies the moral decision against abortion is a matter that will be discussed later in the work. In any case, without an understanding of fetal development, it will be

very difficult to evaluate any of the arguments concerning the person-
hood of the fetus or the morality of abortion.

To set the stage for a discussion of conception, let us first consider what happens to the sperm and the egg in those cases where conception does not take place. After the sperm are deposited near the opening of the uterus they enter the uterus, swim through the uterine cavity, and eventually make their way into the fallopian tubes which are attached to the top of the uterus. Some swim up the fallopian tubes about half way to the ovaries. This is the site of fertilization, but if there is not an egg in the vicinity to be fertilized, the sperm eventually die. The sperm can survive only about thirty-six hours after intercourse, so if conception is going to take place, an egg must be available for fertilization within that time span. If the sperm are deposited very near the opening of the uterus and the chemical conditions within the uterus are optimum, then the sperm are able to reach the point of fertilization in the fallopian tube within a few hours after intercourse. It is estimated that of the several hundred million sperm deposited at intercourse only about two thousand reach the fallopian tube which will contain the egg, and in case of fertilization, only one of these sperm actually fertilizes the egg.

Once each month one of the two ovaries releases an egg which makes its way into the fallopian tube. Once in the fallopian tube it takes the egg about three days to reach the uterus. Conception
must occur within about forty-eight hours after ovulation or the egg is unable to be fertilized. If the egg is not fertilized while it is in the fallopian tube, it will disintegrate and be discharged with the contents of the uterus. As noted above, fertilization takes place about half-way down the fallopian tube. Since the sperm are capable of fertilization for about thirty-six hours after intercourse and the egg is capable of fertilization for about forty-eight hours after ovulation, it follows that for conception to take place, intercourse must occur during a period of about two days before and two days after ovulation.

The following discussion of fetal development will be in terms of three trimesters, or three-month periods. This is a convenient approach for two reasons. First, the sort of development that is going on during each of these three trimesters is characteristically different. Secondly, general discussions of fetal development are in terms of these three trimesters, including the very significant Supreme Court decision on abortion which will be discussed fully in the next chapter. The first trimester of development can be characterized as that development which changes a one-cell, fertilized egg, which in no way looks like a human being, into a small body with features and organ systems resembling a newborn human infant. At the end of the twelfth week the fetus has the form and functioning systems of the human infant, but all in miniature, being only about four inches in
length\(^1\) and weighing less than one ounce. The second two trimesters can be characterized as the enlargement and refinement of all of the systems that will be mature at time of birth.

What actually takes place at conception or fertilization is that the genetic material from the father carried in the head of the sperm unites with the genetic material from the mother carried in the nucleus of the egg to form a new and complete genetic package that will determine all of the inherited characteristics of this new individual. Cell division begins to take place while the newly-fertilized egg is still in the fallopian tube. The original cell divides into two cells which then divide into four. The four divide into eight, sixteen, and so on, so that by the time it reaches the uterus about four days later this small mass has about 150 cells and has formed itself into a hollow sphere.

This small, hollow ball of cells, which is called a blastocyst, attaches itself to the lining of the uterus about six days after ovulation. By the tenth to twelfth day after ovulation the blastocyst has burrowed deeply into the lining of the uterus, has become firmly attached, and has begun to make the connection with blood vessels that will supply its nutrients for the next nine months. At the time of implantation the fetus is a small, hollow ball of cells hardly big

\(^1\) Fetal length here is from top of head to bottom of feet with the fetal body straightened out. The length of the fetus in its usual doubled-up position is considerably shorter, in this case 1.5 inches.
enough to be seen by the naked eye. It is interesting to note that the woman will not have any indication that she is pregnant for about another week, when she misses her first period. Actually it is only a suggestion at this time, for it is not until about six weeks have passed that a physician can tell with any reliability whether a woman is pregnant or not.

At implantation all of the cells in the small cluster are identical, but within a few days different cells on this ball begin to develop into different kinds of tissue which become muscles, nerves, bones, and internal organs. It is still not completely understood just how this one cell which divides into numerous identical cells is eventually differentiated into different organ systems, all the cells of which have identical genetic codes. The rest of the development during the first trimester consists of these few kinds of primary tissue developing into the various organ systems. The development is gradual, and all of the different systems are developing simultaneously, so that no particular events stand out as more important than any others.

By the end of the fourth week distinct body parts are beginning to develop; for example, the eyes, ears, brain, heart, and liver can be seen in their beginning stages. At this stage of development the fetus is only about one-sixth of an inch long and weighs less than one-hundredth of an ounce. By the end of five weeks buds are growing from the main portion of the fetal body which will become the arms and legs.
As the buds continue to grow, new buds for fingers and toes emerge, and bones begin to form in these members.

By the end of the eighth week all of the facial features are clearly recognizable, the fetus has arms and legs with fingers and toes, the bones are forming in the arms and legs, and the intestines, gonads, and external genitalia are forming and can be seen clearly. At the end of the eighth week the fetus is about one inch long and weighs about one-fourteenth of an ounce. It has a functional brain which allows it to move its arms and legs, has a heart that has been beating since the twenty-fifth day, internal organs that are functioning, and form and face that are clearly recognizable as human. The last of the major systems has also begun to develop, involving a process that will not be complete until the person is about twenty-five years old! This is the replacement of cartilage cells, which have formed the basic skeletal structure up to this time, with real bone cells. With the development of the hard skeleton the fetus is essentially complete with respect to its various organ systems. It is interesting to note that in many cases the fetus has reached this stage of development before the woman is even sure that she is pregnant. From now until birth it will be mainly a matter of enlargement and refinement of structure.

Along with the enlargement and refinement, the third month is characterized by the fetus beginning to use and practice with the organ systems it has. By the end of the third month the fetus can kick its
legs, move its feet and toes, make a fist, bend its arms, turn its head, and is able to make several distinct facial expressions. While its nutrients are being supplied through the umbilical cord, the fetus at this point does practice swallowing and breathing, which will be essential activities for survival after the connection with the mother is broken.

While it will be another month, about the sixteenth week, before the mother will be able to feel the fetal motion which is known as the quickening, the fetus is already carrying on two distinct kinds of motion. These can be characterized as original and responsive motions. Original motions in the fetus are motions that seem to be due to no outside stimulus. Responsive motions on the other hand are motions that are clearly in response to outside stimuli. By the end of the twelfth week all the organ systems of the fetus are now in existence and active, and the fetus is practicing various kinds of muscular movements including the specific muscular activity involved in breathing and eating. All of this is going on about a month before the mother feels any motion and when the fetus is only about four inches in length and weighs only about one ounce. At the end of the first trimester the fetus has an active body which is clearly recognizable to have human form, but in a quite miniature version.

The most striking developmental feature of the second trimester is the phenomenal growth of the fetus. At the end of the sixteenth week the fetus is about nine inches tall and has increased its weight to about six ounces. By the end of the fifth month the fetus has grown
several more inches and now weighs about one pound. During this month body hair begins to appear and toe nails begin to appear, and most of the skeleton becomes hard through replacement of the remaining cartilage with bone cells.

Aside from delivery, perhaps the most dramatic moment of pregnancy, at least for the mother, occurs about the beginning of the fifth month. This is the time when the mother begins to distinctly feel the fetus moving in the uterus. This movement includes not only kicking and punching, but also small movements like hiccupping which may last up to a half-hour. During this time the fetus has distinct periods of sleeping and waking. It is during this time that the future infant's sleeping position becomes a matter of habit. The position that it takes as a fetus is called its lie, and this will be its favorite sleeping position after birth. The fetus can be awakened from its sleep by loud noises, thumping on the belly, and from some vibrations such as those of a washing machine.

By the end of the sixth month the fetus will have grown about two more inches and will have increased its weight to about 1.25 pounds. During this time fat will begin to be deposited under the skin, buds for the permanent teeth will come in, and the muscular system will become so strong that the fetus will be able to support its own weight
by holding on to a small rod.\footnote{This sort of behavior has been demonstrated through experiments on aborted fetuses which have been kept alive in conditions resembling the womb. For striking photographs of these experiments see Flanagan, \textit{The First Nine Months of Life}, passim.} While chances for survival if born at the end of six months are slim, there have been numerous cases of fetuses born at this age who did survive.

The third trimester, like the second, is characterized mainly by rapid growth and continued exercise of the organ systems. Kicking becomes much more violent in this period, and activities in preparation for post-natal life are begun, such as sucking the thumb and crying. The crying is without sound, of course, since it is only amnionic fluid passing over the vocal cords. Thumb sucking can begin as early as the second month, some babies even being born with a callus on their thumb from sucking it as a fetus.

While some fetuses survive when born as early as the sixth month, the term "viability" is not used for fetuses until the seventh month. At this point the fetus will weigh about 2.25 pounds, and the organ systems will be functioning well enough to enable the fetus to survive if born. If the fetus does survive at this point, it is only because considerable special attention has been given to it in order to assure its survival.

During the last months of pregnancy the fetus also builds up immunity to numerous diseases. This immunity is due to the immunity
the mother has built up by having had these diseases and having
developed antibodies to protect her from them. These antibodies, like
the nutrients, are passed from the mother's bloodstream into that of
the fetus through the placenta. These antibodies protect the infant
for a period of up to about six months, when they begin to wear off.
Another substance that will help the fetus survive is the substance
gamma globulin which it gets from the placenta and the mother's blood-
stream. In the last month of pregnancy the level of antibodies and
gamma globulin in the blood of the fetus will be at least as high as
that of the mother's blood. During the last month of pregnancy the
fetus gains more than two pounds, and its organ systems develop to the
point necessary to assure survival after birth. At birth the fetus
will weigh about 7.5 pounds and be just under two feet tall.

It is difficult to give a precise statement regarding the medical profession's view regarding abortion, simply because there are
so many physicians of diverse opinions and there has been considerable
change in "majority opinion" over the years. The Supreme Court takes
note of the change in medical opinion over the years in justifying its
decision liberalizing abortion law. For example, it points out that
the view expressed by the American Medical Association in 1970 is much
more liberal than that expressed in 1857.\footnote{Supreme Court Reporter, February 15, 1973, 721. This reference will hereafter be cited S.C.R.}
corresponds to the change going on in abortion laws and presumably in the opinion of the public.

In its 1857 report the Association protested against the "destruction of human life" and called upon state lawmakers to adopt laws consistent with this anti-abortion view. The Association reaffirmed its hard line again in its report on criminal abortion in 1871. In 1967 the Association took the more lenient position that abortion was justified in cases of threat to the health of the mother, where the child might be born with incapacitating abnormality, or in cases of rape or incest. The decision to abort was to be confirmed by three physicians, and the abortion was to be performed in an accredited hospital. In 1970 the Association adopted a similar position. The Court also takes note of the position of the American Public Health Association, adopted in 1970, which is basically consistent with that of the medical association but considerably more lenient in its proposals for implementing actual abortion procedures. This may be due to the fact that because of the role of the Public Health Service in our society, its people are more alert to the needs of the poor, one of which is the need for easy and inexpensive abortions.

Perhaps a better picture of the view of practicing physicians can be seen by an examination of actual surveys of the profession on the question of abortion. In recent years several surveys have been conducted by Modern Medicine, a journal devoted to the practice of medicine. In 1967 doctors were asked whether they favored
liberalization of abortion laws. Eighty-seven percent of those responding favored more liberal laws. This poll was taken the same year that the American Medical Association took its more lenient view.

In 1969 another poll was taken, this time with a more detailed question. It was asked: "Should abortion be available to any woman capable of giving legal consent upon her own request to a competent physician?" Four kinds of response were possible: (1) unqualified yes, (2) qualified yes, (3) unqualified no, (4) qualified no. The results, which included responses of over 27,000 physicians, were reported as: unqualified yes, 51.0 percent; qualified yes, 11.8 percent; unqualified no, 4.4 percent; qualified no, 32.8 percent. The total yes vote was 62.8 percent while the total no vote was 37.2 percent. Perhaps more significant is the unqualified vote: yes, 51.0 percent; no, 4.4 percent. The results showed that the older doctors were less inclined to liberal attitudes than the younger doctors. In the unqualified category, for example, of doctors under thirty-six, 57 percent answered yes, while only 44 percent of doctors over thirty-six answered yes. Another interesting difference was found between specialties, especially those most involved in abortions either in doing the procedure itself or in areas involving the results of abortion or lack of it. For example, in those more concerned with the actual operation the unqualified yes votes ran as follows: general medicine, 38.9 percent; obstetrics-gynecology, 41.4 percent; general surgery, 45.0 percent.

percent. For those more involved with the results of aborting or not for example psychiatry and plastic surgery, the unqualified yes votes were 71.7 percent and 72.6 percent respectively. The unqualified no votes in these areas were what one would expect from the foregoing, those doing the abortions with the highest and those dealing with the aftermath the lowest.

Modern Medicine's latest poll, reported in the May 14, 1973 issue, was considerably more detailed, asking several questions and breaking down responses into groups according to age, specialty, and religious position. This survey included more than 33,000 physicians. The questions which were based on the Supreme Court decision of January 22, 1973, are shown below with their overall responses:

(1) What are your reactions to the decision? 64.7 percent were in favor while 34.7 percent were not.

(2) If favorable [to the Supreme Court ruling], would you approve abortions during: First trimester only? Second trimester? Last three months depending on health of mother? 50 percent thought abortions should be done only during the first trimester; 27 percent would allow them in the second trimester; and 23 percent the last three months.

(3) Does the decision pose any ethical problem for you? 27 percent answered yes with 70 percent answering no.

The breakdown by age group was consistent with the 1969 study with those under thirty-five being 75 percent in favor and those over sixty-five being 59 percent in favor. The specialities also responded in a way similar to the 1969 poll with surgeons, general practitioners, and obstetrician-gynecologists only 59 percent in favor of the decision while psychiatrists approved it by 86 percent. Among religious groups
the Jewish doctors were most in favor of the decision with 92 percent, surprisingly, even higher than the atheists who were only 79 percent in favor. Protestant doctors were 44 percent in favor, with the Catholics making up the most resistant group with 73 percent against the decision. The Catholic doctors also reported the highest rate of ethical problems at 52 percent, while the Protestants had 26 percent, the atheists 20 percent, and the Jewish group reported only 12 percent.¹

What then is one to say about the view of the medical profession on abortion? It seems safe to say that most of its members are in favor of the more liberalized situation we have had since the Supreme Court decision, and this is not much more liberal than the statement of the American Medical Association of 1970 referred to earlier.

Another medically-related question that the Supreme Court takes up in its deliberation over abortion concerns the Hippocratic Oath, which is generally supposed to be the primary ethical statement of the medical profession. The relevant section of the Oath reads as follows: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art." How can doctors approve abortion and at the same time hold to this anti-abortion clause of the Oath? The Court's research offers an interesting insight into this problem. Relying on a 1943 work by Ludwig Edelstein, The Hippocratic Oath, the Court concluded

¹ "33,000 Doctors Speak Out on Abortion," Modern Medicine, May 14, 1973, 31-35.
that the views expressed in the Oath represented only a small segment of ancient thought on abortion, specifically that of the Pythagoreans. The Court says:

...Thus, suggests Dr. Edelstein, it is a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.¹

Thus it seems the Court rejects any claim of legitimacy for the Oath as binding on the medical profession in general. It is curious that the Court did not consider the much more relevant question: Even if the Oath does represent traditional majority opinion in medicine, is that sufficient reason for all contemporary doctors to be bound by it? In fact, is there any point in a physician's education or career where he is required to commit himself to the provisions of the Oath? Even if this could be shown to be the case, it would be relevant to the morality of abortion only in a very indirect way, that is as a statement about the integrity of the doctor with respect to his taking of the Oath. Apparently most doctors do not consider the Oath or at any rate its abortion clause as binding on their practice.

¹ S.C.R., 716.
CHAPTER V

LEGAL CONSIDERATIONS

In a system such as ours the decisions of the Supreme Court become the law of the land. The laws, however, tell us only what is legal and illegal in our society. The concern of this paper is not whether abortion is legal or illegal but rather whether it is moral or immoral. So while one may take the Supreme Court decision as the definitive statement concerning the legality of abortion, it cannot be taken as a definitive statement concerning the morality of abortion. It is, after all, not hard to cite laws that permit behavior which seems quite immoral, for example some of the laws that allow discrimination between blacks and whites. On the other hand there are numerous things that are illegal which in no way seem to be immoral, for example some sexual practices involving consenting adults.

The Justices who agreed with the majority opinion did not claim to be deciding the morality of this issue. Although they were deciding only the legal issue, it is often difficult in a society like ours to distinguish the two questions. However, much of what they said is relevant to the moral issue since they did discuss the status of the fetus. If one could accept the Supreme Court's view on the nature of the fetus, then he might get some insight into the moral issue. This is perhaps an oversimplification, since the Supreme Court decision distinguished between the three trimesters and had something different to say about the fetus and abortion during these trimesters.
There have been numerous court cases relevant to the question of abortion, but the Supreme Court decisions of January 22, 1973, have superseded all of these and have become the final word on the problem up to the present time. We will now consider just what the Supreme Court said and just what its reasoning was in saying this. Some consideration will also be made of the argumentation offered by the dissenting Justices regarding the validity of the decision.

The discussion in this chapter will take the following form. The finding of the Court will first be analyzed, that is we will see just what the decision requires with respect to the establishment of laws on abortion. The next two areas of discussion will concern the Court's reasoning in support of its finding. Here there are two distinct lines of justification. First, the Court relied on what it took to be the view of traditional and constitutional law on the nature of the fetus and the act of abortion. Secondly, the Court considered the claim that the abortion decision is part of a woman's right of privacy. The Court's conclusions were that the fetus is not a person as far as the law is concerned and so has no rights and the woman's right to privacy included the right to decide whether to have an abortion or not, at least in most situations. Each of these, the findings and the two lines of argument, will be considered in some detail. Then some critical questions will be raised regarding the decision.
In the summary to the *Roe v. Wade* decision,¹ Justice Blackmun, speaking for the majority, said:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.²

The Court added that the state may require that the physician mentioned in (a) above be licensed by the state, and that if an abortion is performed it must be by such a licensed physician.

A careful reading of this summary will show that there is a distinction between who makes the decision whether to abort and how that abortion is to be performed. For the first trimester there is no mention of how the abortion is to be performed, but it is clear that the decision whether to abort is to be left up to the woman and her physician. In other words, the state can make no regulations or interfere in any way with that decision. The only thing it can do here

¹ There were two abortion decisions rendered on January 22, 1973. The other was *Doe v. Bolton*. This case will not be discussed, because the provisions of *Roe v. Wade* cover the questions raised relevant to the morality of abortion.

² *S.C.R.*, 732.
is require that the woman's physician be licensed and can prohibit abortions not performed by a licensed physician.

During the second trimester the state still cannot interfere in the decision whether to abort. It can, however, make regulations concerning how the abortion is to be performed if this is done in the interests of the mother's health. An example of this kind of regulation would be requiring that the abortion be performed in a hospital or other special setting rather than a doctor's office or the home, as might be permitted in the first trimester. Again, as in the first trimester, there is no mention of the interests of the fetus.

It is not until the third trimester that any mention of regulations relevant to the interests of the fetus is found. It should be noted too that it is only here that the state can interfere in the decision to abort, "proscribing" abortion in promoting the state's interest in the "potentiality of human life." But even here, this cannot be done in cases where the life or the health of the mother are endangered by the continued pregnancy.

To recap so far, it can be said that during the first two trimesters the state can in no way be involved in the decision whether to abort or not but can make regulations relevant only to the procedure in the interest of the health of the mother. In the last trimester the state can be involved in the decision process but only if the abortion is not being performed to preserve the life or health of the mother. But when one takes into consideration what factors can be involved in the life or health of the mother, then this restriction
becomes exceedingly weak, if it continues to be restrictive at all.

Another point that should be made clear before proceeding concerns the Court's reason for setting the first cut-off point at about twelve weeks. Since many textual discussions of fetal development are given in terms of three trimesters, and the first phase of development finishes at about the end of the first twelve weeks, it might be thought that the Court used that phase of development as its guide in establishing its first-trimester finding. This seems to be only coincidence, since the Court was not here considering the nature of the fetus. The Court set twelve weeks as the end of the no-restriction period because statistics show that during the first twelve weeks abortion is safer to the mother than normal delivery. In other words, the mortality rate for normal delivery is higher than the mortality rate for abortion during the first twelve weeks. And this is even more the case the earlier the abortion is performed.¹

During the second and third trimesters this does not pertain, so regulations concerning abortion are allowed, but only in the interests of the mother's health.

As suggested earlier there are two main factors in the Court's justification. First, in law, both traditional and constitutional, the fetus is not considered a person and hence has no rights. Secondly, the abortion decision is part of a woman's right to privacy. These two lines of justification will be taken in turn; then criticism of these

¹ The Court cites a number of references to support this, the latest of which is a 1971 study published by the Public Health Service. See S.C.R., 725.
parts of the decision will be discussed including that of the dissenting Justices.

The language of the decision puts the problem as follows:

The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. . . .

This hits the nail squarely on the head. If the fetus is a person, then its right to life is guaranteed by the Fourteenth Amendment. If the fetus is not a person, then it is not protected by the Amendment and has no constitutionally-guaranteed rights. On the next page the Court declares: "... the word "person" as used in the Fourteenth Amendment, does not include the unborn."

So the Court held that the fetus is not a person and hence is not protected by law. To support this position the Court considered several factors including common law, English statutory law, and recent American law. In each case the Court failed to find precedent for holding that the fetus is a person and that abortion is to be

1 S.C.R., 728. The relevant section of the Fourteenth Amendment reads as follows:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2 S.C.R., 729.
prohibited. We will consider this in some detail because this is one area where the Court has received much criticism.

Citing various sources from English and American law the Court concluded that abortion prior to quickening was not an indictable offense in common law. Abortion after quickening was held by some to be an offense but not murder. The Court relied here on a review of common law by Cyril Means\(^1\) which purports to show that even abortion after quickening was not an offense. The Court's position was that it appeared "...doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus."\(^2\)

The earliest English statute on abortion, Lord Ellenborough's Act of 1803, made abortion of a post-quickening fetus a capital crime with lesser penalties for the abortion of a pre-quickening fetus. The quickening distinction along with the death penalty disappeared from English law in 1837 and never reappeared. In the Infant Life (Preservation) Act of 1929 viability was recognized as the point after which abortion was a felony, unless it was done in preservation of the life of the mother. Since the 1967 Abortion Act, abortion is legal under two conditions. First, where the continued pregnancy constitutes a threat to the physical or mental health of the mother or any existing children in her family. Second, where there is substantial risk that


\(^2\) *S.C.R.*, 718.
the child would be seriously handicapped, either physically or mentally. Three licensed physicians must agree that the abortion is justified under one of these clauses, except where a single physician thinks it is immediately necessary to terminate the pregnancy in order to prevent grave and permanent injury to the mother. It is interesting to note that this law was considerably more liberal than American law at that time, in that abortion was permitted for the sake of existing children and in cases where the fetus was thought to be seriously abnormal. In any case, the Court did not find in English statutory law sufficient precedent to prohibit abortion.

With respect to American law, the Court pointed out that in all but a few states English common law was accepted until about the middle of the nineteenth century. Some early statutes recognized the quickening distinction of Lord Ellenborough's Act without, however, imposing the death penalty for post-quickening abortions. In 1828 New York passed a law making pre-quickening abortions a misdemeanor and post-quickening abortions second-degree manslaughter, except in cases where it was done to preserve the life of the mother. This New York law became the pattern for most state statutes adopted in replacement of the common law.

In the latter part of the nineteenth century the quickening distinction disappeared from the laws in most states, and the penalties for abortion were increased. By 1969 all but a few states had laws prohibiting abortion under any circumstances except to save the life of the mother. In the past few years there has been a
liberal trend in the laws of some states, with the New York law of 1970 the most notable example.¹

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.²

The Court again could find no precedent sufficient to prohibit abortion. This, as we shall see, is a point of much criticism against the decision.

When consideration of the Constitution itself was taken, the Court pointed out that the word "person," while used, is not therein defined. The Court concluded its examination of the Constitution's uses of the word "person" by saying that "None indicates, with any assurance, that it has any possible pre-natal application."³ In the next section the Court summed up its position with this remark: "All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were


² S.C.R., 720-721.

³ S.C.R., 729.
far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. ¹

We will now consider the Court's other line of justification for its ban on state prohibitions of abortion, which is that a woman's right to privacy includes the right to decide whether to have an abortion or not. The Court pointed out that while there is no specific mention of a right to privacy in the Constitution, there have been numerous cases decided where a right to privacy has been the issue. The Court has recognized "a guarantee of certain areas or zones of privacy." Decisions delineating the areas of privacy have covered such abortion-related areas as marriage, procreation, contraception, family relationships, and child rearing and education. Justification for a right of privacy was found in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments in the course of deciding these cases.²

A consideration of these cases led the Court to say:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.³

However, this right of privacy is not completely unqualified.

¹ S.C.R., 729.


³ S.C.R., 727.
Certain cases were cited to show that there is sufficient precedent to establish that a person does not have an unlimited freedom to do as he pleases with his own body. When other interests would be interfered with by his actions, then his liberty must be limited. It is this rationale that is behind the Court's position that while the right of privacy included the abortion decision, this right is not absolute. It is not absolute when other interests are involved.

What other interests are involved in an abortion decision? The other interests, the Court said, include that of the state in protecting the life of the fetus, but this becomes relevant only after viability. It is interesting to notice that the Court did not say the other interest here is that of the fetus but rather that of the state in protecting prenatal or potential life. So even at this point the fetus is not recognized as something having rights or interests. In any case, after viability the state's interest in the potential life represented by the fetus becomes a consideration in the abortion decision. This interest cannot, however, override the interest of the mother's health. So the right to make the abortion decision is guaranteed to the mother by her right of privacy. The only exception to this is after viability when the state may proscribe abortion to protect the fetus. Even this exception, however, does not apply if the mother's health is threatened.

To begin a discussion of the criticism of the decision, let us consider a problem resulting from a not-too-careful use of language.
In section (a) of its summary, the Court used the word "approximately" in defining the end of the period of no restriction thereby leaving some room for adjustment to particular cases. But the Court did not do this in defining the beginning of the third period, and this has already resulted in some confusion and criticism. Since this marks the period where state interference in the decision to abort is permitted and since there does not seem to be any way to adjust the time, it becomes a matter of great importance that the cut-off point be correct. The problem here is determining the point when the fetus becomes viable, because after that point the state can proscribe abortion to preserve the life of the fetus.

The language of the Court introduces two sources of confusion. First of all, the Court said "viability is usually placed about seven months (28 weeks) but may occur earlier, even at 24 weeks."¹ The Court justified this claim by citing Hellman and Pritchard, Obstetrics, 1971, page 493. What this book actually says on page 493 is: "Abortion is the termination of a pregnancy at a time before the fetus has attained a stage of viability. Interpretations of the word viability have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1000 g (about 28 weeks of gestation)."² The Court seems to be setting the earliest point of viability about four weeks after that set by the Court's reference. To some anti-abortion critics of the Court, this seems to be an example of the Court's bias in favor of abortion,

¹ S.C.R., 730.

prohibiting state regulation for another four weeks of the pregnancy thereby making regulation permissible only during the last twelve weeks. The critics point out that in fact there have been many cases of survival during the four-week period preceding this.

The Court made another mistake which allows the cut-off point to be moved back another two weeks, allowing state restriction in the decision only during the last ten weeks of the pregnancy. Robert E. Hall, a Columbia University obstetrician, points out that in medical terminology a normal pregnancy lasts a period of forty weeks from the mother's last menstrual period, which would have occurred about two weeks before conception took place. The mistake the Court made was in considering the duration of the pregnancy as starting from conception and running thirty-eight weeks, then using the twenty-eight week outer limit for viability without specifying that that is to be counted as twenty-eight weeks from the last menstrual period rather than twenty-eight weeks from conception. Hall refers to a New York Times headline of January 23, 1973, which read "State Bans Ruled Out Until Last Ten Weeks" which was the result of this confusion. Hall summarized the problems as follows:

Since there is little doubt that the vast majority of obstetricians in this country subscribe to the delimitation of both viability and abortion at 500 grams or, roughly, 20 weeks from the last menstrual period, the Court's variant definition will surely evoke embarrassment, at the very least, among physicians who try to comply with this ruling. There are, then, these three viewpoints with regard to the latest date for the interruption of a pregnancy based upon the decision of the doctor and the patient: The obstetrician traditionally sets this limit at 20 weeks. The Court sets it at 24 to 28 weeks, which in itself will create confusion for
no one knows which fetus is viable at 24 weeks and which at 28. And the patient, if she elects to apply the logic of The New York Times may innocently expect this limit to be extended to 30 weeks.

The consistency of the Court's position on the fetus comes into question when one compares some of the Court's remarks. This problem can be put this way. The Court agreed that if the fetus is to be considered a person then its life must be protected. The Court then ruled that no state can pass laws declaring the fetus to be a person. The Texas statute that was in question in this case used language indicating that the fetus is to be considered a live human being or person. The Court said: "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." This injunction, of course, becomes part of the law so that no state can now adopt the theory of life that says the fetus is a person with the rights of persons. What is curious in the light of all this is the Court's remark:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

What the Court seemed to be saying is that it cannot determine the nature of the fetus with respect to personhood, but even so it is not to be considered a person in the constitutional sense and no state

2 S.C.R., 731.
3 S.C.R., 730.
can decide that it is. The curiosity of this position is that the Court is saying it does not know what the fetus is and no one else can say what it is either. To some this does not seem to be a reasonable position. After all, just because medicine, philosophy, and theology cannot agree on the nature of the fetus, it does not follow that we can regard it any way we choose. If medicine, philosophy, and theology were asked to define life with respect to adult human beings, there would not be a consensus. But it would not follow from this lack of consensus that we could regard life any way we please, killing those we dislike, etc.

To conclude this line of general criticism before turning to a consideration of the Court's two specific lines of reasoning, perhaps it would be well to bring in some of the views of the dissenting Justices.¹ Justice Rehnquist offered an interesting insight into the Court's claim that it is in the provisions of the Fourteenth Amendment that a woman's right to the abortion decision is found. In 1821 the first state law prohibiting abortion was passed in Connecticut. By 1868, when the Fourteenth Amendment was adopted, at least thirty-six state and territorial laws were on the books against abortion, but the Fourteenth Amendment was not used to liberalize abortion laws until recent years. Justice Rehnquist's point here was that since there were numerous anti-abortion laws in effect at the time of the adoption of the Fourteenth Amendment and none of these was questioned on passage of the Amendment, or even afterward for about one hundred years, the

¹ Voting with the majority were Justices Blackmun, Burger, Douglas, and Stewart. Dissenting were White and Rehnquist. S.C.R., 705.
drafters of the Amendment and their contemporaries had no idea of this Amendment applying to abortion. In his dissent he said:

To reach its result the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.¹

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.²

One wonders how valid a complaint this is. One of the purposes of constitutional government, and indeed the Supreme Court itself, is to be able to cope with new situations. This boils down to the perennial problem of how much weight should be given to the actual views of our "founding fathers" and how much should be given to the needs of the current situation, a situation that the fathers were not dealing with in their work.

Justice Blackmun was not the only one to use language in a loose way. Justice White in his dissent made a statement that is, to say the least, curious. He said:

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat

¹ S.C.R., 737.
² S.C.R., 739.
to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.¹

Is it reasonable to believe that any woman is going to seek an abortion "for no reason at all" or that any doctor will perform such a procedure "for no reason at all"?

This is perhaps unfair to the Justice. It certainly is a valid consideration that many women will seek abortions just for convenience, rather than more serious reasons, and this was no doubt his intent in this passage. An important part of his concern, however, was over the legitimacy of the Court's action in deciding the case, thereby cutting off the possibility of the state legislatures and the people of the various states having a say in the decision process. His concern here seems to be the same as that of Justice Rehnquist who said the issue "is far more appropriate to a legislative judgment than a judicial one."² Justice White puts it this way:

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impact on the mother on the other hand.³

¹ S.C.R., 762-763.
² S.C.R., 737.
³ S.C.R., 763.
The Court, of course, claimed that it did find some justification for its position in the language and history of the Constitution.

Let us turn now to a criticism of the Court's first line of argument, that is that the fetus is not considered a person in traditional and constitutional law. This, it will be remembered, was supported by an examination of common and statutory law of England and the United States regarding abortion. In its examination of these areas of law it could not find sufficient precedent to prohibit abortion.

One problem with examining the Court's claim with respect to early common law findings is that our use of certain key words may not be the same as the early uses. A good example of this is the Court's reference to Edward Coke's survey of English common law where he said that in common law abortion of a woman "quick with childe" is a "great misprision and no murder." The term "misprision" is usually translated to mean misdemeanor, and since we regard misdemeanors as not very serious crimes, we then think that abortion was not a serious crime in common law.

Germain Grisez points out the mistake in this kind of thinking by showing that Coke and also William Blackstone, another commentator on common law, both used the term "misprision" in reference to very serious crimes. Coke, for example, included as a misprision the crime of threatening a judge with a weapon, for which the punishment was

---

1 S.C.R., 718.

amputation of the offending hand, loss of property, and life in prison. Grisez reminds his readers that according to the United States Constitution "high crimes and misdemeanors" are grounds for impeachment. In the context of the seventeenth and eighteenth centuries, when the Constitution was written and Coke and Blackstone were writing, it seems reasonable to conclude that the term "misdemeanor" or "misprision" referred to very serious crimes. Since abortion is referred to as a "great misprision" it also seems reasonable to conclude that it was indeed a serious crime in the common law. This seems to be a reasonable alternative to the Court's view.

Let us consider the Court's claim in the context of modern law where word meanings will not be a serious problem. As noted earlier, the Court said the word "person" as used in the Fourteenth Amendment does not include the unborn. Then it added: "This is in accord with the results reached in those few cases where the issue has been squarely presented." 1 To support this nine cases are cited, all but two of which are 1970 or later. The other two are 1960 and 1961.

Some critics contend that if the Court had considered other cases, it would be led to a different conclusion. A common line of argument with respect to the Court's denial of the personhood of the fetus is that the fetus is treated as a person in other areas of law, so it ought to be in this most fundamental area, the right to life.

1 S.C.R., 729.
Proponents of this view point out here that there are numerous instances where the unborn are treated as the born in holding and inheriting property, personal damages, and even considerations of life itself. And if this is the case, it seems absurd to deny to the unborn the protections of the Fourteenth Amendment. Rudolf Gerber refers to the law as "schizoid" in that "...the law now protects the rights to property and bodily integrity of one who has no legal right to exist, with the paradoxical result that it is legally permissible to kill but not to injure the fetus."^1 Two representative cases will be considered to see if there is legal precedent for regarding the fetus as a person. The first case is regarded by some to be the forerunner of a series of cases where the fetus is held to be a legal person.^2 In the second, the case is decided clearly in favor of the fetus's right to life.

The first example is a case discussed by William J. Maledon, Editor in Chief of the Notre Dame Lawyer in 1971, in his article "The Law and the Unborn Child: The Legal and Logical Inconsistencies."^3 It is that of Kelly v. Gregory, decided in 1953 in New York. Mrs. Kelly was injured by an automobile when she was three months pregnant. The baby was born handicapped and a damage suit was entered in its behalf against the driver of the car, who was at fault. In the decision it was held that when the fetus was injured it was legally a separate

---


entity from its mother and hence a fit subject for damages. The
decision said:

We ought to be safe in this respect in saying that legal
separability should begin where there is biological separa-
bility. We know something more of the actual process of
conception and foetal development now than when some of the
common law cases were decided; and what we know makes it
possible to demonstrate clearly that separability begins
at conception.¹

Maledon points out that since Kelly v. Gregory damages have been
awarded in numerous cases of prenatal injury, regardless of the stage
of fetal development.

Another very interesting 1964 case² discussed by Maledon
involves the right to life of a fetus. Here a pregnant woman, who
being a Jehovah's Witness was opposed to blood transfusion on
religious grounds, was required to submit to a transfusion anyway to
save the life of her unborn child. The New Jersey Supreme Court held
that the fetus' right to life took priority over the mother's right to
practice her religion as she saw fit, even when this involved a
forbidden medical procedure on the mother herself.

Critics contend that since there are numerous cases³ of the
sort mentioned above where the fetus is clearly regarded as a person.

¹ 282 App. Div., 542, 125 N.Y.S. 2d 696 (1953). Quoted in Law

² Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson,

³ For surveys of such cases see, in addition to Maledon, Law
Review Digest, Charles P. Kindregan, "Abortion, the Law and Defective
Children: A Legal-Medical Study," Suffolk University Law Review, 1969,
David W. Louisell, "Abortion, the Practice of Medicine and Due Process
Realities, and the Arguments, 361-422.
the Court had ample precedent to regard the fetus as a person. In an anti-abortion brief offered before the Supreme Court in support of the positions of Texas and Georgia, the argument is put as follows:

The 5th Amendment protects all persons against arbitrary action by the State. "No person shall be deprived of life, liberty or property without due process of law". If the word "person" in the 5th Amendment is construed to mean only born "person", then all unborn persons who have vested property rights (subject to divestiture if they are not born alive) would have no protection against an arbitrary taking of such property rights by the Federal Government. This would leave an absurd gap in the scope of constitutional protection of individual rights. The unborn person would have legal protection against everyone except the State.

If the unborn offspring of human parents is a "person" within the meaning of the 5th Amendment for the purpose of protecting its property interests against arbitrary action by the government, it must follow that the life of that "person" is also protected against arbitrary interference by the State.

The privacy issue can be attacked in several ways. First of all, regardless of what the Constitution says about a person's right to privacy, it would not apply if other's rights were being violated, especially someone else's right to life. If a mother abandoned her six-month-old baby and it died, no one would think that that was justified because of her right to privacy. The point is that in order for the right to privacy to be a valid consideration here, it must first be supposed that the fetus is not a separate individual. In other words, privacy would not be a relevant factor if the fetus were not regarded as a part of the mother. But the Court seemed again to be ignoring the cases where "legal separability" had been established. If the fetus is regarded as an individual different from the mother, as it is in Kelly v. Gregory and Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, then a woman's decision to abort
involves the killing of another human being and that is hardly a private affair.

As the Court points out, there have been numerous cases where it has been decided that affairs affecting one's own body, and especially cases involving sexual and family matters, fall under the right of privacy. Few critics want to dispute the precedents showing that these other matters are part of a person's right to privacy. It can be disputed, however, that abortion falls under any of these precedents. Even the Court seems doubtful of this in its statement:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or Marriage, or procreation, or education, with which Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce, and Meyer were respectively concerned.\(^1\)

If abortion is "inherently different" from the issues in the cases cited as precedents, then how can these cases count as precedents? One important inherent difference is that in the cited cases nothing is being killed, but this is the essence of the abortion issue. One wonders what is the meaning of privacy if a person cannot be "isolated" in it, as the Court declared.

When one examines what the Court included within the scope of privacy, the concept becomes very broad. For example, in the same paragraph where the Court said the right to privacy was founded in the

\(^{1}\) S.C.R., 730.
Fourteenth Amendment, it listed the following situations as falling under this privacy:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.¹

Considering this catalog of problems, it is understandable that dissenting Justice Rehnquist took the position: "Nor is the 'privacy' which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy."² It is, in any case, debatable whether the cases cited support such a wide scope of privacy. As pointed out earlier, it did not seem so to Justice White who said he could find no support for this position in the language and history of the Constitution. As he saw it: "The Court simply fashions and announces a new constitutional right for pregnant mothers, with scarcely any reason or authority. . ."³

We have considered the Court's findings, its rationale, and some criticism of these. As pointed out at the beginning of this

¹ S.C.R., 727.
² S.C.R., 736.
³ S.C.R., 763.
chapter, the Court was not trying to decide on the morality of abortion but only the legality of it. In deciding that abortion is legal, the Court has not offered any proof of its morality, and many people find abortion immoral for reasons not considered by the Court. Whatever else we may say, there does seem to be one thing that is clear from the foregoing. That is that we need to do considerable thinking about the status of the fetus. Is it to be considered a person having rights? The Court's answer is not very helpful in the moral arena. In the next chapter we will take up this most vital question of the personhood of the fetus.
CHAPTER VI

PERSONHOOD OF THE FETUS

Before turning to a discussion of various views on the morality of abortion, it will be well to take up the question the Supreme Court leaves unanswered. Just what is the status of the fetus with respect to personhood? The Supreme Court says legally it is not a person, but what about morally? In this chapter we will first examine the more traditional criteria of personhood relevant to the abortion debate along with the reasons offered for and against each of them. We will then consider some of the argumentation offered in the contemporary phase of the debate, the phase in which we find modern philosophers engaging. In all of this we will be looking for a morally meaningful criterion of personhood that we can utilize in deciding whether the fetus is to be regarded as a person or not.

It might be well to review how a criterion works. Let us consider a case that deals with the fetus. Suppose a doctor has a patient several weeks pregnant and he wants to determine whether the fetus is alive. Each day he listens with a sensitive stethoscope for fetal sounds. On the twenty-eighth day he hears a fetal heartbeat. This would be taken as an indication that the fetus is alive. In other words, the criterion, a heartbeat, has been satisfied showing the fetus is alive. The problem of personhood is similar, except that we cannot agree on what trait or traits to refer to in trying to show the fetus to be a person.
Perhaps the most difficult problem associated with deciding on a correct criterion of personhood in the fetus is finding some trait that distinguishes in a morally meaningful way between the stage of development immediately prior to its occurrence and that immediately afterward. For a trait to be a valid criterion of personhood it should be the case that prior to its occurrence it is clear that the fetus is not a person and afterward that it is. Admittedly, criteria of this sort are hard to find in many areas of concern. Since, however, the nature of the fetus is a central problem of abortion, we should try to make some decision on its personhood or lack of it. The gradual development from fertilized egg to birth seems to portend the impossibility of finding the sort of criterion we need. Let us now consider six candidates for the criterion of personhood, the proposals that have been the core of the traditional debate over the personhood of the fetus.

**Conception:** This occurs when the genetic material from the father, carried in the head of the sperm, unites with the genetic material from the mother, carried in the nucleus of the egg. The complete genetic code for the new individual is established at this point, a code that will determine all of the individual's inherited characteristics. This event is also called fertilization, and perhaps that is a better term. Since "conception" usually means the beginning of something, by using that term here, we may be led to think of this event as the beginning of the new person and miss the force of the controversy. "Fertilization" does not seem to have this loaded meaning. In any case, the problem is to see just what can be said about the nature of the fetus by considering this event.
One thing that does seem clear when one considers the facts of genetics is that the fetus cannot be correctly regarded as just a part of the mother. Since the genetic makeup of the fetal cells is very different from that of the mother's cells, the fetal cells cannot be part of the mother's cells. Unless we are willing to give up a basic claim of the science of genetics, it seems that we must regard the new fetus as a new individual or at least genetically not a part of the mother.

But does it follow from this that the fetus is a person? This seems much harder to establish. Most traditional argumentation in favor of this view assumes that because the fetus is not part of the mother, but an individual in itself, that it should be regarded as a person having rights. It is clearly the beginning stage of development which will produce a new person, so, the argument goes, it must at this stage be regarded as a person. In his "The Morality of Abortion," Paul Ramsey puts it this way:

Indeed, microgenetics seems to have demonstrated what religion never could; and biological science, to have resolved an ancient theological dispute. The human individual comes into existence first as a minute informational speck, drawn at random from many other minute informational specks his parents possessed out of the common human gene pool. This took place at the moment of impregnation. There were of course, an unimaginable number of combinations of specks on his paternal and maternal chromosomes that did not come to be when they were refused and he began to be. Still (with the single exception of identical twins), no one else in the entire history of the human race has ever had or will ever have exactly the same genotype. Thus, it can be said that the individual is whoever he is going to become from the moment of impregnation. Thereafter, his subsequent development may be described as a process of becoming the one he already is."

---

Let us raise a question here that will be raised with the other proposed criteria. Is there a morally significant difference in the fetus before the event and after it, a difference that would make plausible the claim that after the event the fetus is a person? In the case of conception there is no fetus before the event but only the mother and father. After the event there is a new individual, the fetus. This is indeed a significant difference, but it is not obvious that it proves the fetus to be a person. When one considers that from this point on there are no more drastic changes, that is that fetal development is a gradual process from conception to birth, then it is understandable how this seems to people like Ramsey to establish the personhood of the fetus.

What can be said against this view? The objection commonly raised here is that the fetus at this stage has no resemblance to a human being. It is just a one-celled speck of protoplasm having nothing in common with the rest of us. This strikes some as an obvious proof that the fetus is not a person. To Judith Thomson, for example, it seems obvious that "A newly fertilized ovum, a newly implanted clump of cells is no more a person than an acorn is an oak tree."¹ It is interesting to note that while Thomson thinks the fetus has become a person well before birth, she holds little hope of being able to decide just when.

In the passage quoted above, Ramsey drops a hint of another problem in regarding the newly-fertilized egg a person. If the fetus

¹ Judith Thomson, "A Defense of Abortion," Philosophy and Public Affairs, Fall 1971, 48. Thomson's view on the morality of abortion will be considered later.
is a person from the moment of conception, then what do we make of its personhood if two weeks later it splits into two genetically identical halves thereby becoming identical twins. Is each twin now only half a person, or were there really two persons contained in the original fetus? This is not too difficult an objection to overcome, except perhaps for someone who equated personhood with receiving a soul from God. While each twin may no longer be genetically unique, if the rights of personhood are conferred at conception then it would seem that each twin should be regarded as person. Until we can determine which fertilized eggs will twin, we can be safe by saying at least one person comes into existence at conception. There is another objection to conception as the mark of personhood that points up the virtue of implantation as the cut-off point.

**Implantation:** Since there is a period of several days after conception before the fetus becomes attached to the mother and in many cases never does get implanted in the uterus but just disintegrates, why then should we assign a cut-off point that will have "nature" killing many persons? We should also regard implantation as the event marking personhood because it is only after implantation occurs that the fetus begins to receive nutrients from the mother so it can develop.

One could raise here the same problem of twinning, since this occurs after implantation, but the same solution would be given. There is another objection that appears more powerful. It is that there does not seem to be a difference in the fetus before and after implantation significant enough to label the post-implantation fetus...
a person but not the pre-implantation fetus. The fetus itself does not change immediately. The only difference is that where before it was floating free in the cavity of the uterus it is now imbedded in the lining of the uterus. This difference alone does not seem to justify the accordance of rights that goes with personhood. And of course, the fetus at this point still looks nothing like a human baby, it being just a speck of cells.

An interesting question might be raised here. If one regards the fetus as just part of the mother because of its attachments, dependence, etc., what is one to say about the fetus prior to implantation? Before implantation there are no connections to the mother, nor is it receiving any nutrients from her. It seems, therefore, more plausible to maintain that conception is the starting point of personhood because at implantation the fetus loses some independence to the mother.

Systems Completion: This, it will be recalled, is that time in its development when the fetus has attained a human form with all its parts in place and working even though it is only about four inches from head to toe. The obvious strength of this claim is that now the fetus has a human body, which seems to avoid the grounds for rejecting conception and implantation as the point of personhood because the fetus was then just a clump of cells looking nothing like a human being. After all, it is pointed out, at twelve weeks the fetus has a beating heart, a brain capable of registering on an EGG, and it moves about by its own force within the uterus. Critics ask whether there is
enough difference in the fetus before and after this point to justify the attribution of personhood. Suppose we assign twelve weeks as the time of personhood, how is the fetus different then from what it was two days earlier? While the twelve-week fetus does not look at all like the one-day fetus, the development from one stage to the other has been a very gradual process, without any obvious marks of personhood. It could also be pointed out that the body is actually not completed until about age twenty-five when the last cartilage cells are replaced by true bone. No one, it would seem, would want to say that rights of personhood should not be accorded until age twenty-five.

Quickening: Historically, there have been two reasons for regarding the fetal movements felt by the mother as the mark of personhood. First, until recently there was no way to know the fetus was alive until the mother felt the motion, which usually occurs at about five months. In a time of high fetal mortality, unless there was evidence of life there was not much point in worrying about rights. The second reason was a religious one. It was held by many churchmen that the first felt motion was a sign that God had placed a soul in the developing body. In his discussion of the soul, Thomas Aquinas regarded motion as an indication of life.¹ It is explicitly claimed in this remark by Brigham Young in 1876:

When the body is prepared, at the proper time, the spirit enters the tabernacle, and all the world of mankind in their reflections and researches must come to this

conclusion, for the fact is they can come to no other—
that when the mother feels life there is an evidence
that the spirit from heaven has entered the tabernacle.¹

Since most people were somewhat religious in the last century, perhaps
these two reasons are just two sides of the same coin.

Probably the most obvious objection to this position is that
actual movement of the fetus begins weeks before it is finally felt
by the mother. In fact there are fetal movements as early as the
twelve-week stage discussed above. And, of course, now we are able to
tell that the fetus is alive very early. There is still a powerful
emotional impact of this experience on the mother. Until there is
actual motion to be felt, the mother may not appreciate the fact that
there is a live fetus growing inside of her, but she can hardly miss
it when she can feel it kicking in response to outside stimuli as often
happens. But this, of course, does not answer the question we are
asking: Is the fetus to be regarded a person just because it moves?

The problem again is whether there is a significant enough
difference here to justify labeling this fetus a person, but an
earlier one not. Aside from claims like Brigham Young's that the felt
motion is evidence of the entrance of a spirit, there seems to be no
reason to take the fact that the mother finally feels something that
has been moving for a long time as proof of the personhood of the fetus.

Viability: Proponents of this view hold that the fetus should
be regarded as a person from the point after which it could survive if
delivered. As pointed out in the last chapter, this is as early as

¹ Journal of Discourses (Liverpool: Joseph F. Smith, 1877),
Vol. XVIII, 258.
twenty weeks. There are at least two reasons for this position. First, at this stage the fetus is completely developed and looks like any newborn infant, except for its smaller size. Furthermore, since it would be able to survive if delivered, the only significant difference between this fetus and a newborn infant is one of location. To proponents of this view, this is not enough difference to deny the fetus the rights of personhood.

There are several objections to this view. First, as pointed out by Robert Hall earlier, the exact point of viability is impossible to determine. This prevents it being a useful criterion, because we have no way to know if it is satisfied or not unless the fetus is delivered, but then it cannot be used to determine whether an abortion ought to be performed. The point of viability also differs with race, Negro fetuses in general becoming viable weeks earlier than whites. Another point is that viability is relative to medical technology and other related factors. A fetus delivered at twenty weeks now survives only because of much support from incubators, drugs, special food, etc. During the last century viability would have been much later. So is the twenty-week fetus now a person but only the twenty-eight-week fetus one hundred years ago? Should personhood depend on things in no way part of the fetus, such as medical technology? In fact, even after birth the newborn infant is not independent. Without special care it would die. Considering all this, viability becomes too flexible to be a suitable criterion for personhood.

Birth: After birth, it is held, the infant is clearly a member of the human family. The strength of this position is that birth as a
criterion shares the virtues of all the other proposed criteria plus the undeniable individuality of the infant following separation from the mother. One might still raise the question concerning a morally significant difference between the newborn infant and the fetus just prior to birth. Since the fetus just prior to birth is fully developed and no more dependent on help from others, the only difference seems to be one of location, but this does not seem to be the sort of morally significant difference that is an obvious mark of personhood.

When these six criteria are carefully considered, two things become apparent. All of the criteria are related to physical traits of the fetus, and none of them seems to satisfy the requirement of being an obvious mark of personhood. This difficulty has led some philosophers to reconsider the problem from a different point of view. Without restricting our inquiry to the fetus, can we find some case that will point up the essential nature of personhood? Some find this in what Stanley I. Benn calls the "paradigm of personhood, the adult human being." But it is not in the physical traits of the adult, rather it is in the psychological. In other words, it will be the presence of certain psychological traits which will be the criterion of personhood. Furthermore, we will establish just which psychological traits are relevant by examining ourselves to see what it is about us that makes us persons. As Benn says, after giving his account of personhood: "Now this is how I see myself in the world, and unless I

have a peculiar, solipsistic view of the universe, I recognize others in it that, like me, are persons too."¹

Regarding this view it is well to remember that the concept of personhood is a two-sided coin. On the one hand, it involves a descriptive account of the entity in question. But it also has a moral factor. If X is a person, then X should be treated in a certain way, that is as having a right to life. So the problem can be approached two ways, either by asking what sort of an entity a person is or what sort of entity can have this right. In the recent debate this latter aspect has received considerable attention. It will be seen that using psychological traits as the criterion of personhood can lead to extreme views regarding the personhood of fetuses and infants and corresponding views on abortion and infanticide.

Let us now consider a concept of personhood and rights based on psychological traits which form, as Benn says, the paradigm of personhood. We will examine the views of Michael Tooley and Benn, two contemporary philosophers who have attempted to apply this criterion of personhood to the problem of abortion. Both Tooley and Benn hold that personhood entails ascription of rights. As Tooley says:

"Specifically, in my usage the sentence 'X is a person' will be synonymous with the sentence 'X has a (serious) moral right to life.'"²

Benn puts it this way: "I shall argue that a moral reason that invokes

---

¹ Ibid., 100.

² Michael Tooley, "A Defense of Abortion and Infanticide," in Feinberg, The Problem of Abortion, 55. This is a revised version of a paper which was first published in Philosophy and Public Affairs, Fall 1972.
a right is a special sort of moral reason that can apply only in respect of a particular kind of being - a moral agent or 'a person.'

If the paradigm of personhood is the adult human being, and if being a person means having the right to life, there is still one question to consider: What is it about the adult human being that is the mark of personhood? It is the answer to this question that is relevant to the personhood of the fetus. There is, of course, the additional question: What rationale is there for accepting this as a proper criterion over the others already discussed? Tooley and Benn hold similar views with respect to both questions, and these will now be presented along with some critical questioning of the views.

Both philosophers regard certain psychological traits of adult human beings as the mark of personhood. Tooley's basic argument runs as follows. First of all, there is a conceptual connection between having a right and the conditions under which that right can be violated. Violating a person's right, according to Tooley, must include the prevention of a state of affairs that that person desires to come about. So the conceptual connection is that a person must have a desire for something in order to have a right to it. As he says:

...there is a conceptual connection between, on the one hand, the rights an individual can have and the circumstances under which they can be violated, and, on the other, the existence in him of the corresponding desires. The basic intuition is that a right is something that can be violated and that, in general, violation of an individual's right to something involves frustrating the corresponding desire.

---

1 Benn, "Abortion, Infanticide, and Respect for Persons," 97.

2 Tooley, "A Defense of Abortion and Infanticide," 60.
Tooley then defines having a desire as desiring that a certain proposition be true. But in order to desire that a proposition be true, the person must understand the proposition, and that will require understanding the concepts involved in the proposition.

...The basic point here is that the desires a thing can have at a given time are limited by the concepts it possesses at that time. For the fundamental way of describing a given desire is as a desire that a certain proposition be true. Then since one cannot desire that a certain proposition be true unless one understands it, and since one cannot understand it without possessing the concepts involved in it, it follows that the desires one can have are limited by the concepts one possesses. Hence one cannot be capable of having a given desire unless one is capable of possessing the concepts involved in it.

The final step is obvious. It is to point out that fetuses and newborn infants are not capable of having the concepts necessary to have desires about their own futures, so they are not persons and do not have a right to life.

...At what point in its development does a human organism become capable of envisaging a future for itself and of having desires about that future? Or become capable of forming the concept of a continuing subject of experiences and other mental states? Or become such a continuing self? Or become self-conscious, or at least capable of self-consciousness? These questions obviously demand detailed psychological investigation. Nevertheless I think that everyday observation strongly suggests that there is no more reason for holding that a newborn baby has these capacities or enjoys these states than there is for holding that this is true of a newborn chimpanzee.

Tooley concludes from this that neither abortion nor infanticide violates any person's right to life and so are morally justifiable.

In sum, the argument is:

1 Ibid., 70-71.
2 Ibid., 89-90.
(1) For X to have a right to life, X must be able to desire life.

(2) For X to desire life means desiring that the proposition "X has life" be true.

(3) Desiring that a proposition be true requires understanding the concepts involved in the proposition.

(4) Fetuses are not capable of this sort of understanding.

Therefore: Fetuses cannot have a right to life.

The bulk of Tooley's paper has not been considered, because it is devoted to defending his view against certain counterexamples. For instance, what about an adult human being who is in a coma and cannot have desires? Tooley allows that a person need only be capable of having desires not that he must now hold them. The criticism of Tooley's position is on a much more fundamental point. What is his rationale for claiming the "conceptual connection" that is the basis of his position? In other words, how does he justify (1) above?

Before turning to that, it might be well to consider Benn's view, since it is essentially similar to Tooley's. Benn accepts the position of H.L.A. Hart that having a right entails the "liberty not to insist on one's right."¹ He goes on:

... Now if this is what is understood by a right it follows that only a moral agent, having the conceptual capabilities of considering whether to insist or not upon his right, of manipulating, too, the "pulls" it gives him on the actions of others, capable, in short of having projects and enterprises of his own, could be said to be a subject of rights.

Like Tooley, then, I am employing a pre-suppositional argument. I am arguing, however, that to have a right presupposes not simply the capacity to desire the object in question, but to be aware of oneself as the subject of enterprises and projects that could be forwarded by choosing

to exercise one's rights. While Tooley confines the significance of something approaching this level of self-consciousness to the right to life alone I am contending that it is a precondition for any right at all.¹

Since fetuses cannot have these concepts, they have no right to life. It should be pointed out that while Benn agrees with Tooley on the impossibility of a fetus having rights, he does not agree that that alone justifies killing them. His view is that not all moral obligations flow from rights, and we might be obligated not to kill fetuses for reasons other than that they are persons.

As in the discussion of the traditional criteria, one looks for some convincing rationale for accepting the criterion offered. As Benn puts it, he and Tooley are using presuppositional arguments, the presupposition being necessary to make sense out of our talk about rights. But should we accept the claim that sensible talk of rights is possible only by presupposing this alleged conceptual connection to certain conscious states? In other words, what is offered to show that this is a proper criterion? Benn offers no rationale, and Tooley presents no argument to support the claim but rather attributes it to intuition. Consider again his remark in the earlier quotation: "The basic intuition is that a right is something that can be violated and that, in general, violation of an individual's right to something involves frustrating the corresponding desire." He further adds: "The proposed analysis of the concept of a right seems intuitively plausible."² Other than remarks of this sort, neither Tooley nor Benn offer any

¹ Ibid.
² Tooley, "A Defense of Abortion and Infanticide," 60.
rationale to support their basic view. If "basic intuitions" are allowed, then why accept theirs rather than Ramsey's or any of the rest discussed earlier where fetuses are regarded as persons? Ramsey would surely think that talk of rights is quite intelligible without the fetus having desires and concepts.

This view is clearly not proven to be correct, but what can be said against it? Consider the case of a two-year-old child who wants a bottle of milk. Does Tooley's account really give a correct picture of desiring here? If so, then the child desires that the proposition "I have a bottle of milk" be true. But does Tooley want to say a two-year-old, or ten-year-old for that matter, has an understanding of the concepts of "proposition" and "truth"? Without these concepts he could not desire that the proposition in question be true, according to Tooley's account. When one looks at the contemporary controversy in analytic philosophy over the correct analysis of "proposition" and especially "truth," one would have to conclude that not many people, if any, understand the concepts involved and so could not have desires. This seems almost a Reductio ad Absurdum against Tooley's view. It might be replied here that the reference to a child in this example is beside the point since Tooley is using an adult human being as his paradigm. This might be so, except that Tooley does not seem to want to exclude older children from the category of persons. Yet older children and perhaps many adults will not satisfy his criterion. Daniel Callahan also offers an argument that could be taken as weakening Tooley's position. This will be discussed in a later section on potentiality of personhood.
There are other problems associated with a view of this kind. First of all, when does the necessary psychological state occur? That is, when does a human being become capable of having desires, etc.? As Tooley points out, it is a matter for serious psychological investigation. Since these states are not present at birth, however, this is more a problem for infanticide than abortion. There is another question which has been raised with the other proposed criteria. Assuming that we can discover just when desires begin in an individual, why should this be a morally significant difference? How is the individual who has reached the stage of desires different from the one who has not? Only if we accept Tooley's notion of a conceptual connection between desires and rights does this stage become morally significant. And, as pointed out, we have been given no reason to accept this view. Even Benn speaks of an intuition we have against killing babies.¹ Again, whose intuition are we to accept?

Another position similar to Benn's and Tooley's, which is worth mentioning because of its wide acceptance among social scientists, is that of Ashley Montagu. This view is that humanity or personhood is something an individual acquires by being "humanized" through social interaction and relationships, for example the use of language. It is obvious that on this view, as on Benn's and Tooley's, personhood is not possible in a fetus or newly-born infant. This view likewise suffers from a lack of convincing argument.²

¹ Benn, "Abortion, Infanticide, and Respect for Persons," 98.

There is another fetal consideration which should be taken into account. It is the position that even if the fetus is not now a true person, it should be treated as a person simply because of its potential to become a person. All agree that this potential resides in the fetus. Father Bernard Haring, a highly respected spokesman for the Catholic Church, says potentiality of the fetus is a legitimate reason for not aborting it. Admitting that there is doubt within Christianity about the exact status of the early fetus with respect to personhood, he says this of the fetus: "Christians have shared the common opinions or common doubts about the moment when the embryo is animated. But in any event it is life-to-be, a man, under the protection of the Giver of life."¹ In other words, as it is put by numerous others, even if the fetus is not yet a full-fledged person, it is nonetheless a life developing according to God's plan, and men have no right to interfere with God's purposes.

John Noonan offers an interesting argument based on the potentiality concept. Specifically, when one considers the different degrees of potential at various stages of fetal development, it seems that the most reasonable point to assign rights is from conception on. He points out first how little potential to become a person the ununited sperm and egg have. There are about 200,000,000 sperm deposited in the female with each copulation, only one of which will fertilize an egg. If one assumes that every copulation will result in fertilization, then the chances of any given sperm united with an egg

are one in 200,000,000. This likelihood is even less when one considers that relatively few copulations will result in pregnancy. Of the 100,000 to 1,000,000 undeveloped eggs in the female's ovaries, at most 390 will be ovulated, and of the 390, not more than a few will be fertilized. If for sake of argument we say ten, then the chance of any egg's being fertilized is at best ten in 100,000, or one in 10,000. But assuming that fertilization takes place, then what are the chances of the fertilized egg becoming a person? Statistics show that normally about four out of five do develop to fetal maturity, so the human potential of the fertilized egg is four in five. As Noonan puts it: "At this stage in the life of the being there is a sharp shift in probabilities, an immense jump in potentialities."^1

The moral point is seen when one considers the difference in the way we would view two cases of a hunter firing at something moving in the bushes and in so doing killing another man. If it could be demonstrated that the chances of the movement being another man were less than one in 200,000,000, we would likely not condemn the hunter's action in firing. But if it were shown that the chances of its being a man were four out of five, we would surely condemn the hunter as negligent at least but probably homicidal. Noonan then concludes the argument as follows:

The probabilities as they do exist do not show the humanity of the embryo in the sense of a demonstration in logic any more than the probabilities of the movement in the bush being a man demonstrate beyond all doubt that the being is a man. The appeal is a "buttressing" consideration, showing the plausibility of the standard adopted. The

^1 Noonan, The Morality of Abortion, 56.
argument focuses on the decisional factor in any moral judgment and assumes that part of the business of a moralist is drawing lines. One evidence of the nonarbitrary character of the line drawn is the difference of probabilities on either side of it. If a spermatozoon is destroyed, one destroys a being which had a chance of far less than 1 in 100 million of developing into a reasoning being, possessed of the genetic code, a heart and other organs, and capable of pain. If a fetus is destroyed, one destroys a being already possessed of the genetic code, organs, and sensibility to pain, and one which had an 80 percent chance of developing further into a baby outside the womb who, in time, would reason. ¹

Norman St. John-Stevas thinks that it is fetal potential which has motivated the public and lawmakers to protect the fetus. In his paper "Law and the Moral Consensus," presented in 1966, seven years before the Supreme Court decision liberalized abortion, St. John-Stevas says: "This attitude of the law toward the fetus reflects the general moral consensus in the community which while it stops short of equating the fetus with a human person, agrees that as a living human organism—a potential life—the fetus has rights which should be respected."²

This, of course, is not an argument for accepting potentiality as a moral criterion, but if he is right it does show that our conceptions of what is moral in this case recognize potentiality as a valid consideration.

Haring, Noonan, and St. John-Stevas are all Catholics who ultimately derive their views from their religion. It might be interesting to look at a purely secular argument for accepting potentiality as a mark of personhood. This takes into account an

¹ Ibid., 56-57.
² Labby, Life or Death: Ethics and Options, 47.
argument offered by Callahan in his book *Abortion: Law, Choice, and Morality*. It is especially telling against a view like Benn's or Tooley's where psychological or behavioral traits are offered as criteria. The problem is that no matter which psychological or behavioral trait might be offered, there will always be some humans who are not then exhibiting it. For example, when humans sleep they do not desire, make decisions, or communicate in the socially necessary pattern. One might attempt to escape this objection, as Tooley does, by claiming only that the person must have the capability or potential of doing these things, and that he need actually do them only when other conditions pertain, for example his being awake. But this same thing can be said of the fetus. Before it is born it is like the man asleep, not then behaving in the required way but having the potential to do so when conditions are right. If one is forced into allowing potentialities as valid traits in order to escape this dilemma, then how can he rule them out as valid considerations in deciding how to regard the fetus?

Callahan offers another argument which takes into account three kinds of inter-related potentialities, the biological, the psychological, and the cultural. All are necessary for the full development of a human being, and this development is a life-long process. Just because at the fetal stage the biological potential is the only one of the three being realized is no more reason for rejecting the fetus as human than it would be to reject a man aged thirty just because his cultural potential is not yet fully realized. In practice we define "man" not just in terms of his actual traits but
also in terms of his potentialities. We say men are reasoning creatures. Do we mean that all of them are in fact always reasoning, or that they all have the potential to reason? It is the latter, according to Callahan, and if so, then we should regard the fetus as human not just because of its present traits but also because of its potential.¹

As with the earlier proposals, we must consider what can be said against accepting potentiality as a proper criterion for accordance of rights. One simple objection is that if we treat potentiality as reality and are consistent in our application of this criterion, then we will be forced into absurd behavior. We will, for example, have to treat children as adults because they have the potential to become adults. Tooley offers a similar argument. He contends that if it is wrong to kill an organism because it has the potential to develop into an organism with the right to life, then it should be just as wrong to kill a system of organisms that has the potential to develop into an organism with the right to life. The sperm and egg can be thought of as just such a system, since if left alone they have this potential. If this is the case then contraception would be as wrong as abortion. So unless a person is prepared to condemn contraception, he cannot consistently condemn abortion.² This objection will probably not stand up to Noonan's argument. Granted the sperm and egg are potential persons, but their potentiality is so remote compared to that of the fetus that they cannot

¹ Callahan, Abortion: Law, Choice and Morality, 364-368.
² Tooley, "A Defense of Abortion and Infanticide," 81-84.
be regarded in the same way. Tooley's argument may be o- weaker ground for another reason. It is certainly the case that we often consider potentiality in our judgments about life. We regret the death of a promising young student more than we do the death of an old derelict, even though at the time of his death the student was not making any more of a contribution to society than the derelict. Our special regret is due to our recognition of his potential. While it is easy to cite numerous cases of this sort, it is not so easy to cite cases like Tooley is suggesting where the potentiality resides in a system rather than an individual.

Specific objections to using potentiality as the criterion are not very strong, but it should be pointed out that no one has offered a very good argument in favor of it either. While there are some plausible reasons given for accepting and for rejecting this contention, no very convincing rationale has been offered by either side. This seems to end up much as the other proposed criteria do. With so much uncertainty over these proposed criteria, one wonders if it is as hopeless as it seems in these remarks by Roger Wertheimer:

As things stand, it is not at all clear what, if anything, is the normal or natural or healthy response toward the fetus; it is not clear what is to count as the special historical and social circumstances, which, if removed, would leave us with the appropriate way to regard and treat the fetus. . . . We seem to be stuck with the indeterminateness of the fetus' humanity. This does not mean that, whatever you believe, it is true or true for you if you believe it. Quite the contrary, it means that whatever you believe, it's not true—but neither is it false. You believe it, and that's the end of the matter.1

1 Roger Wertheimer, "Understanding the Abortion Argument," in Feinberg, The Problem of Abortion, 40. This is a revised version of a paper first published in Philosophy and Public Affairs, Fall 1971.
It is important to call attention to one problem in the controversy over the personhood of the fetus. All of the disputants agree on the factual description of the fetus at its various stages. That is, they all accept the details of fetal development as outlined earlier as well as the psychological descriptions of fetuses, infants, and adults. But despite their agreement here, they disagree on the truth of the additional claim that the fetus is or is not a person at various stages of development. Another way to see this problem is to ask if there is anything of a factual nature about the fetus that one side knows but the other does not that convinces that side of the validity of its position on the personhood of the fetus. The answer is no. Both sides know the same facts about the fetus. Yet one side looks at the facts and declares the fetus is not a person before a certain point, and the other side disagrees on the basis of the same facts.

This sort of thing is not uncommon in philosophical controversies. One person looks at the world and sees it as the handiwork of God. Another sees only the operation of natural law. Another sees no meaning whatever. And so it goes. When the same facts can lead equally intelligent people to diverse conclusions, then there seems little hope of settling the controversy on the basis of that evidence. But in the case of the fetus, there seems to be nothing else that could count as evidence in the personhood question except the biological and psychological facts that have been presented.

Taking account of this kind of problem, John Wisdom\(^1\) suggests

that even though two people have the same facts they might differ in their conclusions because they are looking at the facts in a different way or from a different angle. For example, when two people look at a building from a different angle they notice different things, yet the same purely factual description would be accepted by both.

We will see if we can get at the root of this problem by examining a dispute between Tooley and Wertheimer over the nature of the claim that the fetus is a person. It will be recalled that Tooley equates being a person with having a serious right to life. Tooley sees the abortion problem involving two kinds of considerations, namely moral and factual. He says:

What properties must something have to be a person, i.e., to have a serious right to life? At what point in the development of a member of the species Homo sapiens does the organism possess the properties that make it a person? The first question raises a moral issue. To answer it is to decide what basic moral principles involving the ascription of a right to life one ought to accept. The second question raises a purely factual issue, since the properties in question are properties of a purely descriptive sort.

Wertheimer on the other hand thinks the question of the fetus' personhood is a factual question. He says of the fetus:

. . . deciding what to call it is tantamount to a serious and unavoidable moral decision.

This last remark suggests that the fetus' humanity is really a moral issue, not a factual one at all. But I submit that if one insists on using that raggy fact-value distinction, then one ought to say that the dispute is over a matter of fact in the sense in which it is a fact that the Negro slaves were human beings.

1 Tooley, "A Defense of Abortion and Infanticide," 58.
2 Wertheimer, "Understanding the Abortion Argument," 40.
Who is right about this. Is the question "Is the fetus a person?" a moral or a factual question? Which it is will determine how we must answer it.

An analysis of the personhood argument may throw some light on this problem. Consider the following representative argument:

(1) Fetus X has reached viability.
(2) Viability is the criterion of personhood.

Therefore: Fetus X has a right to life and should not be killed.

Tooley would say this argument has both a factual and moral content. It has moral content because the conclusion tells us what is proper behavior toward the fetus. Because the argument has this kind of conclusion which follows only if the second premise is true, Tooley regards the question of the proper criterion of personhood a question of moral principles. Wertheimer would recognize the moral content of the conclusion but would still claim that the question of the proper criterion is not a moral question, but rather a factual one, factual in an unusual way perhaps but still factual.

This difficulty will be clearer when we see that the argument shown above is really a compression of two arguments. Expanded back into its full form, it would include these two arguments:

(1) Fetus X has reached viability.
(2) Viability is the criterion of personhood.

Therefore: Fetus X is a person.¹

¹ This would be enough for Tooley, but only because he includes having a right to life in his meaning of the word "person." See this work, 99. If the term "person" is taken to mean only "full-fledged human being," then one can meaningfully ask how persons should be treated. This analysis takes the latter point of view.
(1) Fetus X is a person.
(2) Persons have a right to life and should not be killed.

Therefore: Fetus X has a right to life and should not be killed.

It is plain now that it is not one argument with both a moral and a factual content. It is rather two arguments, one factual and one moral. If one stresses the first argument, it seems to be a factual question. If one stresses the second, it is a moral question. We can say that the question of how we treat persons is clearly a moral question. But once we have made this distinction and included the moral content in the second argument, it leaves the question of the personhood of the fetus without moral content.

Another way to see the problem is to notice in which argument arises the question of the proper criterion of personhood. It is the first. The question of the proper criterion of personhood is irrelevant to the second argument and its key concern, that is how we should treat persons. Whatever it is that makes something a person, the treatment of it should be the same. The question of the proper criterion arises with respect to the second premise in the first argument. The only moral question is whether the second premise in the second argument is a valid moral principle. With respect to this question, Tooley is right in pointing out that the dispute involves disagreement over moral principles. But the fundamental question Tooley is dealing with in his paper is not this one, but rather what is the proper criterion of personhood, and this is relevant only to the second premise of the first argument. So if we deal just with the question at hand, that is the proper criterion of personhood, then
Wertheimer is right. Perhaps it would be better to say he is partially right. He is right that the question is not moral, but is it a factual question?

To completely clarify this situation we need to bring in another kind of question. There are actually three kinds of questions here, a factual one, a moral one, and what could be called a criteriological one. What sort of behavior is proper toward a person is a moral question. Whether a certain fetus has a certain trait is a factual question. But what trait is a correct criterion of personhood is on this view neither moral nor factual, but rather criteriological. It is the question of the validity of the criterion itself, and it cannot be answered by a straightforward appeal to the facts. It is like the question of what is to count as thinking. Given one criterion of thinking, only humans think. Given another, computers also think. Once we have decided what is to count as thinking, then deciding whether a computer does that is a purely factual question. Deciding what is to count as thinking, however, is a criteriological question.

The problem here is how we arrive at the correct answer to a criteriological question. This is where the real difficulty comes in. In philosophy and life many of the unsolved issues boil down to disagreements over the proper criterion to use. What is the proper criterion of freedom? If we could agree on that, then the freedom/determinism problem could be solved. Do computers think? Do animals feel? Are viruses alive? If we could decide on the correct criteria for thinking, feeling, and life, then we could consider the relevant
facts and answer these questions. Unfortunately, we cannot decide or agree on the criteria.

Wertheimer offers the Wittgensteinian suggestion that we solve disagreements of this kind when we reach an agreement in judgments. We regard eighteen years of age as a correct criterion of adulthood because we agree in the judgment that generally eighteen-year-olds are adults. The problem with the fetus is that we do not have agreement in judgments about it. Wertheimer thinks this is because we do not have a chance to get to know it well enough to make judgments about it we would all agree on. It is just not a part of our lives as eighteen-year-olds are. Without some way to get to know the fetus in our lives, we will be unable to agree in judgments and concepts about it. In this situation with no valid criterion there is no way to assign truth value to the claim that the fetus is a person. Wertheimer puts it this way:

Apparently, the conclusion to draw is that it is not true that the fetus is a human being, but it is not false either. Without an agreement in judgments, without a common response to the pertinent data, the assertion that the fetus is a human being cannot be assigned a genuine truth-value.^

1

This pessimistic conclusion is supported by the fact that despite years of controversy and attempts to resolve the issue no consensus has yet been reached and none seems in sight.

Tooley does not think this pessimistic attitude is justified and he suggests that this can be shown by looking at the root of it. He elaborates on Wertheimer’s comparison of the fetal personhood question to the question of the personhood of the Negro slaves. He says:

1 Wertheimer, "Understanding the Abortion Argument," 46.
The question here is why it should be more difficult to decide whether abortion and infanticide are acceptable than it was to decide whether slavery was acceptable. The answer seems to be that in the case of slavery there are moral principles of a quite uncontroversial sort that settle the issue. Thus most people would agree to some such principle as the following: No organism that has experiences, that is capable of thought and of using language, and that has harmed no one, should be a slave. In the case of abortion, on the other hand, conditions that are generally agreed to be sufficient grounds for ascribing a right to life to something do not suffice to settle the issue.¹

Tooley seems to have missed Wertheimer's point in this passage. From Wertheimer's point of view, this would be mistaken on three counts. First of all, it is not the existence of "moral principles of a quite uncontroversial sort" that settle the issue. It is rather that as Negroes became a part of our lives we came to agree that they were indeed human beings. In other words, we came to an agreement in judgments about their personhood. But it was only because they were a part of our lives that this agreement was possible, and this is precisely what is not possible in the case of the fetus. Given its anatomical isolation, it is simply impossible to get to know the fetus and come to agreement in judgments about it.

The second mistake is perhaps just another way of putting the first one. Pro-slavers presumably would agree that Negroes meet the three criteria Tooley mentions, yet they still believe in Negro slavery. This is because it is not a question of whether the Negroes meet the criteria. It is rather a question of what kind of beings they are. As Wertheimer says of the slaveholder's reply: "... he replies that people with naturally black skin are niggers, and that is an

¹ Tooley, "A Defense of Abortion and Infanticide," 58.
an inferior kind of creature.¹ This view of the slaveholder exists because he does not know the Negro well enough to recognize that he is not an inferior creature.

The third mistake is relevant to the fetus. Tooley says that we cannot agree here because "the conditions that are generally agreed to be sufficient grounds for ascribing a right to life to something do not suffice to settle the issue." The problem is rather that there are at present no generally-agreed-upon conditions sufficient for ascribing a right to life. This is in effect to say that there is no agreed-upon criterion for personhood, at least as it applies to the fetus. And Wertheimer would suggest that this is due to our not knowing the fetus.

Wertheimer offers an interesting suggestion to explain his point:

Close your eyes for a moment and imagine that, due to advances in medical technology or mutation caused by a nuclear war, the relevant cutaneous and membranous shields became transparent from conception to parturition, so that when a mother put aside her modesty and her clothing the developing fetus would be in full public view. Or suppose instead, or in addition, that anyone at any time could pluck a fetus from its womb, air it, observe it, fondle it, and then stick it back in after a few minutes. And we could further suppose that this made for healthier babies, and so maybe laws would be passed requiring that it be done regularly. And we might also imagine that gestation took only nine days rather than nine months. What then would we think of aborting a fetus? What would you think of aborting it? And what does that say about what you now think?²

Maybe Wertheimer is right that if we could get to know the fetus in

¹ Wertheimer, "Understanding the Abortion Argument," 45.

² Ibid., 49.
this way we would be less inclined to abort it. But the fact of the matter is that we do not and cannot come to know it in this or any other way. We seem hopelessly cut off from it while it is a fetus, and if the Wittgensteinian view is correct, cut off from a criterion as well. Something in the chapter on medical considerations seems to support Wertheimer's contention. In the surveys conducted by Modern Medicine the doctors least in favor of abortion were those whose specialties would permit the greatest acquaintance with the fetus, namely general practitioners and obstetricians.¹

Given the lack of success in Tooley's attempt to resolve the personhood dispute, Wertheimer's pessimism still stands. If we have no knowledge of the nature of the fetus with respect to personhood and apparently no way to settle the issue, can we proceed to the question of the morality of abortion? Can we start with the uncertainty over the nature of the fetus and find a morally respectable answer to the question: When, if ever, is abortion justified?

Before attempting to reach an answer to this question, we will take up some other important factors. In the next chapter we will examine the issue of rights and responsibilities relevant to abortion.

¹ See this work, 60-61.
CHAPTER VII

RIGHTS AND RESPONSIBILITIES

In recent years a number of philosophers have published articles dealing with various aspects of the abortion problem. We have already considered the views of some on the status of the fetus. Other issues discussed in the literature include questions concerning rights of various sorts, including the right to life, and the doctrine of the double effect. While it may be somewhat artificial, it is possible to distinguish those arguments that deal with the doctrine of the double effect and those that deal with other aspects of the abortion question. For expository convenience and clarity, this will be the approach used here. A discussion of the doctrine of the double effect will be put off until the next chapter. In this chapter the arguments presented can be considered without too much worry about the question of killing or letting die, but can be evaluated on other relevant grounds.

In the examination of four contemporary philosophers in this chapter we will be paying special attention to the question of rights and the corresponding responsibilities. Does the fetus have a right to life? What does that right include? Where does that right come from? What rights does the mother have? What are our responsibilities to the fetus and the mother? What is the source of these responsibilities? These are some of the problems that will be considered in this chapter.
Four categories of views have been discussed in the current debate in philosophical journals. These are: (1) to regard the fetus as a non-person and abortion as morally acceptable, (2) to regard the fetus as a non-person and abortion as morally unacceptable, (3) to regard the fetus as a person and abortion as morally acceptable, and (4) to regard the fetus as a person and abortion as morally unacceptable. Representatives of each of these views will be discussed in this chapter. To begin this discussion we will go back to the views of Michael Tooley and S.I. Benn discussed in the last chapter. The views of Tooley and Benn represent categories (1) and (2) above, respectively.

Tooley's position is that the fetus is not a proper recipient of the right to life and hence can be aborted without moral qualm. The essence of his argument as set forth in the last chapter is that for an individual to have right to something he must be capable of desiring it and to desire it he must understand the concepts involved. Since the fetus is incapable of having an understanding of the concepts involved in the right to life, it cannot have a right to life. Tooley holds that an infant cannot possess the necessary traits to have a right to life for some time after birth, so both abortion and infanticide are morally permissible. He says of the newborn infant:

Since it is virtually certain that an infant at such a stage of development is not capable of possessing the concept of a continuing self, is not capable of consciousness, it is reasonable to conclude that an infant does not possess a serious right to life at that time, and hence that infanticide is morally permissible in most cases when it is otherwise desirable. The practical moral problem can thus be satisfactorily handled by choosing some short period of time, such as a week after birth, as the interval during
which infanticide will be permitted. This interval could then be modified once psychologists have established the point at which a human organism comes to satisfy the appropriate requirements.1

Since the unborn fetus does not satisfy "the appropriate requirements," it cannot have a "serious right to life" and its abortion is morally permissible.

Tooley is obviously assuming that if an organism does not have a right to life then it is not immoral to kill it. This seems to be to suppose that all moral obligations flow from rights of various sorts. It is this point that Benn disagrees with. While he agrees that the possession of rights depends on satisfying the requirements of personhood Tooley offers, he feels that not all obligations flow from rights, and perhaps there are moral reasons against abortion even though the fetus itself has no rights. Benn thinks that to have a right of any kind one must "be aware of oneself as the subject of enterprises and projects that could be forwarded by choosing to exercise one's rights."2 If this account is correct, then the fetus would not have any rights, including the right to life.

Benn holds, however, that not all moral obligations are due to rights. As he says:

If my account of the preconditions of a right to life is correct, it seems unlikely that a child would satisfy them until many months after birth. And in that case, the

---

1 Tooley, "A Defense of Abortion and Infanticide," 91. For earlier discussion of Tooley's view see this work, 99-105.

2 Benn, "Abortion, Infanticide, and Respect for Persons," 99. For earlier discussion of Benn's view see this work, 99-105.
principle that a person has a right to life would not protect infants until well beyond the very early weeks that Tooley seems to envisage. That is why I have insisted on the possibility that there might be relevant reasons against infanticide—and perhaps against abortion too—that are not reasons based on the right to life of either infant or fetus. What kind of reasons might they be? Mainly consequentialist reasons of a rule-utilitarian kind, I suppose. But precisely because I have ruled out the status of infant and fetus as persons, the relevant consequences cannot be advantages for the fetus or the infant, such that to deny them would be to do them an injustice, for these do not, as yet, possess the qualifications for this kind of moral consideration.¹

What are these consequentialist, rule-utilitarian kinds of reasons Benn has in mind? He suggests that these reasons against killing fetuses and infants are related to the "alleged coarsening or brutalizing of the persons engaging in it."² His reason against infanticide is not that the infant killed is a person or even a potential person with a right to life:

> It is rather that, because the person that he will be (provided he grows up) will be emotionally stunted or impaired if he is deprived of love and tender care as an infant, it is for the sake of those that will grow into persons that we take care of all babies now. For not to do so for some—those that we regard as expendable or dispensable—might well lead us into a callous unconcern for others too.³

Benn thinks this also applies to abortion. He says:

> But if a case like this can be made for infants, it may apply equally well to fetuses; or at least, to fetuses at a stage of maturity at which we can reasonably associate

---

² *Ibid*.
the way we treat them with the way we treat babies—at a stage, that is, at which we think of them, vividly enough, as a baby in the womb.\textsuperscript{1}

While Benn's reason relevant to coarsening or brutalizing might apply here, it is hard to see how his other reason applies. It is certainly true that if we mistreat babies they will later suffer for it, and that is a good reason for not mistreating them as infants. This would also seem to be the case if we mistreat fetuses in such a way that they grow into handicapped persons. But abortion is not this sort of case. Abortion kills the fetus outright thereby preventing its growing into a deprived person. One wonders what Benn has in mind here. It is even more puzzling in light of his earlier remark: "But killing as such is peculiar because it is objectionable (when it is) not because it brings about something like pain which is bad, but because it terminates the existence of something; and why should that be a bad thing, and for whom?"\textsuperscript{2}

Benn's claim that abortion will have a coarsening or brutalizing effect may not hold either if one considers abortion, as do the moderates discussed in Chapter II, as a lesser of two evils which is done for quite humane reasons. A person who "mournfully" sacrifices the life of the fetus to preserve the mother's health or prevent a life of misery for the fetus can hardly on that account be called a brutal person. In fact, one might plausibly argue, it would be more brutal to let a mother or her family suffer when that suffering could be

\textsuperscript{1} Ibid.

\textsuperscript{2} Ibid., 101.
painlessly prevented by abortion. This would seem to be even more the case if, as Benn thinks, the fetus is not a person with a right to life.

Benn may be right about the brutalizing effect, but that seems to be a factual claim that has not yet been demonstrated. If after liberal abortion practices are accepted in society, we find ourselves more willing to accept infanticide and euthanasia and perhaps other problem-solving practices involving killing, then the merits of abortion would have to be weighed against the demerits of this progression of killing. It is certainly true that this does occur in some cases. Many young men who go to war gentle and humane come home much changed having been conditioned to the brutality of combat. And Benn is not alone in this view. In this work so far we have discussed the views of some others who agree that this sort of thing is a serious threat, including Norman St. John-Stevas, Rudolph Gerber, and Jeffrie Murphy. Only time will tell what our liberal abortion policies will do to us, but by then it will probably be too late to change even if we want to.

The next philosopher to be discussed, Judith Jarvis Thomson, is important for two reasons. Hers is a good example of a category-(3) view, holding that the fetus is a person but still claiming that abortion is morally permissible, and her article "A Defense of Abortion" has stimulated considerable interest among philosophers in the abortion controversy. Thomson deals with a number of issues in her paper, but this discussion will concentrate on her conception of rights and how
this bears on abortion. Thomson's view on the nature of the fetus is not very clear. She does not think the newly-fertilized egg is a person, but she does think it has become a person well before birth. She thinks there is little hope, however, of finding out just when. She says:

A very early abortion is surely not the killing of a person. . .

A newly fertilized ovum, a newly implanted clump of cells, is no more a person than an acorn is an oak tree.2

I am inclined to think also that we shall probably have to agree that the fetus has already become a human person well before birth.3

I am inclined to agree, however, that the prospects for "drawing a line" in the development of the fetus look dim.4

What then is Thomson doing in this paper? She offers her procedure as a way of examining the claim of the anti-abortionist that since the fetus is a person it is immoral to abort it. She says:

Opponents of abortion commonly spend most of their time establishing that the fetus is a person, and hardly any time explaining the step from there to the impermissibility of abortion. Perhaps they think the step too simple and obvious to require much comment. Or perhaps instead they are simply being economical in argument. . . . Whatever the explanation, I suggest that the step they take is neither easy nor obvious, that it calls for closer examination than it is commonly given, and that when we do give it this closer examination we shall feel inclined to reject it.

2 Ibid., 48.
3 Ibid., 47.
4 Ibid.
I propose, then, that we grant that the fetus is a person from the moment of conception.\footnote{Ibid., 48.}

Granting for the sake of discussion the personhood of the fetus, how does the argument go from there to show that the fetus ought not to be killed? All parties to the controversy will agree that in the common abortion situation there is a conflict of rights. The fetus being a person has the right to life, and the mother has the right to decide what is to happen in and to her body. But in general one person's right to life has priority over another's right to decide how his body will be used, so the fetus' right to life must take priority over the mother's desires about her body, hence it would be wrong to abort.

To refute this argument, Thomson asks us to imagine a situation where a person awakes one morning to find himself attached via his circulatory system to a famous, unconscious violinist. The explanation is that it was discovered that this violinist had a kidney disease which required someone else's kidneys hooked up in this way to cleanse his blood or he would die. A society of music lovers kidnapped this person and plugged the violinist into him, so now his kidneys are keeping both him and the violinist alive. The question Thomson raises is now that he is awake and sees what is going on, is he morally obligated to remain in this condition? If we apply the abortion argument here, the answer is yes. After all, the violinist has a right to life which takes priority over the donor's right to decide what to do with his body. And since unhooking himself would kill the violinist,
this unwilling donor is not permitted to unhook himself. Thomson then says: "I imagine you would regard this as outrageous, which suggests that something really is wrong with that plausible-sounding argument I mentioned a moment ago."\(^1\)

Before proceeding to a careful analysis of Thomson's argument, a few comments might be in order concerning criticism the article has received. First of all, having this person kidnapped in her story was an unfortunate factor. With this factor, as some of her critics have pointed out, even if everything else in her argument works, all it will prove is that abortion in rape cases is permissible, the kidnapping aspect being like the lack of choice in a rape case. This criticism while valid misses the main point in Thomson's article, as will be shown shortly. Another line of criticism that is seen in the literature is that Thomson does not pay careful enough attention to the moral force of the doctrine of the double effect, but this is a topic for the next chapter.

The main critical discussion in this chapter will be directed at Thomson's conception of rights, including the right to life of the fetus. Before turning to criticism, it will be well to try to get a clear picture of the logical structure of Thomson's argument. First of all, her argument is analogical in that she wants to prove something about abortion by reference to a situation she takes to be similar, the violinist case. In other words, if she can show that abortion is like the violinist case and that it would be morally permissible to

\(^1\) Ibid., 49.
kill the violinist to free oneself, then killing the fetus to free the mother would likewise be permissible. And, as is suggested in the passage quoted above, there does seem to be something "outrageous" in holding that one ought not disconnect himself from the violinist.

Again, the issue has to be seen in the context of a conflict of rights, the fetus' right to life and the mother's right to the use of her own body. Of course, the mother also has a right to life, but if it can be shown that the fetus' right to life does not override the mother's right to use her own body as she sees fit, then it would also follow that it would not override her right to life. One could certainly say the mother's desire to live is a desire respecting what happens to her body. In any case, in the violinist story the life of the kidney donor is not threatened by being hooked up to the violinist. And as Thomson points out, situations where it is the life of the fetus or the life of the mother are very rare nowadays, and even here it is only the Catholic extreme that would elect not to sacrifice the fetus.

Let us now analyze the violinist argument to see what principles emerge to help us decide the abortion issue. The one principle that must emerge if Thomson is to make her case is a principle that shows that the act of not aborting does not necessarily have moral priority over the act of aborting when that is the mother's desire, and to do this she must show that the fetus' right to life does not take moral priority over the mother's right to determine the use of her body. Consider the anti-abortion argument noted earlier:
(1) The fetus has a right to life.

(2) The mother has a right to use her own body as she sees fit.

(3) The fetus' right to life has moral priority over the mother's right to the use of her body.

Therefore: Abortion is not morally permissible.

Now if we substitute the violinist for the fetus and the donor for the mother in the above argument, we get this:

(1) The violinist has a right to life.

(2) The donor has a right to use his own body as he sees fit.

(3) The violinist's right to life has moral priority over the donor's right to the use of his body.

Therefore: Unhooking and thereby killing the violinist is not morally permissible.

So it would seem, if these premises are true it would not be permissible to thus kill the violinist. There is indeed something outrageous about this conclusion which leads Thomson to deny its moral validity. In other words, it is just not true that the donor is morally obligated to remain in this condition, despite the argument. Now if Thomson is right in what she suggests here, then there must be something wrong with an argument that "proves" otherwise. What could be wrong with the above argument? As it stands it seems valid in the sense that if the premises are true then the conclusion follows, so there must be something wrong in the premises. All would agree that (1) and (2) are acceptable, which leaves (3) as the source of the
mistake. Thomson's next step is to offer an analysis of the right to life that is consistent with a denial of (3).

Thomson raises the question of what it comes to to have a right to life. She points out that some think: "Having a right to life includes having a right to be given at least the bare minimum one needs for continued life." Then she raises this question: "But suppose that what in fact is the bare minimum a man needs for continued life is something he has no right at all to be given?" What she specifically has in mind here is the use of the donor's kidneys in her violinist story, to which the violinist surely has no right. As Thomson puts it:

For nobody has any right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right—if you do allow him to go on using your kidneys, this is a kindness on your part, and not something he can claim from you as his due.

One more premise needs to be added to the argument to make sense of it. It is unjust and hence immoral to violate one's rights. Or as Thomson puts it: "In the most ordinary sort of case, to deprive someone of what he has a right to is to treat him unjustly."

---

1 This is not to suggest that this is next in the chronological order of her presentation, but it is the next logical move as the argument is presented here. One of the difficulties of Thomson's article is that the logical order and the chronological presentation often do not coincide. But this, to be sure, is not a rarity in philosophical literature.


3 Ibid.

4 Ibid.

5 Ibid., 56.
With these premises the rationale becomes clear. If the violinist has no right to the donor's kidneys, since he was not given that right by the donor, and the donor's kidneys are necessary to keep him alive, then he does not have a right to whatever is necessary to keep him alive. Since he does have a right to life but not a right to whatever is necessary to keep him alive, it follows that the right to whatever is necessary for life is not a part of the right to life. So any conception of the right to life that includes this provision is incorrect.

There is another common conception of the right to life. Thomson puts it this way: "Some people are rather stricter about the right to life. In their view, it does not include the right to be given anything, but amounts to, and only to, the right not to be killed by anybody."¹ Here we have the same problem as above. Since the violinist does not have a right to the donor's kidneys, it would not be immoral to unhook him. But unhooking him will kill him, so it must not be immoral to kill him. Again, he does have the right to life but he does not have the right not to be killed, so the right to life must not be simply the right not to be killed.

If the right to life does not include the right to whatever one needs for life, and not even the right not to be killed, what does it include? Thomson answers this question in this passage:

The emendation which may be made at this point is this: the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly. This runs

¹ Ibid., 55-56.
a risk of circularity, but never mind: it would enable us to square the fact that the violinist has a right to life with the fact that you do not act unjustly toward him in unplugging yourself, thereby killing him. For if you do not kill him unjustly, you do not violate his right to life, and so it is no wonder you do him no injustice.\footnote{\textit{Ibid.}, 57.}

While a risk, circularity can be avoided or at least minimized although Thomson does not show how. From the premises introduced so far, it is plausible to set the problem in the following way. To kill a person unjustly means to kill him in a way that violates one of his rights. Since it is the removal of the donor's kidneys from the violinist's system that does kill him, the question should center on whether the violinist has a right to the donor's kidneys. Since the donor did not confer on the violinist the right to his kidneys, he has no right to them. If the violinist has no right to the donor's kidneys, and presumably no other right to the use of the donor's body, then it indeed does not violate any of his rights to unhook him from the donor. This seems to complete the violinist argument. None of his rights are being violated in unhooking him, so he is not being treated unjustly. But if not being treated unjustly, he is not being killed unjustly. Since the violation of a right involves injustice and killing the violinist does not involve injustice, it must not violate his right to life. On this view the right to life seems to be some sort of "master right" in the sense that it is violated only if some ordinary right is violated in the process of killing the person, much the same as in a computer or other complex electronic device a "master alarm" light goes on whenever some "ordinary" circuit develops a defect. If this is a
correct view, then it would seem that the right to life has no content of its own, but derives it from other relevant rights in the case. If this analysis of the right to life is correct, it is indeed possible, as Thomson suggests, to kill a person without violating his right to life.

Before turning to criticism of this argument, we should remind ourselves that Thomson's purpose in offering this argument is to throw doubt on the anti-abortion argument with which we started this discussion. Precisely how does it do this? Assuming that the moral principles we have found in the violinist case apply generally, then, as Thomson says:

... the gap in the argument against abortion stares us plainly in the face: it is by no means enough to show that the fetus is a person, and to remind us that all persons have a right to life—we need to be shown also that killing the fetus violates its right to life, i.e., that abortion is unjust killing.¹

What remains to be shown is that the fetus does not have a right to the use of its mother's body. For if it does not, then as in the violinist case, no injustice is done in killing it and hence its right to life is not violated.

Assuming then that the right to the use of one's body is something that the donor must give the recipient, can it be maintained that the fetus has such a right? In a case of rape, it seems unproblematic that the mother has not given any such right to the fetus, just as the kidnapped kidney donor did not give the violinist any right to his kidneys. As Thomson says: "I suppose we may take it as a datum that in

¹ Ibid.
a case of pregnancy due to rape the mother has not given the unborn person a right to the use of her body for food and shelter." As suggested earlier, this is why some critics say that Thomson's argument applies only to rape cases.

Granting that the argument holds in rape cases, we must recognize that pregnancies due to rape are not very common. The really important point Thomson needs to make is that pregnancy due to voluntary intercourse also does not confer on the fetus the right to the use of its mother's body. She recognizes the problem in this passage:

Suppose a woman voluntarily indulges in intercourse, knowing of the chance it will issue in pregnancy, and then she does become pregnant; is she not in part responsible for the presence, in fact the very existence, of the unborn person inside her? No doubt she did not invite it in. But doesn't her partial responsibility for its being there itself give it a right to the use of her body?

Does one's "partial responsibility" for a person's existence give to that person some rights? Thomson thinks not. She asks us to consider a situation where by a house owner's leaving a window open a burglar enters the house. The owner is partially responsible for the burglar's presence by leaving the window open. But does this give the burglar a right to remain and use the house for his purposes? Obviously not. Nor would it make any difference if it were not a burglar but rather an innocent person who blunders in. To further make her point Thomson offers another situation, even wilder than her violinist story:

1 Ibid.
2 Ibid., 57-58.
Again, suppose it were like this: People-seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You don't want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very, very rare occasions does happen, one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house? Surely not--despite the fact that you voluntarily opened your windows, you knowingly kept carpets and upholstered furniture, and you knew that screens were sometimes defective. Someone may argue that you are responsible for its rooting, that it does have a right to your house, because after all you could have lived out your life with bare floors and furniture, or with sealed windows and doors.¹

A woman could certainly avoid pregnancy by never having sexual relations, as the house owner could avoid "seed-people" by having no furniture or carpets, but is this a reasonable condition? In the absence of this extreme precaution, if the woman gets pregnant has she conferred some right to the fetus? Or does her unique biological relationship to the fetus confer on it a right to use her body? Do any of these conditions of pregnancy confer on the mother any special responsibility to allow the fetus to use her body against her wishes? Thomson thinks the answer is no to all of these questions. She says:

Surely we do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot now withdraw support from it at the cost of its life because they now find it difficult to go on providing for it. But if they have taken all reasonable precautions against having a child, they do not simply by virtue of their biological relationship

¹ Ibid., 59.
to the child who comes into existence have a special responsibility for it. They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse.¹

If Thomson is right here and in her violinist argument which purports to supply general principles applicable to the abortion case, then the fetus whose existence is due to voluntary intercourse also does not in virtue of this fact alone have a right to the use of its mother's body. And without that right, to kill it to free the mother is no injustice. Abortion, therefore, is morally permissible. Or at any rate, it is not impermissible simply because the fetus is a person with a right to life as many opponents of abortion contend.

Assuming this analysis of Thomson's argument is correct, what can be said about it? First of all, it is obvious that the argument turns on her conception of the right to life as being violated only when the person is killed unjustly. And this, of course, is derived from her view of rights in general, that is that one cannot have a right against another person unless that right is conferred by that person. If we regard the other side of this coin as the question of responsibilities, it follows that we have no special responsibilities for a person unless we have specifically assumed them. The key passages quoted so far are these:

For nobody has any right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right—if you do allow him to go on using your kidneys, this is a kindness on

¹ Ibid., 65.
your part, and not something he can claim from you as his due.¹

Surely we do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly.²

Since this conception of rights is crucial, in that everything else is derived from it, it would seem important to offer some justification for it. Unfortunately, however, no such justification is to be found in the article. Perhaps Thomson thinks it is not at all controversial, but surely opponents of abortion would not agree with her on this basic issue. This suggests that the same complaint that has been directed at all of the positions criticized so far is appropriate here. And that is that when we get down to basic principles, no rational justification is given, but rather intuition or something like it is resorted to. This came out very clearly in the earlier discussion of Tooley and Benn and in much of the discussion of the various conceptions of personhood.

Aside from the fact that Thomson does nothing to establish this conception of rights, there are other problems with it. If it is true that one gets his rights by having them conferred on him by someone else, then where does a person get his right to life, which Thomson agrees all persons have? According to Thomson the right to life is the right not to be killed unjustly, but that would seem to be a right one has against all others. Is it the case that each of us gets that right by having it conferred by all others? This hardly seems to be the case.

¹ Ibid., 55.
² Ibid., 65.
Thomson says the mother has a right to her own body, but who gave that right to her? She thinks the donor has a right to kill the violinist in order to free himself. Did the violinist give the donor that right?

There are obviously some gaps and inconsistencies in Thomson's arguments, so at this point we will turn to an article by John Finnis entitled "The Rights and Wrongs of Abortion: A Reply to Judith Thomson."¹ This is an important paper for two reasons. First of all, it includes an acute criticism of Thomson's conception of rights. It is also a representative of category (4) in the classification at the beginning of this chapter. Finnis' position, in other words, is that the fetus is a person and that abortion is morally unacceptable. We will examine what Finnis has to say with respect to both of these.

While not criticizing her for not demonstrating her conception of rights, Finnis suggests that the root of the problem is that Thomson has failed to recognize an important distinction between various kinds of rights. Specifically, what she has failed to take into account is the distinction between what Finnis calls Hohfeldian² and non-Hohfeldian rights. What Finnis means by a Hohfeldian right involves: "A three-term relation between two persons and the action of one of those persons insofar as that action concerns the other person."³ The important point to emphasize here is that this kind of right concerns the action of one person as it affects another. An example of this is a


² Named after W.N. Hohfeld. See Ibid., 119.

³ Ibid.
person's right to hit an attacker who is threatening his life, that is the right of self-defense. A non-Hohfeldian right "...is a right with respect to a thing (one's own 'body,' or the state of affairs referred to as one's 'life'). Here the relation is two-term: between one person and some thing or state of affairs."\(^1\) Here the essential thing to see is that this kind of right does not directly concern action and how it relates to some other person, but rather a relationship to some object or state of affairs. A paradigm here would be a person's right to the use of a house he owns. A person has a right to sit in his own living room, and this does not involve action affecting some other person, at least not characteristically.

Finnis thinks that non-Hohfeldian rights cannot be completely analyzed in terms of Hohfeldian rights, apparently because Hohfeldian rights can be explicated in terms of moral responsibilities whereas non-Hohfeldian rights cannot.\(^2\) Furthermore: "And since moral judgments centrally concern actions, it is this specification of Hohfeldian rights that we need for moral purposes, rather than invocations of rights to things."\(^3\) Going back to Thomson's notion that one gets his rights by having them conferred on him by others, Finnis thinks the problem is that Thomson is concentrating on non-Hohfeldian rights when she should be dealing with Hohfeldian rights. This leads Thomson to

---

\(^1\) Ibid.


\(^3\) Finnis, "Rights and Wrongs of Abortion," 119.
what Finnis calls her "curious suggestion," to wit: "I mean, her suggestion that we should speak of 'rights' only in respect of what a man has 'title' to (usually, if not necessarily, by reason of gift, concession or grant to him)."

What appears to be Finnis' point here is that Thomson's mistake is to regard the fetus' right to use its mother's body as a non-Hohfeldian right. Since non-Hohfeldian rights typically deal with rights like ownership which do require conferring by others, Thomson is led to think that this fetal right does not exist unless the mother confers it. But opponents of abortion see the fetus' right to use its mother's body as a Hohfeldian right where the propriety of some action of the mother affecting the fetus is the central issue, not the mother's ownership of her body as Thomson apparently sees it. Referring to "Popes and others whose appeal to 'the right to life'" Thomson is questioning, Finnis points out: "... they are not alleging that the impropriety of abortion follows from any grant, gift or concession of 'rights' to the unborn child." We will return to Finnis' view on how these Hohfeldian fetal rights are generated when we shortly examine his argument against abortion.

It might be interesting at this point to see how Finnis responds to Thomson's discussion of the burglar coming in through the window opened by the homeowner. Thomson uses this to show that just because the owner is partially responsible for the burglar's presence

---

1 Ibid., 121.
2 Ibid.
by his having opened the window that does not give the burglar any right to be in and use the house. This in turn is used to show that just because the mother is partially responsible for the presence of the fetus in her body that does not give the fetus a right to be there. The obvious difference, as Finnis points out, is that: "The burglar not merely has no claim-right to be allowed to enter or stay; he also has a strict duty not to enter or stay... it is actually unjust for him to be there." It can hardly be maintained that the fetus has a duty not to be in its mother's body and its presence there violates that duty. So the cases are not analogous, or at any rate not enough to make Thomson's point.

Finnis notices how Thomson shifts to talk about responsibilities in the passage quoted above. According to Thomson, just as the fetus does not have the rights it needs unless the mother confers them the mother has no special responsibility for the fetus unless she assumes it. This was referred to earlier as the other side of the coin of rights. Finnis says this:

But this terminological suggestion is linked closely with Thomson's substantive thesis that we do not have any "special... responsibility" for the life or well-being of others "unless we have assumed it, explicitly or implicitly" (p. 65). It is this (or some such) thesis about responsibility on which Thomson's whole argument, in the end, rests.

With this shift to talk of special responsibility in mind, we should consider another very important passage in Finnis' paper. It is important because it sums up his criticism of Thomson so far and

1 Ibid., 142.

2 Ibid., 122.
also because it is a transition move to his own argument against abortion. He says:

Thomson's decision to conduct her defense in terms of "rights" makes it peculiarly easy to miss a most important weak point in her defense. This weak point is the connection or relation between one's "special responsibilities" and one's ordinary (not special) responsibilities; and one is enabled to miss it easily if one thinks (a) that the whole problem is essentially one of rights, (b) that rights typically or even essentially depend on grant, concession, assumption, etc., (c) that special responsibilities likewise depend on grants, concessions, assumptions, etc., and (d) that therefore the whole moral problem here concerns one's special responsibilities. . . .

What Thomson, then, fails to attend to adequately is the claim (one of the claims implicit, I think in the papal and conservative rhetoric of rights) that the mother's duty not to abort herself is not an incident of any special responsibility which she assumed or undertook for the child, but is a straightforward incident of an ordinary duty everyone owes to his neighbor.¹

What Finnis now tries to show is that we do have responsibilities to each other, and that these responsibilities do not exist just because we have assumed them or granted the corresponding rights. These responsibilities which are not "special" but just "ordinary" duties we all owe to our neighbors include the duty of the mother not to kill the fetus in her body. The argument takes form in two stages. The first is to show that one of these duties is to refrain from attacking life, and secondly, on the grounds that the doctrine of the double effect is valid, that aborting is to attack life. This turns out, obviously, to be a defense of the Catholic position. Here we will

¹ Ibid., 123. (a) might better have read "that the whole problem is essentially one of non-Hohfeldian rights." This still makes sense, however, since the actions governed by ordinary Hohfeldian rights come within the scope of what Finnis calls "ordinary duties everyone owes to his neighbor." See Ibid., 122-123.
consider the question of these alleged duties and how abortion falls within their scope. The validity of the doctrine of the double effect will be discussed in the next chapter.

Finnis points out that the traditional Judeo-Christian commandments such as "Thou shalt not kill" correspond to the "... hand successfully fulfilling aspects of human flourishing, which in turn correspond to the handful of really basic and controlling human needs and human inclinations." Given this setting of human needs, consider a few representative remarks Finnis makes:

To be fully reasonable, one must remain open to every basic aspect of human flourishing, to every basic form of human good.2

... one criterion of practical reasonableness and hence of morality—namely, that one remain open to each basic value, and attentive to some basic value, in each of one's chosen acts. ...3

He also uses the expression "rationally and thus morally."4 He wishes to examine:

... the content of our responsibilities, duties, obligations, of the demands which human good makes on each of us. The general demand is that we remain adequately open to, attentive to, respectful of, and willing to pursue human good insofar as it can be realized and respected in our choices and dispositions.5

It appears that a person's fundamental moral obligation is to respect

---

1 Ibid., 125.
2 Ibid., 126.
3 Ibid.
4 Ibid., 125-126.
5 Ibid., 126.
and promote the basic forms of human good. Therefore, a basic immorality would be to move against one of these forms of good.

It is obviously a matter of importance how this obligation is generated. And to anticipate the criticism somewhat, Finnis does not make it clear. Since we are dealing with the range of "human goods," perhaps the moral force is to be seen in the concept of "good" itself. Finnis seems to think this in this passage: "... a choice directly against a basic good provides, one might say, its own definitive evaluation of itself." He seems to be suggesting that part of the meaning of "good" is that the thing that is good should be promoted. And if it should be promoted, then persons who recognize that will be obligated to promote it. Furthermore, part of the meaning of "reasonable" is that a fully reasonable person will recognize these basic goods and realize his obligation to promote them. Hence the connection between rationality and moral obligation.

Granting that there are certain basic human goods and that we are morally obligated to promote them, how does this bear on the abortion question? We must further grant that life itself is one of these basic goods, so to move against life is to violate a fundamental obligation. Finnis puts the question this way: "But how does one choose 'directly against' a basic form of good? When is it the case, for example, that one's choice, one's intentional act, 'cannot but be'
characterized as 'inescapably' anti-life? Is abortion always (or ever) such a case?\(^1\)

Finnis discusses abortion in the context of the first ecclesiastical pronouncement on that subject. Supposing a young girl gets pregnant and if it becomes publicly known, she will be killed or at least dishonored. In this circumstance where at worst it is the life of the mother and the life of the fetus, is abortion permissible? On March 2, 1679, the Holy Office under Innocent XI issued a proclamation condemning abortion in this circumstance.\(^2\) Finnis says of this:

The choice to abort here cannot but be characterized as a choice against life, since its intended good life- or reputation-saving effects are merely expected consequences, occurring if at all through the further acts of other persons, and thus are not what is being done in and by the act of abortion itself.\(^3\)

Here it is the nature of the act rather than the results of the act that is of crucial moral importance, since if worst comes to worst and the pregnant girl is killed, the fetus will also perish, whereas if she is aborted at least one life is saved. One has to totally override the results in this kind of case to maintain that not aborting is to promote life.

We are obviously back at the question of the doctrine of the double effect. Only by accepting that doctrine could one conclude that life is being respected by letting two persons die rather than killing one. It appears, however, that if Finnis' argument up to this point is

---

1 Ibid., 129.  
2 See Noonan, The Morality of Abortion, 33-34.  
valid and if the doctrine of the double effect is morally valid, then the opponents of abortion are right. Again, we will consider the validity of this crucial doctrine in the next chapter.

Let us look at one more passage where Finnis clearly puts the question that is central in the doctrine of the double effect as it applies to abortion:

Let us now look back to the traditional rule about abortion. If the mother needs medical treatment to save her life, she gets it, subject to one proviso, even if the treatment is certain to kill the unborn child—for after all, her body is her body, as "women have said again and again" (and they have been heard by the traditional casuists!). And the proviso? That the medical treatment not be via a straightforward assault on or intervention against the child's body. For after all the child's body is the child's body, not the woman's. . . . The child, like his mother, has a "just prior claim to his own body," and abortion involves laying hands on, manipulating, that body.¹

One line of criticism that should be brought against Finnis is that he does nothing to establish his most fundamental claim that there are these basic responsibilities and obligations we all have to each other. In a way, however, this may not be a fair criticism. If Finnis' paper is regarded primarily as an attack on Thomson's position, then perhaps he does not need to establish the existence of these obligations, because Thomson acknowledges that we do have certain obligations that do not flow from the conferring of rights. And if Thomson admits the moral force of the notion of the sanctity of life, as she apparently does in agreeing that all persons have a right to life, then the dispute comes down to the question of when if ever it is morally permissible to move against life. And this in turn leads

¹ Ibid., 140-141.
again to the doctrine of the double effect, which will be discussed later. The real bone of contention here is over Thomson's conception of rights, and Finnis seems to have hit on a point that Thomson overlooked or was downright mistaken about.

On the other hand, if we regard Finnis' argument as a positive attempt to show that abortion is immoral, then we must raise the question of the validity of his basic moral position. Specifically, how can he defend the view that moral obligations follow from a rational recognition of these so-called human goods? In other words, how can a logical move be made from (1) to (2)?

(1) A reasonable man will recognize basic human needs.

(2) A moral man will promote basic human needs.

In fact, is there any way to establish (2)? How can it be shown that each of us has a moral obligation to promote these basic human goods, such as life?

As suggested earlier, perhaps Finnis thinks that because these are goods and the opposite of "good" is "evil" to go against one of these goods would be evil or immoral. But this is an equivocation on the word "good." This problem arises because of the ambiguity of the words "evil" and "good." Specifically, the problem is that both "evil" and "good" have both moral and non-moral senses. "Evil" usually means "immoral," but frequently it is used as a synonym for "misfortune." For example, in David Hume's discussion of the "problem of evil" as evidence against Christian theology, he includes as evils such things as hunger, death, illness, debt, famine, pestilence, that is human misery and misfortune. To refer to these as evils is to use that word
quite differently than when one refers to Hitler as an evil man. In its moral sense, "evil" pertains to men and their deeds. In its non-moral sense, it pertains to their misfortunes and sufferings. The same analysis applies to "good." In its moral sense, "good" pertains to men and deeds, while its non-moral sense refers to their benefits. It is certainly the case that for one sense of "good," the moral sense, to go against good would be immoral. But this is not the sense of "good" if it means fulfilling basic human needs. The opposite of "good" in this sense would be some word like "misfortune" which has no moral force. As we ordinarily use these words, we would say that it is unfortunate that some people do not have enough to eat, but not that it is immoral. Perhaps the point can be seen this way. Suppose we say:

(1) It would be good if all people had enough to eat, so it is immoral that they do not.

If we accept this as a correct use of "good" and "immoral," then we might be led to say that men have a moral obligation to see to it that all others do have enough to eat. But suppose we say instead:

(2) It would be good if all people had enough to eat, so it is unfortunate that they do not.

Now we are not struck with the notion that we are doing something morally wrong in not providing food for the world's hungry millions. Furthermore, (1) would not ordinarily be considered a correct way of speaking whereas (2) certainly would be.

Another way to see the problem is this. If Finnis is using "good" in a moral sense when he talks about human goods, then he is simply begging the question when he concludes from that that men are
obligated to promote these goods. To avoid this, he would certainly have to show prior to its use in the argument that this is a correct use of "good," which he does not. If, however, he is using "good" in its non-moral sense, then he would have to show where the notion of moral obligation comes into the picture, which he does not. If he adopted some form of utilitarianism, he might do it, but then he would have to justify the utilitarian position. And, in any case, it is clear in his essay that he rejects utilitarianism.

While Finnis seems to be correct in his criticism of Thomson that she has not shown that all fetal rights flow from a conferring of these rights by adults, he in turn does not show how they do arise with the corresponding adult responsibilities toward the fetus. If one accepts the sanctity of life as having moral priority over everything else, then he would have to agree with Finnis, but as we have seen, it is not obviously true that it should take priority. Could not one plausibly maintain that happiness or freedom from misery is a basic human good? Even Aristotle, whom Finnis thinks highly of, seems to have thought that it was the ultimate good, the one thing sought as an end in itself and not just as a means to something else. Is a life of misery a good life? To many it is just as obvious that misery is a basic human evil as it is to Finnis that life itself is a basic human good. On this view, failing to abort in some situations would promote human misery and so would be an attack on a basic human good.

This comes down again to the disagreement between the Catholics and moderates discussed in Chapter II. Which takes moral priority, the existence of life pure-and-simple or the quality of life as well? As
suggested earlier, it can hardly be maintained that a person whose main goal is to alleviate human misery is a morally corrupt person. On the other hand, a person whose primary interest is to preserve life at all costs is not obviously wrong in his thinking either.

So it would seem, Finnis' argument suffers from the same weakness as all the rest discussed so far, to wit when it gets down to the starting premises no justification is provided. Probably the best thing we can say is that if his basic moral premises are true then his conclusion is correct. But we can also say the same of all the rest of the positions we have considered. Of course none of these philosophers can be blamed for this, since no one in the history of moral philosophy has been able to establish his basic principles to the satisfaction of his opponents.

So far we have examined two fundamental issues in the abortion controversy, namely the question of the personhood of the fetus and the question of fetal and maternal rights and our corresponding responsibilities. Unfortunately, it has not been possible to decide which views are correct among the various contenders. Some very plausible arguments have been presented, but the plausibility resides in the fact that only if the premises are true do we have good grounds for accepting the conclusion. But the primary disputes are over the truth of the opposing premises. In the next chapter we will turn our attention to some of these as-yet-unresolved questions to see what further light can be thrown on them.
CHAPTER VIII

THE SANCTITY OF LIFE OR THE QUALITY OF LIFE

The title of this chapter is meant to suggest a number of issues. As we have seen, the main difference between Catholics and others who regard the fetus as a person but would allow its abortion is their disagreement over the moral validity of the doctrine of the double effect.1 This can also be seen as a dispute over competing moral principles, a dispute that is essentially part of the deontology/teleology conflict that has characterized the history of moral philosophy.

In this conflict the deontologists have held that it is something in the nature of the act that determines its moral character. As an example of this, the Catholic holds that what makes abortion immoral is that it involves an act of intentional killing of an innocent person, and this is by its very nature immoral. The deontologist does not consider the results of the act in making a moral determination.2 As we have seen, in the abortion case the Catholic would admit that the death of the mother is very unfortunate, probably much more unfortunate than the death of the fetus, but nonetheless

---

1 Hereafter referred to as DDE. For earlier discussion of this doctrine see this work, 21-26.

2 "Deontology" is from the Greek "deon" meaning duty. "Teleology" is from the Greek "teleos" meaning complete or final.

3 The definition here would be of a "strict" deontologist.
abortion cannot be performed, because it is intentional killing of an innocent person and that is absolutely forbidden.

The teleologist, on the other hand, holds that it is the results of the act that should be considered in deciding whether to perform the act. In the abortion case, for example, when it is seen that aborting the fetus will result in a situation with a much greater balance of happiness over misery, then abortion is the proper thing to do. Of course it involves an act of intentional killing, but what counts is that it makes for much happier lives of those concerned.

Given our discussion of personhood so far, we have to admit that we are uncertain how to regard the fetus. If it is not a person, then there do not seem to be any strong reasons for not aborting. But we must consider the possibility that it is a person and see what follows from that. So in this chapter we will assume that the fetus is a full-fledged human being and see if the anti-abortion position can be derived from that. Assuming that the fetus is a person, the abortion dispute can be seen as a conflict between these two moral principles, which are examples of deontology and teleology, respectively:

(D) It is always wrong to intentionally kill an innocent person, regardless of what would be the consequences of that killing.

(T) It is sometimes right to intentionally kill an innocent person when that killing would have overriding good consequences.

Advocates of (D) would emphasize that this principle holds even where following it would have very tragic consequences for those concerned. Advocates of (T) would add that they accept the prohibition against
killing as long as it is regarded only as a prima facie prohibition. Their principle (T) holds when intentional killing or some other prima facie immorality is necessary to produce the good results. Their position is that other considerations frequently do override the prima facie prohibition against killing. Those holding (D) claim that there cannot be any considerations that would be more powerful than the moral obligation generated by the principle itself. The term "utilitarian" is frequently used in reference to an advocate of (T) and will be so used in this chapter, although some utilitarians would want to qualify (T) somewhat.

In the chapter title, the expression "The Sanctity of Life" is meant to emphasize the deontological acceptance of principle (D). "The Quality of Life" refers to (T), the teleological way of looking at the abortion problem. The conflict between the Catholics and others is over what functions as the primary consideration in judgments about abortion. The Catholics hold that it is the sanctity of life itself that has primary impact, whereas their opponents maintain that it is the quality of the lives involved which must determine proper behavior.

The doctrine of the double effect as it applies to abortion is a curious problem because the doctrine seems to apply only when it is a case of having to choose which of two lives is to be sacrificed, the fetus' or the mother's, but this is admittedly a very rare occurrence with modern medical technology. As we have seen, the Catholic view is that it is never permissible to abort, because that involves the intentional killing of the fetus. Not aborting, on the other hand,
does not involve killing the mother but is just a case of letting her die.

Despite the fact that this aspect of the abortion controversy has very little practical application, most philosophers who have entered the current debate have given considerable attention to the DDE, particularly the distinction between killing and letting die. To clearly see the force of this distinction, consider an example similar to the one used in the last chapter. A woman gets pregnant and unless she receives an early abortion she will die. If she dies, the fetus will also die. If she is aborted, only the fetus will die. According to the Catholic view she should not be aborted even though this results in two deaths rather than one. The reasoning is that to abort is to intentionally kill a human being, the fetus, while not to abort is just to let two human beings die. The moral force of the distinction between intentionally killing and letting die is so strong that it is better to let several people die rather than kill one of them.

To many this is perverse outcome. They argue that the mother's life should also be preserved and the moral thing to do in a case like this is to preserve at least one life, even though it involves killing the fetus. After all, they point out, the fetus is going to die anyway. What point is there in letting the mother die needlessly? The answer Catholics give is to remind us that there is a moral prohibition against intentionally killing an innocent human being even when it would have beneficial results, even when it would save other lives.
Intentional killing of innocent persons is absolutely forbidden whereas letting persons die does not carry the same moral weight.

Jonathan Bennett attacks this view in his article "Whatever the Consequences."¹ He assumes, as did Thomson, that the fetus is a person in an attempt to see if the Catholic position can be justified even on that assumption. He says this, in reference to the view that abortion is permissible "... on the grounds that women are human while unborn children are not. This dubious argument does not need to be attacked here, and I shall ignore it."²

Bennett's position is that the problem of the DDE as it applies to abortion boils down to the question whether there is any rational justification for claiming that there is a moral difference between killing and letting die, or as he puts it the acting/refraining distinction. He holds that if such a moral distinction cannot be rationally justified, then the only other possible reason for holding to it is the acceptance of authority. What he has in mind, of course, is the authority accepted by the Catholic Church as it is exemplified in the statement of Pope Pius XI discussed in Chapter II. Bennett says he does not want to consider the question of authority but wants only to show that there is no plausible rationale for thinking that there is any moral difference between killing and letting die as this applies to the abortion case. He says:


² Ibid., 366.
Operating would be killing: If the obstetrician makes movements which constitute operating, then the child will die: and there are very few other movements he could make which would also involve the child's dying. Not-operating would only be letting-die: if throughout the time when he could be operating the obstetrician makes movements which constitute not-operating, then the woman will die; but a vast majority of alternative movements he could make during that time would equally involve the woman's dying. I do not see how anyone doing his own moral thinking about the matter could find the least shred of moral significance in this difference between operating and not-operating.¹

The essence of Bennett's argument on this point is this. Our behavior can be described in terms of bodily movements and the results of these movements. If we want to describe the two possibilities open to the doctor in an abortion case, we might put it this way: (1) Bodily movements A result in the death of the fetus, (2) Bodily movements B result in the death of the mother. In both cases the doctor goes through certain motions, and either the mother dies or the fetus dies. The Catholic wants to ignore the fact that when the doctor is not doing the aborting he is doing something else. Catholics tend to say that when not aborting the doctor is doing nothing to the mother and hence does not kill her. It is true that he is not doing something to the mother, but he is doing something that affects the mother. It is not as if the doctor's behavior was somehow neutral just because he does not take up his scalpel and outright kill the mother. What he does results in her death as much as if he had used the scalpel on her. As Bennett puts it:

Suppose the obstetrician does not operate, and the woman dies. He does not kill her, but he lets her die. The

¹ Ibid., 375.
approach suggested by these words is just an unavoidable
nuisance, and I shall not argue from it. When I say "he
lets her die," I mean only that he knowingly refrains
from preventing her death which he alone could prevent,
and he cannot say that her survival is in a general way
"none of my business" or "not [even prima facie] my
concern." 1

Bennett is quite correct in reminding us that it is not a case
of killing the fetus or doing nothing but is rather a case of killing
the fetus or doing something else that results in the mother's death.
This, however, is not really new to the Catholic, and he will still
contend that there is a moral difference. If Bennett's argument is
taken just as a sceptical argument showing that there is no rational
justification for the moral force Catholics see in this distinction
other than appeal to authority, then he is probably successful.
However, Bennett does not show that the Catholic is wrong in claiming
a moral difference between acting and refraining where acting is
killing and refraining is letting die. He says of the Catholic
position: "Conservativism, when it is not mere obedience, is mere
muddle." 2 Unfortunately he does not show why it is "muddle."

Perhaps this can be shown in the following way. Catholics and
others would agree that there is something morally praiseworthy in
resisting temptation, 3 but this does not seem possible if we accept the
moral distinction between acting and refraining. Consider this case:

1 Ibid., 375
2 Ibid., 384.
3 See, for example, Louis Morrow, My Catholic Faith (Kenosha:
Suppose a man is in desperate need of money, and an occasion arises where he could steal some without any chance of being found out. But he refrains from stealing the money, not out of fear, but simply out of a feeling of moral obligation. Is he not to be morally praised? Has he not done something morally good? If the moral difference between acting and refraining is accepted, the answer is no. Like the doctor who does not abort, this person has done nothing. And if he has done nothing, he has done nothing good. Perhaps it will be suggested that refraining from stealing is good, but it is not as good as stealing would have been evil. The Catholic would then have to show how the difference between acting and refraining could lead to such a conclusion without giving some consideration to results.

But it seems quite clear that according to Catholic thinking this refraining from stealing is not morally neutral, so why should refraining from acting which results in the mother's death be morally neutral? Surely not just because it is refraining instead of acting, for that would also eliminate the moral value in the case of the potential thief who refrains from stealing. If this behavior is not morally neutral, then how is the relative value of each possible action to be determined? There does not seem to be any way to do that with the acting/refraining distinction. And if results are allowed into the moral decision process, then it becomes an open question whether the results of aborting would justify it, but this would be to give up the whole point of the DDE and the absolute prohibition against intentional killing expressed in principle (D).
If the distinction between killing and letting die does not carry moral force, then what does? Consider an example used by Philippa Foot in her article "Abortion and the Doctrine of the Double Effect."¹

Suppose that a judge or magistrate is faced with rioters demanding that a culprit be found for a certain crime and threatening otherwise to take their own bloody revenge on a particular section of the community. The real culprit being unknown, the judge sees himself as able to prevent the bloodshed only by framing some innocent person and having him executed. Beside this example is placed another in which a pilot whose aeroplane is about to crash is deciding whether to steer from a more to a less inhabited area. To make the parallel as close as possible it may rather be supposed that he is the driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed. In the case of the riots the mob have five hostages, so that in both the exchange is supposed to be one man's life for the lives of five. The question is why we should say without hesitation, that the driver should steer for the less occupied track, while most of us would be appalled at the idea that the innocent man could be framed.²

Foot's answer to this question is that where the tram operator did not intend to kill anyone but had no choice, the judge needed the death of the innocent man to bring about his purposes, and he fully intended it in having him executed. Here it is not the acting/refraining distinction that makes a difference, but the intentional/unintentional, or as Bentham and Foot call it, the direct/oblique distinction.

Let us modify Foot's story slightly to make the point even clearer. Suppose the judge did not frame the victim and have him


² Ibid., 387-388.
executed as in Foot's version but rather knowing the man to be innocent allowed a mob to lynch him. The judge could have prevented the killing by telling the mob that he knew the man is innocent, but he refrained from this in order to pacify the mob and prevent further rioting. Here the judge did nothing to bring about the man's death, but we would still hold him responsible. This shows again that there is not enough moral difference between killing and letting die to excuse the judge. What we would take into consideration is the fact that the judge allowed the man to die in order to fulfill his own goals. In other words, the judge needed the death of the innocent man, and he behaved in a way that was designed to bring about that death. He could have prevented it, but he did nothing to stop it. The fact that he did not actively kill the man in no way lessens the judge's moral culpability. So again it would seem, the Catholic position that there is a moral difference between killing and letting die does not stand up to careful scrutiny of the kind Bennett had in mind. The important moral difference rather resides in the distinction between intending the death of the victim and being unable to prevent it.

Foot's sympathy for the deontological position is brought out in her discussion of positive and negative duties. In our moral thinking there is a distinction between our duty to give aid to a person needing help and our duty not to injure a person. Our duty to give aid is a positive duty while our duty not to injure is a negative duty. Foot thinks negative duties in general take priority over positive duties. She says:

It is interesting that, even where the strictest duty of positive aid exists, this still does not weigh as if a negative
duty were involved. It is not, for instance, permissible to commit murder to bring one's starving children food.¹

To refrain from inflicting injury ourselves is a stricter duty than to prevent other people from inflicting injury. . .²

Another question we need to ask when we are appraising actions like the judge's or the tram operator's is whether the conflicting duties are both of the same type. Foot thinks it makes a significant moral difference. For example, in the case of the tram operator, his conflict was between two negative duties, namely his duty not to kill one man and his duty not to kill five. Since they were both of the same type, he was justified in taking account of the results of the two courses of action open to him in making a judgment. But in the case of the judge, it was a conflict between a positive duty, his duty to quell the riots thereby aiding the community, and a negative duty, his duty not to injure the innocent man. According to Foot, the reason the tram operator was justified in acting on the basis of the expected results but the judge was not was the fact that in the tram operator's case the conflict was between duties of the same sort, but in the judge's case it was a negative duty, with a higher priority, opposed to a positive duty.

Foot's conclusion is that even if the DDE does not hold up to the criticism leveled against it, the distinction between positive and negative duties is another factor which must be considered. This prevents the victory of utilitarianism or the defeat of deontology being complete. Foot puts it this way:

My conclusion is that the distinction between direct and oblique

¹ Ibid., 391.
² Ibid., 392.
intention plays only a quite subsidiary role in determining what we say in these cases, while the distinction between avoiding injury and bringing aid is very important indeed. . . I have only tried to show that even if we reject the doctrine of the double effect we are not forced to the conclusion that the size of the evil must always be our guide.¹

Let us see what can be said against this way of defending the deontological position. First of all, Foot attempts to make her case by picking an extreme example, that is one is not justified in committing murder, the violation of a negative duty, to save one's children, the carrying out of a positive duty. Consider instead this kind of case. We have to choose between the violation of a negative duty not to injure someone by cutting off his finger and the violation of a positive duty to save someone who is about to drown. In other words, it is a case where the drowning man can be saved only by chopping off someone else's finger. If we accept the negative duty as having priority, we would have to let the man drown. If we save the drowning man we must violate our negative duty not to injure a person. What is really the morally proper thing to do? It is hard to see how we are morally compelled to let the man drown just to abide by our negative duty not to injure the other man.

Foot's example is plausible because it is a case of which of several lives must be sacrificed, the man about to be murdered or the potential murderer's children. But her answer that here the negative duty wins out is just a different way of stating the outcome of the DDE. In those situations where it is not a case of this life or some other life having to be taken, then Foot's conclusion that negative duties

¹ Ibid.
have priority does not follow. She seems to be saying that in those cases where the deontological principle has priority then negative duties have priority. However, if she attempts to use this to support the deontological view, she simply begs the question.

This is perhaps not quite fair to Foot, as she allows that there might be cases where we would be justified in bringing injury to someone in order to save someone else. The real problem for Foot comes in when we ask how we decide which cases are the exceptions. She does not want the "size of the evil" to be our guide, but what else could we use to make this determination? If one accepts an absolutist version of the deontological principle, then he does not have this problem, simply because there cannot be any exceptions. But if one admits that there can be exceptions, as Foot does, but refuses to consider the results of the proposed action, then what considerations does he resort to to justify the exception? If he must consider the results, then Foot's position is not correct. If he cannot consider the results, then it would seem that there can be no exceptions. Foot offers no suggestions on the resolution of this problem.

How else might the Catholic position be evaluated? If it has not been shown that the DDE is rationally justified, why is it accepted by Catholics and others? Bennett purposely avoided the question of authority, but that might be an important consideration. Let us consider this moral position from a different point of view, namely that of its foundation or ultimate justification to the Catholic. Consider, for example, the following proposition which for the Catholic is the operative moral principle in the abortion issue. (C) It is
always wrong to intentionally kill a fetus even when that killing would have very beneficial results for the fetus and/or the mother.¹

This principle is derived from the more general moral principle (D), a principle which covers other kinds of killing than that in abortion cases. As presented earlier, (D) was stated as follows: It is always wrong to intentionally kill an innocent person, regardless of what would be the consequences of that killing. To make the inference from (D) to (C), one need only assume that the fetus is an innocent person, an assumption which the Catholics do make.

So the Catholic position is derived from the moral principle that it is wrong to intentionally kill an innocent human being, no matter what the consequences of doing so. But suppose someone asks: What is wrong with it? What is so wrong with intentional killing that it takes moral priority over any and all possible consequences? At this point two kinds of answer are possible. A person might reply that to ask a question of this sort is to display a morally corrupt mind. It is just obviously true to any clear thinking and decent person that (D) is true.² The difficulty with this position is that it closes the issue to rational debate. It is certainly the case that many intelligent and decent people do not accept (C) or (D). But if these principles are not based on any other considerations, there is

¹ It may seem odd to talk about killing the fetus as having beneficial results for the fetus, but this is meant to include the prevention of a miserable life for the fetus if it were not aborted, for example in cases of deformity.

² See, for example, G.E.M. Anscombe's remark quoted by Bennett. Bennett, "Whatever the Consequences," 371.
nothing else that can be offered to show the sceptic the validity of these principles.

The other way the question might be answered is to show that (D) is derived from some more basic principle. This is the procedure in the Catholic rationale. As pointed out by John Noonan, the present-day Catholic doctrine has come through popes and St. Thomas Aquinas, but ultimately from the teaching of St. Paul as expressed by Pope Pius XI: "...the killing of the innocent is unthinkable and contrary to the divine precept promulgated in the words of the Apostle: Evil is not to be done that good may come from it."¹ Let us give some consideration to the principle: (E) Evil is not to be done that good may come from it.

It is important to attempt to clarify somewhat the language of the passage from St. Paul. The reason this is necessary is because of the ambiguity of the words "evil" and "good" as we have already seen in the last chapter. As discussed there, the problem is that both "evil" and "good" have both moral and non-moral senses. "Evil" sometimes means "immoral" and sometimes means "misfortune." The moral sense of "evil" relates to men and their behavior. The non-moral sense relates to conditions in their lives, that is to their misfortunes and sufferings. The same analysis applies to "good." In its moral sense "good" refers to men and deeds, and in its non-moral sense it refers to their benefits.

¹ In Treacy, Five Great Encyclicals, 95-96. The Pope's reference is to Romans 3:8.
With this, what does (E) mean? It is unlikely that St. Paul intended both "evil" and "good" in the moral sense, because that would come out as "Do not be immoral in order to be moral," which does not seem meaningful. If these terms were both used in the non-moral sense without qualification, the position would be "Do not bring misfortune in order to bring benefit." If this applies to the same person, it does not seem to make much sense, and that suggests the need for a qualification. There are two meaningful interpretations of this passage. One is "Do not be immoral in order to bring benefit." And the other, adding the qualification suggested above, is "Do not bring misfortune to one person in order to bring benefit to another."

It would appear that either of these could be a correct interpretation of (E). There remains, however, an important gap in the rationale. If one utilizes the first interpretation, in order to go from it to (D), he must show that killing of the innocent is unqualifiedly immoral. If the second interpretation is used, then in order for it to apply to abortion, it would have to be shown that the death of the fetus is always a misfortune to the fetus. Even the Catholics would not claim this in cases of severe deformity, therefore the Catholic position rests on the first interpretation. Hence, (E) will be taken to mean "Do not be immoral in order to bring benefit." This is the only meaningful interpretation that would yield the Catholic position on abortion. But it is also necessary to show that the intentional killing of an innocent person is absolutely immoral.

How might it be shown that the killing of the innocent is always immoral? Consider, for example, whether the principle that
killing the innocent is immoral is an absolute or just a prima facie principle. If it is just prima facie, then there might be other considerations which would justify the killing. So in order for the principle to do what the Catholics want it to, it must be absolute. But can it be demonstrated that killing of the innocent is immoral absolutely, that is in every possible case?

One can anticipate the impending difficulty for the Catholic. If he relies on the Bible, the sceptic will eventually ask him to prove the truth and moral validity of the Bible. Since this is quite beyond the scope of this work, let us restrict our inquiry to a much easier question. Assuming the truth of Christian theology as it is presented in the Bible, how can one show the validity of the absolute prohibition against killing? The critic might point out that this is a rather large assumption. It is indeed, but the reason it is being allowed is to show that the strong interpretation needed to make the Catholic position cannot be justified even if the Christian scriptures are true and morally binding.

First of all, some doubt might be cast on the key scriptural passage that Pope Pius XI referred to. As it is given by St. Paul, it is used in a question about what he had been teaching:

Another question: If my falsehood brings to light God's truth and thus promotes his glory, why must I be condemned as a sinner? Or why may we not do evil that good may come of it? This is the very thing that some slanderously accuse us of teaching: but they will get what they deserve.1

Apparently it was thought at the time that St. Paul had been teaching

1 Romans 3:8, The New American Bible, the currently accepted Catholic version. All Biblical citations in this chapter will be to the New American version.
that it was proper to do evil in order to bring about good. He refers to this as slander, in effect denying that he had been teaching it. But he does not assert that it is God's will that it not be done. A careful reading of the passage does not seem to justify calling this a "divine precept" unless one takes the position that any utterance of St. Paul is a divine precept, including his questions. Furthermore, as Noonan points out, the Pope's statement was not given as infallible teaching.¹

There is a much more fundamental objection to such an absolute position as that of the Catholics. It is, in a way, surprising that the Catholics rule out the legitimacy of the killing of one person in order to benefit others when the Christian religion was founded on just such an event. We must, after all, remind ourselves that according to Christian theology God sacrificed a totally innocent man for the benefit that his death would bring to others.

If this claim seems too strong, consider some passages from the Bible. According to the account of Christ's birth as told by Matthew, when Joseph discovered that his fiance Mary was pregnant and was about to forsake her, an angel appeared to him and said of Mary's child:

Joseph, son of David, have no fear about taking Mary as your wife. It is by the Holy Spirit that she has conceived this child. She is to have a son and you are to name him Jesus because he will save his people from their sins. All this happened to fulfill what the Lord had said through the prophet: "The virgin shall be with child and give birth to a son, and they shall call him Emmanuel," a name which means "God is with us."²

¹ Noonan, The Morality of Abortion, 44.
² Matthew 1:20-23.
The angel was referring to the prophecy of Isaiah concerning the Messiah. In this prophecy there is a very important description of the mission of the future Savior:

We had all gone astray like sheep, each following his own way; But the LORD laid upon him the guilt of us all. Though he was harshly treated, he submitted and opened not his mouth; Like a lamb led to the slaughter or a sheep before the shearsers, he was silent and opened not his mouth. Oppressed and condemned, he was taken away, and who would have thought any more of his destiny? When he was cut off from the land of the living, and smitten for the sin of his people, A grave was assigned him among the wicked and a burial place with evildoers, Though he had done no wrong nor spoken any falsehood. [But the LORD was pleased to crush him in infirmity.] If he gives his life as an offering for sin, he shall see his descendants in a long life, and the will of the LORD shall be accomplished through him.¹

And finally, in the words of Christ himself:

Just as Moses lifted up the serpent in the desert, so must the Son of Man be lifted up, that all who believe may have eternal life in him. Yes, God so loved the world that he gave his only Son, that whoever believes in him may not die but have eternal life. God did not send the Son into the world to condemn the world, but that the world might be saved through him.²

If one accepts these passages, it is hard to deny that it was God's plan and intention that Christ was to be killed and that his death was essential to God's purposes.

One might reply that God did not actually kill Christ.³ Perhaps not, but He certainly did allow him to die when He could have prevented

¹ Isaiah 53: 6-10. According to the preface of The New American Bible, the brackets indicate a gloss, or difficult translation. In the Douay version the sentence reads: "And the Lord was pleased to bruise him in infirmity."

² John 3: 14-17.

³ Just as the judge did not kill the innocent man in the story discussed earlier.
it. And as we have seen, the moral force is not in the distinction between killing and letting die, but seems rather to depend on whether the victim's death is intended and essential for the purposes of the one who lets him die and whether the person who lets the victim die could have prevented it. God's role in Christ's death satisfied all these conditions. He certainly could have prevented it since He is all-powerful. He must have intended it, for He sent Christ for that very purpose. Christ's death was an essential part of the plan, for without it no atonement would have been made. Since according to the Christians, God is morally perfect and God sanctioned this sacrifice, it follows that it was not immoral. If what God does is not immoral and we are admonished to be like God, why would it be immoral for us to sanction an event of this sort as we might do in the case of abortion?

It might be claimed that Christ wanted to do this whereas the fetus is never even asked. A careful reading of some key scriptural passages will show that Christ did not want to die but left the decision in the hands of God, and God decided that he would die. Consider the moving story of Christ's prayer in the Garden of Gethsemani shortly before his death: "He advanced a little and fell to the ground, praying that if it were possible this hour might pass him by. He kept saying, 'Abba (O Father), you have the power to do all things. Take this cup away from me. But let it be as you would have it, not as I.'"1 According to Mark's account, Christ attempted twice

1 Mark 14: 35-36.
more to be relieved of this burden. After his third prayer in the garden, the guards arrived and took him prisoner. If this is not enough, consider Christ's last words as he died on the cross: "My God, my God, why have you forsaken me?"\(^1\)

Perhaps it can be maintained that Christ at least agreed to his death, but the Catholic does not want to say that just because the victim agrees to his own death that it is legitimate to kill him. Reconsider the case of the judge who lets an innocent man be lynched to quell the rioting. Suppose the victim were the judge's obedient son who would do whatever his father wanted, and his father decided to let the mob lynch him. Does this morally justify the judge's behavior in Catholic thinking? If this were a valid exception, then suicide and voluntary euthanasia would have to be permissible, but they are not. If the Catholic regarded these as permissible, then principle (D) would no longer be absolute and it would again become a question of what other considerations take priority over the sanctity of life. But this would be to give up the Catholic position on the DDE. It would seem on a strict interpretation of the Catholic view that what God did in the sacrifice of Christ was immoral. This appears to be an outright Christian refutation of the DDE and principle (D).

There is another interesting question that can be asked about the relation between Christian theology and the extreme prohibition against killing that is expressed in (D). To get at this question, let us consider another story Foot uses. In her article, Foot is not

\(^1\) Mark 15: 34.
using the story in this way, but a slightly modified version of it makes the point very well. She says:

...consider the story, well known to philosophers, of the fat man stuck in the mouth of the cave. A party of potholers have imprudently allowed the fat man to lead them as they make their way out of the cave, and he gets stuck, trapping the others behind him. Obviously the right thing to do is to sit down and wait until the fat man grows thin; but philosophers have arranged that flood waters should be rising within the cave. Luckily (luckily?) the trapped party have with them a stick of dynamite with which they can blast the fat man out of the mouth of the cave. Either they use the dynamite or they drown. In one version the fat man, whose head is in the cave, will drown with them; in the other he will be rescued in due course. Problem: may they use the dynamite or not?

So that we can consider only the aspect of intentional killing, let us modify the story to the extent that the fat man's death would be painless. Suppose he could be painlessly and unknowingly rendered unconscious and then blown to pieces with the dynamite so he would suffer neither pain nor fear. Foot mentions the difference it might make whether the fat man's head is in or out of the cave, that is whether he will perish with those trapped or survive. But to the Catholic it would make no difference. On a strict application of the DDE, in neither case could he be blown up, because both would involve the intentional killing of the victim. Even when he is sure to die anyway he cannot be killed, like the pregnancy case where both mother and fetus are sure to die but aborting the fetus is forbidden. It would be better that all die in this way than that one would be killed outright. Does the Catholic really suppose that this is what God wants in cases like these?

Suppose we modify the story even more. Instead of a party of unrelated adults, have the people stuck in the cave all be one man's children. Suppose this father receives a phone call from a policeman on the scene explaining the situation to him, then the policeman says: "Since these are all your children, we will leave it up to you whether to sacrifice the one stuck in the opening or let them all drown."

Again, the one to be sacrificed would know nothing about it; suppose he is already unconscious from the fall that lodged him in the opening. Now what would a loving father decide in a case like this? It is hard to imagine that a father who is concerned for the welfare of his children would decide to allow all of them to perish when the painless sacrifice of one would save the others, especially when the one is going to die anyway.

In Christian theology is God not regarded as a loving Father whose main concern is the welfare of His children? Is not this the essence of the "Heavenly Father" concept? If God was willing to sacrifice His own son for the rest of us, why would it be so wrong for this earthly father to sacrifice one of his children for the rest? Furthermore, why would it then be inherently wrong to sacrifice a fetus for the good of the mother, especially where the fetus will die anyway? It would seem very difficult for the Catholic to maintain that his view follows from Christian theology or the will of God or even that his view is consistent with these.

The preceding discussion has assumed the truth of the Christian religion. It is, of course, an open question whether there is any truth to the Christian claim. Solving this controversy,
however, is quite beyond the scope of this work. The intent here was to show that even if Christianity is true the DDE and principle (D) cannot be derived from it. If the arguments here are valid, then the Catholic cannot justify his extreme view on the grounds that, however much he regrets it in some cases, it is his Christian duty never to let the consequences override the prohibition against killing.

A number of arguments have been leveled at the DDE and principle (D), but what can be said about (T), the principle that maintains that we are obligated to minimize human suffering sometimes even at the cost of human life? Perhaps it should be pointed out first that the standard criticism of utilitarianism may not even apply to (T) in the case of abortion. This objection to utilitarianism is that on the application of its principles it is possible to conclude that we are morally obligated to perform an unjust act. Finnis, for example, shows how a utilitarian might reason:

... an experimenter accused of killing children in order to conduct medical tests will point out that these deaths are necessary to these tests, and these tests to medical discoveries, and the discoveries to the saving of many more lives—so that, in view of the foreseeable consequences of his deed, he displays (he will argue) a fully adequate (indeed, the only adequate) and reasonable regard for the value of human life.¹

Granting that this experiment would have utilitarian value, what is wrong with it? Finnis and other critics would point out that it goes against the principle of justice because it violates the children's right to life. Assuming this is a valid criticism of this experiment, does it apply to abortion? Not unless the fetus also has a

¹ Finnis, "Rights and Wrongs of Abortion," 126.
right to life, but from what we have considered in Chapter VI that is still an open question. But even if we assume the personhood of the fetus and hence the applicability of these concepts, it has not been shown that they do take moral priority over utilitarian principles.

The utilitarian holds that the prohibition against killing is a prima facie principle, and the Catholic has been unable to show that it is more than that. The Catholic, on the other hand, would accept the validity of the principle to minimize suffering as long as it is regarded as no more than a prima facie principle. In other words, the utilitarian principle is generally good to follow, but it must be abandoned when it conflicts with principles of higher moral priority such as the right to life, that is what Finnis calls basic goods. But to criticize utilitarianism because it would sometimes override these basic goods is simply to beg the question. This cannot count as a criticism unless it is first shown that these basic goods do have moral priority, but that is the essence of the dispute in the first place.

As suggested at the beginning of this chapter, this dispute has gone on unresolved throughout the history of philosophy, so there is little hope of getting agreement between the contenders in the abortion controversy. The Catholics may not be able to prove their extreme view and it may even be inconsistent with their own theology, but it does not follow from that that their position is false. The utilitarians are not much better off. While they may claim that their view is at least consistent with Christianity and would make people
happier, it is not yet proven to be true. As Jeffrie Murphy says of this basic dispute:

For we lie here at the boundaries of moral discourse where candidates for ultimate principles conflict; and it is part of the logical character of an ultimate principle that it cannot be assessed by some yet higher ("more ultimate") principle. You pays your money and you takes your choice.¹

This conflict has resulted in an interesting situation. Proponents of (T) would admit that a prima facie prohibition against killing is quite valid. Proponents of (D) would admit that a prima facie imperative to minimize suffering is quite valid. But neither side admits that its own principle is prima facie, so they disagree on what considerations should have ultimate moral priority, but there appears to be little hope of resolving that dispute. Given all of this, a reasonable working procedure might be to regard both the prohibition against killing and the imperative to minimize suffering as prima facie principles and then look for a way to decide between them when they conflict. The possibility of doing this where these principles conflict in the abortion decision will be discussed in the next chapter.

Before turning to this final chapter, it might be well to recount what we have considered so far. After looking at some of the traditional reasons offered by opponents and proponents of abortion, we took up the question of the personhood of the fetus. After viewing what various disciplines had to say about the fetus, we had to conclude

that no one has yet provided a sound rationale showing that the fetus is a person or that it is not a person. We are simply left with uncertainty on that issue. When we considered the various rights and moral principles relevant to abortion, we found that none of the views has been established as the morally correct way to see the problem. We were left again in a state of uncertainty on these issues. Thus we will begin the final chapter with this admitted uncertainty over the nature of the fetus and the various rights and moral principles. Hopefully, from this uncertainty a plausible position on abortion will emerge.
CHAPTER IX

THE MORALITY OF ABORTION

In the last chapter it was shown that the usual justifications for accepting the DDE and the absolute versions of (D) are not valid. The stories that were related were intended to bring out certain key issues which show the reader the correctness of a certain point of view. Perhaps it would be better to say that these stories were to remind the reader of certain points, because the reader was supposed to agree on the basis of his own beliefs. For example, the story about the judge letting the mob lynch an innocent man was not intended to convince the reader that the judge was responsible for the man's death. It was just assumed that the reader would agree that the judge was responsible and on the basis of that agreement come to realize that the distinction between killing and letting die does not have the moral force the Catholic wants it to have. The stories together with Bennett's argument and the discussion of the inconsistency of the Catholic view with Christian theology show the moral and logical dubiousness of the Catholic position.

It should be emphasized, however, that the arguments to be generated in this chapter do not depend on the assumption that the DDE and (D) are false but only on the fact that we do not know that they are true. In other words, here we will be starting with an admitted uncertainty about these principles and trying to resolve the abortion
problem in the context of that uncertainty. This has the obvious virtue that if successful it will be of practical value, because in real life we must admit to an uncertainty on these issues. If one has accepted the arguments of the last chapter, he will be much more inclined to reject the DDE and (D). And if that is the case, he will be much more persuaded that the decision to abort in some cases is a proper decision.

Before looking at the abortion problem, let us review the problem of the personhood of the fetus. It is important to realize that despite the various proposals as to the time from which the fetus should be regarded as a person no position has won out over the other proposals. We have looked at views that range from the instant of fertilization to sometime after birth. None of the proposals we have examined has been shown to be correct. So even though we have a complete picture of the biological and psychological facts relevant to the fetus, we must admit an uncertainty regarding its personhood. And if Wertheimer is right in his view that we would have to get to know the fetus before we can decide how to regard it, then there seems to be little hope of ever overcoming this uncertainty.

At the present stage of the controversy it is clear that we do not have a definitive answer to the question about the personhood of the fetus. So what are we forced to say? It appears that all we can say without serious objection is that the fetus either is a person or it is not a person, but we have no way of deciding which is the case.
One might plausibly say that a few minutes before its birth it is more likely that it is a person and a few minutes after fertilization it is less likely, but this is not a great deal of help. Given the controversy and what we know about the fetus, it is probably safe to say that the chances of the fetus being a person or not a person are about fifty-fifty.

Perhaps it is like the problem of basic principles, as Murphy suggested in the last chapter. There is no way to rationally decide, so "You pays your money and you takes your choice." One thing that is sure is that this is another of the uncertainties we have to deal with in trying to arrive at a plausible view on the morality of abortion. The various parties to the controversy disagree on the nature of the fetus and on which moral principles take priority. Is there anything they agree on? If there are some things all sides will agree on and some way of working with the areas of uncertainty, perhaps a plausible approach to abortion is possible. The remainder of this chapter will be an attempt to show just that.

In the abortion controversy there are several kinds of cases that require solutions. Two of these directly involve the welfare of the mother. The first is the case where the mother's life is threatened by the continuation of the pregnancy, where it boils down to either the mother or the fetus must die. Although this is rare and only the Catholic extreme would let the mother die, it must be dealt with to have a complete solution to the abortion problem. And of course, this kind of case is much discussed by some of the philosophers we have considered. The other kind of case is where the
life of the mother is not threatened by the continued pregnancy but only her happiness is. While this is certainly the most common situation, it has not been dealt with very much in the literature. It has not been considered to the extent the doctrine of the double effect has, a doctrine which would apply to the first kind of case. Given the uncertainties over personhood and ultimate principles, and whatever we can find that the opponents agree on, we will consider a method of solving the abortion-decision problem, a method that will apply to both kinds of cases and that seems to be both reasonable and moral.

The first sort of case we will consider is where the mother's life is threatened, where a continuation of the pregnancy will result in her death but an abortion will kill the fetus. In other words, either the mother or the fetus will die. How do we decide which it is to be? Let us see, first of all, what principles the parties to the controversy would agree on. All parties would agree to three moral principles: (K) It is wrong to intentionally kill a person, (L) It is wrong to intentionally let a person die, and (S) It is wrong to intentionally let a person suffer. The use of "intentionally" in each principle is meant to rule out accidents, events beyond the agent's control, etc. Intentionality entails that the agent chose to bring about the effect. While principles (K), (L), and (S) are accepted generally, the disagreement is over which takes priority.

To make this point clear, consider some of the stories used in the last chapter. In Foot's story of the runaway tram where the driver
steers to the track occupied by one man rather than five, we would not say the driver intentionally killed a person, because he did not choose to and could not have done anything else. In the story of the judge who lets a mob lynch an innocent man, the judge did intentionally let the man die, because he chose to let him die and could have prevented it if he had wanted to. In Foot's version of the story where the judge had the man executed, he intentionally killed the man rather than let him die. It would not be correct to say John Doe is intentionally letting the children of India die of starvation, because he does not choose to and could do nothing about it anyway. It might be correct to say the President of the United States is intentionally letting them die, if it is in his power to prevent it but he fails to do so.

The point to see is that intentionality applies just as much to letting die and letting suffer as it does to outright killing.

Given the facts of the case at hand, it will not be possible to abide by both principles (L) and (K). The only behavior consistent with (L), that is not letting the mother die, will involve a violation of (K), that is the necessity to kill the fetus. Likewise, to behave according to (K) and not kill the fetus will necessitate a violation of (L) in letting the mother die. Furthermore, while violating (K) will not cause additional suffering and hence a violation of (S), the violation of (L) certainly will violate (S) because of the physical and emotional suffering of the mother who is allowed to die and that of

1 Assuming the fetus does not suffer, which seems quite likely in early abortions at least.
her family. So in this kind of case, (L) and (S) are consistent with
each other but both are inconsistent with the following of (K).

Where all would agree on the moral validity of (K), (L), and
(S), the disagreement arises over which takes priority in cases of
conflict such as the one under consideration. Two more principles will
be introduced here which represent the opposing views in the abortion
dispute. The first will be labeled (DDE) since it corresponds to the
outcome of the doctrine of the double effect as discussed in the last
chapter. It simply states that (K) has moral priority over (L).
Principle (NDDE) says it is not the case that (K) has moral priority
but that (K) and (L) are equal morally.

The last chapter, of course, was devoted to establishing
(NDDE), that is to showing that the doctrine of the double effect is
not morally valid. Since, however, it cannot be supposed that the
arguments of Chapter VIII have convinced everyone, for the purposes of
this chapter it is still an open question which of (DDE) or its
negation (NDDE) is true. Obviously, both cannot be true. Ignoring
the arguments of Chapter VIII, let us agree that both have an equal
chance of being the correct principle. This is one of the uncertain-
ties we must contend with if a practical solution is to be found to
the abortion-decision problem.

The uncertainty over the personhood of the fetus can also be
put into a form similar to the principles listed. The claim that the
fetus is a person will be (P). The view that it is not the case that
the fetus is a person will be (NP). Obviously, they are not both true,
but we must admit that we have no way to determine which is. As far as the facts go, both have an equal chance of being the true proposition.

To recap what we have so far, there are these principles which all would agree are valid:

(K): It is wrong to intentionally kill a person.
(L): It is wrong to intentionally let a person die.
(S): It is wrong to intentionally let a person suffer.

In addition, there are two sets of principles which represent disagreements:

(DDE): (K) has moral priority over (L).
(NDDE): (K) and (L) are equal in moral priority.
(P): The fetus is a person.
(NP): The fetus is not a person.

Let us now see how a consideration of these areas of agreement and disagreement can be utilized in deciding who is to die, the mother or the fetus.

To establish a rationale that will be used in the ensuing discussion, consider this problem. A man is shot in such a way that the bullet has lodged in his spinal cord. After taking tests, X-rays, etc., the doctors conclude that there is no danger of infection or other organic problems if the bullet is left in place, and there is no danger to life if it is surgically removed. However, due to its location in the spinal cord, there are some risks related to the use of the man's legs. The doctors tell the injured man that on the basis of their examinations there are two courses of action open to them, either to operate to remove the bullet and repair the damage to the
cord, or not operate but instead utilize a certain drug that heals nerve tissue. They tell the patient that if he has the operation his chances of permanent paralysis are 25 percent. If he does not have the operation but depends on the drugs, his chances of recovery are only 25 percent while his chances of permanent paralyses are 75 percent. Under these circumstances what is the reasonable thing to do? Obviously, the reasonable thing to do is to have the operation.

Why is this the reasonable thing to do? Because by having the operation his chances of recovery are three out of four, whereas without the operation his chances of recovery are only one out of four. Here is a very important point. If the man chooses to have the operation and it turns out that he loses the use of his legs, his decision to have the operation was still the right decision to make given what he knew about the situation. The odds of his recovery were significantly greater on that alternative, so it was the reasonable thing to do regardless of the eventual outcome. In the absence of complete knowledge concerning the case, one has to go on the probabilities generated out of what is known along with the uncertainties about outcome. This rationale, which is the only reasonable rationale in light of the uncertainties, can be utilized to make the abortion decision.

In the situation where it is the life of the mother or the life of the fetus, two agreed upon principles come into conflict, namely (K) and (L). Since all parties agree that both (K) and (L) are valid principles, some other consideration must be resorted to to decide which is to take priority. This brings in the disagreed upon
principles (DDE) and (NDDE). Furthermore, which of (P) or (NP) is true is also a relevant consideration.

Suppose (NP) is true, that is the fetus is not a person. Then there is no problem of conflict between (K) and (L), because to abort the non-person fetus would not be to kill a person. So (P) must be true for there to be any reason not to abort. Now suppose that (P) is true but that (NDDE) is the valid principle of its set. If (NDDE) is the correct principle, then (K) and (L) have equal priority, but then (S) can be utilized to choose between them. Surely the mother will suffer if the abortion is not performed, so to choose (K) and violate (L) would be to violate (S) as well. But to choose (L) would be to violate only (K). Since (K) and (L) have equal force, the significance of (S) plays the decisive role. It is seen from this that to have a reason not to abort, (DDE) must be the correct principle along with (P).

In other words, only if (P) and (DDE) are both correct would it be wrong to abort, but if either (NP) or (NDDE) is correct then it would be wrong not to abort. In the latter two cases (L) and (S) become the decisive principles, requiring abortion. Where there are two controversial principles each of which could be true or false, what are the possible alternatives and outcomes? There are four possibilities, to wit:

1. (P) + (DDE) \rightarrow Do not abort.
2. (NP) + (DDE) \rightarrow Do abort.
3. (P) + (NDDE) \rightarrow Do abort.
4. (NP) + (NDDE) \rightarrow Do abort.

It is clear that of the possible four cases three call for abortion.
Assuming as we have the equal likelihood of (P) and (NP) being true and the same for (DDE) and (NDDE) and knowing only what the medical facts are about the case, what is the situation in terms of probabilities? In other words, in the absence of knowing what is the right thing to do, what is the most reasonable and moral thing to do? Given the "truth-table" above, we can say: If the abortion is performed the chances of it being morally right are 75 percent while the chances of it being morally wrong are only 25 percent. If the abortion is not performed the chances of that being morally right are only 25 percent while the chances of that being wrong are 75 percent. Again, in the absence of knowing what is the right thing to do, what is the reasonable choice? If one chooses to abort, the odds that he does what is right are three out of four. If he chooses not to abort, they are only one out of four. As in the surgical risk case, it seems obvious that the reasonable thing to do is to opt for the abortion. Furthermore, even if it could turn out that it was a mistake\(^1\) it was still the reasonable and moral thing to decide under the circumstances. And since it was the most reasonable and moral thing to do under the circumstances, the person choosing this way should be praised as having done the morally best thing in light of the available information.

The foregoing analysis has assumed the equal likelihood of (DDE) and (NDDE). However, if the arguments of the last chapter are regarded as more likely valid than not, then the probability of (DDE) is correspondingly reduced thereby reducing even further the likelihood

\(^1\) Perhaps we will be told at judgment day.
that it is wrong to abort. If one outright rejects (DDE), that would eliminate case 1 as an alternative leaving no case where it would be morally wrong to abort. If one takes the position that there is little likelihood that the fetus is a person early in the pregnancy, then the truth of (P) is correspondingly reduced for early pregnancies. So if the abortion is done early thereby reducing the chances of (P) and there are serious doubts about (DDE), then it becomes extremely unlikely that any moral wrong is done in aborting to save the mother. If all the controversial factors are on equal footing, then the greatest probability of the correctness of the Catholic view is only 25 percent. Under these circumstances, it appears that the only reasonable and decent thing to do is to abort.

The other kind of case pertaining to the mother's welfare that needs discussion is where the life of the mother is not in danger but she will suffer psychologically and/or physically by continuing the pregnancy. And of course, the rest of her family will suffer as well. The rationale for deciding in this case is similar to the case just discussed, except that the basic principles in question are not the same. In this case it will be a conflict of (K) and (S). The only way to abide by (S) and prevent the mother's suffering is to violate (K) by killing the fetus. Since it is not a case of killing or letting die, the doctrine of the double effect does not come into consideration. However, there is the problem of which of (K) or (S) is to take moral priority. And as before, there is the problem of the personhood of the fetus. In other words, which of (P) or (NP) is true?
Here is where we really get down to "You pays your money and you takes your choice." The question of which of (K) or (S) is to take priority is essentially the deontology/teleology dispute again. The Catholic holds that since the violation of (K) involves intentional killing it is impermissible. The utilitarian holds that the prevention of human suffering takes priority, especially where the killing itself would not cause suffering as in abortion. In the case where the mother's life was in danger and (DDE) was one of the considerations, it was possible to argue against the Catholic position by attacking the validity of the doctrine of the double effect. But as the history of philosophy testifies, when we get down to the basic disagreement between deontologists and utilitarians, there do not seem to be any good arguments that can be used in deciding the issue.

This, like the personhood dispute, seems to be a situation where either position has an equal probability of being correct. At any rate, given what we now know, their chances are fifty-fifty. If a person accepts the analysis of God's role in Christ's death that was presented in the last chapter and he accepts the Christian view that God is the moral pattern to copy, he might be more inclined to (S). But it cannot be assumed that all will be convinced by that argument. The one thing the Catholic cannot do, however, is to resort to Christian theology to support (K) over (S). It seems that the best we can say is that neither (K) nor (S) has been shown to have moral priority. The rationale will proceed on that basis.
Here we are dealing with two uncertainties, the status of the fetus and which of (K) or (S) takes priority. Again, where there are two factors each of which could be true or false we have four possibilities as will be shown below. It is important to remember that there is one thing we are certain about. If we do not abort, there will be a great deal of human suffering. The four possibilities are:

1. (P) + (K) \implies \text{Do not abort.}
2. (NP) + (K) \implies \text{Do abort.}
3. (P) + (S) \implies \text{Do abort.}
4. (NP) + (S) \implies \text{Do abort.}

What this shows is that of the four possible cases, three call for abortion and only one for not aborting. Only if the fetus is a person and the prohibition against killing takes moral priority will it be wrong to abort. This is shown in case 1. If the fetus is not a person as in case 2, then (K) does not apply, so even if it were prior it would not prohibit abortion. In cases 3 and 4 where (S) has priority, abortion is called for.

The rationale from here on is exactly the same as in the case of the mother in danger of dying. In aborting the chances of it being the right thing to do are 75 percent or three out of four. In not aborting the chances of it being the right thing are only one out of four or 25 percent. As in the problem of deciding to operate, the answer here is clear. In the absence of knowing which of (K) or (S) and (P) or (NP) are correct, the only reasonable and moral thing to do is to abort.
Suppose a Catholic insists on the moral priority of (K), he must still admit to an uncertainty about (P). As Father Bernard Haring pointed out in the quotation in Chapter II, there is still doubt in the highest circles of the Church on the personhood of the fetus.¹ Even assuming the priority of (K) but the uncertainty of (P), the best probability that abortion is wrong is only 50 percent. In other words, only cases 1 and 2 on the above table would be applicable, but only one of these calls for not aborting. The force of this can be put this way. If a person chooses to abort, there is only a 50 percent chance that he has done something wrong. But given the facts of the case, if he does not abort he can be 100 percent certain that he causes a great deal of harm and suffering to the mother and her family. His choice, in other words, is between the possibility of doing wrong and the certainty of causing harm and suffering.

The discussion in the preceding paragraph is dealing with the person who refuses to question the alleged priority of (K), but no valid rationale has been advanced to justify such an adamant position. In the absence of a rationale showing (K) to have priority over (S), the reasonable assumption is that they are equal. But this way the chances of the Catholic view being correct are only 25 percent.

So it turns out to be this kind of case. If abortion is not done, there is only a 25 percent chance that that was the right thing to do, but there is a 75 percent chance that not aborting was the wrong thing to do plus a 100 percent certainty that not aborting will cause

¹ See this work, 7-10.
harm and suffering. It is hard to see how the opponent of abortion can maintain that in the absence of knowledge in these matters the only morally safe thing to do is refuse to abort. It appears from the considerations adduced in this chapter that the only morally safe thing to do is to abort.

The situation where the pregnancy is due to rape or incest seems to fit quite well into the last discussion. Assuming no medical complications, it would seem that the reason for aborting is the psychological suffering that the mother would experience. Given the calculus used in the last discussion, abortion would be called for in the case of rape or incest.¹

A more difficult problem is were abortion is being considered because of the good it will be for the fetus as in a possible deformity in the fetus, for example where the mother has been exposed to rubella early in the pregnancy.² The reason this is more difficult to decide is because in most cases there is no way to know if the fetus actually will be deformed, and if it is what will be the extent of the deformity. In addition there is no way to determine how much suffering would be caused if the fetus is born and lives a lifetime with the deformity.

While this case is harder to resolve, some light can be thrown on it. Consider again the "truth-table" used above where it is suffering rather than another life opposed to (K):

¹ For earlier discussion of rape and abortion, see this work, 39-40.

² For earlier discussion of deformity and abortion, see this work, 30-33.
1. \((P) + (K) \rightarrow \text{Do not abort.}\)
2. \((NP) + (K) \rightarrow \text{Do abort.}\)
3. \((P) + (S) \rightarrow \text{Do abort?}\)
4. \((NP) + (S) \rightarrow \text{Do abort.}\)

The outcome of case 3 is questioned because this is the case in dispute where we do not know how much if any suffering will occur, so we cannot say that \((S)\) applies. However, it is clear that given the uncertainty of \((P)\) and \((NP)\) the highest probability that abortion is wrong would be 50 percent. In other words, even if there were no suffering involved so \((S)\) would not apply and cases 3 and 4 could be ignored, case 2 would still allow abortion if that was the desire of the mother. This means that even if there were no probability of deformity, the probability of the wrongness of abortion would be only 50 percent.

Given, however, the statistical evidence discussed in Chapter III concerning deformity, the leverage swings toward \((S)\) applying and hence it becomes somewhat less than a 50 percent probability that abortion would be the wrong thing to do. For example, some studies have shown that if a mother contracts rubella during the first month of pregnancy the probability of the fetus being significantly deformed runs as high as 60 percent.\(^1\) For ease of calculation, let us assume as an example that in an early rubella case there is a 50 percent chance of a significant fetal deformity with resulting significant

\(^1\) For a survey of these findings and the kinds of expected deformity, see Callahan, Abortion: Law, Choice and Morality, 95-104. See this work, 31-33.
suffering if the fetus is not aborted. Our calculus would then have this form:

1. (P) + (K) $\rightarrow$ Do not abort.
2. (NP) + (K) $\rightarrow$ Do abort.
3a. (P) + (S) + (S) applies $\rightarrow$ Do abort.
3b. (P) + (S) + (S) does not apply $\rightarrow$ Do not abort.
4. (NP) + (S) $\rightarrow$ Do abort.

Since case 3 represents only 25 percent of the total range of probabilities, each of 3a and 3b would represent only 12.5 percent. Therefore the total probability that abortion would be wrong would be 25 percent from case 1 plus 12.5 percent from case 3b giving a total of 37.5 percent. The total probability that it would be right to abort would be 50 percent from cases 2 and 4 plus 12.5 percent from case 3a giving a total of 62.5 percent. So it seems that the chances of abortion being the right thing to do are nearly twice that of it being the wrong thing to do. This is not as strong as in the previous cases where aborting was three times as likely to be right, but it is still a significant advantage. Again, in the absence of knowledge of what would be right, the odds clearly favor abortion as the morally right alternative. This conclusion is reinforced if one brings in additional relevant considerations, for example the effect of a deformed child on the other children in the family.

It seems quite clear then given the uncertainties we have to work with that abortion is the morally right thing to do in each of the cases we have discussed. It is important to remind ourselves that some of these things are indeed uncertainties. Despite all the
attempts at determining the correct status of the fetus with respect to personhood, none seems to have won a logical victory. Some perhaps have an emotional appeal to some people, but that is quite different from having logical validity. Some people have made up their minds on the question of which is morally worse, killing, letting die, or allowing suffering, but no one has come up with a rational justification for one of these over the others. In the absence of certainty on these key issues, we must settle for probability. And if that is the case, then the calculus proposed in this chapter seems more valid a procedure than relying on emotion, intuition, authority, fate, luck, or any of the other things we frequently rely on in the place of reason.

Let us now give some consideration to some possible objections to this proposal. The rationale suggested here depends on there being about equal probability of the truth of each member of each of three sets of propositions: (P) or (NP), (DDE) or (NDDE), and (K), (L), or (S). A critic might ask whether it is safe to assume an equal probability in these cases. In the case of (DDE) and (NDDE), perhaps not, but the arguments of Chapter VIII show if anything that (DDE) is much less likely than (NDDE). With (P) or (NP) and (K), (L), or (S), in the absence of any rationale to establish some other level of priorities, would it be safe to assume anything other than an equal probability in each case?

Suppose a person gave (K) a much higher probability than (S), not because of any logical rationale but because abortion was emotionally abhorrent to him. If he then utilized this higher
probability to show that abortion is morally wrong, he would simply be begging the question. His argument would be: Abortion is wrong, so (K) must have priority. But if (K) has priority, then abortion is wrong. This argument is obviously circular. This is one reason why it is so important to avoid emotionally-loaded language in discussing abortion. One favorite of the anti-abortion groups is "slaughter of the unborn child." If one is swayed by this way of talking he might more easily opt for (K) and (P) as the correct principles. But if he cannot produce an argument to support (K) and (P), an argument that is logically prior to an evaluation of abortion, then he begs the question.

While fallacious, this approach must be somewhat effective. Nearly any anti-abortion book or pamphlet one turns to will have a picture of a hospital garbage can full of aborted fetuses, fetuses chopped to pieces in the course of abortion, etc. The emotional impact of this is very great, but it is logically irrelevant unless it can be shown that these fetuses were persons and that killing them could not be justified on other grounds. But these are the things that have not yet been established. That abortion is gruesome is undeniable. That abortion is morally wrong is an open question.

Another possible objection is that in life and death cases, probability is not good enough. Here we must be certain we do the right thing. But how is this to be managed when we must start with uncertainty in our basic considerations? What is this critic suggesting, that we put off making a decision until we can be sure? That we wait until some new data come along or some new arguments are
generated? That would be fine if the unwanted pregnancies would just stop until we can make up our minds with certainty. This is one of those situations that William James would have called a "forced option," a situation where refusing to decide is the same as deciding one way or the other. Suppose someone is faced with the need to decide whether an abortion should be performed but he refuses to decide until there is some certainty in the basic factors. This is tantamount to deciding not to abort. Everything goes on just as if he had consciously decided that the abortion is not to be done. If we had certainty in these matters that would surely make things much simpler, but in the absence of this certainty we must settle for what we can get and that is probability.

Although this work has turned out to be decidedly pro-abortion, there is a possible objection from the pro-abortion side, namely the feminists or women's liberation faction. Here, after all, is another man telling them that it is morally all right to have abortions. They might point out that the basic consideration is the woman's right to decide what is to happen in and to her body. As we have seen, Judith Thomson gives this high priority in her essay. And since the Supreme Court ruling of January 22, 1973, the decision has been legally left to the woman. So with the woman's right to decide legally guaranteed to her, what point is there is all these attempts to show that abortion

1 See Thomson, "A Defense of Abortion," passim.
is not wrong. If the woman decides to have an abortion, given her freedom to decide, that is the end of the matter; no further justification is necessary.

The answer to this is that just because a woman is free to decide that is not a moral reason for abortion or against it either. The moral reasons come into play in the process of the woman making her decision. They must come into play, at any rate, if her decision is going to be morally respectable. That she is free to decide is unquestionable. But what factors will she consider in making her decision? Having the freedom to make a decision does not guarantee the moral validity of whatever decision one makes. Suppose a woman two-months pregnant decides she wants to punish her devout Catholic parents, so she has an abortion and sees to it that the news reaches the parents and their congregation. Would anyone say that just because she had the freedom to make the decision this abortion was morally justified? It is clear that the reasons for or against abortion must play a role in the decision. If it is going to be a morally respectable decision, it must be based on something other than just the woman's right to decide. This obviously applies equally to both women and men and to all other situations where a decision must be made.

No doubt there are more objections that could be raised, but the ones discussed at least represent a large segment of the concerned parties. The one objection that cannot be raised here, as it can be in many pro-abortion arguments, is that this rationale depends on a callous disregard for the possible personhood of the fetus. This is
given its due regard here, but the possibility of the falsity of this view is also given its due regard, and that is missing in many anti-abortion arguments.

In earlier chapters it was clear that on the crucial issues concerning abortion we were left with uncertainty. Perhaps in the future some new facts and arguments will come along to resolve these questions. But if we are going to have a logically and morally respectable decision-procedure now, we must not pretend that these uncertainties do not exist. The proposal in this chapter has recognized these unresolved questions and utilized them in offering a rationale to morally justify abortion, at least in the typical cases where it seems desirable.

The argumentation is finished. This short postscript will contain just a few parting remarks, remarks about attitudes. The proposal in this chapter obviously gets its force from the uncertainty that pertains to the basic principles and beliefs with which any abortion decision must begin. This uncertainty follows from a realization that good people differ on these views and that none of the contenders has been able to prove any of the various positions.

How might one who is completely convinced of his own view react to this scepticism? The term "invincible ignorance" is borrowed from Father Bernard Haring, who used it in reference to those who cannot accept his position. In his "A Theological Evaluation," he says:

Invincible ignorance is a matter of inability of a person to "realize" a moral obligation. Because of the person's total experience, the psychological impasses, and the whole
context of his life, he is unable to cope with a certain moral imperative. The intellectual difficulties of grasping the values which are behind a certain imperative are often deeply rooted in existential difficulties. The human person is ever in the condition of the disciples to whom the Lord says, "There is still much that I could say to you but the burden would be too great for you now" (John 16:12). According to the very different stature and situation of people, this can be the case not only as to highest ideals and goal-commandments of the Gospel but also as to the concrete and existential understanding of a prohibitive moral norm.¹

Is this the case here? If so, then each of the parties discussed could say that of all his opponents. It would, no doubt, be intellectually comforting if a person could say that the reason other people did not agree with him was because of their invincible ignorance. This, of course, will not do in a philosophical discussion, but will it do in any kind of discussion of abortion? If there are these obligations that would require a woman to give up her chance for happiness or even her life, then they should be demonstrated to the satisfaction of all intelligent and decent people. It should be apparent by now that they have not.

Philosophers and theologians perhaps forget at times that we are here dealing with an issue that goes far beyond the academic. We are dealing with real people and real suffering, and when this suffering could be easily avoided, it will take some powerful arguments to show why it should not. Such arguments have not yet been presented. In the absence of arguments of this sort, it is difficult to see how we can condemn a woman who is unwilling to forego a happy life on the chance

¹ Haring, "A Theological Evaluation," 140.
that she would otherwise be doing something morally wrong. Expressions like "murder," "slaughter," "callousness," and "invincible ignorance" simply do not apply here.
REFERENCES

Books


**Articles and Cases**


Supreme Court Reporter, February 15, 1973, 705-763.

"33,000 Doctors Speak Out on Abortion," Modern Medicine, May 14, 1973, 31-35.

