

A PROPOSED SOLUTION TO THE PROBLEM OF ABORTION

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## ABSTRACT

In this thesis we try to develop a sense of a solution to the abortion problem which afflicts millions every year. The solution lies in seeing that the fetus, in cases of forced pregnancy, may be aborted in order to allow a woman to retain control over her body. But all that the right of the woman consists in is the right to expel the fetus, not to kill it. According to us the fetus is a human person and may be killed only when the conditions that obtain for the killing of any other human person also obtain for the fetus. Otherwise the woman may not kill, though she may expel the fetus in cases of forced pregnancy. In cases of life-threatening pregnancy, the woman may abort to kill, as this would be a case of justified self-defensive killing.

DEDICATION

This thesis is respectfully dedicated to my teacher Capt. M. K. Ashta.

Philosophy is useless if it does not lead to a betterment of life. --

Capt. M. K. Ashta

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## INTRODUCTION

The abortion problem (see Appendix I) is a vexing one. Although a huge amount of material has been published of late, there is no end in sight with respect to the road to the solution of the problem. This thesis is an attempt to see the end of the road. It is also an attempt to suggest the solution.

We begin our task in Chapter I by considering the case for abortion when such a case is sought to be made on the grounds of self-defense. We consider the position of Baruch Brody and the related, but different, position of Pope Pius XI. After discussing Brody we arrive at the conclusion, against Brody, that the "condition of danger" is sufficient to justify self-defensive killing. According to Brody, either the "condition of attempt" or the "condition of action" together with the "condition of danger" is sufficient for justified self-defensive killing. According to the Pope, the "condition of danger" has to be supplemented both by the "condition of attempt" and the "condition of guilt" for justified self-defensive killing to take place. Since the fetus fits the positions neither of Brody nor of the Pope, the fetus may not be aborted to save the life of the pregnant woman in cases of



life-threatening pregnancies. We argue against Brody (who has already argued against the Pope's "condition of guilt" and reduced the three conditions to two) and arrive at the conclusion that the "condition of danger" is sufficient to justify self-defensive killing. We then go on to consider the various cutoff points at which various people have said the unborn (usually called the fetus or zygote in the thesis) acquires human personhood. After the point at which the fetus acquires human personhood, it is usually claimed, the fetus may not be aborted, or may be aborted only in self-defense. (Such a case of self-defense would not be the one that an extreme conservative like the Pope, or even Brody, would make.) It is therefore important to consider these cutoff points one by one to assess their relative worth and to understand the status of the fetus, the entity whose abortion is in question. Once we do this, we arrive at the brain-activity criterion of human personhood as the best candidate for determining the human personhood of the fetus. We defend this criterion against attacks by Sissela Bok (in Chapter I) and H. Tristram Engelhardt (in Chapter III).

After considering and disposing of Brody's anti-abortionism in Chapter I, we consider some liberal arguments for abortion in Chapter II, particularly Michael Tooley's defense of abortion (and infanticide) and the U. S. Supreme Court Roe v.

Wade (1973) judgement. Tooley is found to be too strong when viable alternatives are possible and the Supreme Court is found wanting in logic. Basically, Tooley's criteria of personhood lead him to accept abortion and infanticide. The latter is unacceptable. The conclusion about infanticide is drawn since, for Tooley, only persons have a serious right to life and neither fetuses nor newborn infants have a serious right to life. Tooley is questioned both on his ascription of a serious right to life only to persons (many make a case for a serious right to life of nonpersons, like nonhuman animals) and on his overly strict criteria of personhood. Basically, the suggestion is made that one can escape his conclusion of the acceptance of infanticide (which is abhorrent) by looking at some of the points mentioned above.

The Supreme Court Roe v. Wade is tested for both constitutional precision and logic and is found wanting in both. Basically, the Supreme Court said that the woman has a right to privacy based on the Fourteenth Amendment of the U.S. Constitution. This privacy is absolute in the first two trimesters. The fetus is not a person, according to the Supreme Court, but the State may take an interest in it in the third trimester. We find that there is indication in the Constitution that the fetus may have been considered a person by the framers of the Constitution.

This part is based on the research of John Putka. In any case, the Constitution nowhere specifically says that the fetus is not a person. However, once having decided that the fetus is not a person, the Supreme Court decided that it does not know when fetal life begins; however, this is shown to be a non-question and not germane to the issue of abortion at all. If the Supreme Court had considered the fetus to be a person, as we think is logico-legally indubitable, then it would have had to make a different case for abortion. As it is, the logical blunder is one of superfluity; it had no business to deal with the question of fetal life when it had dealt with the question of personhood of the fetus and when the latter question is germane to the abortion problem.

In Chapter III, our final Chapter, we discuss, and agree with, the views of Judith Jarvis Thomson. We shall let Thomson explain herself in that Chapter. The point that we picked up was that though Thomson is basically right, she does not go far enough. All that the woman has a right to in forced pregnancy (not mere "unwanted pregnancy") is to expel the fetus, not to kill it, since the fetus has rights like any other person and since that is the intuition represented by Thomson's violinist case. Thus women may not seek, in aborting fetuses of forced pregnancy (those due to rape or contraceptive failure), to use those methods which kill the fetus. Unless methods of expelling the fetus are discovered,

women may be compensated but they may not abort. Some practical consequences of our thesis are considered.

In sum: though we are liberals in theory, we are conservative in practice, since the theory, though allowing abortion, does not allow for the killing of the fetus, except in self-defense.

BRODY'S ANTI-ABORTIONISM  
AND SOME CRITERIA FOR PERSONHOOD

1. Brody's Anti-Abortionism

We shall first consider the case for abortion where abortion is sought to be considered and defended on the ground of self-defense. Self-defense is the strongest ground that may be offered for abortion. If abortion cannot be defended on the ground of self-defense, then it is doubtful if it will be possible to defend abortion at all (assuming that the unborn child has a right to life). Part of the thrust of this Chapter is that abortion may be defended on grounds of self-defense. Baruch Brody, however, does not think so. We shall therefore explain and examine Brody's position first.

Brody begins his discussion of abortion by trying to offer a paradigm case for justified self-defensive killing. In this context he relies initially on Pope Pius XI's paradigm of justified self-defensive killing. For the Pope the justified self-defensive killing of B by A is possible when the following conditions are met:

1. The continued existence of B poses a threat to the life of A, a threat that can be met

- only by the taking of B's life (we shall refer to this as the condition of danger).
2. B is unjustly attempting to take A's life (we shall refer to this as the condition of attempt).
  3. B is responsible for his attempt to take A's life (we shall refer to this as the condition of guilt).<sup>1</sup>

The "condition of danger" is necessary for both Brody and the Pope. It is sufficient for neither. But Brody regards the "condition of guilt" as too strong for justified self-defensive killing. For Brody the "condition of danger" together with either (a) the "condition of attempt" or (b) the "condition of action" are sufficient for justified self-defensive killing. Before we consider these conditions (on page 8) let us see why Brody thinks that the "condition of danger" is necessary, but not sufficient, for justified self-defensive killing. Brody chooses the following example to demonstrate this point:

... there is, let us imagine, a medicine that A needs to stay alive, C owns some, and C will give it to A only if A kills B. Moreover, A has no other way of getting the medicine. In this case, the continued existence of B certainly poses a threat to the life of A; A can survive only if B does not survive. Still, it is not permissible for A to kill B in order to save A's life.<sup>2</sup>

Now the only argument that Brody uses to support his point that mere satisfaction of the "condition of danger" is not sufficient to justify self-defensive killing is intuitionist:

Our intuition that it would be wrong for A to take B's life... reflects our belief that the mere fact that B is a danger to A is not sufficient to

establish that killing B will be a justifiable act of killing a pursuer.<sup>3</sup>

But Brody also wishes to establish that the Pope's "condition of guilt" is too strong. For this purpose, he uses a counter-example to demonstrate that something less than the "condition of guilt" might be, together with the "condition of danger", sufficient for justified self-defensive killing:

... B is about to shoot A, and the only way by which A can stop him is by killing him first-- but... B is a minor who is not responsible for his attempt to take A's life.<sup>4</sup>

In this counter-example only the conditions of danger and attempt have been satisfied. Yet, according to Brody:

... A may justifiably take B's life as a permissible act of killing a pursuer. The guilt of the pursuer, then, is not a requirement for legitimacy in killing the pursuer.<sup>5</sup>

There is another condition that could replace the "condition of attempt". This condition is the "condition of action". In this case, B is not even aware that B is going to kill A. To prove his case, Brody resorts again to an example:

... B is about to press a button that turns on a light, and there is no reason for him to suspect what is the case, that is, that his doing so will also explode a bomb that will destroy A. Moreover, the only way in which we can stop B and save A's life is by taking B's life, for there is no opportunity to warn B of the actual consequences of his act. In such a case, B is not attempting to take A's life and, a fortiori, he is neither

responsible for nor guilty of any such attempt. Nevertheless, this may still be a case in which there is justification for taking B's life in order to save A's life; that is, this may still be a legitimate case of killing a pursuer.<sup>6</sup>

In this example, B is merely acting unknowingly. B is not attempting to kill A. But according to Brody:

... we may kill B to save A...<sup>7</sup>

We shall now allow Brody to sum up his own position:

... the mere satisfaction of the danger condition is not sufficient to justify the killing of the pursuer. If, in addition, either the attempt condition or the condition of action is satisfied, then one would be justified in killing the pursuer to save the life of the pursued. In any case, the condition of guilt, arising from full knowledge and intent, need not be satisfied.<sup>8</sup>

We may now apply Brody's paradigm case for justified self-defensive killing to the abortion question. The fetus, in those cases of pregnancy where the life of the mother is threatened by it, satisfies the "condition of danger". But it satisfies neither the "condition of attempt" nor the "condition of action". The fetus may thus not be aborted in order to save the life of the mother. For Brody, the only case where abortion would be permissible would be where both the mother and the fetus will die unless some action is taken and it has been determined that the fetus will die. In the following example, B is the fetus and A is the mother:



... it is permissible to take B's life to save A's life if B is going to die anyway in a relatively short time, taking B's life is the only way of saving A's life, and either (1) taking A's life (or doing anything else) will not save B's life or (2) taking A's life (or doing anything else) will save B's life, but one has, by some fair random method, determined to save A's life rather than B's life.

It is obvious then that it is only under extremely restricted conditions that Brody would allow abortion.

In order to examine Brody's position further, let us turn to the example that Brody uses to demonstrate that the "condition of danger" is insufficient for justified self-defensive killing and compare it with the case that Brody uses to demonstrate how justified self-defensive killing would arise when the "condition of action" is satisfied, together with the "condition of danger". In the "condition of danger" case, B is passively posing a danger to A. But that is all that B is doing. B might, therefore, not be killed in order to save A. But the case where B might be killed to save A would be where B presses a button which would explode a bomb, killing A. But in both cases, B is equally unaware that B is a danger to A. It is not clear to us why the physical action of pressing a button in the one case acquires such moral significance in Brody's mind that he is willing to allow B to be killed in that instance, while not allowing B to be killed in the instance where B is merely posing a danger to A. To our mind the situations are closely similar and

the one moral judgement should apply to both. Either then A has a right to kill B in both situations or A has no right to kill B in either situation. To show this, consider the following situation. Suppose that A were to die if he were to sit on a chair and B flicked a switch. B does not know that flicking the switch would kill A if A sat on the chair. A sits on that chair, B innocently flicks the switch and A dies. Now this situation is not morally different from the following situation: Suppose that A were to die if he sat on a chair only if B did not flick a switch. B does not know that not flicking the switch will kill A. A sits on that chair, B innocently does not flick the switch and A dies. Now if we are right in assuming that the morality of an action is determined either by its results or by the intentions accompanying the act or perhaps by a combination of the two, we fail to see the moral difference between B flicking a switch in the one case and B not flicking the switch in the other case. The action of flicking was performed in innocence as was the action of not flicking. In both instances A dies as a result. There is thus nothing of moral significance to separate the two instances and Brody is wrong in saying that we must protect B in the second situation whereas we can justifiably kill B in the first. Since my examples are analogous to Brody's own, Brody has not shown that justified self-defensive killing arises when B is killed in the case where

B is about to press a button, but that no case of justified self-defensive killing arises where B is merely a danger to A. The point is that in either case B is innocent, A would die as a result of B, and so what might be justified in the one case ought to be justified in the other: either B must be saved in both instances, or B can be killed in both. Since we consider that B ought to be killed to save A, at least prima facie, we shall say that even the "condition of danger" is sufficient for justified self-defensive killing. We shall try to show how the "condition of danger" might be sufficient for self-defensive killing by using an example; we shall later point to its superiority over Brody's example of the "condition of danger".

A man holding a ladder supporting a woman about 50 feet above the ground is suddenly paralyzed in his arms which support the ladder. The woman sees all this happening and realizes the danger to her. If she allows the ladder to fall, by climbing over the roof of the building against which the ladder is supported, the ladder will fall on the man and will kill him. If, however, the woman remains on the ladder, she could lead the ladder away from the man while falling with it. But then she would crash to her death. Suppose that the woman knows all this. What is she obliged to do? We propose that we cannot oblige her to remain on the ladder and veer it away from the paralyzed man. She

could, of course, choose to do just that and we may well then call her behaviour sacrificial. But sacrificial behaviour is not obligatory. Now the situation in a pregnancy where the fetus is a direct threat to the life of the mother (as in ectopic pregnancy) is similar to our own example. There are two parties involved (and not three as in Brody's example). We can see how the fetus, which is growing outside the uterus in ectopic pregnancy, for example, poses a growing threat of hemorrhage to the pregnant woman with each passing day. True, the fetus is innocent and is neither acting nor attempting to kill the mother. But the fetus, by its growing presence alone, is a threat to the life of the mother. The fetus might therefore be aborted by the woman, though, of course, the woman might choose to save the fetus even at the expense of her own life; but that is her privilege, not her duty.

We may now begin to see why Brody's case of the "condition of danger" seemed to suggest that self-defensive killing might not be justified in that case. In Brody's example, B does not pose a direct threat to A, but poses a threat related to C's refusal to give the life-saving drug to A unless A kills B. In the abortion situation (and in our own example which is closely analogous to it), the fetus is posing a direct, physical threat to the life of the mother. One can envisage more complications in the "condition of danger" arising in Brody's case than in our own:

since B is not, by himself, a direct threat to A, one can easily envisage a situation where B ceases to be a threat to A without B or A getting killed. C might get killed, or might lose his interest in killing B. Or A might kill C to get the medicine, or A and B might jointly kill C to get the medicine. But no such possibilities may even arise in the case of ectopic pregnancy: either the fetus is aborted, or the mother will die. Thus B (the fetus) has to be killed in order for A (the mother) to survive. In any case, even if there is no possibility to arrange the demise of C in Brody's example, our example collapses into Brody's and A then has a right to kill B in order to save A's life. It is initially difficult to see this in Brody's case, because the threat that B poses to A is remote, i. e. is triggered by C and we would rather have C dead than have B dead. But once we realize that such a choice is not available (as in the abortion done to save the life of the mother), we shall see that it does not matter whether B is a remote or a near threat.<sup>10</sup> Brody's example is misleading because it is a further step removed from the actual cases of life-threatening pregnancies.

Brody draws much on the distinction that B merely poses a danger in the one case and B acts by pressing a button in the other. We have tried to show that this difference is not morally relevant and that the same principle should apply to both cases.

We then adduced an example to show how the "condition of danger" is itself sufficient for justified self-defensive killing and how Brody misleads us in his example of the "condition of danger" by choosing three participants instead of two and by making B an indirect threat to A. Once this misleading nature of the example is removed we may see that A's (i. e. the mother's) not killing B (the fetus) is an act of sacrifice and not one of duty to save the life of the fetus. In the case of the woman on the ladder, the woman performs an action that leads to the death of the man, in order to save her own life. We saw that such an action is justified. Similarly abortion, if performed to save the life of the pregnant woman, is justified even though the abortion leads to the death of the fetus.

2. The various cutoff points for calling the fetus a human person

The abortion problem attains maximum poignancy when the fetus is seen to be a human person at some stage in its development. But before we consider the worth of the various cutoff points, we must investigate two theses that may be used by both the conservatives and the liberals. As a preliminary indication of their character, the theses could not be very strong since they could be used by both the opposing sides on the abortion problem.

The first thesis is the thesis of ignorance. The thesis

runs in the following way: we do not know what the fetus is. Hence, the fetus would be protected by the conservatives since they would wish to say that the fetus might be a human person. But the liberals would wish to say that the fetus might be a mere piece of tissue. But the only reasonable conclusion to a premise that says that we do not know what the fetus is, is to reserve judgement on the problem of abortion and not to commit ourselves one way or another. (In Chapter II we shall have more to say on this line of reasoning when we examine the U.S. Supreme Court Roe v. Wade judgement in support of abortion.) Hence, we must reject the thesis of ignorance as being a defensible thesis either for or against abortion. All that it may do is foster the idea that the problem of abortion is irresolvable.

The second thesis is the potentiality thesis. This thesis says that the fetus is a potential person from the moment of conception--that given an opportunity for normal growth, the fetus will become a human person. This is true. But trivially so. The conservative will say that the fetus ought to be protected since the fetus is at least a potential person; the liberal will say that the fetus may not be protected since the fetus is at most a potential person with only potential rights. A thesis that is amenable to two opposing sides is at best ambiguous and may be rejected.

We must now consider the various cutoff points. According to Brody there are six points at which a fetus might reasonably be held to be a human person. These are:

... the moment of conception; the time (about the seventh or eighth day) at which segmentation, if it is to take place, takes place; the time (about the end of the sixth week) at which fetal brain activity commences; the moment (sometime between the thirteenth and twentieth week) of quickening, when the mother begins to feel the movements of the fetus; the time (about the twenty-fourth week) at which the fetus becomes viable, that is, has a reasonable chance of survival if born; and the moment of birth.

We shall now consider these points one by one.

1. The moment of conception. At this point a new entity is formed which is totally different from the sperm and the ovum from whose fusion it came into being. Such an entity (the zygote) has the genetic constitution which will direct the life processes of the adult individual throughout his life. But it is clearly fallacious to regard this entity as a human person, to equate the cause (namely the genetic information) of human development with the end-result of that development (namely the human person). The zygote may, of course, be seen as the non-arbitrary starting point of the development of the human person. But the causal starting point is not the human person. Once the distinction between the zygote as the cause of the human person is recognized,



the moment of conception as the non-arbitrary cutoff point for calling it a human person falls.

2. Segmentation. According to Brody, the argument goes as follows:

... Until the time of segmentation, but not thereafter, it is physically possible that more than one human being will develop out of that which resulted from the fertilization of the ovum by the sperm.

... Therefore, that which results from the fertilization of the ovum by the sperm (i) cannot be a human being until the time of segmentation and (ii) is a human being after that time.<sup>12</sup>

But this is also fallacious. Why should an entity be called a human person only after it has crossed the barrier of segmentation? It may be, and Brody is aware of this fact, that such a point may be essential for considerations of individuation but not for any consideration with respect to the human personhood of the zygote:

One amoeba can become two, so why cannot one human being become two?<sup>13</sup>

From this consideration alone it follows that the zygote may be a human person before segmentation as segmentation, by itself, does not rule out prior personhood. The point may be illustrated in the following manner: if a human person A suddenly becomes two, we might have a problem about the identities of the two human persons B and C who result from the splitting. (Are B and C identical with A, or is only one of them identical with A? Which one?) But the

problems that arise are problems of individuation and not at all the problems connected with the human personhood of the zygote. Thus it is possible for the zygote to be a human person before segmentation. Segmentation, by itself, does not guarantee human personhood. On the other hand, if the zygote is not a human person before segmentation, it is not necessary that the zygote will become a human person after segmentation: normal somatic cells constantly divide to form daughter cells as do nonhuman cells like amoebae. There is nothing in segmentation as such which determines personhood.

3. The commencement of brain activity. Before we examine this cutoff point, it will be helpful to state the currently accepted conception of death (brain death) and what the conditions are under which a person's brain dies and the person is called dead. The conditions are:

1. Unreceptivity and Unresponsivity. - There is a total unawareness to externally applied stimuli. . .
2. No Movements or Breathing. - . . .
3. No reflexes. . - . . .
4. Flat Electroencephalogram. - Of great confirmatory value is the flat or isoelectric EEG. <sup>14</sup>

According to Leonard Isaacs:

Although the medically acceptable criteria for total brain destruction have been refined and updated, the thrust of the 1968 Harvard Committee report remains unaltered. <sup>15</sup>

The brain death criterion is the determinant of the death of a person. The brain-activity cutoff point for human personhood may be spelt out in the following way: since the person is dead when his brain stops functioning, the person may be considered to be alive when his brain starts functioning. This would mean that the fetus, in whom brain activity begins at around eight weeks, should be considered a human person at that point, i. e. considered human in the sense that we are prepared to protect it, just as we would protect any other human person in the same context (or kill any other human person, with justification, in the same context).

Despite the prima facie plausibility of the brain-activity criterion of personhood, there is a criticism of it by Sissela Bok that we must note. Bok, in discussing the various cutoff points for calling the fetus a human person, says this about the brain-activity criterion of human personhood:

If brain activity is advocated as the criterion for human life among the dying, . . . then why not use it also at the very beginning? Such a use of the criterion for human life has been interpreted by some to indicate that abortion would not be killing before electrical impulses are detectable, only afterwards. Such an analogy would seem to possess a symmetry of sorts, but it is only superficially plausible. For the lack of brain response at the end of life has to be shown to be irreversible in order to support a conclusion that life is absent. The lack of response from the embryo's brain, on the other hand, is temporary and precisely not irreversible. <sup>16</sup>

According to the latter half of this quotation, the symmetry does not hold since the dead person's brain is in irreversible coma while the fetal brain is not emitting any impulses before eight weeks. But surely the symmetry says that the fetal "brain" before impulses become detectable is like the brain of the dead person (a person in irreversible coma). But the brain of a fetus when electrical impulses become detectable is much like the brain of the live person (a person whose brain is not in irreversible coma). There is thus symmetry at both ends of the scale of life vis-a-vis brain activity and the ascription of personhood. Thus when there is no brain activity there is no person; when there is brain activity, there is a person. Since this, to our mind, is a symmetrical relationship, Bok is quite wrong, to our mind, in suggesting that it is not. We shall take up the point about the brain-activity criterion of human personhood in greater detail in Chapter III when we consider a similar criticism by H. Tristram Engelhardt.

4. Quickening. According to Aristotle, quickening was a sure sign of ensoulment. Quickening also provides evidence of fetal activity and this in turn permits a limited interaction between woman and fetus. This is an important psychological point insofar as "bonding" begins to occur between the woman and the fetus. What we have to consider however is whether the fetus

becomes a human person at that point.

From the fact that the fetus can move (or more accurately, the mother can feel its movements), does it follow that the fetus is a human person? We think not. There are many things that move within and without the body of the mother and they are not for that reason called human persons. Also, something might be still and yet be a human person: a deeply asleep human person is a human person. Thus quickening does not ensure that movement, or the mother's feel of fetal movement, is by itself sufficient, or even necessary, to guarantee human personhood. We must therefore reject quickening as a valid criterion of human personhood.

5. Viability. Viability is the time when the fetus may survive outside the body of the mother (with or without life support systems). But just because something can survive outside the body of the mother, even if it has all the components of a human being, does not ensure that the human being is a human person, unless brain waves have also begun when the fetus is viable. (We shall discuss in detail the difference between a human being and a human person in Chapter III). For the fetus may have all the components of a human person, except for brain waves, in which case it can be called only a human being and not a human person. Since viability is not something that depends upon fetal brain activity, but is a function both of medical technology and the

survival mechanisms of the fetus, we must reject this criterion too as being sufficient, or even necessary, for justifying personhood.

6. Birth. According to Bok:

This is the moment when life begins, according to some religious traditions, and the point at which 'persons' are fully recognized in the law, according to the Supreme Court. The first breaths taken by newborn babies have been invested with immense symbolic meaning since the earliest gropings toward understanding what it means to be alive and human. And the rituals of acceptance of babies and children have often served to define humanity to the point where the baby could be killed if it were not named or declared acceptable by the elders of the community or by the head of the household, either at birth or in infancy. Others have mentioned as factors in our concept of humanity the ability to experience, to remember the past and envisage the future, to communicate, even to laugh at oneself.<sup>17</sup>

Although all these features are true, the point is: why call the newborn a person and not the eight-week old fetus a person? The symmetry criterion that we have already developed would tend to point to the eight-week old fetus who has all the main structures and functions of the newborn infant. Although there is no doubt that the newborn is a person, does mere physical separation from the mother guarantee personhood? We think not; the fact that the fetus is dependent on the mother might be (as we shall see in Chapter III) a reason to abort the fetus, but it is no reason to determine its personhood. If the newborn is dependent on life support

systems for a period after birth, the mere dependence is not taken into account in determining the human personhood of the newborn if it has all the structures and functions of human persons but has, say, weak lungs or heart. If dependence is not to account for personhood or lack of it, why should independence account for personhood as its sole determining factor, or even as a ~~necessary one~~? It is plausible to regard the fetus in utero as a person (as we have tried to show); the fetus would be a person even outside (ex utero), if there is brain activity, but if a newborn infant has no brain, it is doubtful if the human being is also a human person; whatever the legal rationale in regarding it as such one cannot at one end of the life spectrum use one criterion (absence of brain activity) and use another (birth) to determine the presence of human personal life at the other end without logical blunder. We suggest that the law be changed to accommodate this logical point. There are other inconsistencies in the law about the application of the term "person" which we shall investigate in Chapter III; suffice it to say here that even if the fetus is a human person (as we believe that it is) there is no reason to ban all abortions after eight weeks when (normally) brain activity begins. We kill persons to protect our rights. Abortion even of the fetus as person is one instance when, in certain situations, where the fetus acts as a life-threatening pursuer (the case for

self-defense has been considered already, i. e. the case when the fetus is a life-threatening pursuer), killing is permissible. We must, however, reject here the notion that birth is sufficient, or even necessary, for human personhood.

In our next Chapter we shall look at some liberal arguments for abortion. All of them tie the human personhood of the fetus to the morality of abortion; we separate these questions in Chapter III with a consideration of Judith Jarvis Thomson's perceptive views on the matter. Though Thomson says that abortion in cases of failed contraception of rape is permissible, she does not show, (she assumes the fetus to be a person for the sake of argument alone) as we have tried to show, that the fetus is a human person, but takes it for granted that it is. On the other hand, there are those who take the fetus to be a human person on the basis of the brain-activity criterion of human personhood, and who try to argue against abortion altogether. We, on the other hand, while accepting what is sometimes called the "conservative premise", namely the premise that the fetus is a human person at some time in its development, do not arrive at the conservative conclusion that the fetus may not be aborted after that point, but at the liberal conclusion that the fetus may, given certain conditions, justifiably be aborted even after the point at which it becomes a human person; moreover, as a corollary to this point, any human person in the



same sort of parasitic relationship with another person may be removed from that relationship if it is the case that those conditions are met. We shall lay out these conditions in Chapter III. Meanwhile, we shall consider the liberal arguments where the position is that the status of the fetus is intimately connected to the permissibility of abortion. Mainly, we shall deal with Tooley and with the U. S. Supreme Court's Roe v. Wade (1973) judgement.

## II

### LIBERAL ARGUMENTS FOR ABORTION

Let us begin by considering what is sometimes said to be the extreme case for the liberals--the fetus is merely a piece of tissue or a clump of cells and may be aborted at will. Just as a woman may pare her fingernails, so she may abort.

But this view, often propounded by fanatical feminists,<sup>18</sup> meets with little support when the physiology of the fetus is compared to the physiology of the fingernail. Obviously the physiology is different: the fetus has a sex, the fetus will develop fingernails, the fetus exhibits various structures and functions much like the structures and functions of the pregnant woman, and so on. We may seize upon one feature immediately. This is that the fetus will develop fingernails, a fingernail cannot develop a fingernail, therefore the fetus is not like a fingernail or any other structure or function in the pregnant woman's body. The fetus will, normally, develop these structures and functions. Therefore, the fetus cannot be like any of these structures and functions. Anything which has something cannot be like that thing--that is the metaphysical principle being appealed to here. We may thus

dismiss such a view as being biologically nonsensical. There are other liberal views which seem more defensible. As an example, we shall discuss the views of Michael Tooley.

According to Tooley, only persons have a right to life, fetuses are not persons and thus they have no right to life. For that matter, newborns are not persons either. Thus, newborns have no right to life. Tooley supports both abortion and infanticide. Prima facie one would disregard such a position as nonsensical. Or one would try to escape one of the two: abortion or infanticide; some would try to escape both. We shall first try to show that we shall have to reject Tooley's position in order to accommodate our strong intuitions against infanticide, and then present a counter-argument against Tooley's position.

It is clear, at the outset, that Tooley connects the morality of abortion to the status of the fetus. But Tooley is not at all like our naive liberal who says that the fetus is merely a piece of tissue like the pregnant woman's fingernail. What Tooley does is to state what he thinks are necessary conditions of human persons, as opposed to human beings. The term "human being" is, for Tooley, a biological description and no rights apply to human beings, qua biological entities, but only to human persons:

... the expression 'human being' will be taken to be synonymous with the expression 'member of the biological species, homo sapiens'.<sup>19</sup>

The term "person" is reserved for the bearer of human rights. Now this makes it clear that mere sentience is not enough for Tooley to justify the right to life: many nonhuman animals have for Tooley, sentience, but no right to life. To have a serious right to live, one would, for Tooley, have to satisfy the following five conditions:

- ... 1: The capacity to envisage a future for oneself, and to have desires about one's future states...
- ... 2: The capacity to have a concept of a self.
- ... 3: Being a self.
- ... 4: Self-consciousness.
- ... 5: The capacity for self-consciousness. <sup>20</sup>

Since the fetuses and the newborn infants have no such properties or capacities, they do not have a serious right to life, just as many nonhuman animals have no right to life; though some of the higher animals may.

Since Tooley's conditions are so restrictive, we wonder whether they may be applied in practice. The point is that if the result of his moral theory is so fantastic that no one will accept it, then the basis for acceptance of his theory will be completely undermined. On the other hand, if people do accept it, there are chances that they may misuse their freedom by terminating the lives of their newborn infants who belong to the wrong sex, do not have hair colouring of a sort, and so on. Though we

appreciate Tooley's point that the newborn is not so different from the fetus and if abortion is permitted, then why not also infanticide, we must point to a crucial difference between the two. In our view, the fetus is still within the geographical boundary of the mother's body (that as we shall see is, for us, crucial for permitting abortions in some cases), the infant is not; so that even if both are nonpersons it does not follow that the same ground must be accepted as sufficient to terminate both. Although Tooley uses the fact of nonpersonhood as one determining ground of their termination of life (he was primarily concerned with the termination of the life of the severely defective newborns) it is not at all clear that the dependent relationship that the fetus enjoys and the independent relationship that the newborn enjoys are not crucial factors in considering the permissibility of abortion. By this we mean to imply that infants, as nonpersons, might have a serious right to life (just as many claim that many nonhuman animals have, without meeting Tooley's criteria and without being called dependent persons, a serious right to life), while the fetuses, in certain situations, being dependent, do not have a serious right to life. Two points emerge here: First, the relationship of dependence / independence might be crucial in considering the permissibility of abortion and, second, not only persons might have a serious right to life but many nonpersons, like many nonhuman animals,

might possess a serious right to life. (The growing literature-- a nice summation may be found in R. G. Frey, "Animal Rights", Analysis, 37, June 1977, pp. 186-189--on both sides of the question whether animals have rights, including the right to life, shows at least that it is not an unproblematic matter to say that only persons, even by Tooley's criteria, have a serious right to life.) Thus, in sum: Tooley's conclusions, deriving as they do from restrictive criteria, are morally abhorrent; this is not a sufficient ground for rejecting them; many people find abortion to be morally repugnant, though there are fewer people, we think, who would find abortion morally repugnant than would find infanticide morally repugnant. But, given that fetuses and infants are nonpersons, the dependence of the one and the independence of the other might be relevant in considering the permissibility of abortion and infanticide (by "dependence" we mean the relationship of parasitism that the fetus has with the woman; by "independence" we mean the stage when this relationship is terminated, be this at viability or at birth).

We would question Tooley's premise that "only persons have a serious right to life". It is at least plausible that nonpersons, like (at least) some nonhuman animals, have a serious right to life, and the growing literature in support of animal rights supports this plausibility.

Finally, we would say that Tooley's criteria of personhood are not the criteria of personhood at all: our own brain-activity criterion would give a different picture about the personhood of fetuses and newborn infants.

All these points make Tooley unacceptable: there are viable alternate positions that one may adopt to avoid accepting infanticide as permissible.

Now, we shall consider another argument that has been provided for abortion; this is a legal argument and since it, for the first time, opened up abortion on demand at least in the first two trimesters of a woman's pregnancy, a case could be made for considering it in depth. Although the argument is legal, the argument is capable of as rigorous an analysis as any other argument for abortion. This is what we shall proceed to do.

The historic Roe v. Wade (1973) judgement made non-therapeutic abortions legal in the United States. The judgement, and its argument, are important for another reason: though the judgement was right, it was based upon wrong reasoning. Had the judges started with the premise that the fetus is a human person, they would have had to make a stronger case for abortion. In our judgement, it remains a fault with the law that it does not consider an eight-week old fetus a human person, though it accepts the brain death criterion of the death of a human person: it fails to

acknowledge the force of the symmetry between criteria for brain death (as the death of the person) and the beginning of fetal personal life.

The Roe v. Wade judgement struck down the Texas Abortion Statutes as unconstitutional. The appellant was Jane Roe (a pseudonym) and the appellee was Wade, District Attorney for Dallas County, Texas. Jane Roe sought and was granted injunctive relief to have an abortion in Texas by the U. S. Supreme Court when she had been refused this relief by the Texas District Court. The decision of the Supreme Court was based on the Fourteenth Amendment or Article XIV of the U. S. Constitution. Part of Section 1 of Article XIV reads as follows:

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. (Black's Law Dictionary, p. 1500)

The Supreme Court said that the

... Fourteenth Amentment's concept of personal liberty and restrictions upon state action... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. <sup>21</sup>

The Supreme Court acknowledged that refusal to give the woman choice in the matter of the termination of her pregnancy might

a) cause "psychological harm" to the mother by causing her



- distress due to maternity or due to additional offspring;
- b) cause increased burden upon her mental and physical health due to the additional burden of child care;
- c) cause distress to all concerned about the unwanted child;
- d) increase difficulties (including "stigma") of unwed motherhood.<sup>22</sup>

The Supreme Court ruled that in the first trimester of pregnancy

... the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician.<sup>23</sup>

In the second 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.<sup>24</sup>

In the stage of subsequent 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 judgement, for the preservation of the life or health of the mother.<sup>25</sup>

Professor J. E. Thomas says:

The modifiers 'if' and 'may' hold out little hope of protection for the fetus, while 'preserve the life of or health of the mother' ranks the woman's interests above those of the fetus in critical cases. We may conclude that Roe v. Wade offers little or no protection for the fetus.<sup>26</sup>

The decision protects the woman in the first two trimesters of

pregnancy and gives a conditional right to the state to proscribe or regulate the abortion procedure in the third trimester. The right is controlled by State interest in human life. One can see a shift from total freedom retained by the mother and her doctor in the first trimester to control of the abortion procedure in the second trimester to see that the abortion is safe (the earlier the pregnancy, the safer the abortion; the later the pregnancy, the riskier the abortion).

Therapeutic abortions had been permitted by the Texas Statutes. But Jane Roe's health was not in danger as a result of the pregnancy. What Roe wanted was nontherapeutic, induced, abortion. She would have had to travel to another jurisdiction where nontherapeutic abortion was legal. She did not have the funds to do so. The District Court did not give her injunctive relief. The case was appealed before the U.S. Supreme Court and decided on January 22, 1973. With this decision, all anti-abortion Statutes of the Texas "only therapeutic type" in all States had to fall. As a result of these decisions, abortion is available virtually on demand in the United States until viability (interpreted usually as around 20-24 weeks of pregnancy). It is in the interest of the mother to have as early an abortion as possible since early abortions are less risky than actual childbirth.

One important feature in most decisions to liberalize

abortion laws has been the appreciation of the high rate of maternal mortality due to illegal or "back-room" abortions. Figures<sup>27</sup> of maternal mortality in illegal abortions fell from 106 (when 193,000 legal abortions were performed in the United States in 1970) through 41 (586,000 legal abortions in 1972) to only five maternal deaths in 1975 (1,034,000 legal abortions). These figures also indicate the tremendous annual increase in the number of legal abortions from 1970 to 1975 with an average annual increase of 87.1% and with a dramatic 151.29% increase from 1970 to 1971.

With this introduction, let us consider the Roe v. Wade decision more closely. If the fetus is a person, the fetus' right to life is protected by the U.S. Constitution. The Supreme Court admits as much. Only, the Supreme Court proclaims the fetus to be a nonperson. Now there are three important appearances of the term "person" in Section 1 of Article XIV of the U.S. Constitution. Section 1 reads as:

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. (Emphases mine.) (Black's Law Dictionary, p. 1500.)

Prima facie, all three appearances of the term "person" may include the unborn. J. S. Putka makes the point that

At the time of the framing of the Constitution and the Fourteenth Amendment the word 'person' included the word 'child'; during the same period of time the word 'child' included the unborn children described variously as 'foetus' and 'embryo'; therefore, the word 'person,' as used by the framers of the Constitution and the Fourteenth Amendment, includes the unborn as well as the born.<sup>28</sup>

Putka goes on to say:

Nor are these definitions limited to the time of the framers. They have remained remarkably consistent throughout the years...<sup>29</sup>

As a matter of fact this is one of the definitions of "child" that the Webster's New World Dictionary gives:

child. . . an unborn offspring

Since it is obvious that the child is a human person with all the rights, including the right to life, the Court seems wrong in saying that the fetus is not a person within the context of the U. S. Constitution. Now according to the Court:

If . . . personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.<sup>30</sup>

If this is the case, then the Court should have, by considering the fetus to be a human person, dismissed the case of the appellant Jane Roe. But since the Court did not consider the fetus to be a

person, the Court arrived at the opposite conclusion.

Before we proceed further, it is necessary to view with concern another problem in U. S. law regarding the application of the term "person". According to Black's Law Dictionary, the following is the legal definition of "person" as it applies to "unborn child":

Unborn child. . . Word 'person' as used in the Fourteenth Amendment does not include the unborn. *Roe v. Wade*. . . (p. 1029)

But then the Dictionary continues:

Unborn child is a 'person' for purpose of remedies given for personal injuries, and child may sue after his birth. (p. 1029)

There is surely something wrong here; perhaps an inconsistency. Why should the "unborn" be regarded as a nonperson when it is a question of abortion and as a person when it is a question of mere injury? It seems to us that for the law to be consistent, it must treat the "unborn" either as persons or not as persons. It cannot, without inconsistency, treat the "unborn" sometimes as persons and at other times as nonpersons. <sup>31</sup>

After deciding that the fetus is not a person, the Court involved itself in a superfluous problem: it said that it does not know when human life begins.

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.<sup>32</sup>

But what is the point of saying this when the Court had already ruled that the fetus is not a person under the aegis of the U. S. Constitution and cannot be so protected? So far as we see the Court here seems to be using the ignorance thesis that we investigated before. As we have seen, all that the thesis can give one is the conclusion that to try to show that the abortion problem is irresolvable. Brody seems right, to our mind, when he responds thus to the Court's confession:

Why... did not the court conclude, as it did when it considered the question of fetal humanity, that the judiciary cannot rule on such a question?<sup>33</sup>

This in effect is the conclusion of the ignorance thesis, and that is all that may be derived from it. The Court, however, still went on to rule on the abortion problem and ruled against the fetus, without knowing what it is! On the basis of ignorance, all that the Court was entitled to rule was that it was not in a position to decide the abortion question.

In sum: the U. S. Supreme Court is wrong in asserting when discussing the use of the term "person" in the U. S. Constitution that

... in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application.<sup>34</sup>

Putka's research shows to the contrary; it is obvious that the framers of the Constitution might have meant otherwise, namely that the unborn are human persons. If the Court had recognized this feature, it could not have ruled for abortion but against it if it had focussed on the status of the fetus as the determining factor for deciding about abortion. After this is it strange that the Court should assume ignorance about the status of the fetus. All that the ignorance thesis can conclude is that we do not know what the status of the fetus is and are unable to decide about the problem of abortion. This is the thrust of Brody's criticism. If refuge is taken behind the Court's use of terminology: "We need not resolve the difficult question of when life begins" (emphasis mine), the matter is easily resolved, as we shall see shortly. But if the question of when life begins is related to the abortion problem it is related in the sense of when the unborn acquire rights, i. e. when the unborn are persons. But the Court has already decided that the unborn are not persons. If the Court is interested merely in when life begins, that question is:

- a) irrelevant to the abortion debate; the concern in an abortion debate is when (if at all) the unborn acquire the right to life that is accorded to other human persons, and
- b) easily resolvable as we shall shortly show.

There will then be no need to say that

those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus (already footnoted)

when, indeed, there is no problem at all about when life begins but only about whether what is to be protected or destroyed has the right to its life. But if the Court meant, instead of biological life being referred to here, personal life, that question has already been resolved by the Court: it had stated that the fetus is not a person under the aegis of the U. S. Constitution. So the Court is involved either in inconsistency or in superfluity.

Rugh and Shettles, in describing the property of life, say that one "lifelike property" is "... the ability to duplicate... own chemical constituents down to the last atom and to produce other chemicals".<sup>35</sup>

Now, when we consider human life at conception, it is obvious that a normal fertilized ovum is able to duplicate its "own chemical constituents down to the last atom and produce other chemicals". The fertilized ovum is thus alive. That is the answer to the Court's question of when life begins. Since we believe, however, that to make sense, the Court must be asking about when personal life begins, we shall leave the reader again with the many problems that the Court must face before it concludes that the fetus may be aborted.

Directly after the U. S. Supreme Court's Roe v. Wade



judgement the following Joint Resolution proposing an amendment to the U.S. Constitution was placed in the U.S. House of Representatives:

... Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion.<sup>36</sup>

The Resolution was resolved on March 13, 1973, barely two months after the Court's judgement. It effectively gives the States the right, should they choose, to ban abortions (except for medical reasons). Such an action by a State will eat the heart right out of Roe v. Wade. Texas may, in effect, go right back to its pre-1973 abortion law, should it so choose.

The following Joint Resolution was proposed as an amendment to the Constitution, and resolved on May 31, 1973:

"Section 1. With respect to the right to life, the word 'person' as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

"Section 2. This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"Section 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions."<sup>37</sup>

This Resolution challenges the Court's judgement that the unborn is not a human person.

We must, before we end this Chapter, consider one point in favour of the Court. One of the reasons that the Supreme Court announced why it had to strike down the Texas Abortion Statutes was because the Texas law was inconsistent with the case the Texas attorney made for upholding it before the Court. The Texas attorney wanted to show that the fetus is a person. The fetus should therefore be protected under the U. S. Constitution. According to the Texas Statutes, however, the penalty for illegal abortion was less than that imposed for murder. Also, the mother seeking an abortion was not liable for criminal action. Only her physician was. If the killing of the fetus as a human person was considered less serious than the killing of an adult human person, then, perhaps, the Texas Statutes did not consider the fetus to be a human person (see pp. 157-158 of Roe v. Wade).

In the next Chapter we shall consider the woman's right over her own body and how, in certain instances, such a right might justify abortion, even though the fetus is a human person.

### III

#### THE WOMAN'S RIGHT TO AN ABORTION

We have, in Chapter II, been considering the woman's right to an abortion based on current liberal theory. We shall now make our own case for abortion. As we saw in the last Chapter, none of the theories considered could adequately meet our criticisms.

We noted in Chapter I that to incorporate the values of the brain-activity criterion of human personhood (represented by the brain death criterion of a human person), we must grant the fetus at around eight weeks the title of person. The advantage of this view is that we have consistency and symmetry of the application of the term person at any point in an individual's life span. When there is brain activity, we call a person alive; when there is no brain activity, the person ceases to exist. Similarly, a person comes into being when brain activity begins and is not a human person before brain activity begins. We are, however, led to refine our criterion in the light of the criticism of H. Tristram Engelhardt, Jr. against the brain-activity criterion of human personhood. Engelhardt believes that a

... nonflat EEG is only the minimum necessary index of the life of the human person, but it is not a sufficient criterion.<sup>38</sup>

The process of reasoning that leads Engelhardt to this conclusion is the following. According to Engelhardt:

Even after one is pronounced dead according to the new criteria, there need not necessarily be an impairment of bodily functions save those dependent upon an intact brain. A certain level of biological life continues after personal life has ceased and legal death has been declared.<sup>39</sup>

Engelhardt then says that it seems likely then that the beginning of personhood can be analyzed similar to the cessation of personhood. But this is not so, according to him. In the first case we are dealing with "potential" human persons. The potentiality here is "abstract".<sup>40</sup> But in the case of the "unconscious man" the potentiality is concrete<sup>41</sup> and

... the question is really whether the actual basis for being in the world and having rights is lost, that is, the question is whether the brain, the basis for presence in the world, has been sufficiently destroyed so as to erode the capability for personal human life. As a result, the significance of the presence or absence of a flat electroencephalogram (EEG) is different. In the case... of the unconscious man... it measures a necessary although not a sufficient level of cerebral activity for personal human life. This clearly decides the issue. If the necessary basis for having human life is gone, the question is resolved: the patient is dead. Yet, in the... case... of the fetus... the presence of something more than a flat EEG is necessary to decide whether

the life of a human person is involved. . . In short, more than a flat EEG is not a sufficient index of there being a human person alive and present, although a flat EEG, under the right circumstances, is a sufficient index of the absence of a person (i. e. death).<sup>42</sup>

Though Engelhardt accepts the brain death criteria of the death of the person,<sup>43</sup> he refuses to apply it to both ends of the life spectrum. This he does because the potentialities of the fetus and the "unconscious man" are different. But are they? According to Andre E. Hellegers:

Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur. . . At the end of six weeks all of the internal organs of the fetus will be present. . . at the end of eight weeks there will be readable electrical activity coming from the brain. . .<sup>44</sup>

If this is the case, why draw a distinction based on potentiality? Isn't the fetus as potential as the fully-grown human person? Undoubtedly, the fetus is not a fully-grown human person. But neither is a four-month old baby. Since the growth after eight weeks is quantitative growth (no new major structures or functions form), why does Engelhardt create such a wide gulf between a fetus and a fully-grown human person? Or, in our terms, between a not fully-grown human person and a fully-grown human person? Part of the answer, we think, lies in the shift from "dead person" to "unconscious person" that Engelhardt exploits

in the long quotation on page 45. Although he should have been discussing the parallels between a dead human person with still-living structures and functions (but without brain activity) and the fetus, he suddenly begins to talk about the "significance of EEG evidence for an unconscious person". This is a move contrary to the purpose at hand. The person that we are comparing to the fetus is dead, there is no potential of that person of reviving (he is suffering from irreversible coma, not reversible coma). But his heart, lungs, etc. are still functioning, much like the fetus before fetal brain activity begins. But at a crucial point in the discussion, Engelhardt obscures this point by talking about alive persons, persons in whom there is reversibility of consciousness:

On the one hand, there is the potentiality of the fetus, given the right circumstances, of developing into a full-blown human being; on the other hand, there is the potentiality of an unconscious human being regaining consciousness and adult human life.<sup>45</sup>

But there is assumed to be no chance of the latter happening when a person (human being in Engelhardt's terminology; like Brody, Engelhardt conflates human being with human person) is irreversibly dead. If the comparison is to be made, it should be made with a dead human person (in irreversible coma) though with functioning heart, lungs, etc., and a fetus in whom brain activity has not yet started though in whom the heart, lungs, etc., are functioning (say between six and eight weeks). When brain activity begins,

of course, the fetus is like the unconscious human person who is not dead. But then if the unconscious human person is a human person due to brain activity, so must the fetus be due to that brain activity.

Part of the confusion is also terminological. Engelhardt began by discussing the case of the human person who is dead but who has functioning heart, lungs, etc. But then he confuses this entity with an "unconscious human person" (p. 431 of Engelhardt's article). But there is no human person! The human person is dead; has ceased to be. Why not call an entity which functions in biological terms, but does not have brain activity, a human being and distinguish it from an entity which has both biological and cerebral activity (obviously the term "biological" here means all activity except cerebral activity)? Call the latter a human person. Then we have the following. A fetus is a human person when fetal brain activity begins; a human being immediately preceding when biological activity is present and a mere potential human being before that. A fully-grown human person is a human person while brain activity is present, a human being after that when mere biological activity is present and nothing after that. Although there is a lack of symmetry at the last stage, for our purposes, the symmetry in the first two stages is enough<sup>46</sup> to decide the human personhood or the humanness of the fetus. This is, in

effect, our refinement to the brain-activity criterion of human personhood.

Let us proceed, now, to discuss the views of Judith Jarvis Thomson, who, we feel, provides sufficient grounds for aborting the fetus even if the fetus is a human person. Though Thomson does not make a case for saying that the fetus is a human person, but merely assumes it as such,<sup>47</sup> we feel that we have provided the reader with some justification for considering the fetus a human person after brain activity begins. It is with the permissibility of the abortion of such an entity that we are now concerned. Thomson is concerned to show that a woman's rights over her own body supersedes the rights that the fetus may have when the fetus needs the body of the woman to survive.

At the outset, we must explain Thomson's position. It will be seen that Thomson's position is almost self-explanatory. We shall defend it later against attacks by Baruch Brody.

According to Thomson:

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.<sup>48</sup>

Now it seems clear to us that the "impermissibility of abortion" conclusion is a conclusion from the premise that "the fetus is a human person". The argument might, then, be valid or invalid.



Prima facie, the argument is invalid. We have seen at least one case (the case of justified self-defensive killing where, even if the fetus is a human person, the fetus may be aborted to save the life of the mother) which shows that though the premise "the fetus is a human person" is true, the conclusion "abortion is impermissible" is false. Since a true premise and a false conclusion allegedly arising out of the true premise constitutes an invalid argument, we shall accept Thomson's initial reservations about the conservative argument that abortion is impermissible. Hidden behind the conclusion, if the argument is invalid, is the implicit "always impermissible". If the conservative wishes to make exception in the case of self-defensive killing, we invite him to consider other exceptions. Thomson offers one kind of exception to the conservatives. The exceptions are, of course, worth exploring for their own sake.

To repeat: Thomson accepts the conservative premise that the fetus is a human person for that is the only way of showing that "abortion is impermissible" (where "impermissible" is either "always" or "except in case of justified self-defense, if any") does not follow from it. The only consideration that Thomson puts out as supporting her presupposition that the fetus is a human person is the following; she is here talking about the fetus:

By the tenth week. . . it already has a face, arms and legs, fingers and toes; it has internal organs, and brain activity is detectable.<sup>49</sup>

After conceding that the fetus is a human person, Thomson gives the following formulation of the conservative case:

Every person<sup>/</sup> has a right to life. So the fetus has a right to life. No doubt the mother has a right to decide what shall happen in and to her body; everyone would grant that. But surely a person's right to life is stronger and more stringent than the mother's right to decide what happens in and to her body, and so outweighs it. So the fetus may not be killed; an abortion may not be performed.<sup>50</sup>

According to Thomson "[i]t sounds plausible".<sup>51</sup> But she asks us to imagine the following situation, which, though detailed, is worth quoting in full:

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, 'Look, we're sorry the Society of Music Lovers did this to you--we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from



his ailment, and can safely be unplugged from you.' Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you have to accede to it? What if it were not nine months, but nine years? Or longer still? What if the director of the hospital says, 'Tough luck, I agree, but you've now got to stay in bed, with the violinist plugged into you, for the rest of your life. Because remember this. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him.' I imagine you would regard this as outrageous. . . .<sup>52</sup>

Now it ought to be noticed that the situation that Thomson uses in this counter-example is really like the situation of forced pregnancy. The violinist is like the fetus which is parasitic upon the woman. So our intuitions with respect to this counter-example would show that a nine-month long pregnancy (which Thomson compares to even longer periods of time) is unacceptable, if the pregnancy is forced. Now forced pregnancies would occur as a result of (a) rape and (b) failure of contraception.<sup>53</sup> In both these cases then abortion is permissible. But let us see what the act of abortion will permit: it will permit disengagement of the violinist (fetus) from the victim (woman); it will not permit killing the fetus. Thomson herself realizes this when she says:

. . . while I am arguing for the permissibility of abortion in some cases, I am not arguing

for the right to secure the death of the unborn child. . . you are not morally required to spend nine months in bed, sustaining the life of that violinist; but to say this is by no means to say that if, when you unplug yourself, there is a miracle and he survives, you then have a right to turn around and slit his throat. You may detach yourself even if this costs him his life; you have no right to be guaranteed his death, by some other means, if unplugging yourself does not kill him. <sup>54</sup>

Now this feature of the abortion problem is very important. In the cases of unwanted pregnancy where the pregnancy is the result either rape or of failed contraception, all that the woman has a right to do is to detach herself from the fetus, not kill it, even if that is the only way to get rid of it. How, then, it may be asked, will the woman retain control over her body? We suggest that in the case where the only abortion available is one where the fetus would have to be killed in order to perform the abortion, the abortion may not be performed. This means that abortions using saline injections or dilation and currettage may not be performed. (An IUD, which merely prevents implantation of the zygote and hence stops the formation of the fetus is, of course, permissible).

Our thesis boils down to this: if the abortion procedure ensures expulsion of the fetus, but not its death, the procedure is permissible in cases of forced pregnancy. This corresponds to a dictionary definition of "abortion":

expulsion of a fetus from a womb before it is sufficiently developed to survive.

Now if the fetus does not survive after the abortion (the abortion that expels but does not kill), that is the misfortune of the fetus; but the goals of the institution in which the abortion is carried out must be to save the life of the aborted fetus, just as it would reach out to save the life of any other human person in a similar situation. Part of this is of course already happening: medical technology is bringing the age of viability closer and closer to conception. Once aborted fetuses can be saved by such increasing medical technology, they must be rehabilitated much as any other human person in similar circumstances is rehabilitated: The fetus may be found a home after it is able to live without sophisticated machinery, for example. Of course, one way of meeting the viability date in any given community is to convince the woman to bear the child for the length of time it will take the fetus to be viable, arrange an abortion (that does not kill the fetus!) at that point, and give up the fetus to institutional care. But until the time that women are able to get abortions that expel without killing, they have no right to the abortion. Since the nonavailability of appropriate technology is not their fault, but the fault of society, perhaps compensation will have to be paid to women with forced pregnancies. Such compensation may in part be collected from the contraceptive manufacturer (strict controls may be levied over the production of contraceptives) or, in the case of rape, from the

rapist (who can, of course, be charged also with criminal assault).

This is not the time, nor the place, to go into all the ramifications of our thesis; suffice it to say that we have considered some practical points and that the thesis seems to be the only one morally acceptable. As an example of how acceptable our thesis may be to an extreme conservative like Baruch Brody let us look at the way he handles the question of rape:

... however unjust the act of rape, it was not the fetus who committed or commissioned it. The injustice of the act, then, should in no way impinge upon the rights of the fetus, for it is innocent. <sup>55</sup>

Our thesis, then, should be acceptable even to a conservative like Brody; for Brody must admit that the fetus has no right, as a human person, to occupy the body of another human person, even to save its own life. According to Brody in reply to Thomson:

I have no duty to X to save X's life by giving him the use of my body (or my life savings, or the only home I have, and so on), and X has no right, even to save his life, to any of those things. Thus, the fetus conceived in the laboratory that will perish unless it is implanted into a woman's body has in fact no right to any woman's body. But this portion of the claim is irrelevant to the abortion issue, for in abortion of the fetus that is a human being the mother must kill X to get back the sole use of her body, and that is an entirely different matter. <sup>56</sup>

Now Brody's only objection is to the killing of the fetus to enable the woman to retain control of her body. If we don't permit that, then

Brody's objection collapses.

In sum then: we began this Chapter with a consideration of a criticism by Engelhardt. We met this criticism. The criticism gave us occasion to further refine the brain-activity criterion of personhood. It also provided the important terminological point about the difference between a human being and a human person. This point was one of the points of confusion, we think, in Engelhardt's mind.

We then presented Judith Jarvis Thomson's position on abortion. Though we agree with Thomson on the basis of her counter-example of the violinist, we feel that, based on her thesis, she would be forced to allow only those abortions which would expel the fetus but don't kill it. We then considered some practical consequences of such a decision. Mainly, we said that until such time as women have abortions available to them that would expel but not kill, women must retain pregnancy of the fetus, but may be compensated in other ways.

We finally considered Brody's criticism of Thomson. We concluded that if Thomson is pushed to the logical limit (that of abortions that expel, but don't kill) Brody's criticism would collapse.

NOTES

(Please note that only the author's name and page number are given, unless more than one work by the same author is cited. Fuller details may be found in the bibliography.)

1. Brody, p. 8.
2. Ibid. , p. 7.
3. Ibid. , p. 8.
4. Ibid.
5. Ibid. , pp. 8-9.
6. Ibid. , p. 9
7. Ibid.
8. Ibid. , p. 10.
9. Ibid. , p. 23.
10. Let us, as an analogous case, consider the Leon of Salamis example. The Group of Thirty told Socrates that unless he killed Leon, he would be killed by the Group of Thirty. Socrates went home; he did not kill Leon. Now it is obvious that Leon posed a threat to Socrates. According to our criterion of justified self-defensive killing, Socrates would have been justified in killing Leon in order to save his life. But he did not. This, we feel, is an act of nobility and not of duty, much like the woman's act in the ladder example had the woman chosen to save the man's life by endangering her own.
11. Brody, p. 80.
12. Ibid. , p. 91. (Brody uses the term "human being" and "human person" interchangeably. See Brody, p. 3.)
13. Ibid. , p. 92.



14. Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, pp. 85-86. Recent proposed changes in the criteria for the determination of brain death involve "... the irreversible cessation of all brain functions" rather than brain activity. The Law Reform Commission of Canada in Criteria for the determination of death, 1981, says:

The reason why the Commission preferred the term "functions" to the term "activities" is the following. It is scientifically possible, even where the brain is hopelessly destroyed, to monitor by using very sensitive devices residual electrical "activities" in the nervous system, and more particularly some meaningless signs at the level of the brain-stem and spinal cord. These are of no significance in relation to possible recovery of consciousness. In other words, "brain activities" can continue to exist without any "brain functions". The Commission did not wish to prevent diagnosis of death, only because there could still exist some of these measurable "activities" that are not symptoms of real "function". (p. 17).

Thus, the Commission suggests:

The presence of residual electrical activities in the brain-stem would not prevent a person from being declared dead if these activities bear no relation to brain functions. (p. 17)

But this refinement does not affect our principle of logical symmetry which says, in effect, that there should be consistency in the application of the legal concept of person.

15. Isaacs, p. 6.
16. Bok, p. 37.
17. Ibid. , p. 38.
18. The term is not meant to downgrade feminists but only to indicate a mad extreme that some feminists choose to argue their case.

19. Tooley, "Abortion and Infanticide" (unpublished), p. 63.
20. Tooley, "A Defense of Abortion and Infanticide" (in The Problem of Abortion), pp. 59-60.
21. Roe v. Wade, p. 164.
22. Though these factors were noted by the Supreme Court, it did not decide on the basis of any of them.
23. Roe v. Wade, p. 164.
24. Ibid.
25. Ibid., pp. 164-165.
26. Thomas, p. 11.
27. Figures are from Colin Francome, "Abortion Policy in Britain and the United States" (Social Work, January, 1980), pp. 5-9.
28. Putka, p. 34. Putka goes to the dictionary meanings of the term "fetus" when the dictionaries were being used. (Most of the dictionaries, for example A Complete English Dictionary (1735) and A New General English Dictionary (1810) are eighteenth or nineteenth century works.) It is likely then that the framers of the Constitution would have used these dictionaries. Anyway, that is the premise that Putka is working on.
29. Ibid., pp. 34-35.
30. Roe v. Wade, pp. 156-157.
31. It might be said that the inconsistency might be removed if the unborn are treated as conditional persons (i. e. will reap benefits on condition that they are born). In a sense, this is a tautology. For one cannot reap benefits until one is born. But the point is that the law regards the "unborn child" as a person and the child "may sue after his birth" (see p. 38, quotation no. 2). So, in one definition of "person" the law does regard the "unborn" as a "full person", while denying this status to it when it is a question of abortion (see page 38).

32. Roe v. Wade, p. 157. There is a shift of emphasis here from the question of personhood to the question as to when life begins:

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that therefore, the state has a compelling interest in protecting that life from and after conception.  
(p. 159)

But the point obviously is (as is stressed on pages 40-41) that the question of when life begins is irrelevant to the abortion issue; only the question of personhood is relevant. Since Texas made the case that "apart from the Fourteenth Amendment, life begins at conception" and should be protected, the Supreme Court's answer should have been that that is strictly irrelevant. It should have stressed that its interest is in personal life, not mere life, since only persons have rights under the U.S. Constitution and all that the Supreme Court can do is uphold the Constitution. Instead, the Court said "We need not resolve the difficult question of when life begins". But this is not difficult to determine. Biological life of the fetus begins at conception. (Since the Court had already decided that a nonviable fetus is not a person, that personhood is determined by viability, the Court must have been talking of biological life. But if so, what is the difficulty? See page 41.)

33. Brody, p. 127.
34. Roe v. Wade, p. 157.
35. Rugh and Shettles, p. 1.
36. Perkins (Appendix), p. 228.
37. Perkins (Appendix), p. 229.
38. Engelhardt, p. 431.
39. Ibid.
40. Ibid.
41. Ibid.

42. Ibid.
43. Ibid.
44. Hellegers, p. 407.
45. Engelhardt, p. 431.
46. We might try to get out of the problem altogether by saying that before the fetus is a human being, it is neither a human being nor a human person. The same is true, in reverse, of a dead human being and human person.
47. Thomson, p. 122. Though Thomson does indicate some features of fetal development, she does not go into depth in considering the personhood of the fetus, but grants it to the conservative. See note 49.
48. Ibid.
49. Ibid., pp. 121-122. Even here Thomson assumes the fetus to be a person for the sake of argument alone.
50. Ibid., p. 122.
51. Ibid.
52. Ibid., pp. 122-123.
53. Thomson uses a rather colourful example to explain failure of contraception:

If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, "Ah, now he can stay, she's given him a right to the use of her house--for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle". It would be still more absurd to say this if I had bars installed outside my windows, precisely to prevent burglars from getting in, and a burglar got in only because of a defect in the bars. It

remains equally absurd if we imagine it is not a burglar who climbs in, but an innocent person who blunders or falls in. 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 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. . . (p. 132)

These analogies are convincing and at par with "the hangover analogy". "The hangover analogy" runs something as follows:

Suppose a firm that assures you that its product X is 98% effective (the same percentage as the birth-control pill is said to be effective) against hangover after liquor is consumed. Suppose you dutifully take the drug, consume some liquor and have a hangover. Now it is certainly not your duty to "nurse" your hangover after the assurances given by the firm. If you happen to be one of the unfortunate 2% that the drug doesn't work for, an average of the general population taking the drug could, if the percentage of those for whom the drug doesn't work is more than 2%, be the basis for a legal suit on grounds of misleading advertising.

- 54. Thomson, p. 139.
- 55. Brody, p. 38.
- 56. Ibid., p. 28.

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APPENDIX ONE



## APPENDIX ONE

The abortion problem may be formulated in one of the following ways:

- a) Is abortion alright? or
- b) Under what conditions, if any, is abortion morally permissible?

The conception of person being used in addressing this problem is the legal conception. This is the appropriate conception because it is under this conception that practical decisions, of which abortion is one, are taken with respect to the life or the death of such persons. Though the legal conception is not without its problems (as we shall see in the thesis), we must begin with the legal conception for practical reasons. Since this thesis makes a claim to practicality embodied in the dedication to Capt. M. K. Ashta, such a justification is enough for the legal conception to be here adopted.

APPENDIX TWO

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In this Appendix we shall discuss in more detail Engelhardt and Tooley.

To begin with Engelhardt. Engelhardt says on page 430 of his article "Viability, Abortion, and the Difference Between a Fetus and an Infant" that

To reason from a purely biological fact directly to social values involves the naturalistic fallacy described by G. E. Moore.

On the same page he also remarks that

Biological facts do not imply social values.

Our point against this is that it is not at all certain that biological facts do not imply social values. (There are well-known objections to Moore's naturalistic fallacy though we need not go into them here.) However much of "socialization" that Engelhardt might bring into the concept of a human person, the legal definition of the same, with which we are concerned, is wholly devoid of the social abilities of persons. When the law says that a person is dead when brain waves cease, the law is not saying that that person is, or is not, able to act in sociable ways. When an unconscious person lies on the operating table without the slightest possibility

of ever regaining consciousness which would enable him to act socially, the person is, in the eyes of the law, still a human person, and ought to be treated as such. The differences, then, that Engelhardt wishes to create between a fetus and an infant are irrelevant from a legal point of view (or ought to be if the law is to be applied consistently at both ends of the life-spectrum). Consider, then, these differences with considerable scepticism with respect to the problem with which we are concerned:

There is... no regular and usual communication of needs from the fetus to the mother, forming a general social structure. On the other hand, a newborn infant can already, for example, elicit a series of regular responses and activities from rational human beings, even though the infant itself is not rational. Its crying, even within the most primitive social context, appears as a demand [sic] for food, etc., and initiates a series of activities directed to the infant, as if it were a person. The infant, in virtue of being able to assume the role "child", is socialized in terms of this particular role, and a personality is imputed to it, that is, in virtue of its ability to engage in crude interactions with others and, thus, to enter into the role "child", a relation of obligation is acknowledged. Even though the infant is irrational, it can play a relatively independent role in a social matrix which is rational. (p. 432)

Now we are not saying that what Engelhardt says is wrong. All that we are trying to say is that Engelhardt does not touch the basic issue. The basic issue is that the law is not interested, or even faintly concerned about, the sociability criterion of human

persons. No matter how much beyond sociability a human person might be (lying on that operating table without hope of ever regaining sociability) the person ought to be treated as a human person. (Otherwise, there may be culpability for murder.) If a decision to end the life of the person is made, the act of ending that life is called "euthanasia". Euthanasia is the merciful killing of a human person. It is not the killing of something which is not a human person. The fetus at eight weeks is very much like Engelhardt's unconscious man. The same reason (for example, poor prognosis for a normal social life) that is given for the termination of the adult human life must be given for the termination of fetal life in which brain activity has commenced. (Thus, when defective newborns after eight weeks are aborted, the act should be seen to be one of euthanasia.)

Engelhardt makes a great deal of the differences between an adult unconscious human person and a fetus with brain activity:

In the first case, it is hard to see what rights a fetus has aside from potential rights, not having actually secured human existence. In the second case, that of the unconscious man, the question is really whether the actual basis for being in the world and having rights is lost, that is, the question of whether the brain, the basis for presence in the world, has been sufficiently destroyed so as to erode the capability for personal human life. As a result, the significance of the presence or absence of a flat electroencephalogram (EEG) is different. In the second case (i. e. that

of the unconscious man), it measures a necessary although not a sufficient level of cerebral activity for personal human life. This clearly decides the issue. If the necessary basis for having human life is gone, the question is resolved: the patient is dead. Yet, in the first case (i. e. that of the fetus), the presence of something more than a flat EEG is necessary to decide whether the life of a human person is involved. Mere EEG evidence of brain activity is not evidence, as some have alleged, that the fetus is a person. A nonflat EEG is only the minimum necessary index of the life of a human person, but it is not a sufficient criterion. (p. 431)

Now the operative sentence in this whole quotation is the following:

In the second case (i. e. that of the unconscious man), it measures a necessary although not a sufficient level of cerebral activity for personal human life. (p. 431)

The "it" is the EEG reading. Now according to the law, the EEG reading, however faint, would ensure a human person. A flat EEG reading would warrant human personal death. Though Engelhardt wishes to say this ("If the necessary basis for having human life is gone, the question is resolved: the patient is dead" (p. 431)), he does not wish to say that a flat EEG would ensure human personal life. But this is surely inconsistent with the law (which question, as we shall repeat, is what we are interested in). It is clear that what Engelhardt means by "personal" is not the legal sense of "personal" (which is what we are interested in).

Engelhardt also makes a spurious distinction between the

"abstract" potentiality of the fetus and the "concrete" potentiality of the unconscious (adult) human person. Firstly, no such distinction is recognized in the law. Secondly, we fail to see why the past of a human person should become so important in determining his personhood. If two entities A and B are in the same straits then they should be treated equally, irrespective of their past. Thus - if the unconscious person has the same potentiality as a fetus with brain activity (a plausible viewpoint) they should both be treated equally.

Let us now turn to Tooley who, in a different way, misses the point about brain death. Tooley in "Abortion and Infanticide" makes the following claim:

Some human beings have suffered brain damage that, while so extensive as to destroy completely the neurological basis of consciousness, memory, personality, thinking, and all of the higher mental functions, left the brain stem intact and functioning. As the brain stem controls basic bodily functions such as circulation, respiration, digestion, etc., such a human can remain alive, even without artificial life-support systems. Now if the damage in question is irreparable, not merely at the present stage of technology, but in principle, it is natural to suppose that though the human organism lingers on, the individual once associated with that organism no longer exists, and hence that it is not even prima facie wrong to kill the human organism which remains. (p. 79)

But this is what Tooley would want, not what our current laws express. Currently, the brain death criterion is "whole brain death"

not "higher brain death" as Tooley would maintain. If Tooley's criterion was to be employed, one would be condoning murder according to current laws. Now it might be that a few years (or even months) from now the "whole brain death" criterion of human personal death will be replaced by the "higher brain death" criterion as envisaged by Tooley. In that case, we shall have to reformulate our application of the higher brain death criterion as it would (or would not) apply to human infants and to those in the condition that Tooley describes. Until that time, however, the "whole brain death" criterion must be accepted. All that would remain constant would be the application of the principle of logical consistency.



APPENDIX THREE

## APPENDIX THREE

### The Doctrine of the Double Effect

According to Germain Grisez (in Abortion: The Myths, The Realities, and The Arguments, New York: Corpus Books, 1966) the following is the principle of double effect "as it is currently understood". (The principle is also referred to as "theory" and as "doctrine".)

One may perform an act having two effects, one good and the other bad, if four conditions are fulfilled simultaneously.

- 1) The act must not be wrong in itself, even apart from consideration of the bad effects. (Thus one does not use the principle to deal with the good and bad effects of an act that is admittedly murder.)
- 2) The agent's intention must be right. (Thus if one aims precisely at death, the deadly deed cannot be justified by the principle.)
- 3) The evil effect must not be the means to the good effect, for then evil will fall within the scope of one's intention, and evil may not be intended even for the sake of an ulterior good purpose. (Thus it is certainly wrong to kill someone in order to inherit his wealth.)
- 4) There must be a proportionately grave reason for doing such an act, since there is a

general obligation to avoid evil so far  
as possible.

Now the principle of double effect does not apply to the case of the woman where the woman has a right to the protection of her right over her own body; the case, in short, that we made in Chapter III. The fourth condition is not fulfilled. If the abortion cannot save the life of the fetus, the abortion that has been performed to protect the right of the woman over her own body does not equal the effect, i. e. the death of the fetus. Strictly speaking, therefore, the principle of double effect cannot be used to defend the thesis propounded in Chapter III. The thesis propounded there is defended on independent grounds, as outlined there. However, the doctrine of double effect has received attention from recent philosophers and it is worthwhile to investigate it further in the light of what these philosophers have to say about it. We shall be discussing, in particular, Hart, Foot and Bennett, in that order. The point of this exercise is plainly exegetical. The idea is to try to state clearly each author's position with respect to the principle of double effect. Not much original criticism is levied since the principle is beyond the scope of this thesis (as is mentioned above).

P. Foot in "The Problem of Abortion and the Doctrine of Double Effect" (Oxford Review, November 5, 1967) says:

The words "double effect" refer to the two effects that an action may produce: the one aimed at, and the one foreseen but in no way desired. By the "doctrine of the double effect" I mean the thesis that it is sometimes permissible to bring about by oblique intention what one may not directly intend. Thus the distinction is held to be relevant to moral decision in certain difficult cases. It is said for instance that the operation of hysterectomy involves the death of the foetus as the foreseen but not strictly or directly intended consequence of the surgeon's act, while other operations kill an innocent life. . . (p. 6)

Foot's paper is a direct result of H. L. A. Hart's paper entitled "Intention and Punishment" (Oxford Review, Number 4, Hilary, 1967, pp. 5-15). Hart has this to say about the doctrine of double effect:

Some legal theorists, Bentham among them, have recorded. . . divergence by distinguishing as an "oblique" intention the mere foresight of consequences from a "direct" intention where the consequences must have been contemplated. . . not merely as a foreseen outcome but as an end. . . or as a means to an end. (p. 10)

The difference between "oblique" intention and "direct" intention is at the heart of the doctrine of double effect, doing as it does the function of drawing the crucial distinction in the doctrine between what is intended ("direct" intention) from what is foreseen but unintended ("oblique" intention). If there had been only "direct" intention to operate with, this would have been impossible.

Hart distinguishes cases where the double effect would or would not apply by means of the following examples:

The doctrine of double effect is said to distinguish those cases where according to Catholic doctrine a doctor may save the life of the foetus from those where he is not permitted to do this. . . If a woman is found to have cancer of the womb of which she will die unless the womb is removed the surgeon may according to Catholic doctrine remove the womb with the foreseen consequence that the foetus dies. On the other hand he is not permitted to perform a craniotomy killing an unborn child to save a woman in labour who would die if the head of the foetus is not crushed. (pp. 12-13)

Hart finds this position unacceptable, since he finds no difference of any moral consequence between "oblique" intention and "direct" intention:

Perhaps the most perplexing feature of these cases is that the over-riding aim in all of them is the same good result, namely. . . to save the mother's life. . . There seems to be no relevant moral difference between them on any theory of morality.

It is perfectly true that those cases which the Catholic doctrine forbids may be correctly described as cases of intentional killing (intentionally killing the dying man to stop his pain, intentionally killing the unborn child to save the mother) whereas the cases which the doctrine allows are more naturally described as cases of "knowingly causing death". But neither these verbal differences nor the differences in causal structure are correlated with moral factors. (p. 13)

Although Hart is against the doctrine of double effect, Foot supports it:

. . . the strength of the doctrine seems to lie in the distinction it makes between what we do (equated with direct intention) and what we allow (thought of as obliquely intended). (p. 10)

Since there is a basic conflict of values here between Foot and Hart, we do not see a way of solving the problem with respect to their basic conflict. We would, however, tend to agree with Hart. We too feel that the distinction between "oblique" intention and "direct" intention, a distinction which is necessary, if not essential, in making sense of the doctrine of double effect, is a spurious distinction since the end-result is very well foreseen as a consequence of the performance of the action, though it is not intended as such. Since the end-result is the same whether the end is intended or not, the value of the action, as such, remains the same, whatever the intention. (We admit to being consequentialist here. We recognize that there are other streams of thought. But this is neither the occasion nor the opportunity to try to defend our position against other positions. All that we would like to point out here is that the consequentialist position is not intrinsically implausible and if not neither is the consequence that flows from it, namely that the distinction that the doctrine of double effect uses is spurious.)

In his article entitled "Whatever the Consequences" (Analysis, Vol 26, Number 3, January 1966, pp. 83-101), Jonathen Bennett says basically the same thing as Hart. The following example that Bennett chooses to demonstrate his point is the following:

A woman in labour will certainly die unless an operation is performed in which the head of her unborn child is crushed or dissected; while if it is not performed the child can be delivered, alive, by post-mortem Caesarian section. This presents a straight choice between the woman's life and the child's. (p. 83)

Now, according to Bennett, this is what the doctrine of double effect would say about this problem:

To do the operation would be to kill the child, while to refrain from doing it would not be to kill the woman but merely to conduct oneself in such a way that--as a foreseen but unwanted consequence--the woman died. The question we should ask is not: "The woman's life or the child's?", but rather: "To kill, or not to kill, an innocent human?" The answer to that is that it is always wrong to kill an innocent human, even in such dismal circumstances as these. (p. 83)

But, according to Bennett, such thinking is spurious:

Operating would be killing: if the obstetrician makes movements which constitute operating, then the child will die. . . Not-operating would 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. . . 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. (p. 96)

We, as we indicated before, would tend to agree with Bennett.