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The Moral Significance of Birth

MARY ANNE WARREN

Does birth make a difference to the moral rights of the fetus/infant? Should it make a difference to its legal rights? Most contemporary philosophers believe that birth cannot make a difference to moral rights. If this is true, then it becomes difficult to justify either a moral or a legal distinction between late abortion and infanticide. I argue that the view that birth is irrelevant to moral rights rests upon two highly questionable assumptions about the theoretical foundations of moral rights. If we reject these assumptions, then we are free to take account of the contrasting biological and social relationships that make even relatively late abortion morally different from infanticide.

English common law treats the moment of live birth as the point at which a legal person comes into existence. Although abortion has often been prohibited, it has almost never been classified as homicide. In contrast, infanticide generally is classified as a form of homicide, even where (as in England) there are statutes designed to mitigate the severity of the crime in certain cases. But many people—including some feminists—now favor the extension of equal legal rights to some or all fetuses (S. Callahan 1984, 1986). The extension of legal personhood to fetuses would not only threaten women's right to choose abortion, but also undermine other fundamental rights. I will argue that because of these dangers, birth remains the most appropriate place to mark the existence of a new legal person.

SPEAKING OF RIGHTS

In making this case, I find it useful to speak of moral as well as legal rights. Although not all legal rights can be grounded in moral rights, the right to life can plausibly be so construed. This approach is controversial. Some feminist philosophers have been critical of moral analyses based upon rights. Carol Gilligan (1982), Nell Noddings (1984), and others have argued that women tend to take a different approach to morality, one that emphasizes care and responsibility in interpersonal relationships rather than abstract rules, principles, or conflicts of rights. I would argue, however, that moral rights are complementary to a feminist ethics of care and responsibility, not incon-

sistent or competitive with it. Whereas caring relationships can provide a moral ideal, respect for rights provides a moral floor—a minimum protection for individuals which remains morally binding even where appropriate caring relationships are absent or have broken down (Manning 1988). Furthermore, as I shall argue, social relationships are part of the foundation of moral rights.

Some feminist philosophers have suggested that the very concept of a moral right may be inconsistent with the social nature of persons. Elizabeth Wolgast (1987, 41–42) argues convincingly that this concept has developed within an atomistic model of the social world, in which persons are depicted as self-sufficient and exclusively self-interested individuals whose relationships with one another are essentially competitive. As Wolgast notes, such an atomistic model is particularly inappropriate in the context of pregnancy, birth, and parental responsibility. Moreover, recent feminist research has greatly expanded our awareness of the historical, religious, sociological, and political forces that shape contemporary struggles over reproductive rights, further underscoring the need for approaches to moral theory that can take account of such social realities (Harrison 1983; Luker 1984; Petchesky 1984).

But is the concept of a moral right necessarily incompatible with the social nature of human beings? Rights are indeed individualistic, in that they can be ascribed to individuals, as well as to groups. But respect for moral rights need not be based upon an excessively individualistic view of human nature. A more socially perceptive account of moral rights is possible, provided that we reject two common assumptions about the theoretical foundations of moral rights. These assumptions are widely accepted by mainstream philosophers, but rarely stated and still more rarely defended.

The first is what I shall call the intrinsic-properties assumption. This is the view that the only facts that can justify the ascription of basic moral rights¹ or moral standing² to individuals are facts about *the intrinsic properties of those individuals*. Philosophers who accept this view disagree about which of the intrinsic properties of individuals are relevant to the ascription of rights. They agree, however, that relational properties—such as being loved, or being part of a social community or biological ecosystem—cannot be relevant.

The second is what I shall call the single-criterion assumption. This is the view that there is some single property, the presence or absence of which divides the world into those things which have moral rights or moral standing, and those things which do not. Christopher Stone (1987) locates this assumption within a more general theoretical approach, which he calls “moral monism.” Moral monists believe that the goal of moral philosophy is the production of a coherent set of principles, sufficient to provide definitive answers to all possible moral dilemmas. Among these principles, the monist

typically assumes, will be one that identifies some key property which is such that, "Those beings that possess the key property count morally . . . [while those] things that lack it are all utterly irrelevant, except as resources for the benefit of those things that do count" (1987, 13).

Together, the intrinsic-properties and single-criterion assumptions preclude any adequate account of the social foundations of moral rights. The intrinsic-properties assumption requires us to regard all personal or other relationships among individuals or groups as wholly irrelevant to basic moral rights. The single-criterion assumption requires us to deny that there can be a variety of sound reasons for ascribing moral rights, and a variety of things and beings to which some rights may appropriately be ascribed. Both assumptions are inimical to a feminist approach to moral theory, as well as to approaches that are less anthropocentric and more environmentally adequate. The prevalence of these assumptions helps to explain why few mainstream philosophers believe that birth can in any way alter the infant's moral rights.

THE DENIAL OF THE MORAL SIGNIFICANCE OF BIRTH

The view that birth is irrelevant to moral rights is shared by philosophers on all points of the spectrum of moral views about abortion. For the most conservative, birth adds nothing to the infant's moral rights, since all of those rights have been present since conception. Moderates hold that the fetus acquires an equal right to life at some point after conception but before birth. The most popular candidates for this point of moral demarcation are (1) the stage at which the fetus becomes viable (i.e., capable of surviving outside the womb, with or without medical assistance), and (2) the stage at which it becomes sentient (i.e., capable of having experiences, including that of pain). For those who hold a view of this sort, both infanticide and abortion at any time past the critical stage are forms of homicide, and there is little reason to distinguish between them either morally or legally.

Finally, liberals hold that even relatively late abortion is sometimes morally acceptable, and that at no time is abortion the moral equivalent of homicide. However, few liberals wish to hold that infanticide is not—at least sometimes—morally comparable to homicide. Consequently, the presumption that being born makes no difference to one's moral rights creates problems for the liberal view of abortion. Unless the liberal can establish some grounds for a general moral distinction between late abortion and early infanticide, she must either retreat to a moderate position on abortion, or else conclude that infanticide is not so bad after all.

To those who accept the intrinsic-properties assumption, birth can make little difference to the moral standing of the fetus/infant. For birth does not seem to alter any intrinsic property that could reasonably be linked to the

possession of a strong right to life. Newborn infants have very nearly the same intrinsic properties as do fetuses shortly before birth. They have, as L. W. Sumner (1983, 53) says, "the same size, shape, internal constitution, species membership, capacities, level of consciousness, and so forth."³ Consequently, Sumner says, infanticide cannot be morally very different from late abortion. In his words, "Birth is a shallow and arbitrary criterion of moral standing, and there appears to be no way of connecting it to a deeper account" (52).

Sumner holds that the only valid criterion of moral standing is the capacity for sentience (136). Prenatal neurophysiology and behavior suggest that human fetuses begin to have rudimentary sensory experiences at some time during the second trimester of pregnancy. Thus, Sumner concludes that abortion should be permitted during the first trimester but not thereafter, except in special circumstances (152).⁴

Michael Tooley (1983) agrees that birth can make no difference to moral standing. However, rather than rejecting the liberal view of abortion, Tooley boldly claims that neither late abortion nor early infanticide is seriously wrong. He argues that an entity cannot have a strong right to life unless it is capable of desiring its own continued existence. To be capable of such a desire, he argues, a being must have a concept of itself as a continuing subject of conscious experience. Having such a concept is a central part of what it is to be a person, and thus the kind of being that has strong moral rights (41). Fetuses certainly lack such a concept, as do infants during the first few months of their lives. Thus, Tooley concludes, neither fetuses nor newborn infants have a strong right to life, and neither abortion nor infanticide is an intrinsic moral wrong.

These two theories are worth examining, not only because they illustrate the difficulties generated by the intrinsic-properties and single-criterion assumptions, but also because each includes valid insights that need to be integrated into a more comprehensive account. Both Sumner and Tooley are partially right. Unlike "genetic humanity"—a property possessed by fertilized human ova—sentience and self-awareness are properties that have some general relevance to what we may owe another being in the way of respect and protection. However, neither the sentience criterion nor the self-awareness criterion can explain the moral significance of birth.

THE SENTIENCE CRITERION

Both newborn infants and late-term fetuses show clear signs of sentience. For instance, they are apparently capable of having visual experiences. Infants will often turn away from bright lights, and those who have done intrauterine photography have sometimes observed a similar reaction in the late-term fetus when bright lights are introduced in its vicinity. Both may

respond to loud noises, voices, or other sounds, so both can probably have auditory experiences. They are evidently also responsive to touch, taste, motion, and other kinds of sensory stimulation.

The sentience of infants and late-term fetuses makes a difference to how they should be treated, by contrast with fertilized ova or first-trimester fetuses. Sentient beings are usually capable of experiencing painful as well as pleasurable or affectively neutral sensations.⁵ While the capacity to experience pain is valuable to an organism, pain is by definition an intrinsically unpleasant experience. Thus, sentient beings may plausibly be said to have a moral right not to be deliberately subjected to pain in the absence of any compelling reason. For those who prefer not to speak of rights, it is still plausible that a capacity for sentience gives an entity some moral standing. It may, for instance, require that its interests be given some consideration in utilitarian calculations, or that it be treated as an end and never merely as a means.

But it is not clear that sentience is a sufficient condition for moral equality, since there are many clearly-sentient creatures (e.g., mice) to which most of us would not be prepared to ascribe equal moral standing. Sumner examines the implications of the sentience criterion primarily in the context of abortion. Given his belief that some compromise is essential between the conservative and liberal viewpoints on abortion, the sentience criterion recommends itself as a means of drawing a moral distinction between early abortion and late abortion. It is, in some ways, a more defensible criterion than fetal viability.

The 1973 *Roe v. Wade* decision treats the presumed viability of third-trimester fetuses as a basis for permitting states to restrict abortion rights in order to protect fetal life in the third trimester, but not earlier. Yet viability is relative, among other things, to the medical care available to the pregnant woman and her infant. Increasingly sophisticated neonatal intensive care has made it possible to save many more premature infants than before, thus altering the average age of viability. Someday it may be possible to keep even first-trimester fetuses alive and developing normally outside the womb. The viability criterion seems to imply that the advent of total ectogenesis (artificial gestation from conception to birth) would automatically eliminate women's right to abortion, even in the earliest stages of pregnancy. At the very least, it must imply that as many aborted fetuses as possible should be kept alive through artificial gestation. But the mere technological possibility of providing artificial wombs for huge numbers of human fetuses could not establish such a moral obligation. A massive commitment to ectogenesis would probably be ruinously expensive, and might prove contrary to the interests of parents and children. The viability criterion forces us to make a hazardous leap from the technologically possible to the morally mandatory.

The sentience criterion at first appears more promising as a means of defending a moderate view of abortion. It provides an intuitively plausible distinction between early and late abortion. Unlike the viability criterion, it is unlikely to be undermined by new biomedical technologies. Further investigation of fetal neurophysiology and behavior might refute the presumption that fetuses begin to be capable of sentience *at some point in the second trimester*. Perhaps this development occurs slightly earlier or slightly later than present evidence suggests. (It is unlikely to be much earlier or much later.) However, that is a consequence that those who hold a moderate position on abortion could live with; so long as the line could still be drawn with some degree of confidence, they need not insist that it be drawn exactly where Sumner suggests.

But closer inspection reveals that the sentience criterion will not yield the result that Sumner wants. His position vacillates between two versions of the sentience criterion, neither of which can adequately support his moderate view of abortion. The strong version of the sentience criterion treats sentience as a sufficient condition for having full and equal moral standing. The weak version treats sentience as sufficient for having some moral standing, but not necessarily full and equal moral standing.

Sumner's claim that sentient fetuses have the same moral standing as older human beings clearly requires the strong version of the sentience criterion. On this theory, any being which has even minimal capacities for sensory experience is the moral equal of any person. If we accept this theory, then we must conclude that not only is late abortion the moral equivalent of homicide, but so is the killing of such sentient nonhuman beings as mice. Sumner evidently does not wish to accept this further conclusion, for he also says that "sentience admits of degrees . . . [a fact that] enables us to employ it both as an inclusion criterion and as a comparison criterion of moral standing" (144). In other words, all sentient beings have some moral standing, but beings that are more highly sentient have greater moral standing than do less highly sentient beings. This weaker version of the sentience criterion leaves room for a distinction between the moral standing of mice and that of sentient humans—provided, that is, that mice can be shown to be less highly sentient. However, it will not support the moral equality of late-term fetuses, since the relatively undeveloped condition of fetal brains almost certainly means that fetuses are less highly sentient than older human beings.

A similar dilemma haunts those who use the sentience criterion to argue for the moral equality of nonhuman animals. Some animal liberationists hold that all sentient beings are morally equal, regardless of species. For instance, Peter Singer (1981, 111) maintains that all sentient beings are entitled to equal consideration for their comparably important interests. Animal liberationists are primarily concerned to argue for the moral equality

of vertebrate animals, such as mammals, birds, reptiles and fish. In this project, the sentience criterion serves them less well than they may suppose. On the one hand, if they use the weak version of the sentience criterion then they cannot sustain the claim that all nonhuman vertebrates are our moral equals—unless they can demonstrate that they are all sentient *to the same degree* that we are. It is unclear how such a demonstration would proceed, or what would count as success. On the other hand, if they use the strong version of the sentience criterion, then they are committed to the conclusion that if flies and mosquitos are even minimally sentient then they too are our moral equals. Not even the most radical animal liberationists have endorsed the moral equality of such invertebrate animals,⁶ yet it is quite likely that these creatures enjoy some form of sentience.

We do not really know whether complex invertebrate animals such as spiders and insects have sensory experiences, but the evidence suggests that they may. They have both sense organs and central nervous systems, and they often act as if they could see, hear, and feel very well. Sumner says that all invertebrates are probably nonsentient, because they lack certain brain structures—notably forebrains—that appear to be essential to the processing of pain in vertebrate animals (143). But might not some invertebrate animals have neurological devices for the processing of pain that are different from those of vertebrates, just as some have very different organs for the detection of light, sound, or odor? The capacity to feel pain is important to highly mobile organisms which guide their behavior through perceptual data, since it often enables them to avoid damage or destruction. Without that capacity, such organisms would be less likely to survive long enough to reproduce. Thus, if insects, spiders, crayfish, or octopi can see, hear, or smell, then it is quite likely that they can also feel pain. If sentience is the sole criterion for moral equality, then such probably-sentient entities deserve the benefit of the doubt.

But it is difficult to believe that killing invertebrate animals is as morally objectionable as homicide. That an entity is probably sentient provides a reason for avoiding actions that may cause it pain. It may also provide a reason for respecting its life, a life which it may enjoy. But it is not a sufficient reason for regarding it as a moral equal. Perhaps an ideally moral person would try to avoid killing any sentient being, even a fly. Yet it is impossible in practice to treat the killing of persons and the killing of sentient invertebrates with the same severity. Even the simplest activities essential to human survival (such as agriculture, or gathering wild foods) generally entail some loss of invertebrate lives. If the strong version of the sentience criterion is correct, then all such activities are morally problematic. And if it is not, then the probable sentience of late-term fetuses and newborn infants is not enough to demonstrate that either late abortion or infanticide is the moral equivalent of homicide. Some additional argument is needed to show that either late abortion or early infanticide is seriously immoral.

THE SELF-AWARENESS CRITERION

Although newborn infants are regarded as persons in both law and common moral conviction, they lack certain mental capacities that are typical of persons. They have sensory experiences, but, as Tooley points out, they probably do not yet think, or have a sense of who they are, or a desire to continue to exist. It is not unreasonable to suppose that these facts make some difference to their moral standing. Other things being equal, it is surely worse to kill a self-aware being that wants to go on living than one that has never been self-aware and that has no such preference. If this is true, then it is hard to avoid the conclusion that neither abortion nor infanticide is quite as bad as the killing of older human beings. And indeed many human societies seem to have accepted that conclusion.

Tooley notes that the abhorrence of infanticide which is characteristic of cultures influenced by Christianity has not been shared by most cultures outside that influence (315–322). Prior to the present century, most societies—from the gatherer-hunter societies of Australia, Africa, North and South America, and elsewhere, to the high civilizations of China, India, Greece, Rome, and Egypt—have not only tolerated occasional instances of infanticide but have regarded it as sometimes the wisest course of action. Even in Christian Europe there was often a *de facto* toleration of infanticide—so long as the mother was married and the killing discreet. Throughout much of the second millennium in Europe, single women whose infants failed to survive were often executed in sadistic ways, yet married women whose infants died under equally suspicious circumstances generally escaped legal penalty (Piers 1978, 45–46). Evidently, the sanctions against infanticide had more to do with the desire to punish female sexual transgressions than with a consistently held belief that infanticide is morally comparable to homicide.

If infanticide has been less universally regarded as wrong than most people today believe, then the self-awareness criterion is more consistent with common moral convictions than it at first appears. Nevertheless, it conflicts with some convictions that are almost universal, even in cultures that tolerate infanticide. Tooley argues that infants probably begin to think and to become self-aware at about three months of age, and that this is therefore the stage at which they begin to have a strong right to life (405–406). Perhaps this is true. However the customs of most cultures seem to have required that a decision about the life of an infant be made within, at most, a few days of birth. Often, there was some special gesture or ceremony—such as washing the infant, feeding it, or giving it a name—to mark the fact that it would thenceforth be regarded as a member of the community. From that point on, infanticide would not be considered, except perhaps under unusual circumstances. For instance, Margaret Mead gives this account of birth and infanticide among the Arapesh people of Papua New Guinea:

While the child is being delivered, the father waits within ear-shot until its sex is determined, when the midwives call it out to him. To this information he answers laconically, "Wash it," or "Do not wash it." If the command is "Wash it," the child is to be brought up. In a few cases when the child is a girl and there are already several girl-children in the family, the child will not be saved, but left, unwashed, with the cord uncut, in the bark basin on which the delivery takes place. (Mead [1935] 1963, 32–33)

Mead's account shows that among the Arapesh infanticide is at least to some degree a function of patriarchal power. In this, they are not unusual. In almost every society in which infanticide has been tolerated, female infants have been the most frequent victims. In patriarchal, patrilineal and patrilocal societies, daughters are usually valued less than sons, e.g., because they will leave the family at marriage, and will probably be unable to contribute as much as sons to the parents' economic support later. Female infanticide probably reinforces male domination by reducing the relative number of women and dramatically reinforcing the social devaluation of females.⁷ Often it is the father who decides which infants will be reared. Dianne Romaine has pointed out to me that this practice may be due to a reluctance to force women, the primary caregivers, to decide when care should not be given. However, it also suggests that infanticide often served the interests of individual men more than those of women, the family, or the community as a whole.

Nevertheless, infanticide must sometimes have been the most humane resolution of a tragic dilemma. In the absence of effective contraception or abortion, abandoning a newborn can sometimes be the only alternative to the infant's later death from starvation. Women of nomadic gatherer-hunter societies, for instance, are sometimes unable to raise an infant born too soon after the last one, because they can neither nurse nor carry two small children.

But if infanticide is to be considered, it is better that it be done immediately after birth, before the bonds of love and care between the infant and the mother (and other persons) have grown any stronger than they may already be. Postponing the question of the infant's acceptance for weeks or months would be cruel to all concerned. Although an infant may be little more sentient or self-aware at two weeks of age than at birth, its death is apt to be a greater tragedy—not for it, but for those who have come to love it. I suspect that this is why, where infanticide is tolerated, the decision to kill or abandon an infant must usually be made rather quickly. If this consideration is morally relevant—and I think it is—then the self-awareness criterion fails to illuminate some of the morally salient aspects of infanticide.

PROTECTING NONPERSONS

If we are to justify a general moral distinction between abortion and infanticide, we must answer two questions. First, why should infanticide be discouraged, rather than treated as a matter for individual decision? And second, why should sentient fetuses not be given the same protections that law and common sense morality accord to infants? But before turning to these two questions, it is necessary to make a more general point.

Persons have sound reasons for treating one another as moral equals. These reasons derive from both self-interest and altruistic concern for others—which, because of our social nature, are often very difficult to distinguish. Human persons—and perhaps all persons—normally come into existence only in and through social relationships. Sentience may begin to emerge without much direct social interaction, but it is doubtful that a child reared in total isolation from human or other sentient (or apparently sentient) beings could develop the capacities for self-awareness and social interaction that are essential to personhood. The recognition of the fundamentally social nature of persons can only strengthen the case for moral equality, since social relationships are undermined and distorted by inequalities that are perceived as unjust. There may be many nonhuman animals who have enough capacity for self-awareness and social interaction to be regarded as persons, with equal basic moral rights. But, whether or not this is true, it is certainly true that if any things have full and equal basic moral rights then persons do.

However we cannot conclude that, because all persons have equal basic moral rights, it is always wrong to extend strong moral protections to beings that are not persons. Those who accept the single-criterion assumption may find that a plausible inference. By now, however, most thoughtful people recognize the need to protect vulnerable elements of the natural world—such as endangered plant and animal species, rainforests, and rivers—from further destruction at human hands. Some argue that it is appropriate, as a way of protecting these things, to ascribe to them legal if not moral rights (Stone 1974). These things should be protected not because they are sentient or self-aware, but for other good reasons. They are irreplaceable parts of the terrestrial biosphere, and as such they have incalculable value to human beings. Their long-term instrumental value is often a fully sufficient reason for protecting them. However, they may also be held to have inherent value, i.e., value that is independent of the uses we might wish to make of them (Taylor 1986). Although destroying them is not murder, it is an act of vandalism which later generations will mourn.

It is probably not crucial whether or not we say that endangered species and natural habitats have a moral right to our protection. What is crucial is that we recognize and act upon the need to protect them. Yet certain contem-

porary realities argue for an increased willingness to ascribe rights to impersonal elements of the natural world. Americans, at least, are likely to be more sensitive to appeals and demands couched in terms of rights than those that appeal to less familiar concepts, such as inherent value. So central are rights to our common moral idiom, that to deny that trees have rights is risk being thought to condone the reckless destruction of rainforests and redwood groves. If we want to communicate effectively about the need to protect the natural world—and to protect it for its own sake as well as our own—then we may be wise to develop theories that permit us to ascribe at least some moral rights to some things that are clearly not persons.

Parallel issues arise with respect to the moral status of the newborn infant. As Wolgast (1987, 38) argues, it is much more important to understand our responsibilities to protect and care for infants than to insist that they have exactly the same moral rights as older human beings. Yet to deny that infants have equal basic moral rights is to risk being thought to condone infanticide and the neglect and abuse of infants. Here too, effective communication about human moral responsibilities seems to demand the ascription of rights to beings that lack certain properties that are typical of persons. But, of course, that does not explain why we have these responsibilities towards infants in the first place.

WHY PROTECT INFANTS?

I have already mentioned some of the reasons for protecting human infants more carefully than we protect most comparably-sentient nonhuman beings. Most people care deeply about infants, particularly—but not exclusively—their own. Normal human adults (and children) are probably “programmed” by their biological nature to respond to human infants with care and concern. For the mother, in particular, that response is apt to begin well before the infant is born. But even for her it is likely to become more intense after the infant’s birth. The infant at birth enters the human social world, where, if it lives, it becomes involved in social relationships with others, of kinds that can only be dimly foreshadowed before birth. It begins to be known and cared for, not just as a potential member of the family or community, but as a socially present and responsive individual. In the words of Loren Lomansky (1984, 172), “birth constitutes a quantum leap forward in the process of establishing . . . social bonds.” The newborn is not yet self-aware, but it is already (rapidly becoming) a social being.

Thus, although the human newborn may have no intrinsic properties that can ground a moral right to life stronger than that of a fetus just before birth, its emergence into the social world makes it appropriate to treat it as if it had such a stronger right. This, in effect, is what the law has done, through the doctrine that a person begins to exist at birth. Those who accept the

intrinsic-properties assumption can only regard this doctrine as a legal fiction. However, it is a fiction that we would have difficulty doing without. If the line were not drawn at birth, then I think we would have to draw it at some point rather soon thereafter, as many other societies have done.

Another reason for condemning infanticide is that, at least in relatively privileged nations like our own, infants whose parents cannot raise them can usually be placed with people who will love them and take good care of them. This means that infanticide is rarely in the infant's own best interests, and would often deprive some potential adoptive individual or family of a great benefit. It also means that the prohibition of infanticide need not impose intolerable burdens upon parents (especially women). A rare parent might think it best to kill a healthy⁸ infant rather than permitting it to be reared by others, but a persuasive defense of that claim would require special circumstances. For instance, when abortion is unavailable and women face savage abuses for supposed sexual transgressions, those who resort to infanticide to conceal an "illegitimate" birth may be doing only what they must. But where enforcement of the sexual double standard is less brutal, abortion and adoption can provide alternatives that most women would prefer to infanticide.

Some might wonder whether adoption is really preferable to infanticide, at least from the parent's point of view. Judith Thomson (1971, 66) notes that, "A woman may be utterly devastated by the thought of a child, a bit of herself, put out for adoption and never seen or heard of again." From the standpoint of narrow self-interest, it might not be irrational to prefer the death of the child to such a future. Yet few would wish to resolve this problem by legalizing infanticide. The evolution of more open adoption procedures which permit more contact between the adopted child and the biological parent(s) might lessen the psychological pain often associated with adoption. But that would be at best a partial solution. More basic is the provision of better social support for child-rearers, so that parents are not forced by economic necessity to surrender their children for adoption.

These are just some of the arguments for treating infants as legal persons, with an equal right to life. A more complete account might deal with the effects of the toleration of infanticide upon other moral norms. But the existence of such effects is unclear. Despite a tradition of occasional infanticide, the Arapesh appear in Mead's descriptions as gentle people who treat their children with great kindness and affection. The case against infanticide need not rest upon the questionable claim that the toleration of infanticide inevitably leads to the erosion of other moral norms. It is enough that most people today strongly desire that the lives of infants be protected, and that this can now be done without imposing intolerable burdens upon individuals or communities.

But have I not left the door open to the claim that infanticide may still be justified in some places, e.g., where there is severe poverty and a lack of accessible adoption agencies or where women face exceptionally harsh penalties for “illegitimate” births? I have, and deliberately. The moral case against the toleration of infanticide is contingent upon the existence of morally preferable options. Where economic hardship, the lack of contraception and abortion, and other forms of sexual and political oppression have eliminated all such options, there will be instances in which infanticide is the least tragic of a tragic set of choices. In such circumstances, the enforcement of extreme sanctions against infanticide can constitute an additional injustice.

WHY BIRTH MATTERS

I have defended what most regard as needing no defense, i.e., the ascription of an equal right to life to human infants. Under reasonably favorable conditions that policy can protect the rights and interests of all concerned, including infants, biological parents, and potential adoptive parents.

But if protecting infants is such a good idea, then why is it not a good idea to extend the same strong protections to sentient fetuses? The question is not whether sentient fetuses ought to be protected: of course they should. Most women readily accept the responsibility for doing whatever they can to ensure that their (voluntarily continued) pregnancies are successful, and that no avoidable harm comes to the fetus. Negligent or malevolent actions by third parties which result in death or injury to pregnant women or their potential children should be subject to moral censure and legal prosecution. A just and caring society would do much more than ours does to protect the health of all its members, including pregnant women. The question is whether the law should accord to late-term fetuses *exactly the same* protections as are accorded to infants and older human beings.

The case for doing so might seem quite strong. We normally regard not only infants, but all other postnatal human beings as entitled to strong legal protections *so long as they are either sentient or capable of an eventual return to sentience*. We do not also require that they demonstrate a capacity for thought, self-awareness, or social relationships before we conclude that they have an equal right to life. Such restrictive criteria would leave too much room for invidious discrimination. The eternal propensity of powerful groups to rationalize sexual, racial, and class oppression by claiming that members of the oppressed group are mentally or otherwise “inferior” leaves little hope that such restrictive criteria could be applied without bias. Thus, for human beings past the prenatal stage, the capacity for sentience—or for a return to sentience—may be the only pragmatically defensible criterion for the ascription of full and equal basic rights. If so, then both theoretical simplicity and moral consistency may seem to require that we extend the

same protections to sentient human beings that have not yet been born as to those that have.

But there is one crucial consideration which this argument leaves out. It is impossible to treat fetuses *in utero* as if they were persons without treating women as if they were something less than persons. The extension of equal rights to sentient fetuses would inevitably license severe violations of women's basic rights to personal autonomy and physical security. In the first place, it would rule out most second-trimester abortions performed to protect the woman's life or health. Such abortions might sometimes be construed as a form of self-defense. But the right to self-defense is not usually taken to mean that one may kill innocent persons just because their continued existence poses some threat to one's own life or health. If abortion must be justified as self-defense, then it will rarely be performed until the woman is already in extreme danger, and perhaps not even then. Such a policy would cost some women their lives, while others would be subjected to needless suffering and permanent physical harm.

Other alarming consequences of the drive to extend more equal rights to fetuses are already apparent in the United States. In the past decade it has become increasingly common for hospitals or physicians to obtain court orders requiring women in labor to undergo Caesarean sections, against their will, for what is thought to be the good of the fetus. Such an extreme infringement of the woman's right to security against physical assault would be almost unthinkable once the infant has been born. No parent or relative can legally be forced to undergo any surgical procedure, even possibly to save the life of a child, once it is born. But pregnant women can sometimes be forced to undergo major surgery, for the supposed benefit of the fetus. As George Annas (1982, 16) points out, forced Caesareans threaten to reduce women to the status of inanimate objects—containers which may be opened at the will of others in order to get at their contents.

Perhaps the most troubling illustration of this trend is the case of Angie Carder, who died at George Washington University Medical Center in June 1987, two days after a court-ordered Caesarean section. Ms. Carder had suffered a recurrence of an earlier cancer, and was not expected to live much longer. Her physicians agreed that the fetus was too undeveloped to be viable, and that Carder herself was probably too weak to survive the surgery. Although she, her family, and the physicians were all opposed to a Caesarean delivery, the hospital administration—evidently believing it had a legal obligation to try to save the fetus—sought and obtained a court order to have it done. As predicted, both Carder and her infant died soon after the operation.⁹ This woman's rights to autonomy, physical integrity, and life itself were forfeit—not just because of her illness, but because of her pregnancy.

Such precedents are doubly alarming in the light of the development of new techniques of fetal therapy. As fetuses come to be regarded as patients,

with rights that may be in direct conflict with those of their mothers, and as the *in utero* treatment of fetuses becomes more feasible, more and more pregnant women may be subjected against their will to dangerous and invasive medical interventions. If so, then we may be sure that there will be other Angie Carders.

Another danger in extending equal legal protections to sentient fetuses is that women will increasingly be blamed, and sometimes legally prosecuted, when they miscarry or give birth to premature, sick, or abnormal infants. It is reasonable to hold to the caretakers of infants legally responsible if their charges are harmed because of their avoidable negligence. But when a woman miscarries or gives birth to an abnormal infant, the cause of the harm might be traced to any of an enormous number of actions or circumstances which would not normally constitute any legal offense. She might have gotten too much exercise or too little, eaten the wrong foods or the wrong quantity of the right ones, or taken or failed to take certain drugs. She might have smoked, consumed alcohol, or gotten too little sleep. She might have "permitted" her health to be damaged by hard work, by unsafe employment conditions, by the lack of affordable medical care, by living near a source of industrial pollution, by a physically or mentally abusive partner, or in any number of other ways.

Are such supposed failures on the part of pregnant women potentially to be construed as child abuse or negligent homicide? If sentient fetuses are entitled to the same legal protections as infants, then it would seem so. The danger is not a merely theoretical one. Two years ago in San Diego, a woman whose son was born with brain damage and died several weeks later was charged with felony child neglect. It was said that she had been advised by her physician to avoid sex and illicit drugs, and to the hospital immediately if she noticed any bleeding. Instead, she had allegedly had sex with her husband, taken some inappropriate drug, and delayed getting to the hospital for what might have been several hours after the onset of bleeding.

In this case, the charges were eventually dismissed on the grounds that the child protection law invoked had not been intended to apply to cases of this kind. But the multiplication of such cases is inevitable if the strong legal protections accorded to infants are extended to sentient fetuses. A bill recently introduced in the Australian state of New South Wales would make women liable to criminal prosecution if they are found to have smoked during pregnancy, eaten unhealthful foods, or taken any other action which can be shown to have adversely affected the development of the fetus (*The Australian*, July 5, 1988, 5). Such an approach to the protection of fetuses authorizes the legal regulation of virtually every aspect of women's public and private lives, and thus is incompatible with even the most minimal right to autonomy. Moreover, such laws are apt to prove counterproductive, since the fear of prosecution may deter poor or otherwise vulnerable women from

seeking needed medical care during pregnancy. I am not suggesting that women whose apparent negligence causes prenatal harm to their infants should always be immune from criticism. However, if we want to improve the health of infants we would do better to provide the services women need to protect their health, rather than seeking to use the law to punish those whose prenatal care has been less than ideal.

There is yet another problem, which may prove temporary but which remains significant at this time. The extension of legal personhood to sentient fetuses would rule out most abortions performed because of severe fetal abnormalities, such as Down's Syndrome or spina bifida. Abortions performed following amniocentesis are usually done in the latter part of the second trimester, since it is usually not possible to obtain test results earlier. Methods of detecting fetal abnormalities at earlier stages, such as chorion biopsy, may eventually make late abortion for reasons of fetal abnormality unnecessary; but at present the safety of these methods is unproven.

The elimination of most such abortions might be a consequence that could be accepted, were the society willing to provide adequate support for the handicapped children and adults who would come into being as a result of this policy. However, our society is not prepared to do this. In the absence of adequate communally-funded care for the handicapped, the prohibition of such abortions is exploitative of women. Of course, the male relatives of severely handicapped persons may also bear heavy burdens. Yet the heaviest portion of the daily responsibility generally falls upon mothers and other female relatives. If fetuses are not yet persons (and women are), then a respect for the equality of persons should lead to support for the availability of abortion in cases of severe fetal abnormality.¹⁰

Such arguments will not persuade those who deeply believe that fetuses are already persons, with equal moral rights. How, they will ask, is denying legal equality to sentient fetuses different from denying it to any other powerless group of human beings? If some human beings are more equal than others, then how can any of us feel safe? The answer is twofold.

First, pregnancy is a relationship different from any other, including that between parents and already-born children. It is not just one of innumerable situations in which the rights of one individual may come into conflict with those of another; it is probably the *only* case in which the legal personhood of one human being is necessarily incompatible with that of another. Only in pregnancy is the organic functioning of one human individual biologically inseparable from that of another. This organic unity makes it impossible for others to provide the fetus with medical care or any other presumed benefit, except by doing something to or for the woman. To try to "protect" the fetus other than through her cooperation and consent is effectively to nullify her right to autonomy, and potentially to expose her to violent physical assaults such as would not be legally condoned in any other type of case. The

uniqueness of pregnancy helps to explain why the toleration of abortion does not lead to the disenfranchisement of other groups of human beings, as opponents of abortion often claim. For biological as well as psychological reasons, "It is all but impossible to extrapolate from attitudes towards fetal life attitudes toward [other] existing human life" (D. Callahan 1970, 474).

But, granting the uniqueness of pregnancy, why is it *women's* rights that should be privileged? If women and fetuses cannot both be legal persons then why not favor fetuses, e.g., on the grounds that they are more helpless, or more innocent, or have a longer life expectancy? It is difficult to justify this apparent bias towards women without appealing to the empirical fact that women are already persons in the usual, nonlegal sense—already thinking, self-aware, fully social beings—and fetuses are not. Regardless of whether we stress the intrinsic properties of persons, or the social and relational dimensions of personhood, this distinction remains. Even sentient fetuses do not yet have either the cognitive capacities or the richly interactive social involvements typical of persons.

This "not yet" is morally decisive. It is wrong to treat persons as if they do not have equal basic rights. Other things being equal, it is worse to deprive persons of their most basic moral and legal rights than to refrain from extending such rights to beings that are not persons. This is one important element of truth in the self-awareness criterion. If fetuses were already thinking, self-aware, socially responsive members of communities, then nothing could justify refusing them the equal protection of the law. In that case, we would sometimes be forced to balance the rights of the fetus against those of the woman, and sometimes the scales might be almost equally weighted. However, if women are persons and fetuses are not, then the balance must swing towards women's rights.

CONCLUSION

Birth is morally significant because it marks the end of one relationship and the beginning of others. It marks the end of pregnancy, a relationship so intimate that it is impossible to extend the equal protection of the law to fetuses without severely infringing women's most basic rights. Birth also marks the beginning of the infant's existence as a socially responsive member of a human community. Although the infant is not instantly transformed into a person at the moment of birth, it does become a biologically separate human being. As such, it can be known and cared for as a particular individual. It can also be vigorously protected without negating the basic rights of women. There are circumstances in which infanticide may be the best of a bad set of options. But our own society has both the ability and the desire to protect infants, and there is no reason why we should not do so.

We should not, however, seek to extend the same degree of protection to fetuses. Both late-term fetuses and newborn infants are probably capable of sentience. Both are precious to those who want children; and both need to be protected from a variety of possible harms. All of these factors contribute to the moral standing of the late-term fetus, which is substantial. However, to extend equal legal rights to fetuses is necessarily to deprive pregnant women of the rights to personal autonomy, physical integrity, and sometimes life itself. *There is room for only one person with full and equal rights inside a single human skin.* That is why it is birth, rather than sentience, viability, or some other prenatal milestone that must mark the beginning of legal parenthood.¹¹

NOTES

1. Basic moral rights are those that are possessed equally by all persons, and that are essential to the moral equality of persons. The intended contrast is to those rights which arise from certain special circumstances—for instance, the right of a person to whom a promise has been made that that promise be kept. (Whether there are beings that are not persons but that have similar basic moral rights is one of the questions to be addressed here.)

2. "Moral standing," like "moral status," is a term that can be used to refer to the moral considerability of individuals, without being committed to the existence of moral rights. For instance, Sumner (1983) and Singer (1981) prefer these terms because, as utilitarians, they are unconvinced of the need for moral rights.

3. It is not obvious that a newborn infant's "level of consciousness" is similar to that of a fetus shortly before birth. Perhaps birth is analogous to an awakening, in that the infant has many experiences that were previously precluded by its prenatal brain chemistry or by its relative insulation within the womb. This speculation is plausible in evolutionary terms, since a rich subjective mental life might have little survival value for the fetus, but might be highly valuable for the newborn, e.g., in enabling it to recognize its mother and signal its hunger, discomfort, etc. However, for the sake of the argument I will assume that the newborn's capacity for sentience is generally not very different from that of the fetus shortly before birth.

4. It is interesting that Sumner regards fetal abnormality and the protection of the woman's health as sufficient justifications for late abortion. In this, he evidently departs from his own theory by effectively differentiating between the moral status of sentient fetuses and that of older humans—who presumably may not be killed just because they are abnormal or because their existence (through no fault of their own) poses a threat to someone else's health.

5. There are evidently some people who, though otherwise sentient, cannot experience physical pain. However, the survival value of the capacity to experience pain makes it probable that such individuals are the exception rather than the rule among mature members of sentient species.

6. There is at least one religion, that of the Jains, in which the killing of any living thing—even an insect—is regarded as morally wrong. But even the Jains do not regard the killing of insects as morally equivalent to the killing of persons. Laypersons (unlike mendicants) are permitted some unintentional killing of insects—though not of vertebrate animals or persons—when this is unavoidable to the pursuit of their profession. (See Jaini 1979, 171–3.)

7. Marcia Guttentag and Paul Secord (1983) argue that a shortage of women benefits at least some women, by increasing their "value" in the marriage market. However, they also argue that this increased value does not lead to greater freedom for women; on the contrary, it tends to coincide with an exceptionally severe sexual double standard, the exclusion of women from public life, and their confinement to domestic roles.

8. The extension of equal basic rights to infants need not imply the absolute rejection of euthanasia for infant patients. There are instances in which artificially extending the life of a severely compromised infant is contrary to the infant's own best interests. Competent adults or

older children who are terminally ill sometimes rightly judge that further prolongation of their lives would not be a benefit to them. While infants cannot make that judgment for themselves, it is sometimes the right judgment for others to make on their behalf.

9. See *Civil Liberties* 363 (Winter 1988), 12, and Lawrence Lader, "Regulating Birth: Is the State Going Too Far?" *Conscience* IX: 5 (September/October, 1988), 5–6.

10. It is sometimes argued that using abortion to prevent the birth of severely handicapped infants will inevitably lead to a loss of concern for handicapped persons. I doubt that this is true. There is no need to confuse the question of whether it is good that persons be born handicapped with the very different question of whether handicapped persons are entitled to respect, support, and care.

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