AN ANALYSIS OF THE ABORTION ARGUMENT

by

ANDREW THOMPSON

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Department of LAW

The University of British Columbia
1956 Main Mall
Vancouver, Canada
V6T 1Y3

Date 9/10/84.

ABSTRACT

The purpose of this thesis is to provide an overview of the current abortion debate.

The introduction argues that only three topics are relevant to abortion discussion namely personhood, potentiality and rights. There are three possible decisions on the nature of the foetus' moral status:

a) it is a person

b) it is not a person

c) the matter is non-decidable.

Chapter 1 examines the argument that personhood and humanity are equivalent concepts. It rejects this conclusion. Personhood is a normative concept whilst humanity is a biological one. Thus the foetus' humanity does not automatically entitle it to rights. Rights are ascribed to persons. What requires to be clarified is the criterion of personhood, that is, those qualities which qualify a biological entity to be ascribed moral rights and duties and thus the concomitant moral status of person.

Chapter 2 details the various theories of personhood presented in both the legal and the philosophical literature, and attempts to abstract the single most convincing criterion from them. The relationship between personhood and rights is elucidated and the moral significance of the foetus' potential to be a person discussed.

Chapter 3 examines the conflict between foetal and maternal rights and interests in various fact situations. The radically different conclusions on the moral permissibility of abortion when the foetus is

a) accounted a person, and

b) accounted a non person are delineated.

Chapter 4 returns to the matter of non-decidability and considers abortion's permissibility when the criteria of (a) justifiability, and (b) pragmatism are employed as rational alternative criteria to that of personhood/non personhood.

CONTENTS

INTRODUCTION

Abortion belongs to that select group of moral issues which inspire genuine passion in those who believe they hold the "correct" opinion in relation to it, and genuine puzzlement in the social majority who remain concerned but undecided.

Such intensity of feeling is simultaneously encouraging and unfortunate. The former because it signifies a moral awareness vital to the well being of any healthy body politic: the latter because with passion comes partisanship and with partisanship distortion. Moral certainty induces the belief that differing views are dangerous heresies to be subverted by any means including black propaganda, wilful misconstruction of opposing arguments and slanted simplification of the problem's complexities calculated to reinforce one particular position at the expense of its competitors.

It is those most involved with the abortion debate who attempt to lead and form public opinion via television, the press and the printed page. Their output reflects the intellectual myopia to which the committed activist is always susceptible. The task of this thesis is to take a step back from the front line; avoid the sniping from fixed positions and present an overview of the affair based on an analysis of what the central elements of the dispute actually are and an assessment of how effectively the plethora of literature on the subject deals with them.

This is not to say the author's personal prejudices will not intrude with the text - such neutrality would be impossible to guarantee; rather the tactic shall be to mark such partiality clearly.

This paper has no pretensions beyond those of philosopher artisan as opposed to those of philosopher king. Its methodology shall be to organise, clarify and critically comment on existing material and by such means hopefully make the layman's decision on the permissibility or impermissibility of abortion more informed. It is a guide, not a directive.

As illustration of this point, it should be noted that three assumptions underpin the analysis. The first two are that the paper is unabashedly relativist in its outlook and is the product of Western legal and moral consciousness. Concepts such as "persons" and "rights" are purely products of and only comprehensible to occidental thought.

No attempt shall be made to present the "right" or "true" or "only" solution to the abortion question because such certainty is considered to be illusory. Abortion is not a subject which can be resolved by the simple application of truth values. This is not to say that absolutist theories which claim to possess a monopoly of truth relative to the matter shall be ignored or underplayed, on the contrary each shall be represented as scrupulously as the writer's ability permits. Relativism's strength is its equality of treatment of all rival responses to a particular problem. This fairness stems from its central tenet that free flow of information is the single most important component of rational choice between options. Abortion is simply one more example of this rule's application.

The third assumption is that abortion is primarily a moral issue. Legal norms regulating its availability (or lack of it) are reflections of an antecedent moral conclusion. A number of misconceptions can arise from an inexact understanding of this idea. It is <u>not</u> being

argued that morality is somehow superior to positive law or takes some form of precedence in any apparent conflict between the two. All that is being claimed is that abortion is first of all thought about in moral terms such as "is this right or wrong?", and "who is harmed and who benefits by one particular moral policy as opposed to another?". Then having reached one particular decision out of the range of all those possible, the non-coercive moral norms are translated into coercive legal ones.

This does not mean that legal concepts have no part to play in the abortion debate. Indeed it shall be argued that jurisprudential analysis of concepts such as legal personality can be fruitfully transplanted to abortion discourse. What it is intended to demonstrate is the priority between legal and moral rules in this matter and expose as unsound any line of reasoning based on pre-existent legal norms since such argument is founded on a fallacious "reference to authority" premise.

Having outlined the paper's objectives and assumptions it is now time to present the matrix of its approach. Put briefly, it is that any meaningful discussion on abortion can only be conducted around three salient topics, namely:

1) Personhood

2) Potentiality

3) Rights.

It is suggested that any discourse purporting to form a prescriptive view on abortion's permissibility which is outwith this framework is either irrelevant or at best tangential to it. Employing the early

Wittgenstein as a metaphor these issues are the simples of the abortion argument complex; to couch abortion discourse without employing them is to engage in nonsense.

The ordering of the simples is logical not random. Only entities which are considered to be persons can be the subject of moral rights and duties, thus any discussion of foetal versus maternal rights is futile until it is established that foetuses are included in the group of entities to which personhood is ascribed. It shall be seen infra that the literature details a wide range of conclusions on this point ranging from those which hold personhood commences at conception to those which argue that it is not acquired until the advent of self consciousness some twelve months after birth. Analysis will also demonstrate how confused our concept of a person is and provide an insight into how much of Western moral thought consists of a tension between naive realism and the abstract realism of pure ideas.

Turning to the first issue namely foetal status[1] two decisions making alternatives are possible. Since clarification forms part of the paper's manifesto a flow chart shall be employed to illustrate the analytical structure thus:

Foetal Status

Decidable Non-decidable

The possibility of foetal status being non-decidable is curiously neglected in the existing material, possibly because it is seen as an unforgivable piece of moral timidity which prevents a coherent moral and legal policy on abortion being formulated. Such criticism is untenable since it may well be that the foetus possesses the properties

which permit an entity to be classified as a moral person to such a limited degree that its membership of this particular class is problematic. Equally, the properties it does possess may preclude its all out rejection and the question is clouded further by the intra-uterine being's physiological development during the course of its gestation. Given this confusion non-decidability is a perfectly understandable attempt to avoid moral arbitrariness and use an alternative and more reliable criterion.

Two such criteria are suggested in the available abortion bibliography. The first outlined by Roger Wertheimer[2] concentrates on what abortion laws a liberal Western State can justifiably enact given current Western moral and political consciousness and the premium it places on individual freedom of action and bodily privacy. The second endorses a pragmatic approach based on an utilitarian notion of measuring the social costs and benefits of forbidding abortions against the costs and benefits of allowing them. Adherents of this latter view might paraphrase their point in this way:

> "A decision on foetal status is simply too difficult a judgement call for us to make. Given that we cannot know for certain whether the foetus is or is not a person, the only sensible course is to switch to another policy making criteria which provides greater certainty and social cost benefit calculations give us just that."

Wertheimer's followers would agree with the first half of this statement and substitute their doctrine of justifiability for the second. Incorporating the two theories into the flow chart gives this result:

Foetal Status

Decidability Non-decidability

Justifiable Pragmatic

Returning to the left hand side of the chart three distinct conclusions of foetal personality (or the absence of it) have emerged from the work of contemporary moral philosophers. The first holds that the foetus becomes a person at some point of its intra uterine existence and upon attaining this status acquires a right to or interestin life which overrules any conflicting maternal interest either (a) absolutely (if one adheres to the doctrine of double effect) or (b) in all instances except those "hard cases" involving for example a choice between the mother's and the foetus's life or a pregnancy induced by rape. Within this genera of argument there are several sub species which are perjoratively labelled "liberal" or "conservative" depending on how early or late in its development the foetus is accounted a person.

The question of potentiality shall be dealt with within the context of "the foetus as a person" discussion. Its relevance was first elucidated by Michael Tooley[3] and is unusual in that it permits a dualistic interpretation of the morality of abortion: playing the devil's advocate for a moment a pro-lifer might frame his submission in this way.

> "The pro choice faction claim that the foetus is a potential person, who left to its own devices will mature into an extra uterine being recognised as a person by the opposition and accorded rights including that of not having its life ended unjustifiably. Is the difference between actual and potential persons not irrelevant? Shouldn't that

> most fundamental right, the right of life be extended to both?"

Those in favour of women's choice would counter that potential personhood cannot confer rights until it is realised and to classify the foetus in this way is to admit its irrelevance to the abortion discussion.

The second conclusion had its genesis in Judith Jarvis Thomson's seminal article.[4] A full discussion of its content shall be conducted infra but its vital insight was to point out that even if foetal personality were conceded then this would not automatically resolve the abortion dilemma per se because it also had to be admitted that the foetus was a party to a very special relationship with another person, namely the woman whose womb it occupies. Conflicts of rights and interests can arise between the two parties and judgements of the relative worth of each have to be made. If the foetus were viewed as a parasite (depending on the circumstances of its conception) then this would affect its claims to the use of its host's body until it is realised.

The third member of this perceived solution set to foetal status shall be called "the foetus as a non person" and is virtually self explanatory. The foetus lacks the capacity to figure in our moral calculus as a person and any claim it has to our moral concern has to be founded on some other ground(s).

If the chart is expanded to include this analysis it looks like this:

Foetal Status

Decidable			Non-decidable	
Foetus as a person	Foetus as a Parasite	Foetus as a non person	Justifiable	Pragmatic

Double effect

The next matters to be considered are the moral and legal norms which are consistent with the decision on status. For example, if the foetus is a person, is abortion impermissible in all cases and if so why? Are there any problems in concluding the foetus is not a person but combining that with the belief that abortions are morally impermissible, and if so what are the good reasons for this disjunction? Where do the justifiable and pragmatic avenues lead to in terms of rules governing abortion?

Questions of this sort involve considerations of rights. Specifically they necessitate us devising a theory of rights capable of adjudicating and regulating conflicting maternal and foetal rights and interests. Thankfully judgements between the two need not be made blindly. There is a rich seam of legal precedents (representing antecedent moral thinking) to aid decision-making. This source gives clue to how similar rights/interests conflicts have been settled in the past. These precedents can only be persuasive but they indicate just how productive an interplay between moral and legal science can be.

Recognition of the importance of rights enables the flow chart to be presented in its entirety:

Foetal Status

Decidable				Non-decidable	
Foetus as a person	Foetus as a Parasite	Foetus as a non person		Justifiable	Pragmatic
Double effect					
(1) (2)	(3)	(4)		(5)	(6)

(1) - (6) being the moral and legal norms consistent with the prior decision on status.

The transition from flow chart analysis to a coherent written presentation of the nature of the abortion argument shall be achieved by dividing the thesis into four chapters.

The first shall deal with one of the two main groups of theories on the nature of foetal personality. The theories within this group consider that the crucial issue in determining the morality of abortion is whether the foetus is a human being, since an entity's rights are contingent on its humanity (or lack of it).

The subject of the second shall be personhood and potentiality. It shall outline and criticise the various definitions of the former and assess the relevance of the latter as a reason for ascribing moral and thus legal rights. The difference between the two categories is that personhood theories hold that it is persons, not human beings who are right and duty bearing entities. Thus for the personhood theorists the morally relevant question is whether the foetus is a person rather than a human being.

The comparative strengths of the two shall be tested by answering

these four questions:

1) Is the foetus a human being?

2) Is the foetus a person?

3) What is the difference (if any) between a person and a human being?

4) Which of the competing human being/rights, person/rights nexae is the most convincing?

The first and second questions shall be answered by examining the available literature and assessing how well each of the humanity and personhood theories fares in the dogfight with its fellows.

To answer the third and fourth questions is an altogether trickier affair, since it may be that there is no common intellectual denominator or overlap between the two considerations to permit a comparative evaluation of each to be implemented. It will be argued however, that juristic analysis permits just such a comparison to be made.

The third chapter shall clarify the relationship between rights and interests and discuss the implications for the availability of abortion that according or declining to accord personhood to the foetus will have.

The fourth shall examine the alternative criteria of policy making, that is justifiability or pragmatism, which follow from accepting that foetal status is non-decidable.

The direction and purpose of this work have now been silhouetted, but it would be inappropriate to conclude without posting one final warning. It is virtually impossible to avoid a persuasive use of language when writing on this topic. To employ the word "foetus" instead of an alternative term such as "unborn child" influences reader

reaction. Similarly to speak of "the woman whose womb the foetus occupies" as opposed to "the foetus's mother" implies a pro choice sympathy. Language is not value free and bias cannot be avoided by even the most discriminate of authors. Thus vigilance has to be exercised by the reader to ensure that his or her attitudes are not coloured by such subliminal means.

FOOTNOTES TO THE INTRODUCTION

(1) Foetus is being used here as a convenient term to denote all the stages of intra-uterine development. Of course in the medical literature a number of terms such as zygote, batoclyst, embryo, foetus, each describing the entity at a particular stage of its development are employed. For a review of the various stages of intra-uterine development see Daniel Callahan "Abortion, Law, Choice and Morality" (London) 1970 pp. 371-77, and Germaine Grisez "Abortion, Myths, Realities and Arguments" (New York) 1970 pp. 11-35.

(2) Roger Wertheimer "Understanding the Abortion Argument" essay in "Rights and Wrongs of Abortion" (Princeton) 1974.

(3) Michael Tooley "Abortion and Infanticide" essay in "Rights and Wrongs of Abortion" op cit.

(4) Judith Thomson "A Defence of Abortion" essay in "Rights and Wrongs of Abortion" op cit.

CHAPTER ONE

The Foetus as a Human Being

The source of dissent within this particular coalition springs from when in the course of its gestation (if indeed at all) the conceptus becomes a human being.[1] After all, between its conception and delivery the entity undergoes a continuous process of development. Its cells multiply: its form elongates and becomes ever more "human-like" in appearance. It acquires major bodily organs and a nervous system. Its brain develops as evidenced by its increasing E.E.G. reading. It responds to external stimuli and becomes capable of spontaneous movement. But which is the moment of humanisation in this process? - that point of biological and physiological fact which (for this group at least) has the attendant moral consequence of entitling the foetus to a place in our normative calculus.

Various criteria present themselves as candidates in this particular intellectual election. The factor which distinguishes them is the temporal one of how early or late in gestation they consider humanisation to occur.

Humanity at Conception

The earliest point at which a claim for intra-uterine humanity is entered is at conception; that is when the male sperm and female egg unite to form the single cell zygote.

John Noonan proffers two grounds for this conclusion. First it is the one sanctioned by two thousand years of Christian moral thought:

> "If one steps outside the specific categories used by the theologians, the answer they gave can be analysed as a refusal to discriminate among human

> beings on the basis of their varying potentialities. Once conceived the being was recognised as man because he had man's potential. The criterion for humanity thus, was simple and all embracing: if you are conceived by human parents you are human." 2

The obvious difficulty with this approach is that it makes reasoned discourse with those who do not share similar religious scruples virtually impossible. Thus this thesis will not include within its terms of reference any argument on abortion based exclusively on theological premises.[3]

However, Noonan and the other adherents to the argument from genotype provide reasons for their view comprehensible to the non-believer. Conception is the genesis of humanity because it is at that point that a new individual human being - individual and human that is by virtue of its unique genetic code - comes into existence.

> "At conception the new being received the genetic code. It is this genetic information which is the biological carrier of human wisdom, which makes him a self evolving being. A being with a human genetic code is man" 4

This conclusion is shared by other philosophers who have written on the subject. Richard Werner summarises the argument into three propositions.[5]

1) An adult human being is the end result of the continuous growth of the organism from conception.
2) From conception to adulthood, there is no break in this development which is relevant to the ontological status of the organism.
3) Therefore one is a human being from the point of conception onwards.

Indeed he makes the point diagrammatically.

	B	C	D	E
A. (sperm)				
A. (ovum)	Conception	Birth	Personhood	Death

B-E is one continuum "the archetypal chain of human identity would be constituted by B through E".

Germaine Grisez writes:

> "The unity of the fertilised ovum is continuous with that which develops from it, while the duality of sperm and ovum are continuous with the duality of the two parents. Thus the proper demarcation between parents and offspring is conception and so the new individual begins with conception. From this point of view then it is certain that the embryo from conception until birth is a living human individual" 6

Curt Stern:

> "The first two months counted from the time of fertilisation represent undoubtedly the most important period in the development of the new human being" 7

After conception the new human being merely matures. His potential is simply fulfilled. But there is no point in his subsequent development when he becomes more human than he was at conception.

It is now proposed that the moral conclusions derived from the decision on foetal status be examined. For the present this discussion shall be limited to an explanation of why abortion is <u>prima facie</u> morally wrong if the argument from genotype is accepted. Detailed consideration of "hard cases" such as pregnancies induced by rape, incest or contraceptive failure, or those which threaten the woman's life shall form part of the third chapter and its analysis of rights.

Noonan's argument is that since embryos are human beings and the killing of human beings is always prima facie morally wrong then killing embryos just because they are small, mute and defenceless is equally wrong:

> "It is wrong to kill humans, however poor, weak, defenceless and lacking in opportunity to develop their potential they may be. It is morally wrong to kill embryos." 8

What Noonan is doing is appealing to the principle of formal justice that like cases should be treated alike, or as Paul Ramsey puts it:

> "Fundamental to ethical reasoning is the requirement that cases be treated similarly if they are similar in all relevant and important moral features." 9

According to Noonan the only way to rebut this argument is either to maintain "that in determining who should live human beings should be discriminated against by their potential,"[10] in which case it might be argued that Jews, negroes or any group whom the ruling class of a particular society consider inferior or undesirable could be killed. Or, alternatively, the premise that embryos are human beings from conception on has to be discredited.

Noonan concludes his statement of his prescriptive view with a virtual challenge to the abortion advocate either to provide some reasons to substantiate the belief that there are relevant moral differences between embryos infants, and mature adults, which justify the killing of one group but not the other, or else produce evidence to deny embryonic humanity. If he cannot meet either requirement then his argument fails.

Other abortion conservatives[11] such as Grisez and Ramsey would agree with Noonan's moral theory. There is however a split in the conservative ranks which has significant consequences for the morality of abortion. This split should now be detailed.

Humanity at Segmentation

Fundamental to the argument that the zygote[12] is a human being is the premise that it is a unique non-recurring individual separate from both the man and woman who helped create it and from any other human being. It is the question of the zygote's individuality which divides the criterion of humanity at segmentation from its conception counterpart.

Identical twins (that is twins derived from the same sperm and egg as opposed to fraternal twins which are simply the products of simultaneous pregnancies) come into existence during the second or third week of pregnancy when the conceptus has developed into a batoclyst. Thus the segmentationists argue that it is impossible to speak of the unique individual until the post twinning state, or as Paul Ramsey puts it:

> "(B)ut for the fact of identical twins in human reproduction the genetic arguments for when life is transmitted would prevail, since however there may be two individuals having the same genotype from segmentation onwards the genetic argument is rebutted." 13

Andre Helleger adopts a similar opinion and adds therider that species are recognised by their genetic constitution. It is not possible to diagnose "a genetic package" in the case of the conceptus until the possibility of twinning is resolved one way or the other. Since resolution of this matter does not occur until the batoclyst stage the conceptus' membership of the human species has to be

postponed until it has passed that developmental point.[14]

Phillip Montague assesses the damage done to the argument from genotype by the argument from segmentation and speculates on how the former might be redrawn to regain its credibility. Identifying its central premise as:

> "The individual which is the human infant comes into existence at conception and then undergoes a process of continuous development throughout gestation. That is we can trace the development of a single individual from conception to birth (and beyond of course)" 15

He argues that this premise is false because:

> "The fact that a single human zygote can develop into two distinct infants thus renders extremely dubious the idea that human zygotes are numerically identical to the infants into which they will develop." 16

If the zygote is to be rescued then the conceptionists will have to show why it ought to have a special moral status by virtue of its potential humanity.[17] If potential humanity is considered to be morally relevant then it can further be argued that unfertilised ova and human somatic cells ought to have a moral status similar to zygotes. This is because the former can be chemically stimulated to develop into human beings,[18] and the latter can be used to fertilise ova.[19] Thus both these sorts of entities share the zygote's property of potentiality.

The moral significance of the disagreement is that Ramsey and his ilk cannot condemn the abortion of the conceptus prior to twinning as being morally impermissible unless per Montague they accept the principle of potentiality. Indeed Ramsey explicitly states that segmentation supports classifying intra-uterine devices (coils) and "morning after" pills as contraceptives or "an attack on prehuman

matter." [20]

Balance dictates that the similarities of the two positions be noted. Ramsey concurs that once "the outer limits of the human community" have been defined then within it:

> "equal justice and equal rights prevail and everyone counts for one and none counts for more than another, no matter how recent his arrival or how soon his departure date." 21

The extent of the dispute is a two or three week delay in accepting that the life of a human individual has begun.

Noonan's response to segmentation is to ignore it. Grisez tackles the problem foursquare but his reply is unconvincing. First he contends that identical twins should be regarded as "the grandchildren of their putative parents".[22] The individual zygote being the true offspring and the twins its children by asexual reproduction!

Second the criteria for individuality differs in each case. The zygote is individual due to its genetic constitution; the embryonic twins "because we discern distinct masses each of which functions in the way we expect a human being at that stage of development to function."[23]

This is only a pseudo answer for it evades the question of how it is possible to classify as a human being an entity which may divide to produce two distinct human beings if individuality is accepted as the key to humanity. To rectify this Grisez argues that "individuality is relative".[24] The morally relevant individuation which endows an entity with humanity and gives it a right to life is that of itself from its parents rather than any later sub-individuation. In any event this later individuation is problematic as it "can break down more or less

seriously"[25] since Siamese twins or "twin monsters"[26] may be born.

It is James Humber who provides a strategy to resolve this apparent impasse. He argues that the conservative infight stems from a common failure to recognise that their argument is founded on the nature of conception rather than that of humanity.

> "It is the analysis of conception not human which is central to the abortion controversy." 27

Conception simply denotes a start or beginning, not a fertilisation of the egg per se. The latter is read into the term because "such unions usually cause creations of the sort being referred to" i.e. human beings.[28]

Once the proper meaning of conception is understood then the pro-abortion argument falls because the only possible answer to the question of what has begun at conception is "human life for what else results?"[29] Thus for the abortion conservative:

> "Once the quest for certainty" (in defining human) "is abandoned a case can be made that their moral position has strong factual support and that it is for that reason probably correct." 30

The nature of this case is that most people would think it morally wrong to kill a foetus five seconds before its birth therefore "humanity seems predicable of some pre natal organisms."[31] The next question is when the organism's humanity with its attendant right to life comes into effect. Humber's reply is "when its life begins" which is at conception. At the very least claims Humber, this reasoning shifts the burden to the pro-abortionist to refute the conservative view.[32]

This amended argument from conception can encompass all those potentially embarrassing biological phenomena which threaten the

genetically orientated argument. For example ova may develop into human beings without interacting with sperm. The result is always a female child virtually identical to its mother. If possession of a unique genetic code is the criterion of humanity then one has to conclude that it is morally impermissible to kill any unfertilised ovum since it possesses the genetic code requisite for humanity. The alternative is to hold that humanity is not predicable of the ovum alone. This involves denying that women born virginally are human, since conception in the sense of a union between sperm and egg does not occur in these cases.

If conception is taken to mean the start of the egg's development independent of cause then this difficulty disappears since it is conception in general, not one particular form of it which is the beginning of human life.

Similarly twinning ceases to be a problem for although the number of human lives which have begun is not known, it is known that human life has started:

> "And this is all the conservative need show for the right to life is a human right, not a personal one. If twinning were to occur at time T and the zygote was destroyed before that point, this only adds to the immorality of that particular abortion. Rather than destroying one human life the abortion violates the rights of two." 33

Unfortunately Humber fails to elaborate on his distinction between personal and human rights. The context suggests that personal is being used as a synonym for "individual" which presumably the zygote is not due to the possibility of two discrete human being emerging from it. The distinction only confuses Humber's case. After all if twinning were not to occur until a human being was twenty one years old, would that

mean he had human rights up to his majority and personal rights thereafter?

The conservative position has now been delineated. It is now time to consider other cut off points for humanity placed at successively later stages of gestation. The reasons for the suitability of these cut off points shall be detailed and the moral precepts derivable from them adduced.

Humanity on Attaining Human Form

For N. J. Berrill it is the morphological development of the foetus which is the relevant factor for giving it rights. Whilst the history of the human individual begins with conception "the person in the womb"[34] is not present until the sixth to eighth week of pregnancy, when all major bodily organs are present, albeit in a rudimentary form.

Prior to that time the conceptus is too unlike extra-uterine human beings to be placed in the same category as them or to be given the same rights. Thus abortion is permissible until the person is present. This reference to "person" or "human person" as opposed to "human being" shall crop up ever more frequently in the literature being quoted and an attack on such distinctions as fatuous shall be a major plank of the conservative response.

Humanity Contingent on Brain Development

Others argue that it is not human form but a functioning human brain which is the distinguishing feature of a human being. A perfectly formed human body with a non-functioning brain would not be a human being. The problem therefore is to determine when the foetus

acquires sufficient consciousness to be accounted a human being. John Fletcher lists twenty "positive and negative" criteria for "humanhood" namely:

Positive Criteria: minimal intelligence; self awareness; a sense of time; a sense of futurity; a sense of past; capability to relate to others; communication; control of existence; curiosity; change and changeability; balance of rationality and feeling; idiosyncracy; and neo cortical function.

Negative criteria: man is not non nor anti artificial; man is not essentially parental; man is not a bundle of rights; man is not a worshipper.[35]

What Fletcher is doing is presenting a list of features which constitute a standard human being and then taking a back bearing to establish the minimum complement of features which establish humanity. He considers this to be neo cortical activity since this "is the cardinal or hominizing trait upon which all other traits hinge".[36] Without "the synthesizing function of the celebral cortex (without thought or mind) the person is non-existent."[37]

Again reference is made to "person" without there being even an attempt to define this term's relationship to human being. To compound this lacuna Fletcher does not include human genetic code as a criterion for humanhood. A robot or intelligent extra terrestrial being could conceivably possess all his positive and negative criteria. Would these entities be humans or persons? In addition are the two terms

equivalents or do they refer to different types of consideration? These points shall be dealt with infra.

Werner Pluhar prefers "simple consciousness" as the relevant cut off point. Using this standard he claims that early feticide would not be morally wrong but infanticide would.[38] Pluhar is vague about the exact point in foetal growth when simple consciousness is acquired. He prefers to speak of a "cut off slope"[39] rather than a cut off point. The simple consciousness championed by Pluhar should be distinguished from self consciousness which he considers to be an altogether too exacting standard:

> "Why should the poor foetus or infant in order to have a right to life be required to think of itself in sophisticated philosophical terms." 40

It is the "ability to experience" not the capacity for introspection which is morally relevant. The morality or immorality of abortion is a function of foetal consciousness. The greater its degree of sentience the greater degree of wrong done to it by its abortion. This does not rule out all abortions however:

> "Foetuses do not acquire their sentience all at once, it comes by degrees. Hence on the sentience cut off slope, although the destruction of any sentient entity is prima facie always to some extent wrong, the degree of prima facie wrongness varies considerably as a function of the degree of simple consciousness present. As a consequence countervailing considerations will frequently of course in the early stages of the development of the foetus's consciousness make abortion right all things considered." 41

This account of rights as a "sliding scale" varying directly with the foetus's degree of humanhood, i.e. sentience is a radical departure from the conservative doctrine of equal rights for all human beings

regardless of their varying capacities. But its popularity amongst those who could be classified as abortion liberals[42] is evident.

Rudolf Ehrensing uses brain activity as the dividing line between human life and human personal life. The "presence of human life does not mean that the human person is present." The distinguishing feature between the two is "the existence of a living brain in some form."[43] This being the case then:

> "If the developing embryo is not yet a human person then under some circumstances the welfare of actually existing persons might supersede the welfare of developing human tissue." 44

This enigmatic phrase is not clarified by Ehrensing but presumably he means that maternal interests may take precedence over the embryonic ones.

In direct contrast to Pluhar, Roy Schenck prefers self consciousness as the distinguishing feature of what he calls "the human person":

> "Each human foetus progresses through a continuous series of developmental stages and ultimately passes through the level of complexity at which self awareness becomes possible. It seems reasonable to propose that this is the point at which the foetus changes from a potential to an actual human person. Embryological studies on the developing cortex suggest this level of complexity is probably not achieved before the sixth month of development." 45

The foetus's lack of human personateness has this consequence:

> "If the foetus has not yet become a human person then it would seem that the other persons involved and particularly the mother should become of major importance." 46

Thomas Hayes unites the morphological and neurological aspects of foetal development. There is no "point in development where the biological form and function of the human individual are suddenly

added." Instead:

> "The attributes of form and function that designate the living system as a human individual are acquired at various times .... in a process that is relatively continuous. The foetus late in development is obviously a living human individual in form and function. The simple cell stage, early in development does not possess many of the attributes of biological form and function that are associated with the human individual." 47

Thus morally speaking:

> "The human individual develops biologically in a continuous fashion and it might be worthwhile to consider the possibility that the rights of a human person might develop in the same way." 48

Humanity at Viability

Lawrence Becker postulates that becoming a human being is a "process of entry" in which the foetus passes through the "being/become boundary".[49] The foetus has completed this transition when:

> "The organism has assumed its basic morphology and when its inventory of histologically differentiated organs is complete." 50

Becker considers that this does not occur until at least the middle of the sixth month of pregnancy[51] and thus viability can serve as "a rough completion of the metamorphosis."[52] Confusion has arisen over the status of the conceptus prior to viability because the adjectival use of human and the use of human as a noun. When one speaks of human concepti foetuses then human is being used to differentiate these entities from animal foetuses. To talk of a human being is to refer to a discrete entity in the objective world just as the term tree refers to an object in the world.

Becker believes that a "graduated interests" approach best fits the becoming/being boundary. The interests of the mother take precedence early in pregnancy but those of the foetus become increasingly important as gestation progresses.

Malcolm Potts shares this preference for viability. The life of the intra-uterine being as a continuum which does not permit the drawing of straight forward decisions between human and non human. The biological differences between the conceptus and the fully developed adult diminish as the former matures. The conceptus' rights grow in direct proportion to its physical development:

> "The simplest and most satisfactory ethic on abortion is to avoid ascribing any legal or theological status to the embryo during the first two weeks of its development, beyond this time the embryo becomes increasingly important and at viability (28 weeks) the foetus should have the same rights as a newborn child" 54 - including presumably the right not to be killed."

Martin Buss sees humanity as consisting of "relatively distinct form of organisation of which there are four in number namely sub-molecular; molecular; organic and socio-cultural"[55] It is the last which constitutes the human person since:

> "The fact that the human person includes a body does not mean that the body itself already makes man." 56

Strictly speaking this would mean truly human life would commence at birth since interaction with other human beings on a non-biological level is necessary "to form the human person". But Buss argues another "physic" level of organisation between organic and socio-cultural may exist:

> "No known being however has an organisation which is more than simply organic but less than cultural unless the being should exist in the womb. If such an order should obtain there it is fortunately fairly easy to determine its earliest possible appearance, according to tentative data brain waves which appear in a foetus during the seventh month." 57

Actually this is inaccurate since brain waves can be detected as early as eight weeks[58] so Buss will either have to reassess his position or else argue that it is only in its seventh month that the foetus has a sufficiently sophisticated level of brain development to be accounted a human person.

Leslie Sumner identifies abortion as a difficult moral dilemma because it occupies the "uncertain middle ground."[59] Pro-abortionists assimilate it to contraception while anti-abortionists tend to assimilate it to infanticide. The crux of the case is whether or not the foetus is a human individual. Echoing Wertheimer he claims this matter "must be open to confirmation or disconfirmation otherwise the argument as a whole is undecidable."[60]

Unfortunately "human admits a variety of meanings" which Sumner subsumes under the three headings namely specific normic and developmental.[61] The first denotes whether an entity is a member of the human species. Genetic human beings are human in this specific sense. The second covers cases where genetic humans differ so radically from an atypical human being in terms of appearance, intelligence, anatomy and so on that they are termed "monsters" and thus denied full humanity. The third encompasses the physical differences between specific humans such as a zygote and a mature atypical adult. According to Sumner we react to this difference in degree, "by saying the zygote is not yet a

human individual."

The foetus is clearly human in the specific sense since it was conceived of human parents. The vast majority of foetuses do not suffer from mental or physical handicaps and thus their normic status is assured. Developmentally, according to Sumner the zygote is not yet human whereas the full term foetus is. This development lag means that:

> "the foetus comes gradually to be treated as a moral person in the full sense." 62

The morally relevant physical change is the acquisition of major body organs and some form of minimal central nervous system.[63] Consistent to this criteria Sumner does not consider the abortion and infanticide of anecepholics nor the killing of humans who have lost their consciousness permanently to be morally wrong.[64]

Applying his doctrine to the matter of abortion he concludes that the gradual and continuous nature of foetal development makes the drawing of sharp moral lines surely arbitrary. All that can be said is that abortion should be permitted for any reason during the first thirteen weeks of pregnancy. During the last four to five months it should only be performed in circumstances in which post natal killing would be morally permissible. In the intermediate stage between the two previously outlined "the morality of abortion is unclear."[65]

An Overview of the Foetus as a Human Being Dispute: Comment and Criticism

The main arguments on the nature of foetal humanity and its relation to the morality of abortion have now been presented. It is suggested that two separate issues can be abstracted from them. First

there is the question of whether the foetus is a human being. This is a factual question to be decided by reference to the natural sciences. Second there is the normative question of which entities may be said to have moral rights or interests. Are human beings the only such entities? If this is the case then genetic humanity can be the only criterion for being a moral right and duty bearing unit.

If this premise does not hold however; if entities other than human beings may have rights then logically genetic humanity per se cannot be the basis of moral consideration. It must be some other set of qualities which warrant such consideration-qualities which are enjoyed to a sufficient extent by extra-uterine human beings to enable them to be ascribed rights. The question this raises for the morality of abortion is whether intra-uterine human beings have the relevant qualities in sufficient measure to qualify as entities who have rights.

It is the "foetus as a person" school which recognises the human being/rights distinction. It is persons not human beings who have rights. The real crux of the personhood debate is to elucidate the salient qualities of persons and determine whether foetuses enjoy them sufficiently to be admitted as members of the class of persons. The nature of moral personhood will be the subject of the next chapter. The present one shall be concluded by answering the questions put in the previous paragraph.

There are limits to what may be proved in establishing the foetus's humanity. This is because one is dealing with a <u>definition</u> which can be accepted or rejected by the deciding individual. As John O'Connor puts it:

> "The fundamental defect in Noonan's account is the assumption that the criterion for humanity needs to be discovered. Rather I suggest that we must decide what the criterion is to be. This is not of course to say that it is a subjective matter. Rather there are good and bad reasons for deciding in the way we do." 66

Ultimately all that can be said is that criterion X is the most plausible or reasonable definition of a human being. Despite this limitation those who argue that the human being begins at the zygote stage[67] can marshall a remarkably strong corps of arguments in their favour. Contrary to the impression given by the literature it seems more credible to believe that the diverse criteria for when the life of a human being commences have been arrived at by the taking of a backbearing. Each writer has imagined an identikit picture of a standard human being (i.e. a mature, sentient, asymmetrical male or female biped of normal intelligence and with a full complement of bodily organs) as the centre of the circle of humanity and then traced back along the radius to determine how far removed from the norm an entity can be before it is located outwith the circumference.

Tracing back the standard human being through his adulthood, adolescence, infancy and foetality, they watch as the quota of features that constitute the atypical human being's mature normality diminish. Finally each sets a line at a point where he considers the physical differences between the standard human being and intra-uterine being are so acute that the latter has somehow lost its human status.

What gives conception its particular potency in this line drawing exercise is that it constitutes the beginning of the development process which will result in the mature human being. Further, all

the features such as a functioning brain, bodily form, rudimentary anatomy which are variously claimed as the decisive homonizing traits are present at conception, as this biological evidence makes clear:

James Ebert: "All development rests ultimately on the genes" 68

F. J. Gottleib: "The genes exercise their control of development by means of their products, through a process involving differential functions in time" 69

This data would appear to vindicate Ramsey's claim that after conception, subsequent development:

> "May be described as a process of becoming the one he already is. Genetics reaches us that we were from the beginning what we essentially still are in every cell and in every human attribute." 70

Every cut off point subsequent to conception can be attacked by the conservative by one simple criticism namely "the slippery slope" which Joel Rudinow has summarised as follows:

> "No particular point between birth and conception is a point at which the person/non person distinction can be non arbitrarily located because the differences in development between any two successive intra-uterine points are so unimpressive. Consequently we are forced to locate the beginning of human life at the point of conception" 71

As Anne Lindsay points out[72] the slippery slope is not an argument designed to establish conception as the beginning of human life. Rather it is a criticism of any argument which attempts to locate human life at any other point. The conservative can look at human form; the primitive brain development; viability; birth and so on and say:

> "What is the significance of these points? What of the foetus one minute or one second prior to any one of them? What is the difference which

suddenly makes the foetus a human being?"

The reply to the slippery slope criticism is hinted at by Pluhar and Sumner but is most fully articulated by Donald De Veer. It is that the criticism rests on an arbitrary restriction namely that only successive foetal changes are to be compared. If this methodology alone is employed then of course these changes will be found to be insignificant. However if gestation is considered as a series of stages, viz:

Zygote S1/S2/S3/S4/S5/S6 Neonate

then it is obvious that "requisite differences do exist between non-successive stages"[73]

There are major differences between a four week and a thirty four week foetus which could be used as a basis of considering the second to be a human being and the first not.

As Rudinow notes, the slippery slope is almost an effort to dupe the reader into believing that nothing happens to the foetus during pregnancy. Once the comparison of successive states is dispensed with then:

> "it (the slippery slope criticism) can invite the conclusion that there are no impressive differences between zygotes and viable foetuses. It can invite the conclusion but cannot sustain it." 74

The slippery slope is rebuttable on this analysis. But for the purpose of establishing the foetus's biological humanity the conservative need not employ it. His argument from conception is sufficient in itself. After all what is the status of the zygote or embryo if not human? To speak of a pre-human or an adjectival human smacks of semantics, or a failure of imagination.

There is a continuity between adult and embryo which defies a

human/non human division or more properly exposes such a division as arbitrary. It can be argued that the embryo is only potentially human, but this would seem to be more plausible as a description of the sperm and egg. Once the latter has been activated to begin the discrete new human being that potential has been realised.

So it seems that the most sensible course is to agree that the foetus is a human being from conception on. What then is its claim to rights?

Roger Wertheimer thinks that as far as the morality of abortion is concerned the expressions "a human life", "a human being", a "person" are "virtually interchangeable";[75] but is this the case? For example, we speak of legal persons and their legal rights and duties but we do not speak of legal human beings. The reason underlying this distinction is that law is a normative, not a natural science and person a normative, not a natural term.

The conservative response to such an apparent distinction is that it is a pseudodistinction because all legal and presumably moral persons are human beings. Humanity and personality are exact fits. Thus, the criterion for one is identical to the other, and it has already been admitted that conception and genetic code are the best criteria for a human being.

If it can be reasonably suggested that entities other than genetic human beings can have rights, then this human being/rights fit is broken, and some other basis for ascribing rights to entities has to be found.

The next few ideas are going to sound like pump science fiction, but are based on a factual premise. We, that is the U.N., on behalf of

the world's population have packed a Pioneer space probe currently travelling in our galaxy with data on planet Earth and its inhabitants. There are diagrams of atypical male and female human beings; tapes of Mozart's music; mathematical calculations and so on.

The point of this exercise is to attempt to contact life forms on other planets and open communications with them. This data is designed to demonstrate that we are sentient reasoning beings. Now suppose this message elicits a response and a group of extra terrestrials pay us a visit. Unfortunately, their craft lands in the midst of a Mississippian Klu Klux Klan meeting whose members summarily dispatch our visitors with hunting rifles "'cause we ain't having no gook Martians messing with our womenfolk". Is their action morally impermissible?

It is hard to see how Noonan, Ramsey or the human being/rights school in general can condemn the killings. After all, it isn't <u>human beings</u> who have been killed so no rights have been violated. The only way they can condemn the killings is if they treat them like the distasteful deaths of animals.

However, I think most of us agree that the two cases are not similar. I think we would say that the extra-terrestrials were entitled to the same moral concern and respect as ourselves and their being killed was morally wrong. These aliens enjoyed moral rights equivalent to our own and their rights were violated by the Klansmen's action.

If this is the case then it is not species per se but properties which individual members of a species may possess which determines whether they have rights, i.e. are persons. Thus entities other than human beings may have rights and be persons. Equally, human beings who

do not have the requisite properties may still be human but not have rights.

From this perspective, the relevant question for the morality of abortion is not "is the foetus a human being?" Instead it is "is the foetus a person?" What are the qualities which qualify an entity for consideration in our moral scale of rights and interests? Do foetuses possess them?

The conservative can respond to these questions with an amended slippery slope criticism. If foetuses are considered to lack the qualities requisite for holding rights and thus being persons then it can be argued that this withholding is artitrary. The foetus, one hour, or one day prior to that development point which confers personhood is so similar to the personal entity that there are no non-arbitrary grounds for making such a radical moral distinction between the two. Thus, working back by small degrees, personhood should be located at conception. Alternatively, he could employ the argument from potentiality outlined in the introduction supra.

The initially puzzling interchangeable use of terms such as "human person" and "person" in the material discussed supra can now be understood. The writers half perceived that biological humanity did not have an automatic correlation with rights but were unable to sufficiently free themselves from naive realism to categorically state that being ascribed rights was dependent on having qualities which could conceivably be possessed by entities who were not genetically human. They could not quite stop themselves believing that rights were some sort of invisible addition to our bodies instead of a purely normative

concept. So they fudged the issue to talking of "human person" and "persons" without ever explaining the difference between these terms and "human being".

By this means they became easy meat for the abortion conservative and his clear cut foetus - human being - rights argument. The argument that the foetus is not a human being from conception on is patently dubious. Unless it is realised that having rights is more than a matter of being genetically human then the abortion liberal succumbs to the criticism that he is breaching the rules of formal justice by arbitrarily differentiating between human beings.

Footnotes to Chapter One

(1) Actually the question is more complex than that since it shall be seen that other terms such as "human person" and "person" are employed and the difference in meaning (if any) between them will have to be elucidated.

(2) John Noonan "Abortion and the Catholic Church, A Summary History" (Natural Law Forum) v. 12, 1967, p. 126.

(3) e.g. that abortion is immoral because it is a denial of the gift of life from God; or that the relevant cut off point is when the foetus receives its immortal soul.

(4) John Noonan "An almost absolute value in history" essay in "The Morality of Abortion" (Harvard 1970) p. 57.

(5) Richard Werner "The Moral Status of the Unborn" Social Theory and Practitioner 1975, p. 202, and p. 208.

(6) Germaine Grisez "Abortion, Myths, Realities and Arguments" (New York), 1970, p. 274.

(7) Curt Stern "Principles of Human Genetics" (San Fransisco 2nd Ed.) 1960, p. 38.

(8) John Noonan "Deciding Who is Human" Natural Law Forum, v. 13 (1968) p. 134.

(9) Paul Ramsey "Abortion, A Review Article" Thomist v. 37, 1973, p. 175.

(10) John Noonan "Deciding Who is Human" op cit p. 135.

(11) That is those who believe in highly restrictive abortion policies since the intra-uterine being is a human being from a very early point in its existence and as such it is morally impermissible to kill it.

(12) The single cell entity consisting of forty six body cell chromosomes produced through the combination of the twenty three chromosomes of the female egg and twenty three chromosomes of the male sperm.

(13) Ramsey "Abortion, A Review Article" op cit. p. 189.

(14) Andre Helleger "A Look at Abortion" National Catholic Reporter (March 1967), pp. 3-4.

(15) Phillip Montague "The Moral Status of Human Zygotes" Canadian Journal of Philosophy, v. 8, No. 4, p. 700.

(16) Montague op. cit. p. 702.

(17) Ibid p. 70-4

(18) This is known as parthogenesis.

(19) This is known as cloning.

(20) Ramsey op. cit. p. 193.

(21) Ramsey ibid p. 185.

(22) Grisez op. cit. p. 25.

(23) Ibid p. 26.

(24) Ibid p. 274

(25) Ibid p. 26.

(26) That is beingswho are partially separate but who share the same body organs or brain.

(27) James Humber "The Case Against Abortion" Thomist v. 39 (Jan. 1975) p. 68.

(28) Ibid. p. 68.

(29) Ibid p. 69.

(30) Ibid p. 70.

(31) Ibid pp. 70-71

(32) Ibid. p. 67.

(33) Ibid p. 69.

(34) N. J. Berrill. "The Person in the Womb" (New York) 1967, p. 4 (my emphasis).

(35) Joseph Fletcher "Four Indicators of Humanhood" Hasting Centre Report, Dec. 1974, p. 3.

(36) Ibid p. 4

(37) Ibid p. 6

(38) Werner S. Pluhar "Abortion and Simple Consciousness" Journal of Philosophy v. 74, 1977, pp. 159-160.

(39) Ibid p. 166.

(40) Ibid p. 162.

(41) Ibid. p. 165.

(42) Liberal in the sense that they would be prepared to accept abortion as morally permissible up to their particular cut off point in gestation, i.e. six weeks, three months, six months, or whatever it may be.

(43) Rudolf Ehrensing "When is it really Abortion?" The National Catholic Reporter (May 25) 1966, p. 4.

(44) Ibid. p. 4.

(45) Roy Schenck "Let us Think About Abortion" The Catholic World, p. 207 (April 1968) p. 16.

(46) Ibid p. 17.

(47) Thomas Hayes "A Biological View" Commonweal 85 (March 1967) p. 678.

(48) Ibid p. 679.

(49) Lawrence C. Becker "Human Being Boundary of the Concept" Philosophy and Public Affairs, v. 4 (1975) p. 338.

(50) Ibid p. 338.

(51) Ibid p. 344.

(52) Ibid p. 347.

(53) Ibid. p. 339.

(54) Malcolm Potts "The Problem of Abortion" in F. J. Ebling (ed) Biology and Ethics (New York Academic Press) 1969, p. 75.

(55) Martin J. Buss "The Beginning of Human Life as an Ethical Problem" Journal of Religion (July 1967) v. 47, p. 249.

(56) Ibid p. 250

(57) Ibid p. 252

(58) See Callahan op cit. p. 373.

(59) Leslie Sumner "Towards a Credible View of Abortion" Canadian Journal of Philosophy, v. 4, 1974, p. 164.

(60) Ibid p. 168

(61) Ibid pp. 169-171

(62) Ibid p. 178

(63) Ibid p. 178

(64) Ibid p. 179

(65) Ibid p. 180

(66) John O'Connor "On Humanity & Abortion" Natural Law Forum, 1968, v. 13, p. 131.

(67) Zygote in the sense of the fertilised or activated female egg.

(68) James Ebert "Interacting Systems in Development" (New York) 1965, p. 8 - quoted Gallahan, p. 376.

(69) F. J. Gottleib "Developmental Genetics" (New York) 1966, p. 2, quoted Gallahan, p. 376.

(70) Paul Ramsey "The Morality of Abortion" in Life and Death: Ethics and Options (Seattle University Of Washington Press) 1968, p. 62.

(71) Joel Rudinow "On the Slippery Slope" Analysis v. 34.1, 1973, p. 174.

(72) Anne Lindsay "On the Slippery Slope Again" Analysis v. 35.2 1974, pp. 32-33.

(73) Donald de Veer "Justifying Wholesale Slaughter" Canadian Journal of Philosophy v. 5, No. 2, Oct. 1975, p. 251.

(74) Rudinow op. cit. p. 175.

(75) Roger Wertheimer op. cit. p. 25.

CHAPTER TWO

Personhood and Potentiality

The Foetus as a Person

It was Michael Tooley's article "Abortion and Infanticide" which sparked a series of publications in the seventies dealing with the nature of moral personhood, although the distinguishing of persons from human beings had been postulated by John Fletcher[1] as early as 1954. What differentiates Tooley's work is its explicit espousal of a moral precept which had previously only been expressed as a conservative criticism of criteria which stipulated sophisticated neurological development as the prerequisite of humanity. This precept is that infants as well as foetuses do not have a right to life and are not persons.[2]

For Tooley, any discussion of the permissibility of abortion depends on deciding what properties an entity must possess to have a serious right to life, this being the definitive characteristic of a person. This is a purely moral discussion as he makes clear:

> "I shall treat the concept of a person as a purely moral concept, free of all descriptive content..... in my usage the sentence "X is a person" will be synonymous with the sentence "X has a serious moral right to life." 3

Rights are dependent on an entity's ability to have desires. For example a kitten may have a right not to be tortured because its behaviour - crying out in pain, attempting to escape its torturer and so on - indicates a desire not to be tortured. However, the kitten does not have a right to life since it cannot conceive of itself as a living discrete experiencing entity. Thus, to kill it painlessly is not

morally impermissible.[4]

The reason why a kitten is not a person is because it fails to satisfy Tooley's "self consciousness requirement" namely:

> "An organism possesses a serious right to life only if it possesses the concept of itself as a continuing subject of experiences and other mental states and believes that it is itself such a continuing entity." 5

Only persons have consciousness as opposed to purely behaviouristic desires such as those a hunted rabbit may have. A right to life is:

> "not just the continued existence of a biological organism but the right of a subject of experiences and other mental states to continue to exist." 6

So the entity must have the concept of self, the capacity for some sort of introspection; an awareness of time; of birth and death and the ability to formulate a desire to keep on living. Unless it possesses this conceptual framework then it cannot have a right to life. Since foetuses and infants lack this framework they cannot have a serious right to life and cannot be persons. A phrase of Wittgenstein's comes to mind when dealing with Tooley's analysis "the limits of my language are the limits of my world." Similarly Tooley believes that the limits of an entity's concepts are the limits of its rights. As he summarises his argument:

> "having a right to life presupposes that one is capable of desiring, to continue existing as a subject of experiences and other mental states. This in turn presupposes both that one has a concept of such a continuing entity and that one believes that one is oneself such an entity. So an entity that lacks such a consciousness of itself as a continuing subject of mental states does not have a right to life." 7

A couple of points should be clarified before discussion is continued. First, Tooley is not advocating the wholesale killing of neonates. Rather he is claiming that they may be killed on utilitarian grounds if they are for example, severely retarded or grossly deformed. This qualification does not make his argument any less obnoxious to his opponents. Second, the obvious conservative rejoinder to Tooley is that of potentiality.[8] A consideration of this matter constitutes the final part of Tooley's article but my discussion of it shall be deferred until the second section of this chapter which deals with this topic.

The nature of the personhood approach is now becoming clear. Humanity is irrelevant to rights. The "ought" of rights cannot be derived from the "is" of biology. This notion first mooted by David Hume[9] now resurfaces some two hundred years later. Rosalyn Weiss restates Hume's guillotine in terms of personhood:[10]

> "Considerations regarding the definition and application of the term 'human' are not essential in themselves but as a means to a further end; the end is plainly the ascription of rights ..... What sort of things have rights? This is a moral question, not a question of biological facts."

Thus:

> "our distinction must be drawn between entities which have rights and entities which do not, between persons and non persons." 11

This distinction means that the relevant subject of inquiry is to find:

> "a non arbitrary rationally defensible morally relevant standard by which to establish not the biological status of the foetus, but its moral status. We must seek criteria relevant to a thing having rights, that is to its personhood, and must steer quite clear of any attempt to find criteria by which to determine a thing's humanity." 12

Mary Warren takes up this challenge to define "the moral community"[13] She argues that genetic humanity per se is not the qualification for membership and offers as an alternative five factors which together make up the criterion of personhood namely:

1) Consciousness - of objects and events both internal and external.

2) Reasoning - including a problem solving capability.

3) Self motivated activity.

4) The capacity to communicate on an infinite number of topics.

5) The presence of self concepts and self awareness, individual and racial, or both.[14]

Any being which lacks these properties cannot be a person. As for the apparent confusion between "person" and "human being" this is attributed by Warren to a confusion between genetics and morality:

> "It is true that the claim X is a human being, is more commonly voiced as part of an appeal to treat X decently than is the claim that X is a person, but this is either because "human being" is here used in the sense which implies personhood, or because the genetic and moral senses of human have been confused." 15

Thus, some human beings may not be persons and some persons may not be human beings. Even a fully developed foetus lacks the five attributes according to Warren and thus is not a person. Indeed, it is "considerably less person like .... than the average mammal".[16] Warren's moral conclusion is that the woman's right to bodily privacy is always paramount in any abortion case (even late term ones) since there are no other rights to conflict with it.

Jane English does not agree with Warren's conclusions on the moral

permissibility of late abortions. She believes that it is impossible to provide a sharply focussed concept of a person, instead:

> "Person is a cluster of features of which rationality, having a self concept and being conceived of humans is only a part." 17

The latter half of her statement indicates her failure to appreciate just how species neutral Tooley's, Warren's and Weiss' philosophies are.

English believes the "typical person" to be a bundle of five factors, namely, biological, psychological (including sentience), rationality, social (being accepted as a person by one's fellows) and legal (being accepted as a person by the legal order governing one's society).[18] There is not a "single core of necessary and sufficient features" - only features which are more or less typical.

The last two features introduce a subjectivist element into the nature of personhood which was avoided by Tooley and Warren. As Noonan has pointed out, various ethnic and religious minorities have not been recognised as moral persons in the past, for example, the Jews in Nazi Germany, or the untouchables in India, although their members possessed the qualities of rationality and self awareness. English is only paying lip service to the concept of personhood. The presence of biological considerations in her criteria indicates that she has failed to appreciate the normative nature of personhood.

English's confusion is confirmed by her treatment of foetal personateness. She considers that it lies in the "penumbra" of personhood, and as such our psychology cannot countenance its destruction:

> "Our psychological constitution makes it the case that for our ethical theory to work it must prohibit certain treatment of non persons which are significantly person like." 19

This is simply question begging. Either an entity is ascribed rights or it is not. If the foetus is given rights then it is a person. To speak of a "personlike" entity is simply a piece of special pleading on behalf of the foetus, designed to sneak it into the category of persons. If English believes that the foetus possesses the qualities which makes it a suitable subject for rights then she should say so. That she does not indicates that she is torn between her emotional reaction to the foetus and her desire for intellectual consistency. She wishes to protect the late term foetus because of its resemblance to a neonate, ignoring Tooley's and Warren's point that neither is a person. To achieve her end, she retreats into the realm of subjective psychology:

> "In the early stages of pregnancy, abortion can hardly be compared to murder for psychological reasons, but in the later stages it is psychologically akin to murder." 20

Thus:

> "even if the foetus is not a person, abortion is not always permissible because of the resemblance of a foetus to a person." 21

There is little wrong with English's line of thought which cannot be rectified by dispensing with equivocation. She ought to say that the mature foetus should be considered a person, because most of us think of it as such. Attempts to create a special moral status for the mature foetus on the grounds of its family like resemblance to a person simply confuse the issue.

Tristam Englehardt argues that there are two separate issues

involved in personhood. The first is ontological, that is the analysis of the term "human person"[22] vis a vis the referent "human life"; the former being of an ethical and the latter of a biological character. The second is operational, that is how one is to obtain measurable criteria which would justify the statement that a person exists where none existed before.[23]

Englehardt, like Tooley, concludes that persons are "the subjects of self consciousness". He enlists the aid of ordinary language analysis to demonstrate the incongruity of speaking as a person. It is spoken of as asexual, non sentient animal:

> "At most, the foetus is an animal with great promise of being more than just an animal .... there is no immediate sense to be made of personal language with reference to the present state of the foetus" 24

The obvious counter argument to the self consciousness criterion is that persons temporarily lose their self consciousness and thus their personhood when they sleep or are knocked unconscious, and so on. A strict construction of Tooley's and Englehardt's criterion, would mean that it would be morally permissible to kill these individuals during these temporary losses of self awareness.

Tooley's and Englehardt's reply is to distinguish between entities which <u>have had</u> self consciousness, have lost it temporarily, but will regain it in the normal course of events and entities who have <u>never</u> enjoyed self awareness. As Tooley says:

> "An individual's right to X can be violated not only when he desires X but also when he would now desire X were it not for one of the following (i) he is in an emotionally unbalanced state (ii) he is temporarily unconscious (iii) he has been conditioned to desire the absence of X." 25

He then elaborates the rights of the temporarily non self conscious individual. If you kill him, you violate his right to life "because one violates a desire he had before becoming unconscious". Namely, his desire to continue his existence "as the subject of experiences and other mental states". The foetus and neonate have never formulated such a desire, indeed they are incapable of doing so.[26]

Englehardt frames the point in this way. The sleeper is not a "promissory note" like the foetus. Rather it is entity which has been a person.[27] The "potentiality of the sleeping person is concrete and real in the sense of being based upon past development of a full blown individual". The sleeping person had an actual conscious life beforehand, "the discontinuity of sleep is bridged and woven together in mental life".[28]

However, both Tooley and Englehardt would find it difficult to argue against the proposition that if the individual's loss of self consciousness was permanent, as in the case of a comatose individual of the Karen Quinlan type, then it would be morally permissible to switch off his or her life support system or even kill the individual if he or she survived withdrawal from the system.

For Englehardt the conceptus, embryo and foetus do not show any sign of the rationality which distinguishes the person from other organisms. To talk of the foetus as a person is to confuse its potentiality with its current actuality, that is its future states with its present ones.

Like English, Englehardt believes that the manner in which an entity is regarded socially affects its moral status. The ethical

significance of the person is dependent on its falling within a social category. That is to say, by its being treated as a value to be respected individually and by the community.[29]

He employs this concept to justify a difference between the treatment of foetuses and infants. Englehardt accepts that a stringent definition of a person excludes infants from the category since they lack language and the ability to engage in meaningful social interaction. Thus, like foetuses, they are only potential persons. But Englehardt considers that this group of potential persons should be protected - unlike foetuses. His justification of this discrimination between potential persons shall be discussed infra in the section dealing with potentiality.

Concluding his argument, Englehardt suggests that the ontological status of the foetus is non personal, or merely biological.[30] Therefore the foetus has no rights to be infringed by its abortion. Medicine ought to serve human persons, not human life, and so women should be permitted to have abortions at any stage of their pregnancy.

Lisa Newton provides possibly the most uncompromising statement of the view that personhood is a problem of ascription rather than description. Adopting the is/ought distinction, she argues that the foetus's humanity is a factual question whilst its personhood is an evaluative one and "never shall the one entail the answer to the other".[31] There is an obvious biological continuity to the foetus's life from conception onwards. The doubtful issue is the moral import of this life at its various stages.

Personhood for Newton is a moral and legal category attributed by

moral and legal orders on ground which have varied throughout history. She believes that a person is always distinct from a thing for it is the bearer of rights and responsibilities; the focus of moral obligations and the possessor of legal standing:

> "to say a foetus has rights is to say that a foetus is a person and the two attributions are in the context identical in meaning and neither ... is entailed by any set of biological facts." 32

Thus, the prime question is whether the foetus should be given rights when "history and law do not compel us to". Personhood in previous societies was ascribed to animals, natural formations and human artifacts. There were courts in Athens to try animals accused of various delicts.[33]

Equally, personhood has been denied to certain human beings on various grounds such as sex, family, race or ethnic origin. These exercises in discrimination now seem grossly unfair, but they illustrate Newton's main thesis which is that personhood will never emerge at some "magic moment"[34] in the foetus's growth. Instead, good reasons for granting rights to some but not all entities will have to be provided. In effect, what Newton has done is to take John Connor's argument that humanity is a decidable and not a discoverable criteria and applied it to personhood.

Gary Atkinson provides a summary of the two main criteria of personateness presented in the literature. The first centres on an entity's capacities. This presents the difficulty of determining the appropriate level of achievement an entity must attain to be enfranchised as a person. The second focuses on how the entity is received.

The problem inherent in the second approach is that it permits any troublesome or unproductive minority to be arbitrarily excluded from the moral community.[35] As Atkinson admits:

> "Abortion can be said to have been justified by moral argument only when a correct definition of a person has been presented and adequately defended." 36

Having set out the crux of the abortion problem, Atkinson goes on to provide a very puzzling solution to it. He professes his distaste for Tooley's criterion and argues that genetic humanity should be the morally relevant factor in ascribing rights. Though it is not per se "a sufficient condition for being a person". It is relevant "in distinguishing forms of killing".[37] He claims that:

> "nothing that was neither self conscious nor a member of a species whose adults are normally self conscious could be a person."

Since human beings are the only species which satisfy these conditions then personhood is linked to humanity.

The next phase of his argument is obscure. He first states that he is "not arguing on behalf of genetic humanity as a mark of moral humanity". Nor is he "suggesting that genetic humanity is necessary for moral humanity".[38] But he then writes:

> "genetic humanity may be the only non question begging mark we have to distinguish the moral community as is presently encountered." 39

Reconciliation of these various statements appears to be impossible. But an interesting argument can be teased out of Atkinson's work. This is that genetic humanity offers the simplest and least arbitrary definition of personateness.

The weakness of Atkinson's position is that he derives his conclusions by a process of inductive rather than deductive reasoning. Since personhood is dependent on self consciousness, and only human beings have self consciousness, then the best way to define personateness is by humanity. There are, after all, some four billion confirming instances of his thesis, are there not? And where is the self aware non human entity who might refute his thesis? But this approach, although seductive, is fallacious, for we have known since Hume[40] that a general cannot be derived from a series of particulars. Atkinson's theory can be rebutted by simply hypothesising a rational self aware non human entity and challenging Atkinson to account for it within the framework of his existing theory.

Comment and Criticism of Foetal Personhood

The personhood and humanity arguments are mutually exclusive. The judging individual has to make a choice between the two. Either rights go to human beings by virtue of their humanity as evidenced by the fact that only human beings currently have moral and legal rights. Or entities - any entities - are ascribed rights and duties by reason of their possessing sufficient intellectual awareness to comprehend these concepts. The proponents of personhood would concede that human beings of a certain level of intelligence are the only species on this planet to possess such awareness. They would counter however, that foetuses, although human, lack this property and are thus only potential, not actual persons.[41]

If the argument from humanity is accepted, then per earlier analysis[42] the abortion conservative can deploy a formidable series of

arguments to have the foetus enjoy rights from its conception on. To do otherwise, is to admit the propriety of discriminating between human beings by reason of their differing capacities.

It can be argued that such discrimination already occurs. For example, legal capacity varies according to various factors such as age, intelligence and mental stability (or rather the lack of it). An individual may not vote, engage in sexual intercourse, or enter into contracts until he or she has reached a certain minimum age, or is of a sound and sufficient intelligence. Insane and retarded adults have different legal rights and duties under Western law to those of individuals of normal intelligence. Given that such discrimination already exists, why should we blanch at discriminating against foetuses?

The weakness of this argument is one of scale. None of the examples cited involve as radical an infringement of the human being's interests as abortion. Historical examples of equivalent discrimination in the moral treatment of human beings such as the Jews in Nazi Germany; the untouchables in India, or the aboriginal peoples of the Americas now engender moral revulsion.

If foetuses are to be treated differently, despite their humanity, then what are the possible "spill over" effects on our treatment of other unproductive human beings such as the retarded, the handicapped and the aged? Fletcher and Sumner are prepared to let ancephillics (human beings without nervous systems) be killed. If consciousness is to be the sole requirement then marginally conscious human beings such as the comatose and the severely retarded are in danger of losing their right to life.

This "uptake argument" has found favour with such abortion conservatives as Gary Atkinson and Ronald Gerber. Atkinson writes:

> "the denial of human status to the zygote cannot be justified by good reasons and so cannot be used to justify abortion while opposing infanticide and voluntary euthanasia" 43

moreover,

> "the best argument against abortion involves showing its heinous consequences for those already born" 44

R. J. Gerber echoes this approach. He claims that statutes permitting abortion will be open to liberal judicial construction which will result in infanticide and euthanasia being brought within their scope. The rational which permits abortion is equally germane to infanticide and euthanasia and will consequently result in legislation permitting those activities.[45]

> "the real danger lies in the possible diminution of value and humanity accorded to the socially deprived among the born" 46

The uptake argument is a neo "slippery slope". Abortion is morally indistinguishable from euthanasia or infanticide, admit the permissibility of one and you are equally bound to accept the permissibility of the others. As David Gerber points out however, this perceived "inevitability" is only a pseudo inevitability. Its akin to arguing that seventeen year olds should have the vote because they are so similar to eighteen year olds and then working down by yearly degrees to three year olds. In addition, there are other elements such as women's choice which are absent from the euthanasia and infanticide examples.[47]

These arguments are alarmist attempts to conjure up images of

rabid pro-abortionists gleefully terminating every pregnancy in sight and measuring up babies and grannies for similar treatment once they've duped the legislative and judiciary again.

What gives arguments of the uptake sort their potency is that they appeal to our sense of fairness. As such, they give a valuable insight into contemporary attitudes towards rights. Rights are seen as trumps. Entities possessing them form part of a different moral calculus from those who do not. The two calculi being referred to are utilitarianism and rights. Non personal entities are subject to the former. It is this ethical theory which underpins our killing animals for food, sport and economic gain. Persons are subject of the latter and it is considerations of person rights which protect the aged, infirm and socially unproductive from being killed, regardless of any saving in social resources which would accrue from such action.

Any abortion liberal who couches his argument in terms of humanity is ultimately forced to devise criteria for humanhood which seem arbitrary and unrelated to the known biological data. Of course, it may be that this writer's preference for conception as the most tenable mark of humanity is a minority opinion. Perhaps the majority would consider humanity to be a product of form or brain development or whatever. It is for each individual to decide.

All the members of the foetus as a human being school share a common failing. They do not address the question of why human beings and human beings alone are ascribed moral rights and duties and why their interests are held to be of special significance. Instead, they proceed from the assumption that the human being/rights nexus is

self evident. Their point might be framed in this way:

> "Look, isn't it obvious that adults, children, and even neonates cannot be killed except under very limited circumstances. They have varying rights admittedly, but the right to life is the most fundamental right, and is common to all. Therefore, all we have to do is decide whether this right should be extended to foetuses."

The humanist's reticence is exploring the reasons underlying the rights/human being connection is understandable. Once investigation into the matter is undertaken, then it becomes obvious that genetic or biological humanity is irrelevant to rights. What is of significance are the properties enjoyed by human beings of a certain level of sentience - a sentience not shared by either foetuses or infants. Rights are independent of species. The moral system has a different logic and a different entity variable for its logic. That variable is the person, not the human being.

Warren's theory of moral personhood is the most thorough going attempt to provide a convincing definition of the qualities, which constitute the moral person. The others limit themselves to demonstrating the moral/biological dichotomy and outlining the limits of the foetus's capacities which disqualify it from being a right and duty bearing entity.

The abortion conservative is not confounded by the shift to personhood. He can argue that foetuses ought to be given rights since the differences between these human beings and the human beings who are given rights are insufficient to justify such a discrepancy in moral treatment. This is what English and Potts were attempting to do when they argued that late term foetuses and neonates should have equal

rights. Once an entity is ascribed moral rights and duties then it is a person, there being no element to personhood over and above the ascription of rights and duties.[48]

The conservative is engaged in a considerably more difficult task than that undertaken by Potts and English. Personhood for the conservative ought to be ascribed to the foetus at conception. The problem in making this view appear plausible is the massive disparity in the abilities of embryos and neonates. If the neonate's claim to personhood is problematic then the conceptus' seems ludicrous by comparison. Given this situation, it seems plausible to say that potentiality is the conservative's only workable line of play. His argument should be that since the embryo will develop into an entity possessing the qualities of personhood then it ought to be treated as a person from its conception onwards. Conception being the last arbitrary point at which to locate the beginning of the biological continuum which will see the entity develop its personal properties.

An amended slippery slope criticism can be used to back up the argument from potentiality. Neonates and infants are ascribed a right to life both legally and morally, in Western societies, even though they lack the standard features of a rights bearing subject and only have the potential to develop these features. This potential is shared by foetuses and embryos. To treat potential persons differently seems to be a breach of the principle of formal justice, unless good reasons for the discrimination can be provided. This argument from potentiality shall be discussed infra. The next stage in analysis centres on the usefulness of applying jurisprudential conclusions on legal

personality to its moral equivalent.

The Insight from Law

The discussion appears to have reached a stalemate. On one side there is the claim that moral rights are held by human beings, by reason of their humanity. The obverse claim is that rights are held by persons. Any entity including a human being may be accounted a person, depending on the degree to which it possesses the stipulated properties of personhood such as the ability to communicate, reason, be self aware and so on.

Admittedly, there may be difficulty in stipulating the abilities which qualify an entity to be the subject of rights and duties. This is a limitation common to all normative science. Unlike the causal scientist, the moral thinker can only present his conclusions and the reasoning by which he achieved them and ask each individual to make a judgement upon them. It is possible for the moral scientist to attack unfavourable decisions as arbitrary or unsound, but an empirically verifiable rebuttal along the lines of causal or natural science is unavailable to him.

This does not mean that a purely subjective view on the nature of personhood and the morality of abortion has to be adopted. Each individual's moral judgements are influenced and shaped by discussion with others. All relevant information ought to be available to the individual to enable him to make an informed choice on abortion's permissibility. An examination of how jurisprudence has dealt with the problem of legal personality shall help us to achieve this end. Is the legal person held to be a different form of consideration from

the human being? Can entities other than human beings be legal persons? Is the legal person/human being distinction a purely semantic rather than a substantive one?

The answers to these questions are persuasive rather than binding. The group which comes off worst in this inter-disciplinary analysis can argue that legal and moral conclusions are irreconcilable. That is their privilege.

At first blush, legal philosophy appears to favour the distinguishing of persons from human beings, as the work of the following three jurists shows:

Hans Kelsen:

> "to define the physical (natural) person as a human being is incorrect because man and person are not only two different concepts but also the results of two different kinds of consideration. Man is a concept of biology and physiology, in short, the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms." 49

David Derham:

> "So soon as there is any system, any organisation with a logic of its own, just as soon there must be some constants, some reference points given on which to base the logic of the system. Just as the concept "one" is essential to the logical system developed and yet is not one something (e.g. apple, orange, etc.) So a legal system ..... must be provided with a basic unit before legal relationships can be devised which will serve the primary purpose of organising the social facts. For the logic of the system, it is just as much a pure concept as the "one" in arithmetic. It is just as independent of a human being as one is from an apple." 50

F. H. Lawson:

> "Legal personality is not the same as human personality ..... legal personality and legal persons are as it were mathematical calculations devised for the purpose of simplifying legal calculations." 51

The legal person is the entity variable in the universe of legal discourse. It is a right and duty bearing unit and has no existence independent of the rights and duties it personifies. As Kelsen says:

> "the 'person A' is the comprehension of all the legal norms qualifying acts of A as duties or rights; we arrive at 'the personality of A' when we conceive of these norms as forming a single unit which we personify." 52

In adopting this tack, Kelsen is echoing Kant, who concluded that:

> "the unity of experience would never be possible if we were willing to allow that new things that is new substances, could come into existence ... This permanence is however, simply the mode in which we represent to ourselves the existence of things in the field of appearance." 53

The sum of a thing can never be greater than its parts. A leaf for example, is not a 'super entity' in addition to the qualities of colour, shape, biochemistry and so on which make it up. To state that there is something more to the legal person than a coalition of legal rights and duties is to duplicate the object of cognition. Thus, a human being is not a legal person if there are 'no legal norms qualifying any behaviour of this individual as a duty or a right."[54]

By this analysis legal persons and human beings are not equivalents. The criterion of legal personhood is whether an entity's behaviour is qualified as a right or duty by the legal system. Transplanting this to moral philosophy, a moral person is an entity whose behaviour is qualified as a right or a duty by the moral order. The moral order

being referred to is Western morality derived as it is from the Judaeic/ Christian tradition.

This conclusion does not take us very far in deciding why certain entities are ascribed rights and duties whilst others are not. Nor does it aid us in determining whether foetuses should be made the subject of rights and duties. It is at this point that the abortion conservative can counterattack. He can argue that the entities which actually are treated as legal persons are extra uterine human beings. Law is simply a coercive order for the regulation of human behaviour. Given this state of affairs then shouldn't all human beings be treated as persons both morally and legally? To do otherwise is a breach of the principle of formal justice. Since foetuses are human beings from conception, they should also be treated as legal and moral persons from that point. The present legal and moral differentiation between extra and intra uterine human beings is unfair.

Further study of the jurist's work appears to give some credence to this argument. Kelsen states for example:

> "When one speaks of actions and forbearances of a juristic person, it must be actions and forbearances of human beings which are involved .... the legal order can impose rights and duties and confer rights only upon human beings, because only the behaviour of human beings can be regulated by the legal order." 55

Derham:

> "All legal systems (at least as far as I am aware) are concerned with the control and organisation of relations between human beings by means of general rules." 56

Lawson:

> "legal problems ultimately concern human beings." 57

If this argument is to be rebutted then it must be shown that the properties which an entity must possess to be accorded legal rights and duties (in Western legal systems) are independent of genetic humanity. Professors Sam Coval and J. C. Smith have undertaken a study in this very area. Their purpose was to elucidate the abilities an entity must enjoy to be considered "an agent"; that is to be accorded the status of an entity variable in the logic of Western legal systems.

Coval and Smith's thesis is that the fundamental data of the law is action. Only actions as opposed to thoughts are the subject of legal rights and duties. If it is possible to identify the salient features of an action then it should be possible to adduce the salient properties of the agent, that is the performer of the action, which qualify him or her as an entity variable of legal systems.

The law provides for the mandatory set of features of a standard action which the agent will be held fully responsible for. In addition, it provides for a set of adjustors when the agent's legal responsibility will be held to be diminished. These adjustors are the analytical tools which will unlock the concept of action and allow the criteria of agency to be defined. Each adjustor cancels a correlative feature of a standard action. If all the negative features of an action that is the adjustors, are removed then the positive features of a standard action will remain.

Coval and Smith list five adjustors[58] namely accidentally; mistakenly; inadvertently; carelessly; and involuntarily. To say that "A broke the window accidentally" means that A's agency was diminished by an unforeseen interfering event which prevented him from doing the

act he intended. 'A' meant to kick the football to B. He did not foresee that the ball would smash the window. Consequently, in full agency, the agent's action must be the result of events which are foreseen.

An agent performs an act mistakenly, when he intends to do action 'A' but does action 'B' instead, owing to his having false beliefs. An example of this would be a surgeon amputating the wrong leg. An agent executes an action inadvertently when he completes the commission of the act he intended but this action has an unforeseen result. The distinction between accident and inadvertence is that in the first case there is an unforeseen interfering event which prevents the agent from completing his intended task. In the second case the action is completed but produces an unforeseen result.

A careless action is constituted by the agent engaging in act (i) which he may or may not complete and in the course of performing act (i) bringing about act (ii) due to the lack of care he exercised in relation to act (i). The criticism of a careless action attaches to how the action was performed, not to its results.

The distinguishing feature of an involuntary action is that it involves an infringement of the agent's free choice or interference with the set of interests which normally guide an agent's actions. An example of this (albeit a grossly overworked one) is an agent being forced to do an action he would normally eschew because someone is pointing a gun at his head.

In addition to the adjustors, there is the blanket cancellation of an action constituted by the agent denying that he performed it.

This infers that some relevant piece of behaviour of the agent's body has to be in effect when he performs an action.

Working back from the adjustors, a picture of a standard action emerges.[59] The results of a standard action must be foreseen. It must be a product of true beliefs. A certain standard of care must attend its execution. A normal choice and intention of the agent must be the relevant cause of the action.

Having identified the features of the standard action, it is now possible to derive the qualities of a standard agent. An agent must be a sentient, reckoning, goal oriented, physically effective system. He or she must be able to foresee consequences; gauge conditions; have beliefs; choose freely; exercise skill and care in the performance of actions and his, or her own body must be the relevant cause of the action. A full agent must be able to predict, calculate and appraise the truth value of beliefs. He or she must have interests, needs and goals which can be ranked in terms of their relative importance to him. The full agent must be able to actuate these goals.

Nothing in this criterion of agency supports the view that genetic humanity is a necessary feature of agency. Any entity, regardless of species, which has these qualities qualifies as an agent or person.

By undertaking an analysis of action as a legal concept, Coval and Smith arrive at a portrait of an agent, (or person) which bears a family resemblance to Warren's criterion of moral personhood and Fletcher's conditions of humanhood. (The nature of Fletcher's misnomer should now be clear). The advantage of Coval and Smith's work is that it highlights in a non arbitrary way the implicit assumptions that legal systems make about the entities whose behaviour is made the subject of

legal rights and duties, that is persons.

Clearly, neither foetuses nor infants are agents in the Coval/Smith sense. They only have the potential to become agents. Applying Coval and Smith's conclusions to the moral sphere, neither foetuses nor infants are persons. They are only potential persons. This conclusion does not preclude a conservative objection to abortion based upon the ascription of moral and legal rights to one group of potential persons, (infants), but not to another (embryos and foetuses). How can this practice be justified? A consideration of this question and potentiality in general shall conclude this chapter.

One final point ought to be noted. The theory of personhood if accepted is a theory of liberation with important moral consequences for how we as human beings treat other entities who could arguably be persons. Experiments with chimpanzees for example, indicate that they are capable of mastering sign language and can differentiate themselves from their environment and other members of their species. Mammals such as dolphins and whales display similar abilities. If rights go to persons and not simply human beings, then our present practice of killing these entities for gain or using them as fodder for medical experiments cannot be distinguished from performing such practices on other persons of our own species.

Potentiality

Tooley's argument on potentiality runs as follows. First he considers how the conservative might amend his position to accommodate the realisation that species considerations are irrelevent to rights. The conservative can argue that there is a property even if one is

unable to specify what it is, that is (a) possessed by adult humans and (b) endows any organism possessing it with a right to life.

If there are properties which satisfy points (a) and (b) at least one of those properties will be such that any organism potentially possessing that property has a current right to life simply by virtue of its potentiality. That is to say, it has a right to life now by virtue of the fact that it will in the course of its normal development acquire the property which qualifies an organism to be ascribed rights. Since adult human beings have the relevant property entitling them to personhood then any organism with the potential to develop into an adult human being including embryos and foetuses, must have a right to life.[60]

Tooley believes that this "potentiality principle" can be refuted by another moral principle which he calls "the moral symmetry principle."[61]

This second principle is explained thus:

> "Let C be a causal process that normally leads to outcome E. Let A be an action invoking a minimal expenditure of energy that stops process C before outcome E occurs. Assume further that actions A and B do not have any other consequence and that E is the only morally significant outcome of process C. Then there is no moral difference between intentionally performing action B and intentionally refraining from performing action A, assuming identical motivation in both cases." 62

This principle is then applied to the problem of foetal potentiality. Tooley asks us to imagine that a remarkable chemical has been developed which can be injected into kittens and transform their feline brains into human ones. The kittens would have self awareness, reasoning powers, a problem solving capability, an ability to use language and

so on.

It is morally indefensible to deny the treated kittens a right to life since there is no relevant moral difference between them and sentient human beings. However, it would not be seriously wrong to kill the kittens instead of injecting them. The fact that one can initiate a causal process which will transform the kittens into entities with a right to life does not mean that the kittens have a right to life prior to being injected.

By the dictates of the moral symmetry principle, if it is not seriously wrong to refrain from injecting the kitten (inaction) then it is equally not wrong to interfere in the causal process once it has started (action) by neutralising the chemical or killing the kitten. By the same token, it is not wrong to destroy a member of the species homo sapiens which presently lacks the properties which qualify it as a person, but will come to have them. The only difference between the kittens and the foetus's potentialities is the time at which they were acquired.[63]

The crux of Tooley's argument is his assumption that omission is morally equivalent to action, and that to fail to do something to prevent adverse consequences 'A' is as wrong as performing an action, which result in adverse consequences 'A'. As Tooley himself concedes, this is a controversial claim but his point is not without a certain intuitive appeal. What after all is the moral difference between (a) Jones failing to warn Smith that he is about to be blown to pieces by a bomb (thus saving Jones the trouble of killing Smith) and (b) Jones shooting and killing Smith.

The legal ramifications of each scenario are radically different. Perhaps this legal distinction between act and omission or misfeasance and non-feasance reflects a perceived moral difference between the two. If A shoots B and B dies as a result, then ceteris paribus A is guilty of murder. But if A sees B drowning and only has to throw him a life-belt to save him but fails to do so then he is not guilty of any crime.

Of course, it is possible to say that this stage of affairs is morally unacceptable and there is no morally relevant difference between the two cases to match the legal one. Consider this example however. It is hard to argue that most people in the West enjoy a remarkably high standard of living, vis a vis the third world. Every year, millions of the latter's citizens die of easily curable diseases for the lack of drugs, or starvation for lack of food.

Now it is plain that if we in the West would donate even ten per cent of our annual GNP to UNICEF and the other relief agencies, then millions of people would be saved. Because we do not do so, they die in numbers which exceed the death tolls run up by Hitler and Stalin. However, we do not feel that we are murderers, and we certainly do not feel as we would feel if we actually shot the starving African child as opposed to letting her die through our neglect.

This moral intuition is not immutable. Perhaps if the examples framed by Tooley were made widely known, then moral attitudes might shift to his point of view. But in the light of present moral consciousness, it is hard to argue with the contention that Tooley's moral symmetry principle does not hold good. Western moral thought does consider the killing of the foetus to prevent it from becoming a

person to be morally more pernicious than merely failing to initiate the process that will give the entity its potentiality. Thus, morally speaking, abortion is a different case to celibacy.

There remains the problem of explaining why neonates receive moral respect while foetuses do not. Tristam Englehardt attempts to justify the difference in treatment and thus defuse infanticide by suggesting that the infant

> "plays a role socially and qualitatively distinct from that of the foetus. It is this new social richness which distinguishes the role child." 64

The infant, although lacking the necessary qualities of personhood, is appreciated socially as an individual to whom persons have actual, not merely potential, obligations. This social value is not shared by intra uterine human beings. The separation of neonate and mother means that the first can play a relatively independent role in the social matrix. As Englehardt says:

> "A social and not simply biological structure is available"

because

> "the mother and child relationship is actively and explicitly social." 65

Englehardt believes that the infant's ability to be the focus of other individual's concern and attention distinguishes it, morally speaking, from the foetus and makes its preferential treatment justifiable.

Atkinson suggests that Englehardt's distaste for infanticide is leading him to do a piece of special pleading on behalf of the neonate.[66] Indeed, it is possible to argue that Englehardt is covertly subscribing

to the uptake argument and its conclusion that the killing of neonates would have a brutalising effect on society as a whole.

Francis Wade criticises Englehardt's argument on the grounds that it misunderstands the nature of the foetus's potential. The potentiality is no mere "promissory note" as Englehardt believes, but a guarantee as to the future:

> "the potentiality of the foetus to become an adult is not a passive potency which is neutral to the future, nor a specifiable active potentiality which is very "iffy premise" but is an active guarantee of the future as far as the agent is concerned." 67

Wade's rejection of Englehardt's thesis is based on a perception that the biological/personal disjunction is erroneous. He puts forward three arguments to substantiate his premise that no new personal being arises from social visibility. First, there is no source for this new being. Second, there is an obvious continuity between the genotype and the adult. Third, the body prepared in genotype plays a vital part in consciousness.[68] For Wade, the foetus is identical to the mature human being:

> "the natural tendency to think and to choose is basic to the being of the foetus and the biological tendencies (the ones most clearly active in the genotype) are only the specifications of the radical tendency to become a thinking being. Only by the specification of a body and a brain can this foetus ever become the actually thinking being its nature tends to. Consequently, it is not metaphorical to say that the foetus is in this sense personal, its whole natural thrust is to become a functioning being." 69

This argument is misconceived. By syncretising humanity and personateness, Wade employs the foetus's humanity as the basis for it being awarded rights. The error of confusing causality with normativity

(the "is" with the "ought") has already been pointed out. The relevant question in the potentiality discussion is still the one posed by Tooley, namely, should the foetus be given rights because of its capacity to develop the properties of personhood or should such ascriptions be postponed until the entity's potential is realised?

Whilst logic may dictate the moral permissibility of infanticide, the practice remains at odds with current moral intuitions. As such, it represents a serious stumbling block to a widespread acceptance of the liberals' conclusions on potentiality and abortion. The abortion liberal faced with such moral disquiet might argue on the following lines:

> "its true that we have to accept the moral permissibility of infanticide as part and parcel of the moral permissibility of abortion. But there are important differences between the two practices which will radically affect the frequency with which they are performed. In the case of abortion, the only way in which the woman can protect her interests of bodily privacy and freedom of action is for the foetus to be killed. There are other options available in infanticide. The woman can simply walk away from her child without suffering any infringement of her interests. The state can pay for orphanages to care for unwanted neonates. And what of the opponents of the practice shouldn't they demonstrate their sincerity by paying for the care of the threatened infants."

So <u>in practice</u> if the measures outlined above are implemented then the problem of infanticide need not arise.

Gary Atkinson opposes this view. The abortion liberal cannot rely on the charity of his opponents to care for unwanted children. Thinkers such as Tooley and Warren will have to face up to the unpalatable fact that their arguments accept the moral permissibility of killing a neonate because it is ugly or retarded or otherwise

socially unacceptable. Per Atkinson, the abortion conservative need not put his money where his principles are:

> "I wouldn't have wanted the Jews to be killed, but neither would I want six million of them to move in with me." 70

Atkinson believes abortion and infanticide to be inherently wrong. Thus, there is no moral obligation on the opponents of these practices to pay protection money to prevent them occuring. Rather they should be stopped altogether. Immoral acts should be proscribed by virtue of their immorality, not "bought off" by a process of economic exchange.

Atkinson is trying to discredit the pro choice view by placing abortion on a moral par with the holocaust. This tactic is dishonest and unfair. The killing of the Jews is commonly perceived as a clear cut discrimination between persons on the grounds of ethnic origin. Such a ground is now regarded as morally irrelevant, just as a person's race or colour or sex is regarded as being irrelevant to his rights.

The concept of the person in Western legal and moral consciousness was instrumental in securing equality of treatment for women, blacks, aboriginal peoples and so on. This sexless, raceless entity variably enables the individual to dispense with considerations of gender, colour religion and race in his moral judgements. But the qualities of intelligence, language, social interaction, creativity which admitted (albeit belatedly) negroes, women and other racial and ethnic minorities to the moral community of Western man are not present in the foetus. To attempt to gloss over the enormous disparity in foetal abilities and the abilities of a typical person or dismiss the disparity as irrelevant is not an answer to the problem, but an avoidance of it.

Mary Anne Warren postulates that potentiality is a pseudo problem based on a misunderstanding of the potential person's capacities. As a first line of attack, she presents this intuitive argument. Imagine you have been captured by aliens who wish to borrow your body cells for a period of time to produce billions of new people. You are not under any obligation to allow your body to be used for this purpose even if you are denying potential persons life.

This example is not entirely aposite because it involves a refusal to initiate a process which will result in new persons being created rather than an interruption of a process which has already commenced. As such it constitutes a moral defence of celibacy rather than one of abortion. The extension of the example to abortion can only be achieved by an acceptance of Tooley's moral symmetry principle.

Warren's second thesis is that it is impossible to wrong potential people since they are, morally speaking, non-existent.

> "The very notion of acting wrongly towards a merely potential person that is one which will never become a person is incoherent. For who is it that is being wronged when a potential person is prevented from being a person? Absolutely no-one." 71

The agonising over foetal potentiality stems from sentient individuals picturing themselves as foetuses, and then speculating on how they would feel if their lives were taken from them. The foetus lacks this capability. Indeed, if it is possessed then the abortion problem would be largely resolved, since foetuses would be considered to be persons. As Warren puts it:

> "When we try to imagine the state of affairs consisting of our never having existed at all .. we in fact tend to imagine ... that we the

> existing people we are, are suddenly to have our existence snatched from us." 72

Potential persons are mythic entities without rights to be violated:

> "If a wrong is done when a potential person is prevented from becoming a person, it is not done to the persons who might have been since that person is a purely mythical being. And it is not done to the merely potential person i.e. the non sentient stuff which cannot be wronged any more than non-existent people can." 73

Warren's argument is a direct rebuttal of the argument from the golden rule advanced by R. M. Hare. Hare rejects the rights orientated approach to abortion on the grounds that "rights are the stamping ground of the intuitionists."[74] He prefers recourse to a tested moral principle namely a restated golden rule that we should do unto others as we would gladly have them do unto us. Applying this to abortion, he concludes that since we are glad that no-one aborted us then we should not abort foetuses. We should not abort potential persons (foetuses) since we were once potential persons ourselves and are glad that we were allowed to live.[75]

Warren points out that this approach involves second guessing on our part. That is we are employing our present sentience to put ourselves back in the womb and imagine what it would be like to be aborted. This is untenable because each of us as a person is distinct from the foetus from which we developed.

> "the foetus which later became you was not you because you did not exist at that time ..... you are a particular person, not just a particular human organism." 76

thus:

> "if it had been aborted nothing whatsoever would have been done to you since you would never have

> existed. You cannot coherently be glad you were not aborted since in order for there to be a you at all, you cannot possibly have been." 77

Warren's emphasis on mind/body dualism will not be attractive to all because it seems to suggest that there is a metaphysical "you" in addition to the body and brain which make up the corporeal "you". This dualism is unnecessary since self consciousness is derived from a particular level of neo-cortical development and nothing more. Any human being which lacks this level of development be it foetus, infant or adult, is not a person. There is no super "you" over and above the functioning body and brain which makes you up. Stripped bare, Warren's argument is that it is fatuous to cast your mind back to a time when you had no mind at all.

Hare fails to consider all the possibilities contained within his argument. For example, why not ask individuals to imagine themselves to be gametes? If they are glad that they were not killed by contraceptives then doesn't this make contraception immoral?

Equally it is possible to dispute Hare's claim that the golden rule is the best moral principle to govern abortion. Hare's formulation of it is blatently loaded in favour of the foetus. Essentially he is putting his question to physically healthy, fully sentient adults, who were wanted and loved by their parents. Abortions usually occur when these conditions do not hold; when it is the case that the foetus will be born retarded or handicapped and so on.

What would happen to Hare's argument if individuals were asked to imagine themselves in those sorts of circumstances?

Suppose they were told that they would be born badly retarded or

disabled? Is it not likely that they would rather be aborted than live?

Alternatively, why shouldn't people be asked to imagine that they are pregnant women whose physical, mental or economic welfare is severely threatened by their pregnancies? Again, isn't it likely that they would agree that they and other like cases ought to be allowed an abortion? Indeed, suppose they were asked to imagine themselves as foetuses and told that their birth might kill or severely harm their mother or cause enormous economic harm to their parents and siblings? Might they not agree to be aborted for altruistic reasons? And what would Hare do in these circumstances? Refuse their requests because they didn't accord with his own moral sentiments?

If Hare believes that imagining ourselves as pregnant women or knowledgeable foetuses is silly, how does he propose to distinguish this silliness from asking us to imagine ourselves as foetuses at all?

Hare is only offering a false certainty based on a selective choice of issues. He arbitrarily ignores the claims that women may put forward as grounds for seeking an abortion and then thinks he has found the definitive solution to the problem through a consideration of the other party's, that is the foetus's, interests. Once the interests of the mother are added to the calculation then we are faced with making a judgement of the relative worth of foetal and maternal interests. That is we are back to rights.

Potentiality is used by Richard Wasserstrom as a basis for claiming a unique moral capacity for the foetus with a status close to, but not the equivalent of, a full adult.

> "Abortion is a morally worrisome act because it involves the destruction of an entity that

> possesses the potential to produce and be things of the highest value." 78

This is simply a piece of special pleading on behalf of the foetus which reveals a misunderstanding of the nature of personhood. Possibly Wasserstrom is trying to sneak the foetus into the category of persons by creating a pseudo category of semi personal entities protected from assault by reason of their potentiality. But such talk of "semi" or "special" persons is useless. An entity is either accounted a person, or it is not. What is at issue is whether potentiality per se is a sufficient condition for personhood. If Wasserstrom believes that it is then he should say so explicitly.

Wasserstrom's equivocation is probably the product of a tension between his intuitive response to abortion and his considered comparison between the abilities of foetuses and the abilities of self aware extra uterine human beings. Intuitively Wasserstrom is anti abortion, but the radical differences in the abilities of the two types of entity under consideration cause him to baulk at placing the former in the same moral category as the latter. He resolves his dilemma by creating a special category safe from harm but which acknowledges the major differences between the two types of entities.

In addition to the category of potential person, Wasserstrom identifies two other optional moral categories within which the foetus might be located. The first is that the foetus is merely an appendage to the woman's body.[79] The second is that the foetus is on a moral par with animals such as dogs, cats and monkeys.

If the first conclusion is accepted then it is virtually impossible to construct any sort of argument against the woman's right to have this

lump of tissue removed. The most morally dubious case is where the woman wishes an abortion for trivial reasons such as a desire to get back into a pair of designer jeans. Even in this example, there are no grounds for refusing her request. Individuals are allowed to have cosmetic operations to remove, enlarge or otherwise alter various bits of their anatomy without interference by the State and regardless of how unnecessary the operation may seem to be. If the foetus is considered to be a mere lump of tissue then it has not more interest in its continued existence than a piece of nasal cartillege slated for removal.

Consideration of the second category raises questions about our moral treatment of animals. This matter is taken up by Jay Newman who criticises both the pro and anti abortion groupings for neglecting the significance of animal rights:

> "Most opponents and defenders of abortion share an important belief that non humans or non persons do not have rights and interests worth considering. It is not intuitively obvious to me that this belief is true." 80

He goes on to cite instances of governments enacting legislation to prohibit the killing and torture of animals. He believes these statutes reflect limited recognition of animals as "right having things" who although not "a human being or a person .... are not so different that their interests need not be taken into account by a moral agent."[81]

There are two defects in Newman's reasoning. Firstly, there is the now obvious failure to differentiate between humans and persons. Second, there is his animism in endowing the term "person" with the

significance beyond that of being a referent for a right and duty bearing entity variable. Non personal entities cannot have rights since personateness is dependent on rights.[82] By confusing humanity with personality, Newman presents himself with the unnecessary problem of classifying the non-human entities whom he believes enjoy rights.

In any event, lumping foetuses with animals does nothing to advance the anti-abortionist's case. In Western societies, animals are killed for utilitarian reasons. They are killed to feed persons, they are killed to provide sport or economic gain for persons. If an individual owns a cat or a dog he can no longer afford, he can arrange to have it put down. When a particular animal population grows too large, it is culled.

Admittedly, it can be argued that there are legal rules to protect animals from being killed or ill treated. But the former are based on the animal's scarcity value and the latter can be subsumed under a Tooleyian scheme of rights. The animals are protected from torture because they can conceive a desire to avoid it. The moral impermissibility of torturing or wilfully ill treating foetuses has never been in doubt. It is their right to life that is in question. Ironically it is personhood which offers the best arguments for ascribing rights to certain non human species such as the higher primates and whales in recognition of the comparatively sophisticated degree of sentience these creatures enjoy.

Contraception

It is now time to deal with two issues that emerge from potentiality. The first of these is contraception. Potentiality is a double

edged sword for the conservative. It can be argued that the sperm and egg are just as much potential persons as zygotes. Interfering in intercourse to prevent them combining could be said to be as serious a moral delict as abortion. Thus, if the conservative is to use potentiality in his case then he must accept the immorality of contraception as well.

Of course, some abortion conservatives would be only too glad to do this, but while abortion may be a tricky moral problem for most of us, contraception does not pose the same moral dilemma. It is one argument that has been lost in the bedrooms of virtually all Western societies. The conservative can only escape the embarrassment of labelling contraception as immoral by identifying one or more morally relevant differences between zygotes and gametes.

The conservative's attempts at distinguishing the two has been based upon probability. Noonan argues that differences in probabilities constitute moral differences. To kill a foetus is to destroy something which has a four in five chance of developing into an adult human being. To kill a sperm only negates a one in a hundred million chance this being the number of sperm ejaculated during intercourse.[83] Werner Pluhar considers potentiality to be quantifiable. The more negligible the potential the more readily it is rebutted by countervailing moral considerations. In the case of gametes, the degree of potentiality is minimal and is outweighed by virtually any factor up to and including inconvenience.[84]

Charles Daniels deals Noonan's and Pluhar's conclusions a pretty convincing blow. He asks us to imagine that there is a lottery being

held in which five million people have bought one dollar tickets. The holder of the winning ticket shall receive the five million dollars gained by ticket sales. Before the draw is made, A burns the money. There is no great loss to any one ticket holder since each only had a one in five million chance of winning. Can this argument from probability be used to argue that the act was not a serious moral delict?[85] It is hard to see how the rights orientated abortion conservative can suddenly switch to utilitarianism in the case of contraception without succumbing to the charge of intellectual inconsistency.

Potential and Future Generations

The second minor theme to emerge from the major concern of potentiality is how our moral obligations to future generations compare to those we owe (if any) to potential persons. Pluhar argues that if it is conceded that future generations have rights to a clean environment, adequate resources and so on then foetuses ought to have rights as well, since they are no less potentially personal than future generations.[86]

The answer to this point is provided by Warren and Daniels. It is that Pluhar is confusing potential persons with actual but future ones. To quote Warren, there are:

> "morally relevant differences between real people of the future whose lives will be affected by what we do now and the potential people of the present which are not now, though they may later become beings with moral rights." 87

Pluhar could only prove his case by establishing that future foetuses were to be treated differently from present foetuses, as opposed to showing that future persons were to be treated differently

from present foetuses.

Daniels identifies two optional justifications for endowing future generations with rights. Either future persons will have rights after they have developed beyond the potentiality stage and these rights are now being violated by this generation's actions. Or future persons now have rights which are being currently violated. Daniels considers the first of these options to be the more acceptable. But he states that whichever option is accepted it does not alter the fact that future persons are not potential ones. Potentiality is a present property. Thus, the fact that we may feel obligated towards future generations of self conscious entities does not entail our owing obligations to present non sentient potential persons.[88]

Conclusions on Potentiality

Potentiality reveals a surprising symmetry in the abortion liberal's and the abortion conservative's positions. The logic of the personhood argument leads inexorably to infanticide and the challenge that practice presents to current moral consciousness. The logic of potentiality leads the conservative into condemning contraception, and thus going against present moral thinking which holds that practice to be permissible.

Any attempt to assuage the initial shock infanticide evokes revolves around showing what a tiny (or even zero) number of cases would be involved. The infant, unwanted by its parents, would only be killed if no other private individual or government or privately sponsored institution could be found to care for it. Ultimately, however, it has to be admitted that if no one was willing to pay for

the unwanted neonate, it would be morally permissible to kill it. Englehardt's thesis on the infant's social significance being a ground for ascribing it rights is dependent on us as persons feeling that we owe obligations to the infant. If no such sense of obligation exists, then the infant's death is permissible.

Expediency prompts the conservative to abandon any notion of grouping contraception with abortion. The cost of this expediency is a loss of consistency in his argument.

The personhood school are probably in a better position to secure widespread acceptance of their ideas. It seems unlikely that governments or private organisations would refuse to care for threatened neonates. It may even be the case that public opinion would accept the moral permissibility of infanticide if fully acquainted with the argument from personhood. There does not seem to be the same possibility of securing a widespread acceptance of contraception's immorality.

Footnotes to Chapter Two

(1) John Fletcher "Medicine and Morals" (Boston) 1954.

(2) Tooley op. cit. p. 52.

(3) Ibid p. 55.

(4) Ibid p. 55.

(5) Ibid p. 59.

(6) Ibid p. 61.

(7) Ibid p. 64.

(8) See Intro. p. 9 supra.

(9) David Hume "A Treatise on Human Nature" (London) 1972, Bk. 3 Part 1, S.1.

(10) Rosalyn Weiss "The Perils of Personhood" Ethics v. 89, 1979, p. 67.

(11) Ibid p. 68.

(12) Ibid p. 69.

(13) Mary Anne Warren "On the Moral and Legal Status of Abortion" The Monist v. 57, 1973, p. 52.

(14) Ibid p. 55.

(15) Ibid p. 56.

(16) Ibid p. 58.

(17) Jane English "Abortion and the Concept of a Person" Canadian Journal of Philosophy, v. 5, 1975, p. 233.

(18) Ibid p. 234

(19) Ibid p. 241

(20) Ibid p. 242

(21) Ibid p. 242

(22) The error of the human/person conjunction has been pointed out supra.

(23) Tristan Englehardt "Ontology of Abortion" Ethics, v. 84, 1974, p. 217.

(24) Ibid pp. 219-220

(25) Tooley op. cit. p. 81

(26) Englehardt op. cit. p. 220.

(27) Ibid p. 220

(28) Ibid p. 230

(29) Ibid p. 231

(30) Ibid p. 233

(31) Lisa Newton "Humans and Persons A Reply to Tristam Englehardt" Ethics v. 85, 1975, p. 332.

(32) Ibid p. 335

(33) Hans Kelsen "General Theory of Law and State" (Harvard) 1945, p. 3.

(34) Newton op. cit. p. 336

(35) Gary Atkinson "Persons in the Whole Sense" American Journal of Jurisprudence v. 22, 1977, p. 112.

(36) Ibid p. 116.

(37) Ibid p. 117

(38) Ibid p. 117

(39) Ibid p. 117

(40) David Hume "Enquiries" S.IV. pt 11 para 31

(41) See pp 38-48 supra.

(42) See pp 30-33 supra.

(43) Gary Atkinson "The Morality of Abortion" International Philosophical Quarterly v. 9, 1970, p. 357.

(44) Ibid p. 362.

(45) R. J. Gerber "Abortion the Parameters of Decision" Ethics v. 82, 1972, pp. 150-153.

(46) Ibid p. 154

(47) David Gerber "Abortion and the Uptake Argument" Ethics, v. 83, 1973, pp. 83-84.

(48) See pp. 40-41 supra and pp. 56-58 supra.

(49) Hans Kelsen "General Theory of Law and State" op. cit. p. 94.

(50) David Derhan "Theories of Legal Personality" essay in Legal Personality and Political Pluralism ed. Webb. (Victoria, University of Melbourne Press) p. 5.

(51) F. H. Lawson "Creative Use of Legal Concepts" New York University Law Review 32 (1954) p. 916.

(52) Kelsen op. cit. p. 95.

(53) Immanuel Kant "Critique of Pure Reason" (New York) 2nd ed. 1968, p. 216.

(54) Kelsen op. cit. p. 95.

(55) Ibid pp. 97-98

(56) Derhan op. cit. p. 5

(57) Lawson op. cit. p. 916

(58) Sam Coval and J. C. Smith "Concept of Action and its Juridical Significance" Toronto Law Journal v. 30, (1980) p. 200.

(59) Ibid pp. 207-213

(60) Tooley op. cit. pp. 70-71

(61) Ibid p. 75.

(62) Ibid pp. 73-74

(63) Ibid pp. 75-76

(64) Englehardt op. cit. p. 231

(65) Ibid p. 232

(66) Gary Atkinson "Persons in the Whole Sense" op. cit. p. 108

(67) Francis Wade "Potentiality in the Abortion Discussion" Review of Metaphysics v. 39, 1975, p. 245.

(68) Wade op. cit. pp. 250-251

(69) Ibid p. 254

(70) Gary Atkinson "Persons in the Whole Sense" op cit. p. 110

(71) Mary Anne Warren "Do Potential Persons Have Moral Rights?" Canadian Journal of Philosophy, v. 7, 1977, p. 280.

(72) Ibid p. 280

(73) Ibid p. 280

(74) R. M. Hare "Abortion and the Golden Rule" Philosophy and Public Affairs v. 4, 1975, p. 203.

(75) Ibid p. 212

(76) Warren "Potential Persons" op. cit. pp. 279

(77) Ibid p. 280

(78) Richard Wasserstrom "The Status of the Foetus" Hastings Centre Report June 1975, p. 21.

(79) Ibid p. 19

(80) Jay Newman "An Empirical Argument Against Abortion" New Scholasticism v. 51, 1977, p. 388.

(81) Ibid p. 392

(82) See Kelsen's explanation of the point supra.

(83) Noonan "Abortion and the Catholic Church" op. cit. p. 129

(84) Pluhar op. cit. p. 168-169

(85) Charles Daniels "Abortion and Potential" Dialogue Canada v. 18, 1979, pp. 221-222

(86) Pluhar op. cit. p. 167

(87) Warren "Potential Persons" op. cit. p. 285

(88) Daniels op. cit. p. 222.

CHAPTER THREE

Rights

Rights, Interests and the Right to Life

In the introduction reference was made to both a right to life and an interest in life. It is now time to elaborate on these concepts and in particular the insight they give into the morality of killing foetuses when they are (i) accounted non persons and (ii) accounted persons.

George Fletcher provides an excellent analysis of rights, interests and their relationship to justifiable killing.[1] He wishes to explain why entities with a right to life may nonetheless be properly subject to an untimely death. He considers that an adequate analysis of the "right to life" depends on answering the following three questions:

1) Who holds the right?
2) What are the norms, both positive and negative for protecting life?
3) What are the criteria for justifying a violation of these norms?[2]

Fletcher prefers to speak of an "interest in life" rather than a right to life when dealing with the second question. The distinction permits the effects of dangerous actions by others on one's interest in life to be properly described:

> "Interests and rights run on different tracks. Interests are connected with the notion of harm and risk of harm." 3

He also draws a distinction between moral and legal rights. A

particular group of persons may be excluded from protection under the law but their moral right of life remains intact.

A person's interest in life may be harmed without there being a breach of his right to life. For example, an Indian peasant killed by a piece of debris from Skylab has suffered an injury to his interest in life but not to his right to life. Nor would his right to life be violated if he died of an infectious disease during an epidemic. Such examples are not "killings" although there is a sequence of events which result in death. Only killings constitute a breach of a norm protecting life. Assuming that the description of a death as a harm is based on the source of death being external to the deceased then not every death is a killing.

The notion of harm leads you to speak of an interest in, rather than a right to life. In daily discourse however, we tend to refer to rights rather than interests. The reason is that it is a more persuasive use of language which invites the listener to respect the interest whether the law does or not:

> "The language of rights permits us to transcend the supposed gap between law as it is and the law as it ought to be." 4

Fletcher next considers examples of killing, starting with intentional killing. There is a shared moral consensus that intentional killing is generally wrong, but there are exceptions to this general norm.

Those which are based on utilitarian considerations such as intentionally killing one individual to save many more lives are rejected by Western legal systems. But there is one exception which

is accepted by all Western legal systems and that is the killing of another in self defence.

But how far does this right of self defence run? To determine its limits, Fletcher asks us to consider a non controversial case of rape generating a right of self defence. A man attempts to rape a woman. The only way she can resist his attack is to choke him and thereby endanger his life. If she kills him then it is in self defence.

There is one further qualification. If the prohibition on intentional killing extends only to direct intention, i.e. where the agent knowingly wanted to kill the aggressor, then self defence is not an exception to this prohibition. It is outside the prohibition. For self defence both morally and legally, is limited to cases of defensive killing where the intention was simply to ward off the aggressor's attack, not to kill him. The death is a side effect. If the prohibition against intentional killing includes both direct and oblique intention, then knowingly causing death to ward off attack nominally violates the norm and the doctrine of self defence functions to explain why the violation is permissible.

The development of a rationale for the right of self defence is dependent on distinguishing between three matters that might be termed rights and interests:

1) The interest of the woman in maintaining her sexual integrity.

2) The interest of the aggressor in his life.

3) The right of the woman to ward off attack.

The first two are interests. The third is a right in the sense that it is a correlative of the duty of third parties not to assault

others. Violations of rights do not necessarily involve infringements of interests. For example, the woman's right would be violated if someone restrained her from responding to the rapist's attack, but her interest would go unharmed if the rapist did not follow through with his attack, but ran away instead.

Rights may be absolute or relative according to Fletcher.[5] In the case of self defence, if the right is absolute, then killing the aggressor is permissible, even if done to protect a minor interest. Thus if the aggressor only wanted to massage the woman's breasts, or simply pat her head, it would be morally permissible for her to kill him if there were no other way of escaping or warding off the assault.

If the right is relative then heed must be paid to the value of the interests threatened by the assault. If there were no alternative between the woman killing her assailant and him massaging her breasts, then she should let the assault occur because the violation of her interests does not compare with the violation of the aggressor's interest in life.

Of course, these matters involve judgement calls and different individuals would place different values on the conflicting interests present in the examples. But it does not seem unreasonable to say that there is a breaking point after which the pursuer's interests seem trivial compared to the assailant's interest in life, so trivial in fact that it would be improper for her to kill the aggressor to prevent their being invaded.

There is a problem with the relativist theory which the absolutist theory avoids. The latter is nicely cut and dried. It provides a consistent answer to all possible fact situations, although we may be

morally troubled by the nature of the answer in some cases.

The relativist theory, although seemingly more sensitive to changing circumstances and apparently less morally dubious, involves us in conceptual problems. For example, one would generally say that an interest in life counts for more than an interest in sexual integrity, yet in the rape example, there is a reversal of this perception. It is as if the aggressor's interests were discounted by the moral culpability of his attack on the woman. Suppose, however, he is not "responsible" for his actions through psychosis or involuntary intoxication. One would still say the woman had a right of self defence, but how can the assailant's interest be discounted in the absence of his being morally blameworthy? and if his right is not discounted, how can the woman's interest be more stringent?

Fletcher's pessimism with regard to his relativistic theory is misplaced for two reasons. First, even if one accepts that the psychotic or involuntarily intoxicated "aggressor" presents a difficulty sufficiently grave to prevent the relativistic theory being applied to the rape case, that is no reason for retreating headlong back into the comfortable consistency (or rigid inflexibility) of the absolutist theory. It certainly seems puzzling that the responsible rapist may be legitimately killed whilst the "irresponsible" one may not (how after all is the victim to distinguish between the two? Ask him to discontinue his assault so she can perform a quick Rosarch test on him?) It is possible however to construct a fall back position for the theory to explain away this puzzlement. This position is that there are certain interests which are so trivial in comparison to the aggressor's interest in life that it would be unjustifiable to kill in their

defence, even if the aggressor is "responsible" for or "guilty" of the assault. The difficulty lies of course in establishing what constitutes a minor, as opposed to a major interest.

The second (and most convincing) reason for rejecting Fletcher's conclusions is provided by Coval and Smith's theory of agency. Insanity and involuntary intoxication present such a quandry to Fletcher because he appears to be unable to distinguish between innocence by reason of these defences, from innocence by reason of the agent not performing the alleged assaulting action. That is to say, he cannot find any relevant moral difference between the insane aggressor and the non aggressor.

Coval and Smith identified seven positive features of an act simpliciter:[6]

1) Foresight with regard to relevant causes of circumstances.
2) Relevant true beliefs.
3) Foresight of relevant collateral effects of one's behaviour.
4) Attention to how one acts.
5) Choice.
6) Intention.
7) Behaviour.

For Coval and Smith, "even the most attenuated case of action includes some aspects of choice and belief as well as intention and behaviour." If the theory is applied to the non aggressor and insane aggressor examples then it can be seen that the first involves a blanket cancellation of all the features of the action - "I didn't do this".

In this sense the agent is not responsible for his action because no action has been performed.

In the case of insanity however, the agent is still responsible for his actions:

> "An agent is in some degree responsible so long as the act in question may be causally traced to him and some feature of his agency .... But responsibility by itself does not imply culpability or blame or fault while responsibility is a form of causal relation, culpability is a form of control according to a policy." 7

It is this distinction between culpability and responsibility which allows the relativistic theory to accommodate the example of the insane assailant. The victim of the deranged assailant's action and the tribunal which subsequently has to determine the assailant's culpability stand in different relations towards the aggressor. Given this difference in relations, it does not seem arbitrary to say the victim can base his response to the aggressor on a criterion different to that employed by the court.. Turning to the rape case, the woman might state her view in this way:

> "Unless I kill agent A he will rape me. Now if he is a normal agent performing this action simpliciter then there is no moral difficulty over my homicidal response to his attack. If however, he is insane, that is a non standard agent whose abilities to judge or foresee the factors which are the prerequisites of a standard action are impaired then a court will hold him responsible, but not culpable for his actions.
>
> But my circumstances are not the same as the court's. From my point of view, I need only satisfy myself that he is responsible for his action in terms of standard features 7 and 8. I can tell that he is because he's throttling me, his penis is exposed and erect, he's ripping off my clothes and spreading my legs apart. This action is still his action

> however misguided, perverse and insane it may be. He is responsible for this attenuated action and I can use this admittedly limited degree of responsibility as justification for my killing him. The court may have to determine whether his grasp of features (1) - (6) was impaired before deciding on their treatment of him, but I do not."

The value of the theory of agency is its capacity to elucidate and re-explain in terms of good reasons statements such as the one taken from Glanville Williams "Criminal Law":

> "A man is allowed to kill in self defence against a wrongdoer and even to kill a lunatic who attacks him, although the lunatic may be, because of his insanity, under no criminal responsibility for the attack." 8

As it stands, the statement does nothing to soothe Fletcher's misgivings over the killing of a non responsible aggressor. But once the nature of the lunatic's responsibility for his action is explained; once it is demonstrated why his limited degree of responsibility allows his victim to respond to him as she would respond to a culpable party, then the rationale underlying Williams' statement is made clear.

Fletcher goes on to consider how the woman's right of self defence can be fitted into the matrix of (1) the interest in life; (2) violation of a protective norm and (3) a criteria of justification. The interest in life is protected by the norm which prohibits both directly and indirectly intended killings. Self defence is an exception to this norm. In the case of self defence, the aggressor's interest in life is sacrificed. But how can this be justified? Why can this right to life be set aside? Has the protective norm been violated or merely infringed, or indeed, was the killing of the aggressor in conformity with its content?

One attempt to answer these sorts of questions is the theory of forfeiture. As Joel Feinberg puts it:

> "At the moment a homicidal aggressor puts another's life in jeopardy his own life is forfeit to the threatened victim." 8a

As an explanation, the theory is unsatisfactory. First, if you forfeit your rights, as for example outlaws forfeited theirs in the middle ages, then there is no wrong done - that is no violation of a norm - in killing you. There is no distinction between killing an outlaw and killing a gnat or a wolf. Thus the problem of justification does not arise.

This is not the case in the matter of justified killing. A norm protecting life has been nominally violated. The killer's intentions are relevant to justifying the violation. For example, if in the rape case the victim's lover had seen them in flagrante, mistakenly concluded that he had been cuckolded, and killed the rapist in a mad rage, then the killing would be unjustified for:

> "A justified killing requires that the defender has the right reasons for trespassing on the norm protecting human life." 9

A possible criticism of the tripartite matrix of interest in life; prohibition on killing and criteria of justification is that the third element is tautologous. It would be possible to list all the exceptions to the prohibitory norm, and thus there is no need to provide a general criteria. Judith Jarvis Thomson objects to this view on the grounds of good housekeeping. It would be impossible to neatly list <u>all</u> the circumstances in which intended killing is justified.[10]

Fletcher believes there to be a more powerful objection. To

state the criteria of justification as negative elements of the prohibitory norm obscures the logic of justification.[11] It ignores the necessity of the agent acting for good reasons. The necessity of good reasons follows from his action being a violation of the norm. It would be equally incorrect to redraw the norm to read that it is wrong to intentionally kill another unless one acts with the right reasons in cases, X, Y, and Z where X, Y, and Z stand for categories of justifiable killing. This would lump justified killing with the killing of non persons such as insects. Both claims would be denials that the act violated the norm. But the former involves the invasion of an interest not present in the latter. A justified harm is not the same as a harm which falls outside the scope of the norm protecting life. An interest has been invaded, even if the invasion was justified.

Judith Thomson neatly encapsulates the concept of a justified harm by distinguishing between an infringement of a right to life and a violation of it. A justified killing merely infringes the right, an unjustified killing violates it.[12] By this scheme compensation is due to someone whose property is damaged by another to avoid a greater evil. However, the criterion of compensation is of little relevance to cases of justifiable self defence. No Western legal system awards compensation to the aggressor who is injured by another's efforts to ward off his attack.

The distinction between infringement and violation of the victim's interests is illuminating only if it is linked to the general theory of norms and their justifiable violation. In many instances of justified conduct - but not self defence - compensation is due to the

victim. Further, in all cases of justifiable conduct, including self defence, the agent must act for the right reasons.

As a summary of his analysis Fletcher provides this taxonomy of the issues which arises in discussing whether someone wrongfully kills another:

1) No infringement of the right to life, e.g.
   a) No being with a worthy interest is affected, for example, a mouse or a wolf.
   b) The being once had a right to life but has since forfeited the right, for example, the special case of the outlaw.
   c) A being with such an interest is affected, but the defendant's act does not constitute the killing of the victim for example the skylab case.
2) Infringing the right to life. This is the standard case of the justifiable killing.
3) Violating the right to life. This is the case of wrongfully (unjustifiably and intentionally) killing another.[13]

There are two further categories of killing identified by Fletcher, namely:

4) Excusable violations of the right to life. Examples of this category are killings by the insane; killings under duress of the "kill or be killed" type and killings by those who honestly but mistakenly believe that the deceased was aggressing against him.

5) Intentional killings done on the grounds of personal necessity. An example of this sort of homicide is the killing of the cabin boy in R. v Dudley and Stephens,[14] where the right of life of the weakened cabin boy was violated so that the other two occupants of the life boat might live.

These killings are also excusable although not justifiable, according to Fletcher.

Unfortunately, Fletcher fails to elaborate on the distinction between justifiable and excusable killing. Is it the case that the perpetrator of an excusable killing has violated the prohibitory norm but should not be subject to the norm's sanction so that in killing the rapist you are innocent of any crime, whereas in killing the cabin boy you are guilty of breaching the norm, but shouldn't be punished for it?

Fletcher appears to be saying that where A justifiably kills B then he had a right to kill him. Where he excusably kills B then he had no right to kill him, but it is "inappropriate to blame him."[15]

As a demonstration of the distinction Fletcher reanalyses a problem set by Judith Thomson.[16] Suppose there is a tank coming towards you and its occupants are intent on using it to kill you, You have an anti-tank weapon and can blow the tank to pieces. Its occupants however have strapped a baby to the tank's front, so that if you fire the gun you will kill the baby as well as your attackers.

Thomson believes you can use the gun in exercise of your right of self defence. Fletcher thinks you do not have any right to kill the baby (you only have such a right against the tank crew), but it would be morally inappropriate to blame you for killing the baby to save your

own life. Your killing the baby can only be excused, it cannot be justified. The way to elicit our intuitions is to invoke the fiction of the independent observer who is witness to this bizarre scene. He has a right to defend you against the tank but he does not have a right to kill the baby:

> "The threatened victim's killing an innocent non aggressor may well be excusable as should have been the case in Dudley and Stephens but it does not follow that a third party has the right to intervene and choose the person who will survive the unfortunate conflict." 17

It is prudent to pause and take stock of Fletcher's scheme of morally permissible killing before considering it in the context of abortion.

First there are the cases of justifiable killing, in which the killing agent A acted to protect a sufficiently substantial interest from invasion by another agent B where B's invasion constituted a breach of a duty which he owed A. An example of this would be killing in self defence to prevent one's own death or rape or crippling injury. Equally it would be justifiable for a third party to kill to protect agent A provided (i) the killing was the only way to protect A's interest; and (ii) the killing was done for good reasons.

It appears (although this is a matter of inference) that Fletcher does not consider justifiable killings to be in breach of the prohibitory norm protecting life. It is as if the norm has a set of "built in" exceptions which set the parameters of justifiable killing.

Then there are the excusable killings. In these cases the deceased's right to life is violated not merely infringed but the circumstances of the killing make it (morally?) inappropriate to

execute the sanction stipulated by the prohibitory norm, despite the fact that the norm has been violated. Fletcher makes a categoric mistake here by grouping together killings under duress; killings by lunatics and killings where the agent was unavoidably and excusably mistaken in his belief that the victim was aggressing against him. He then creates a second category of killings excusable on the grounds of personal necessity a la the killing of the cabin boy in Dudley and Stephens, or the killing of the baby by the threatened agent in the tank example.

This classification is inconsistent. The nature of its inconsistency can be perceived by reference to the theory of agency. Killings done on the grounds of personal necessity or under duress involve a negation of standard feature five, that is, the agent's normal choice. His ability to reckon, predict, calculate and have true beliefs is unimpaired. It is simply that his normal range of choice is not open to him due to the circumstances in which he finds himself.

Killings by the insane and those who mistakenly and excusably believed that they were being attacked by the deceased involve a negation of standard features (1-5) in the first case and 1, 2 and 5 in the second. There is a greater degree of diminished responsibility involved in killings of this sort.

The synthesising of Fletcher's relativistic theory of the morality of homicide with Coval and Smith's theory of agency has produced a discriminate, intuitively appealing, and logically consistent theory on the moral permissibility of killing. It is now time to apply this theory to the abortion issue.

At this stage, the object is to formulate a moral policy for

abortion, that is, an answer to the question of when it is morally permissible to allow the practice and when it is not. The work of other moral philosophers who have written on the matter with abortion more directly in mind will be examined to determine whether they have anything of value to contribute to the task. Indeed, it might be the case that their work will cause the reader to reject Fletcher's theory in favour of some other. At certain points in the discussion, the moral conclusions derived from the analysis shall be compared to the legal norms regulating homicide in various Western jurisdictions. This will tell us whether our moral policy is wildly out of sync with the moral intuitions which underpin those legal norms.

The Moral Permissibility of Abortion when the Foetus is Accounted a Non-Person

If it is assumed that the foetus is a non person then there are no circumstances in which a woman can be refused an abortion, or rather if her request is denied then the denial is unjustifiable. This may appear to be a singularly bald statement, given the rather equivocal tone of the paper up to this point, but there is no other interpretation which can be given to the matter. The foetus as a non person has no right to life. It is an entity of the sort covered by section (a) of Fletcher's first category of killings.[18] Its death does not involve any infringement of any right to life.

The unequivocal nature of this moral and legal precept demonstrates why personhood is such a keenly contested issue in the abortion debate. A conclusive defeat for the abortion conservative on this issue sees him counted out of the contest entirely.

The Foetus as a Person

If the foetus is accounted a person then the morality of abortion is a segment of the morality of homicide. The foetus is a person like any other. If it is wrong to kill an adult or child in circumstances X then it must be equally wrong to kill a foetus in same case X. Further if it is morally permissible to kill a foetus in circumstances Y, then it must also be permissible to kill a child or adult in those circumstances.

Women seek abortions for a variety of reasons, from the urgent (their life is threatened by the pregnancy being continued) to the apparently trivial (they wish to go on a trip to Europe).[19] As a matter of convenience it is proposed to divide the spectrum of abortion reasons into five general categories. Each shall be examined to determine the morality of abortion in those circumstances.

The categories are:

1) Potentially fatal pregnancies. These are cases where the mother will die unless she is allowed to have an abortion.
2) Pregnancies induced without the woman's consent. Examples of this type would be pregnancies resulting from rape, incest or contraceptive failure.
3) Pregnancies which threaten the woman with serious physical and mental harm.
4) Pregnancies which threaten the woman's economic welfare. For example, she will be destitute if forced to continue with the gestation. Or the birth will place a severe burden on her and her husband's ability to provide for the

family they already have.

5) Inconvenient pregnancies, that is the woman's mental and/or physical health, and economic welfare is largely unaffected but she no longer wishes to continue with the pregnancy because she finds it irksome, or at odds with her other plans, or because she no longer wishes to have a child.

(1) Potentially Fatal Pregnancies

I want to start discussion of this topic by presenting Judith Jarvis Thomson's views. In her landmark article Thomson argued that abortions were still morally permissible, even if the foetus was considered to be a person. Analysis of her general theory is more properly located in the subsequent categories of abortion circumstances. What is of relevance in her article to the present subject is her justification of the moral permissibility of the mother aborting her potentially fatal pregnancy as an exercise of her right of self defence.

She compares the mother/foetus relationship with that of a woman and child trapped in a tiny house.[20] The child is growing rapidly and will crush the woman to death before he bursts free to walk unharmed from the house. The foetus, despite his personal innocence, is a threat to another innocent, namely the woman, who houses him. In such circumstances, says Thomson, the woman is not under any duty to the foetus to stand idly by while he kills her. There may be "drastic limits to the right to self defence"[21] but in these circumstances, killing in self defence is justifiable.

> "Both are innocent, the one who is threatened is not threatened because of any fault, the one who threatens does not threaten because of any fault. For this reason, we may feel that we bystanders cannot intervene. But the person threatened can ... In sum a woman surely can defend her life against the threat to it posed by the unborn child, even if doing so involves its death." 22

On this analysis, self induced abortion by the woman is permissible if done to save her life. Such a procedure is dangerous to the woman's health. From her point of view it would obviously be helpful if she could enlist the aid of trained medical staff. Is it permissible for these third parties to lend a hand? Thomson thinks it is. It is a false impartiality for third parties to say they can do nothing because both parties to the rights conflict are innocents. It neglects the fact that the woman owns the body that is housing the foetus. To deny her aid would be like denying aid to the woman who is about to be crushed when she owns the house.

Aid from third parties has to be voluntary. They may choose to be good Samaritans and help the woman, but they are not under any duty to her to do so:

> "One has a right to refuse to lay hands on people even when it would be just and fair to do so ...
>
> I have not been arguing that any given third party must accede to the mother's request that he perform an abortion to save her life, but only that he may." 23

John Finnis disagrees with Thomson's conclusion. His ontology of rights is derived from the premise that certain acts are good or bad, irrespective of their consequences. Abortion is a member of a set of practices which are always wrong since they involve the killing of an innocent person.[24]

For Finnis, it is morally impermissible to perform a therapeutic abortion to save the mother's life because this involves the foetus being used as a means to an end. The only exceptions to this general moral norm are those cases covered by the doctrine of "double effect" that is where:

> "the expected bad effect" - the foetus's death - "or aspect of an action is not intended either as an end or as a means and hence does not determine the moral character of the act as a choice not to respect one of the basic human values" 25 - that is life."

But when is an abortion within the doctrine's cope and when is it not? Finnis provides four criteria to define the limits of the doctrine's application:26

1) It must be the case that the chosen action would have been performed even if the victim had not been present. Thus, for example, ecclesiastical philosopher's held it permissible to remove a cancerous womb, regardless of whether a foetus was a person, since the womb would be removed regardless of the foetus's presence. It would also be permissible to draw off the amiotic fluid to relocate a displaced womb, despite the foetus being killed as a result.
2) The person making the choice must be the one whose life is threatened by the presence of the victim. This means that bystanders are not permitted to act on their own initiative but must wait until the person threatened requests their aid. In the case of abortion, the mother has to ask for the operation to be performed. It cannot be done on her doctor's initiative.

3) The chosen action ought to amount to a denial of aid and succour to the victim, not an actual intervention that amounts to an assault on his body. Finnis places special emphasis on this principle:

> "The child like his mother has a "just prior claim on his own body" and abortion involves laying hands on, manipulating that body. And here we have perhaps the decisive reason why abortion cannot be assimilated to the range of Samaritan problems." 27

4) The third principle is not all embracing. If an "action" is done against someone who had a duty not to be doing what he is doing or not to be present where he is present, then the action is ceteris paribus morally permissible. Finnis does not believe the foetus to be in breach of any duty he might owe the woman. It wasn't under any duty not to enter his mother's body, indeed it didn't invade or enter it at all. It simply came into being, within it. It does not commit any delict in remaining where it is. Thus, the foetus does not fall under the possible exception to the third principle:

> "it" (the child) "was not in breach of any duty in coming into being nor in remaining present within the mother; Thomson gives no argument at all in favour of the view that the child is in breach of a duty in being present (although her counter examples show she is often tacitly assuming this)" 28

Applying the four principles to the propriety of abortions performed to save the mother then these are Finnisian permissible when (a) the operation would be performed regardless of the foetus's presence: (b) the mother has given her consent to the operation: (c) the operation does not involve an assault on the foetus's person, but

only a denial of aid or support for it.

There is a lacuna in Finnis' argument. He does not explicitly consider whether it is morally permissible for the mother to abort herself without any help from "outsiders". Thomson thinks her right of self defence permits her to do so. If the problem is referred to Finnis' four principles then it appears her action would be impermissible. This conclusion is dependent on finding the foetus innocent of any breach of duty towards the mother. If he were considered to be guilty of such a delict then ceteris paribus his abortion would be permissible. Thus it seems per Finnis that there is no moral distinction to be drawn between first person and third party abortions.

Between them, Thomson and Finnis capture all the salient points of the potentially fatal pregnancy problem. Thomson justifying it as a legitimate exercise of the woman's right of self defence on the one hand, and Finnis redrawing it in terms of his doctrine of double effect, on the other. Inter alia Finnis disputes Thomson's construction of the right of self defence on the grounds that it ignores the vital element of the victim being in breach of a duty of care he owed to the killer.

It is now time to apply Fletcher's analysis to Thomson's and Finnis' arguments to see what further insight into the question (if any) is derived. Unlike Thomson, Fletcher would consider the killing of the foetus to save the mother's life to be an example of excusable killing. It is an intentional killing done by reason of personal necessity. The reason why it cannot be construed as a killing in self defence is because the foetus is not an aggressor. It has not been in breach of any duty in arriving in its intra uterine location. For the mother to

abort the foetus is for her to violate not merely infringe its right of life. But per Fletcher, this violation is excusable and by that he seems to mean, that she should not be punished for breaching the prohibitory norm.

In terms of Fletcher's analysis, the medical staff, who in the normal course of events would perform the abortion, are like the observers in the tank example. They cannot choose between two innocents. Thus pace Fletcher, if they were to aid the woman they would be party to the violation of the child's right to life, but unlike the mother, their conduct would not be excusable.

How does Finnis' doctrine of double effect affect Fletcher's analysis? The answer is that it leaves his conclusions on the permissibility of the mother killing the foetus to save her own life intact. But it causes one to ponder on the permissibility of third parties assisting the woman by performing the abortion for her.

To illustrate the point, consider this amended version of Thomson's tank example. Imagine that the tank driver's intended victim has a sniper's rifle instead of an anti-tank weapon. He can fire off a shot that would kill the driver. Unfortunately, this would also cause the tank to veer out of control, and crash, thus killing the baby.

Finnis would consider the baby's being killed to be permissible in these circumstances since they came within the scope of his doctrine of double effect. He would not consider the killing of the baby to be permissible in the original Thomson example, because of the element of assault. The change in circumstances does nothing to affect Fletcher's prescriptive view. In either case, the killing of the baby is excusable,

not justifiable.

Let a third party be introduced into this example. He has the rifle and can dispatch the tank driver with a single shot. Thus, he will save the threatened victim, but ceteris paribus, he will cause the crash that kills the baby. Under Finnis's criterion he can shoot the aggressor because he is not assaulting the baby. He would shoot the driver if the baby were not there, and the driver is in breach of a duty of non aggression he owed to his intended victim.

The moral permissibility of the third party's intervention under the Fletcherian criterion depends on whether the judging individual believes there to be a moral difference between direct and indirect killing. If he believes that it is permissible to indirectly kill someone then the third party may shoot and the doctors may abort. If he does not believe there to be a relevant moral difference between the two: that is to say he considers shooting the tank driver and thus indirectly killing the baby to be on a moral par with blowing the tank (and the baby) up, then the third party cannot intervene in the amended tank example, nor can medical staff help the mother abort her child in the circumstances specified by Finnis' criterion.

H.L.A. Hart considers that indirect and direct killing are morally indistinguishable. There is no moral difference between indirectly killing a foetus by removing the cancerous womb it inhabits, and directly killing it by crushing its skull during the course of a craniotomy:

> "in both cases alike, the death of the foetus is a "second effect" foreseen but not used as a means to an end or an end." 29

Hart admits to being bemused by the doctrine's recognition of the moral distinction between direct and indirect (or as he puts it "oblique") intention:

> "the so called doctrine of "double effect" is used to draw distinction between cases in a way which is certainly puzzling to me and to many other secular moralists." 30

The only difference which Hart can discern between cases within and cases beyond the doctrine's application is that in cases of the first kind, the link between the action which kills the foetus and the foetus' death is contingent. In cases of the second type, the link between action and foetal death is conceptual. The result is so immediately and invariably linked to the action that there can be no possible doubt of the connection between the two events.

Hart's conclusions on the doctrine reflect his suspicion that it is simply an exercise in selective moral blindness:

> "Perhaps the most perplexing feature of these cases is that the overriding aim in all of them is the same good result, namely in the first group to save human suffering and in the second to save the mother's life. The differences between the cases are differences of causal structure leading to the application of different verbal distinctions. There seems to be no relevant moral difference between them on any theory of morality." 31

and further:

> "it seems that the use of the distinction between direct and oblique intention to draw the line as Catholic doctrine does between what is sin and what is not sin, in cases where the ultimate purpose is the same, can only be explained as the result of a legalistic conception of morality, as if it were couched in the form of a law in rigid form prohibiting all intentional killing as distinct from knowingly causing death." 32

Thomson shares Hart's view of the doctrine's moral irrelevance. She devises the following test for the direct/indirect distinction:

> "We should get as clear a direct killing and as clear an indirect killing as we can which so far as possible differ only in that respect and then look to see if a moral difference emerges." 33

With this in mind, she puts this moral dilemma to us. A missile launcher has been constructed by an aggressive foreign power and is trained upon us. The only way to trigger the missiles is for a group of two year old children to crawl through interior tunnels to the missiles and trigger them at source.

There are two possible continuations of this story. In the first, there is only one launcher which takes two years to build. The children take only one day to train. We are able to bomb the site to destroy the launcher and save our lives, but unfortunately the children will be killed by our doing so. In the second, it is the children who take two years to train and the launcher a day to build, thus in saving our lives by the bombing, we have to bomb with the object of killing the children.[34]

In the first continuation, the killing of the children is indirect killing. Their death is not our end, nor is it a means to our end. If they survive the bombing then that is so much to the good. In the second case, the killing of the children is direct killing. It is our intention that the children die and if they survive the first wave of bombing, then the bombing must continue until they are killed.[35]

Pace Finnis it is permissible to bomb in the first set of circumstances but not in the second. Thomson believes the bombing to be permissible in both cases. She reckons that the automatic response

to her argument will be to claim that the children are innocent in the manner intended by the principle "direct killing of the innocent is always impermissible". For this counter claim to be effective, then a narrower technical definition of innocence as meaning "not part of the threat against others" will have to be devised.

The restriction on the meaning of innocence does not save the direct killing/indirect killing distinction. This is because the sole difference between the two is that the victim's death is an end, or means in the former, and merely a foreseen circumstance in the latter. the victim's innocence or otherwise is irrelevant to the distinction.[36] Where the restrictive interpretation of innocence may be relevant is in determining when a given direct killing is morally permissible. By accepting the narrow definition of innocence, it is possible to justify the killing of the children in both examples.

The price to be paid for this justification is a concomitant acceptance that the difference between direct and indirect killing does not have the moral significance that we originally claimed for it. The acts in both the first and second examples are both permissible, despite one being a direct and the other an indirect killing.

Thomson wants to force the abortion conservative to make an explicit choice relative to the permissibility of abortion. If her argument is sound, he either has to agree that the foetus may not be killed under any circumstances, including inter alia where the continuation of the pregnancy will kill the mother: or if he agrees that the foetus may be killed to save its mother, then the method by which the foetus is killed - direct or indirect is morally immaterial.

Her victory is only a limited one. What she has established is the moral permissibility of the woman engaging in a "self help" abortion when the child - albeit innocently - threatens her life. Thomson believes that it is morally permissible, but not obligatory for third parties to intervene to help the mother. Finnis thinks that it is generally impermissible for third parties to help, except for those cases falling within the doctrine of double effect. Fletcher holds that it's morally impermissible for any third party to make a choice between two innocent lives.

Phillippa Foot considers the doctrine to be morally relevant and employs it as a basis for determining the morality of therapeutic abortions performed by third parties:

> "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 doctrine of double effect I mean the thesis that it is sometimes permissible to bring about by oblique intention what one may not directly intend." 37

The value of the doctrine according to Foot, is the way it enables us to resolve certain hard cases:

> "in certain cases one is justified in bringing about knowingly what one could not directly intend." 38

For example, if a mad murderer threatens to kill two people unless we kill one, then our refusal to engage in killing is justifiable because:

> "we foresee that the greater number will be killed but we do not intend it; it is he who intends (that is strictly or directly intends) the death of innocent persons; we do not." 39

The doctrine is even more valuable in explaining Western morality's distinction between act and omission:

> "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)." 40

This distinction between death caused by action and death caused by omission is not a purely legal one:

> "there is worked into our moral system a distinction between what we owe people in the form of aid and what we owe them in the way of non interference." 41

Foot then applies the doctrine to abortion and reaches these conclusions:[42]

1) Where both the mother and child will die if nothing is done, but the mother can be saved if the child is killed, then the abortion ought to be performed. This is a case of act versus omission. There is no serious conflict of interest here according to Foot and the abortion can be carried out by any means - that is, there is no need to follow Finnis' principle of not laying hands on the foetus.

2) Where it is the case that the lives of both parties are in danger and both will die if nothing is done but it is possible (a) to save the mother by killing the child, or (b) save the child by killing the mother, then it "would be reasonable to act". The problem lies in deciding which of the parties should be saved. Foot considers "probably we should decide in favour of the mother". This conclusion has its roots in utilitarianism, not rights theory. Rights and utility are mutually exclusive. It is a fundamental premise of rights that certain things cannot be done to persons

regardless of the benefit to overall social welfare. If Foot admits that the greater "value" of the mother allows her to be chosen over the foetus, then she is employing a utilitarian approach which most of us would probably adopt. But this approach is at odds with the rights orientated thrust of the rest of her theory.

3) In cases where (a) the mother will die if the pregnancy continues but she will live if the child is killed, and (b) if nothing is done then the mother will die, but the child can be safely delivered after her death, then third parties cannot intervene. Instead, they have to let events take their course:

> "We may not intervene ----- since the child's death would be directly intended while the mother's would not." 43

Baruch Brody broadly agrees with Foot's conclusions on when abortions are permissible. He then considers whether it is permissible for the foetus to be aborted as part of the mother's right of self defence, just as for example a murderous assailant might be killed.

Brody identifies three elements in the assailant case:

1) The continued existence of B poses a threat to the life of A and killing B is A's only possible escape.

2) There is an unjust attempt by B to take A's life.

3) B is responsible for this attempt.[45]

Brody wants to determine how many of these conditions need to be present for the killing of B to be permissible. He believes (3) to be superfluous since - per Williams - it would be permissible for you to kill a lunatic or a minor who is trying to kill you even though he is

not legally responsible for his actions.[46]

He then devises an example in which only condition (1) is met. Suppose that B, by switching on a light, will explode a bomb which will kill A. B. is unaware of the light switch/bomb nexus. He has no intention of killing B but nonetheless Brody believes it is permissible to kill A to save B.

This example leads Brody to amend the condition (2) to (2'):

> "B is doing some action that will lead to A's death and is such that if B is a responsible person who did it voluntarily knowing that this result would come about, B will be to blame for the loss of A's life ..... If the conditions (1), (2) or (2') are satisfied, one would be justified in taking B's life to save A's life. The satisfaction of (3) is not required." 47

In the foetus/mother relationship condition (3) is absent. Condition (1) is met, thus the dispute boils down to whether condition (2) or (2') is satisfied. Brody believes that they are not. In the case of (2) the foetus has neither the beliefs nor the intention of killing its mother. With regard to (2'), since the foetus is simply trying to reach maturity, then it cannot be blamed for the loss of the mother's life.

For Brody, the killing of the foetus is not subsumable into the categories of killings which are justifiable because they were done in self defence. He then considers whether there are other grounds to justify the killing of the foetus when its presence threatens to kill its mother. He asks us to reflect on these two cases:

a) A bomb has been placed in a room containing five people and its triggering device has been placed in another room containing one person. If nothing is done, then all six will

be killed in the resultant explosion. Can you blow up the triggering device and kill one to save five?

b) There is a small village threatened by brigands. They want Joe, one of the villagers, and will kill all the villagers including Joe unless they give Joe up to them for execution - can they hand Joe over?

There are three possible answers to these questions:

1) It is permissible to take B's life to save A's life if B is going to die anyway and taking B's life is the only way of saving A's life.

2) It is permissible to blow up the triggering device and hand Joe over because it is permissible to take one life to save other lives if this is the only way of saving these lives.

3) It is permissible to kill the person in the triggering room and give up Joe because one is not trying to kill a life but to save other lives.

Brody thinks answer (3) is the most dubious of the trio, particularly in the village example because the villagers are clearly participating in Joe's death. He dislikes (2) because it has the defect of standard utilitarian theories, namely "it does not do justice to the considerations of fairness."[48] Thus, by a process of elimination (1) is best. It is only permissible to take B's life if he will die anyway.

What if the circumstances are amended so that the five people in the room with the bomb will be killed if it explodes, but the person in the triggering room will not? Or in the second example, the village

leaders will be killed by the brigands if they don't give up Joe, but by giving their lives to the brigands, they will save Joe's. According to principle (2) it is still permissible to kill the individual in each case. But Brody believes this to be unfair to the individual. He thinks the moral strength of principle (1) is that it points out this unfairness.

The riposte to Brody's conclusions is that by being fair to the individual in each instance, he is being unfair to the others, who will die in his stead. But, replies Brody, our moral obligation is not to take men's lives. We have no obligation to save them.[49] This view accords with Finnis' and Foot's conclusions that actions and omissions are morally different. Therefore per (1) if it is the case that the foetus will live and its mother will die if no action is taken, then it is impermissible to abort the foetus. If however, <u>both</u> the mother and foetus will die if no action is taken, then the foetus may be aborted.

For Brody, the justifiability of killing is affected by the length of time the parties will live. For example, if one takes the bomb in the room case then it would be permissible to blow up the man in the triggering room if he were going to die of cancer in a few hours, but not if he is going to die from his wounds in a few years.

But what of the ultimate hard case involving A and B where both will die in a relatively short time if nothing is done, and the taking of B's life is the only way to save A's life and vice versa? The solution according to Brody is this:

> "It is permissible to take B's life to save A's life if taking B's life (or doing anything else) will save A's life but one has by a fair random method determined that one should save A's life rather than B's." 50

Under this principle:

> "An abortion is permissible only if in addition to the satisfaction of those conditions, it is the case that the foetus will die and either there is no way to save the foetus or there is a way but by a fair random procedure we have determined that we should save the mother and not the foetus." 51

By substituting the criteria of "fair random choice" for Foot's presumption in favour of the mother, Brody avoids any espousal of utilitarianism, unless one considers his thesis that length of life affects the justifiability of killing to smack of the doctrine. Just what constitutes a fair random procedure for choosing between mother and foetus is another matter. A toss of a coin might qualify as just such a decision making procedure. To the casual observer, Foot's theory of choice would seem to be a lot less arbitrary than Brody's.

The advantage of Brody's theory from our point of view is that it deals with abortion exclusively in terms of when it is morally permissible for third parties to perform them. Since the current abortion controversy centres on whether women ought to be able to have safe medical abortions then Brody's analysis is beautifully in point. The gap in his argument is his failure to consider the permissibility of women engaging in unaided self help abortions if the pregnancy threatens to be fatal. Fletcher fills this particular gap by holding such killings to be excusable violations of the norm prohibiting killings. The killings are not exercises in self defence, but killings

of necessity.

I now want to present my own conclusions on the conflicting theories which have been outlined and try to evaluate their degrees of compatability with the Western morality of homicide as exemplified by the norms of various Western legal systems regulating the matter.

Firstly, it seems to me that Fletcher's labelling of the mother aborting her foetus as an excusable killing, due to personal necessity, is considerably more convincing than Thomson's explanation of it as an exercise in self defence. The element of assault which is intrinsic to the concept of killing in self defence is absent from the mother/foetus case. The foetus cannot be lumped indiscriminately with the lunatic or minor who is advancing on you, axe in hand. His situation is more like you being trapped underground with a young child. The rescue attempt will take six hours, but with both of you consuming oxygen, you will be dead in four. If you kill the child however, you will have sufficient oxygen to last you until the rescuers come. The child is not assaulting you. He is not performing any action directed against you; he is only breathing. Thus, to kill him is not self defence. It is not a response to an aggressive action. Nor does it fall within Brody's amended second condition. It is a killing done out of personal necessity to save one's own life. It is an unjustified killing that is excusable due to the agonising circumstances.

Several major legal philosophers agree with Fletcher's conclusion that necessity excuses the violator of the prohibitory norm on killing from being punished. Hobbes had this to say on the matter:

> "If a man by the terror of present death be compelled to do a fact against the law, he is

> totally excused because no law can oblige a man to abandon his own preservation." 52

Kant,[53] Bentham,[54] Austin,[55] and Holmes[56] concurred with this view.

To switch from legal philosophers to legal commentators or authoritative writers on criminal law, Gerald Gordon, author of the definitive modern textbook on Scottish Criminal Law has this to say:

> "It is submitted that where the law lays down no rule of choice anyone who kills another to save himself should be excused." 57

Glanville Williams states that the defence of necessity was provided in S. 81 of the Indian Penal Code (which was drafted by English lawyers) and in the Queensland and Western Australian Criminal code S. 25. It has also been partially recognised - that is, it is a defence in cases where the killing is done to save the killer's own life - in certain European Penal Codes such as that of Germany (S. 5) and the Soviet Union.[58]

The case of Dudley and Stephens[59] would prima facie appear to exclude necessity as a defence in English law. Dudley and Stephens were crewmen of a vessel which sank at sea. They got into an open boat with a seventeen year old cabin boy. After twenty days at sea, seven of them without food and water, they killed the cabin boy (who was near death anyway) and indulged in cannibalism. They were picked up after twenty four days and convicted of murder, although they received only six months imprisonment.

Gordon believes that this judgement was erroneous. In any event, it is at its highest only persuasive authority to Scots law. He thinks the jury were influenced by the knowledge that the men would not be

hanged. The court was probably revolted by the fact that the case involved cannibalism as well as murder. Finally, it seems the court assumed that the law must enforce its particular version of Christian morality which held that the men ought to have waited passively for death.[60] Glanville Williams criticises the decision on similar grounds; accusing the judge of indulging in mere rhetoric in his declaration "that the principle once admitted might be made the legal cloak for unbridled passion and atrocious crime."[61]

Thus, on balance it seems that Western law does admit the excusability of killings done on the grounds of necessity and those legal orders which do not are out of step with moral thought. Thus, the mother can excusably take the life of the foetus under the circumstances in which the foetus' continued existence threatens her life.

What of the permissibility of third parties performing abortions at the mother's request? Thomson thought this was simply a matter of the surgeon being a good Samaritan. Fletcher pointed out that the surgeon was killing an innocent, and did not have the moral standing to make such a choice. A more discriminate moral code was provided by Foot and Brody and this is the one which I find to be the most convincing.

To show why, I ask you to imagine yourself back in the cave, but with an additional factor present in the affair. Cracks have appeared in the rubble which entombs the parties. This does not alter the situation concerning the oxygen level, but it allows one of the rescuers to aim a rifle and shoot either you or the child. You yell to the rescuer to shoot the child. The child is mute, so he can have no say in the matter, - may the rescuer shoot?

Thomson says he may, but she assumes he will shoot to save you, presumably on the utilitarian grounds that you, as a sentient adult, are worth more than a mute child. But equally the rescuer could shoot you to save the child. Just as the surgeon could kill the woman to save the foetus if both were going to die and he believed the foetus to be the more important.

Fletcher's theory makes it impermissible for the rescuer to shoot either of you. So there is a chance both of you will die, despite the fact that one of you could be saved.

Brody and Foot recommend that we consider all the possibilities. If it is the case that the child will die, regardless of whether he shoots or not, but you will live if he kills the child, then it is permissible for him to shoot the child. By the same token it is permissible for a surgeon to abort a foetus to save its mother if the foetus is going to die whatever happens and performing the abortion will save the mother.

If it is the case that you will die of asphyxiation but the child will live to be rescued, then the rescuer cannot shoot. He cannot make a utilitarian decision that you are more valuable than the child, without violating the child's rights. Equally, if it is the case that you would live but the child would die if nothing were done, then this moral principle prevents you from being shot. By analogy under any moral theory based on rights, the surgeon cannot step in to abort the foetus and save the mother if the foetus can be safely delivered after the woman's death.

If it is the case that both of you will die in the event of the

rescuer failing to shoot, but one of you will live if the other is shot, then the rescuer may shoot either of you. For Foot and Brody it is better to kill one person to save another than let both die. But how to choose between you? According to Foot, the rescuer ought to base his choice on his judgement of the worth of you relative to the child, that is on utilitarian considerations. Brody says that it has to be by fair random choice for example, by drawing lots.

Brody's method of decision making was given legal recognition in U.S. v Holmes.[62] The facts of the case were that some passengers and all of the crew got into two lifeboats after the vessel William Brown had sunk. One of these boats, commanded by the mate, was overloaded so that it became necessary to put some people overboard to prevent it sinking. Holmes, who was a member of the crew, and had helped throw sixteen male passengers overboard under the mate's orders was convicted of manslaughter, the grand jury having refused to indict him for murder. The court did not reject his defence of necessity out of hand, but considered that the wrong principle of selection had been employed. The "etiquette of the sea" demanded that superfluous crew members should be sacrificed before passengers. Thereafter, choice amongst the passengers should have been made by drawing lots.

Brody and Foot do not endorse Finnis' dictum that abortion ought not to involve an assault on the foetus' person. Provided their other criteria are met then aborting the foetus by performing a craniotomy is as morally permissible as aborting it by means of a hysterectomy.

This conclusion is shared by most Western legal systems as this quote from Hart shows:

> "The English law of abortion in common with other secular systems, makes no distinction between the two ways of terminating a pregnancy which I have illustrated above: if undertaken to save the mother's life both forms of destroying the foetus are permissible, and the distinction between direct and indirect intention is ignored." 63

Pregnancies Induced by Rape, Incest and Contraceptive Failure

Discussion of this topic is best started by considering Judith Jarvis Thomson's landmark article. Proceeding from the assumption that the foetus is a person, Thomson nonetheless believes that the traditional argument on abortion which holds the foetus' right to life to be more important than the mother's right to control what happens in and out of her body is unsound.[64]

As proof of her belief she constructs the following case. Imagine that you awake one morning to find a famous violinist in bed beside you. His kidneys have been connected to yours by the Society of Music Lovers without their having received your prior permission. This state of affairs is to last for nine months. If you elect to unplug yourself before that time then the violinist will die.

Now if the right to life argument holds good then unplugging yourself is morally impermissible since it violates the violinist's supposed right to life, and subordinates it to the lesser right of bodily freedom and privacy. But, according to Thomson, one intuitively feels that detaching yourself from the violinist is morally permissible.[65] If this is so, then how can this intuition be rationalised in terms of rights theory?

The answer according to Thomson is that we confuse situations in which it would be right - that is laudable, kind or noble - for A to do B for C; with situations in which A has a duty to do B for C and

correlatively C has a right that A do B for him. Unfortunately, Thomson uses a rather confused terminology to distinguish the two. She calls behaviour which is the opposite of "right" behaviour "indecent".[66] Behaviour which is the opposite of that specified by the moral duty and thus which is in breach of the correlative moral right is termed, "unjust".[67] The confusion arises from her failure to identify rights as correlatives to duties.

To illustrate her point that saying X ought to do A is not automatically equivalent to saying that X has a duty to do A, Thomson puts forward the following two examples. Imagine that you are dying of a fever and only the touch of Henry Fonda's cool hand on your fevered brow will save you. He is on the West Coast. Do you have a right that Henry Fonda fly over and touch your brow? Thomson does not think you do. It would be nice of Henry Fonda to oblige you, and one might consider it indecent of him to refuse, but there is no right/duty relationship between the two of you.[68]

Again, imagine that there are two brothers, the elder of whom has been given a box of chocolates which he refuses to share with the younger. Does the younger brother have a right to share and does the elder have a duty to share them? Once more Thomson believes the answer to be no. He would only be in breach of a duty to his younger brother if the chocolates had been given to both and he refused to share them. Then one could say that the elder brother had violated the younger brother's right to the chocolates.[69]

For Thomson, the violinist case is akin to the Henry Fonda and greedy brother examples. It would be noble of you to donate your

kidneys but you are not under any duty to do so. The violinist has no right that you do so, irrespective of whatever right to life he may have. Properly understood:

> "the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly." 70

The mother/foetus relationship per Thomson is like the Good Samaritan/wounded traveller one. The woman can choose to help the foetus by allowing it to use her body, but she is not under any obligation to do so. The unfairness of current abortion laws is that they coerce pregnant women into Good Samaritanism when no other social group is required to display this degree of concern to their fellow persons.

Artfully framed though the violinist example is, it does not permit the range of applications to the abortion problem which Thomson claims on its behalf. For example, a vital factor in establishing the permissibility of the woman unplugging herself is the absence of her consent to being cojoined with the violinist in the first place. What if the woman had agreed to being hooked up to the violinist and then decided to opt out halfway through the treatment? These factors of bad faith and reliance colour the permissibility of her action.

Thomson's analysis is best suited to abortion cases involving pregnancies induced without the mother's consent, such as those caused by rape, incest and contraceptive failure. Putting it into Fletcherian terms, Thomson is saying the woman's interest in bodily privacy takes precedence over the foetus's interest in life where the pregnancy was not of the woman's volition. She may kill the foetus to uphold her interest.

References to Finnis' and Fletcher's work provide some cogent reasons for rejecting Thomson's analysis. Taking pregnancies resulting from contraceptive failure first, five counter points to Thomson's argument can be adduced. First, there is no element of assault in the act of intercourse, only an unforeseen consequence. Second, it is not the case that woman has no alternative but to kill the foetus to protect her interest - unlike the potentially fatal pregnancy. She can elect to have the child and give it up for adoption thereafter. Third, the foetus is not in breach of any duty in being where he is, therefore the third element underpinning Fletcher's criteria of justified killing is missing. Killing the foetus is killing an innocent. Fourth, there is not the same certainty that the woman's interest in bodily privacy is so vital that it is worth killing for. Thus, it is not certain that the woman's killing an innocent to safeguard it is even excusable, let alone justified. Fifth, Thomson's theory is based on the assumption that abortion is one of the range of Good Samaritan problems. But as Finnis points out, the priest and the Levite failed to save the stricken traveller, they did not actively try to kill him.[71] Abortion on the other hand involves the killing of the foetus. The woman does not merely avoid providing him with food and shelter, she assaults him in the eviction from her womb.

Thomson's reply to Finnis' point is to dismiss it as being morally irrelevant. There is no moral difference between acting to kill someone and failing to save them (assuming that it is within your power to do so).[72] Such an assumption goes directly against contemporary Western moral thinking on this issue. As Finnis, Brody and Foot

have pointed out, the two are not regarded as moral equivalents. Legally we are not obliged to save individual A's life whilst we are under a prima facie duty not to end it. Thomson is treading the route marked out by Tooley in his moral symmetry principle and the formidable array of arguments which were led against Tooley can be deployed with equal ease to rebut Thomson.

Pregnancies resulting from rape and incest are very much harder to judge. In these cases an assault has been committed. There has been a violation of the woman's right to freedom from assault. The question boils down to whether the delict committed by the foetus' father against the foetus' mother should carry over to the foetus itself. That is, should the "sins" of the father - which would have justified the mother killing him - be visited upon the foetus and permit his being killed? Or should the woman be forced to carry to term a pregnancy she not only did not want, but was forcibly compelled to have?

Even such a committed abortion conservative as Finnis has doubts over the justice of coercing a raped woman into taking her child to term:

> "Perhaps forcible rape is a special case, but even then it seems fanciful to say that the child is, or would be, in any way at fault, as the violinist is at fault or would be but for the adventious circumstances that he was unconscious at the time." 73

Finnis tries to take refuge in his direct/indirect killing thesis. It is impermissible to <u>directly</u> kill the rape induced foetus so in the vast majority of cases it will be impermissible to abort it.[74] Serious doubt has been cast on the validity of Finnis' belief that the abortion must not involve an assault on the foetus, by Thomson, Foot and Hart in their writings on the doctrine of double effect.

Faced with this controversy, each individual has to make a personal value judgement on the morality of aborting foetuses created by rape or incest. He either has to say "the foetus himself is innocent of any delict against the woman. He came into being as a result of a delict committed against his mother, but that delict was not his. The woman's right of recourse runs against the rapist, not the product of his action". Or he has to say "the foetus is the product of a delict. He is an inseparable part of that delict. The woman's right of self defence which runs against her rapist and permits her to justifiably kill him, runs against the foetus as well".

Another possible option is to consider that the woman may excusably kill the foetus induced by rape or incest, just as she can excusably kill the innocent foetus which threatens her life. But the woman's interest in bodily privacy is less important than the foetus' interest in life. And if she waits for nine months she can still put away the legacy of her suffering without killing a person who is innocent of any delict against her. Again, it is up to each judging individual to decide between these options.

Pregnancies Threatening the Woman's Physical and/or Mental Health

The foetus/mother; rights/interest structure is a constant in the five categories under consideration. The variable is the particular interest of the woman prejudiced by the foetus' presence.

In cases involving a threat to the woman's physical and/or mental health, the severity of the possible harm to the woman varies. The degree of harm influences the permissibility of her having an abortion.

At one polarity of the physical/mental health spectrum, there are those pregnancies which literally threaten to destroy the woman's personality. Referring back to the analysis of personhood, if it is the case that the woman will be left in a vegatative state if forced to carry her pregnancy to term then the threat posed to her personality by her pregnancy is as acute as that posed by biological death. Therefore the morality of abortion in such circumstances is the same as the morality of aborting potentially fatal pregnancies.

The more minor the degree of physical and mental distress suffered by the woman then the correspondingly weaker claim she has to an abortion. For example, it may be that the woman will suffer some moderate degree of physical discomfort and mental upset for the duration of her pregnancy, but will not experience any ill effect hereafter. Abortion in such cases appears to be immoral. If the practice is considered to be morally permissible in such cases then in effect, one individual may kill another who is innocent of any delict against him but whose presence causes him temporary moderate mental and physical discomfort. Such a proposition is radically at odds with Western morality. It is also inconsistent with the legal principle that one's right of self defence is limited to circumstances involving a severe threat to oneself or a third party.[75]

Occupying the middle ground are those cases where the woman will suffer severe but not catastrophic physical and mental harm unless her pregnancy is terminated. She may become a chronic invalid, or suffer from severe and prolonged post natal depression if she takes her pregnancy to term. The conclusion of each judging individual will vary

in these sorts of situations. Some would decide in favour of the foetus whereas others would favour the woman's interest(s) in these marginal cases. Legal norms can be usefully employed as a guide in our decision making. What sorts of interests have Western legal systems held to be sufficiently important for individuals to kill in defence of them?

Before engaging in this interdisciplinary exercise in clarification it is prudent to remember the standing of the parties in this interests dispute. The foetus is an innocent. His presence in the maternal womb does not constitute a delict. Therefore killing the foetus to safeguard the maternal interest, he innocently prejudices, can only be morally excusable, not morally justifiable.

Legal norms delineating a person's right to kill in defence of an interest threatened by another proceed from the assumption that the victim of the killing is a delinquent. That is, he is in breach of a legal duty to A (such as the duty not to assault another) which A can justifiably respond to by killing him. Thus, even if it were legally permissible for agent A to kill delinquent agent B in circumstances 'C' to protect interest 'X', a further question has to be asked to determine the moral permissibility of foetal agent 'B' being killed, namely "would it be permissible for a non delinquent to be killed in these circumstances to protect this interest?"

Section 34(2) of the Canadian Criminal Code permits killing in self defence against an unlawful assault where the killer:

> "causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes" (my emphasis)

In Scots law the justifiability of homicide appears to be limited to circumstances in which it is necessary to save life from unlawful attack. In H.M.A. v McCluskey[76] it was held that a man who killed to ward off an attempted sodomy was guilty of the lesser crime of culpable homicide (manslaughter).

To quote Gordon:

> "If then rape is put on one side as a unique exception, the result of McCluskey is that homicide can be justified only by the necessity of saving life from unlawful attack." 77

Section 197(3) of the Californian Penal Code permits killing where:

> "there is reasonable ground to apprehend a design to commit a felony or do some great bodily injury" (my emphasis).

In People v Williams[78] Justice Lyons employed the following test to judge the permissibility of killing in self defence per S.8(1) Chapter 3, 8, or 1U. Rev. Stat. 1963:

> "We must determine if the use of such deadly force by defendant was justified. Such force is justified if the threatened force would cause death or great bodily harm or is a forcible felony." 79

Justice Harrison in Montgomery v Commonwealth[80] formulated this criterion:

> "You can only kill to save life or limb or prevent a great crime or to accomplish a necessary public duty." 81

The various American state penal codes appear to allow a greater degree of latitude in killing in defence of bodily health than the Canadian (common law) and Scottish (civilian/common law) systems. There is a general agreement that killing to protect bodily integrity is only

justifiable if the threatened bodily harm is extremely grave.

Once the decision on which interests one may kill to defend has been made then the permissibility of killing the foetus to protect the woman's interests is best governed (in the writer's opinion) by the Foot/Brody theories. Thus:

1) If doing nothing will result in the foetus dying and the mother's vital interests being harmed, then killing the foetus is excusable.

2) If doing nothing will cause the mother to suffer great bodily harm and they both will die but a surgeon can operate (a) to save the mother by killing the foetus or (b) to save the child by killing its mother or causing her severe bodily harm, then a choice between foetus and mother ought to be made by a fair random method.

3) If by doing nothing the mother will suffer great bodily harm but the foetus will be safely delivered, then the surgeon cannot excusably abort.

It may seem that a decisive answer to the question of when abortions to protect the mother's physical and mental health is being deliberately avoided. This is not so. A decisive answer cannot be provided. Different individuals will value the relative value of the woman's and the foetus' interests differently. This moral doubt leads us to pose new questions, for if it is the case that the subject does not lend itself to decisive conclusions; if the moral community is irrevocably split over the matter with both sides being able to present cogent and morally appealing arguments in favour of their prescriptive view(s) then

the matter becomes one of whether one side may justifiably impose its moral views on the other. This is a problem of political morality, and it shall form the subject of this work's fourth and final chapter.

What should be clear by now is the importance of the foetus' moral status to the abortion debate. If accounted a non person, then the balance is shifted decisively in favour of a "pro-choice" viewpoint. If accounted a person, then a "pro life" moral and legal policy results with its attendant problems of determining when the foetus as a person's interests take precedence over the woman as a person's ones and vice versa.

Economic Welfare

The degree of harm which an unwanted pregnancy can cause to a woman's (and her immediate family's) economic welfare varies. Consequently, it does not seem arbitrary to separate first world cases from their third world counterparts. No woman in the West is going to starve as a result of her being pregnant and unable to work. There are welfare agencies both public and private which will undertake to maintain both her and her immediate dependents. This is not to belittle the degree of economic disadvantage these women suffer, but can this temporary disadvantage justify the killing of the person (i.e. the foetus) who is its innocent cause? Especially if the woman has the alternative of taking her pregnancy to term and giving up the resultant child for adoption?

Reference to Western legal systems shows us that the right of killing in self defence is strictly limited. Every Western European country is a signatory to the European Convention of Human Rights,

Article 2(1) and (2) of which reads:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary.
>
> (a) in defence of any person from unlawful violence,
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained,
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Thus killing of aggressors (let alone innocents) in defence of economic interests is excluded.

As Gordon puts it:

> "the courts of a signatory to the convention can hardly continue to maintain the right to kill in defence of property especially if they restrict the right to kill in defence of the person." 82

These legal norms reflect a moral opinion that it is impermissible to kill someone, that is deprive him of his interest in life, to safeguard an economic interest. Thus, abortions to protect and preserve economic interest are immoral. No third party can aid the woman in aborting the foetus and it is morally inexcusable as well as unjustifiable for the woman to abort or attempt to abort herself.

In "third world" cases, the economic consequences of an unwanted pregnancy can be devastating. Given the absence of social welfare agencies, both the mother and her existing children could conceivably

starve as a result of the foetus' existence.

If it is the case that the woman will literally starve unless she is allowed to have an abortion then the pregnancy in question is a potentially fatal one. Thus, the moral permissibility of her having an abortion has already been considered inter alia in the section which dealt with such pregnancies. Since the death of the woman from starvation will undoubtedly kill the foetus as well, the choice comes down to deciding whether to let the mother and foetus both die, or killing the second to save the first. In such cases, the abortion is morally permissible.

To alter the terms of reference slightly, suppose it is the case that the pregnant woman has other young children. It is the case that she will survive her pregnancy, but her other children will not because she is unable to work to provide for them. For a surgeon to abort the foetus in such circumstances would involve him killing the foetus. For him not to abort in such circumstances would involve him in failing to save the foetus' siblings. As has been previously shown, failing to save (an omission) is a lesser wrong in Western morality than killing (an action). Killing the foetus to save one or more of his siblings is morally akin to killing the foetus to save the mother where the former could be safely delivered after the latter's death. A utilitarian theory can justify the killing in both cases. A moral theory founded on rights cannot.

There is one set of cases which are traditionally cited in abortion discussion as a discrete category requiring explanation when in fact they are simply a member of the category currently being

discussed. It is argued that foetuses who will develop into severely mentally or physically handicapped children can be justifiably aborted because of the enormous financial burden their maintenance would place on their parents.

This argument is fallacious. There is no special case to be made for the mother of a handicapped foetus. If a utilitarian theory of morality is espoused by the judging individual, then the permissiblity of the woman having an abortion to protect her economic interests is all the more certain in instances where the foetus will develop into a handicapped child and require a particularly large share of the parents' resources to care for it.

If the morality of abortion is based upon rights theory, then the social cost of the particular person has no bearing upon his rights. Under rights theory it is morally impermissible to violate a handicapped person's right to life, regardless of whatever saving of resources his death might achieve. It is no more permissible to kill a foetus because of its handicap than it would be to kill an extra uterine person because of his. The only moral relevance the mental handicap has is whether it is sufficiently severe to preclude the child from being accounted a person.

Inconvenience

The further we move from the "hard cases" the easier it becomes to discount the woman's claim for an abortion - if it is assumed that the foetus is a person. In "inconvenience" cases, the woman's health and economic welfare will not be seriously impaired by her carrying the pregnancy to term. It is the case that she has changed her mind,

for one reason or another, no longer wants a child, and now wishes to have the foetus killed to realise this wish.

It does not seem unreasonable to say that Western moral theory would find the prospect of killing an innocent person for reasons of convenience morally repugnant. Even Thomson is troubled by the prospect. She contends that pregnancies requiring only minimally decent Samaritanism on the woman's part should be carried to term since abortions in such circumstances would be "indecent".[83]

What does the term "indecent" mean however? Remember that a killing which constituted a breach of a right in the right/duty sense was termed "unjust" by Thomson. "Indecent" covered cases where Henry Fonda would not walk four yards to touch and save the fever victim. Does Thomson mean that in cases like the woman seeking a seventh month abortion to go on a trip to Europe the foetus has a right against the mother to have its gestation taken to term? Or is it the case that the rights theory so carefully elaborated by Thomson in the earlier part of her essay loses its significance as one progresses across the abortion spectrum towards the less fraught cases, so that when the "minimally decent" cases are reached it is no longer a question of rights, but a matter of what is right?

Whatever the answer, it can safely be said that the killing of a person by another to protect his or her minor interests is inconsistent with Western moral and legal thinking. Abortions for such reasons - presuming that the foetus is a person - are equally impermissible.

Footnotes to Chapter Three

(1) George Fletcher "The Right to Life" Georgia Law Review v. 132 p. 135 (1979).

(2) Ibid p. 136

(3) Ibid p. 136

(4) Ibid p. 138

(5) Ibid p. 141

(6) Smith and Coval "Concept of Action op. cit. p. 209.

(7) Ibid p. 210

(8) Glanville Williams "Criminal Law" (Stevens and Sons) 1953 p. 577.

(8a) Joel Feinberg "Voluntary Euthanasia and the Voluntary Right to Life" Journal of Philosophy Public Affairs, v. 93, (1978) p. 111.

(9) Fletcher op. cit. p. 145.

(10) Judith Jarvis Thomson "Self Defence and Rights" (University of Kansas Press) 1976 pp. 7-9.

(11) Ibid p. 145

(12) Judith Jarvis Thomson "Some Ruminations on Rights" Arizona Law Review v. 19 (1978) p. 45.

(13) Fletcher op. cit. 1.147-8.

(14) R. v Dudley and Stephens Ir. Q.B.D. 273 (1884)

(15) Fletcher ibid p. 148.

(16) Thomson "Self Defence and Rights" op. cit. p. 8

(17) Fletcher p. 148.

(18) Fletcher p. 147.

(19) This example is borrowed from Thomson's "A Defence of Abortion" op. cit. p. 22.

(20) Thomson "A Defence of Abortion" p. 8.

(21) Ibid p. 9.

(22) Ibid p. 9.

(23) Ibid p. 10.

(24) John Finnis "The Rights and Wrongs of Abortion" essay in "The Rights and Wrongs of Abortion" op. cit. pp 93-96.

(25) Ibid p. 103.

(26) Ibid pp. 105-10

(27) Ibid p. 109

(28) Ibid p. 110.

(29) H.L.A. Hart "Intention and Punishment" essay in Punishment and responsibility (Oxford University Press) 1968 p. 123.

(30) Ibid p. 122.

(31) Ibid p. 124.

(32) Ibid p. 125.

(33) Judith Jarvis Thomson "Rights and Deaths" essay in "The Rights and Wrongs of Abortion" op. cit. pp. 120-121.

(34) Ibid p. 121.

(35) Ibid p. 121.

(36) Ibid p. 123.

(37) Phillipa Foot "The Problem of Abortion and the Doctrine of Double Effect" Oxford Review No. 5 1967 p. 6.

(38) Ibid p. 8.

(39) Ibid pp. 9-10.

(40) Ibid p. 10.

(41) Ibid p. 11.

(42) Ibid pp. 14-15.

(43) Ibid p. 15.

(44) B. A. Brody "Abortion and the Sanctity of Human Life" American Philosophical Quarterly v. 10 No. 2, April 1973 p. 133.

(45) Ibid p. 134.

(46) Glanville Williams "Criminal Law" op. cit. p. 577.

(47) Brody op. cit. p. 135.

(48) Ibid p. 136.

(49) Ibid p. 137.

(50) Ibid p. 140.

(51) Ibid p. 140.

(52) Hobbes "Leviathan" ch. 27.

(53) Immanuel Kant "Philosophy of Law" Trans. (Hastie) 1887 p. 52.

(54) Jeremy Bentham "Works" (1843) v. 1 p. 397.

(55) John Austin "Province of Jurisprudence Determined" 4th Ed. (1879) p. 515.

(56) Oliver Wendell Holmes "The Common Law" (1881) p. 44, & 47.

(57) Gerald H. Gordon "Criminal Law" (Edinburgh) 1967, p. 375.

(58) Glanville Williams op. cit. p. 569.

(59) R. v Dudley and Stephens (1884) 14 Q.B.D. 273.

(60) Gordon op. cit. pp. 376-8.

(61) Glanville Williams op. cit. pp. 582-5.

(62) U.S. v Holmes (1841) 26 Fed. Cases 360, No. 15, 383, see also - Hall Force and George's "Criminal Law and Procedure" 3rd Ed. (Bobs Merrill) 1976 pp. 555-560.

(63) Hart "Intentions and Punishment" op. cit. p. 125.

(64) Thomson "A Defence of Abortion" op. cit. pp. 4-5.

(65) Ibid p. 5.

(66) Ibid p. 17.

(67) Ibid p. 13.

(68) Ibid p. 11.

(69) Ibid pp. 12-16.

(70) Ibid p. 13.

(71) Finnis op. cit. pp. 108-109.

(72) Thomson "Rights and Deaths" op. cit. pp. 124-125.

(73) Finnis op. cit. pp.110-111.

(74) Ibid p. 111.

(75) See pp. 81-84 infra

(76) McCluskey v H.M.A. 1959 J.C. 39.

(77) Gordon op. cit. p. 710.

(78) People v Williams 56 111. App. 2d. 159. 205 N.E. 2d. 749 quoted Hall, George and Force op. cit. p. 579.

(79) Hall, Force and George op. cit. p. 582.

(80) Montgomery v Commonwealth 98 Ua. 840 36 S.E. 371.

(81) Quoted Hall Force and George op. cit. p. 616.

(82) Gordon op. cit. p. 710.

(83) Judith Thomson "A Defence of Abortion" pp. 21-22.

CHAPTER FOUR

Justifiability and Pragmatism

Justifiability

Up to this point, discussion of the abortion argument has been predicated on the assumption that the foetus' moral status is decidable. As was outlined in the introduction, this assumption is not unimpeachable. It is possible to conclude that foetal status is such a tricky moral problem that it defies a non-arbitrary solution. Consequently, other criteria, namely those of justifiability and pragmatism (which is a synonym for social utility in this context) can be regarded as a sounder basis for moral decision making.

If it is assumed that the foetus lacks any definite moral standing then the abortion dilemma boils down to this: there is an individual 'A' who wishes to have this operation performed on her body and ceteris paribus there is another individual willing to perform it at her request.

This arrangement outrages the moral sensibilities of a significant social minority or perhaps even a social majority. Those outraged cannot conclusively show that any other individual is prejudiced by the practice but nonetheless they remain disgusted by it. In such circumstances is it morally permissible for legislation to be enacted prohibiting abortion? In other words, are anti-abortion laws legitimate?

The analysis of these questions shall consist of three sections. The first will focus on the question of whether the enforcement of public morality by the legal order is morally justifiable when it

involves impinging on the freedom of the individual. The second shall consider whether any legal order can be justified morally speaking. The third shall examine the anti-abortion laws issue from a purely legal perspective as provided by Coval and Smith's causal theory of law.

a) Is Legal Enforcement of Public Morality Justifiable?

Within what might be called the mainstream of philosophical articles on abortion to address the matter of whether anti-abortion laws can be justified in a liberal Western democracy when the status of the foetus is classified as non-decidable. Roger Wertheimer believes the burden of proof in this issue rests with the state, (state can be a dangerously misleading term, perhaps Kelsen offers the least meta-physical/ideological definition of it as the personification of a legal order regulating a population within fixed geographical limits).

The state has to show that the restriction in individual liberty brought about by laws prohibiting abortions actually saves human (that should read personal) lives. If no proof can be adduced to support this proposition then these laws are illegitimate.

> "the existence and powers of the state are legitimated through their rational acceptance to the citizenry and it would be irrational for the citizens to grant the state any coercive power whose exercise could not be rationally justified to them. Thus, the state has the burden of proving that its actions are legitimate.. But the social costs of the present abortion laws are so drastic that only the preservation of human lives could justify them. So to justify those laws, the state must demonstrate that the foetus is a human being. But if that can't be done at all the state can't do it either so the laws must be deemed an unjustifiable burden and hence an illegitimate exercise of power." 1.

The importance of Wertheimer's argument deserves to be emphasised. If the condition of non-decidability is assumed then the choice has to

be between individual liberty and state power. For Wertheimer, the choice is clear. The individual liberty of the citizen always ought to be presumed to be the higher value. Restrictions on an individual's liberty have to be justified in terms of good reasons. These restrictions ought not to be purposeless. They have to be linked to a matrix of goals which are rational themselves.

Non decidability reduces the abortion question to a segment of the debate on the justifiability of coercive normative social orders such as law. How does the state justify itself? What is the nature of our obligation to obey the law - indeed is there such an obligation or is it all a matter of coercion?

Discussion of these questions shall conclude this chapter. For the moment it is proposed to continue the analysis of the legitimacy of abortion laws.

Baruch Brody centres his article on the question of whether it might be morally permissible to legalise abortion, even if it is accepted that the practice involves the taking of an innocent human life and is thus morally wrong. He concludes (not surprisingly) that the two propositions are incompatible and thus that the legal problem of abortion cannot be separated from the problem of foetal status.[2]

Brody's methodology is worth highlighting. He first formulates two principles which he claims are not clearly incompatible:

1) Abortion is wrong since it involves the taking of an innocent human life.

2) It is wrong for the state to have laws prohibiting abortions.[3]

He then attempts to construct a plausible principle which if cojoined with (1) and (2) would make an inconsistent triad. Such a principle would delineate the type of wrong actions which ought to be prohibited by law. A number of principles are floated but each is inadequate since it fails to account for all the special circumstances where the performance of one wrong action will produce overridingly beneficial side effects. Thus he concludes:

> "the rightness (or appropriateness) of a law prohibiting certain actions cannot be settled by decisions about the rightness or wrongness of the action, or even by such decisions coupled with decisions about why the action is wrong" 4

So the original objection to statements (1) and (2) will not do. The compatability of principles (1) and (2) will have to be tested by considering "the results of having such a law in a given society." Are the disadvantages of prohibiting abortion such that it is permissible for the state to permit them regardless of their immorality?

Before studying the consequences of anti-abortion laws, Brody attempts to show why the joint assertion of principles (1) and (2) cannot be vindicated by the claim that the citizens of a pluralistic society ought not to use the law as a means of enforcing their private morality. If the rights of a minority to pursue a course of action they consider to be correct are absolutely protected then there are no grounds, to prevent say the Klu Klux Klan from killing blacks because they do not consider them (as Brody puts it) "human".

Even if this principle is weakened so that the majority may legislate to prohibit the minority's action where the "action in question is so evil that the desirability of its illegal prohibition"[5]

outweighs the desirability of allowing minority freedom of conscience then this does not reconcile principles (1) and (2). The reason for this being that the anti-abortionist does not perceive any difference between killing a foetus and killing an adult negro:

> "An adequate account of the relation between law and morality in a pluralistic society does not easily support the joint assertibility of (1) and (2). Even in a pluralistic society the minority cannot always have the right to follow its own conscience." 6

As a conclusion to his analysis Brody summarises a number of arguments commonly used to justify abortion being legalised and considers whether any one of them allows an individual who believes in principle (1) can nonetheless countenance abortion's legalisation.[7] Examples of these arguments are that the prohibition of abortion interferes with a woman's right to bodily freedom and a doctor's right to practice medicine as he sees fit. Abortion is discriminatory since the rich will always be able to obtain them, be they legal or not. Unwanted children result from unwanted pregnancies. Women die from back street abortions, and so on.

Naturally since Brody has assumed that the foetus is a person, none of these utilitarian arguments rebut the foetus' right to life, any more than they would rebut an adult human being's right to life (assuming this human being to be a person). What Brody fails to do is consider the consequences for his argument if his first principle does not hold good. What if the foetus were not to be regarded as a person? What if its moral status was seen as being non-decidable and other criteria were employed to determine the morality of abortion?

It has been shown <u>supra</u> that Brody cannot conclusively

demonstrate the foetus' personateness.[8] Why does he not consider where this non-decidability might lead? The possible answer for Brody's reticence on this point might lie in his anti-abortion sympathies. As it is he is simply question begging, producing slanted arguments whilst waiting for some other philosopher to establish foetal personateness and thus allow his conclusions to slip neatly into place as part of the super structure of the anti-abortion position.

If non-decidability is assumed, then the abortion dilemma centres around the issue dealt with by Brody in the second section of his article, namely when (if ever) is it morally permissible for a legal order to restrict the individual's freedom of action when no obvious harm to any other individual results from the action? Viewed from this perspective, the permissibility (or as Wertheimer puts it the legitimacy) of laws prescribing abortion are linked to the moral question of what action or practices the law may justifiably forbid us as individuals from doing.

The work of John Stuart Mill is the seminal influence in discussions of this sort. His thesis is simple; a practice ought to be legally prohibited only if it harms someone other than the practitioner(s):

> "The object of this Essay, is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted individually or collectively in interfering with the liberty of action of any of their number is self protection. That the only purpose for which power can be rightfully exercised over any member

> of a civilised community against his will, is to prevent harm to others. His own good either physical or moral, is not sufficient warrant." 9

If Mill's principle is followed, then abortion ought not to be legally prohibited since there is no certainty that the foetus is an "other" to be harmed by the practice. Of course, the abortion conservative would deny this uncertainty. But this particular part of the thesis is devoted to considering the possibilities which flow the premise of non-decidability. Even if harm to the foetus is not a factor in this present discourse, it can still be argued that abortion does cause harm to those individuals whose moral sensibilities are outraged by it. Does this form a ground (even under Mill's principle) for prohibition? Indeed, why accept Mill's thesis at all? Why not simply say that the moral views of the majority in any given society can be legitimately enforced upon those who do not share them.

These questions were discussed in the Hart/Devlin debate of the nineteen sixties with Hart arguing for a neo Millian respect for personal moral privacy and Devlin advocating a more muscular intervention of the law into those hard moral cases where there is no obvious victim(s) of the individual(s)' actions, save possibly the agents themselves, only a prevailing moral notion that the practice is distasteful and immoral.

Devlin's case is founded on two chief arguments. The first is that society has a right to protect its own existence. The second is based on the right of the majority to adhere to its own moral convictions in defending its social environment from potential changes it disapproves of.

The substance of the first argument is this. In modern Western societies there are two classes of moral principles. The first might be described as optional, they are adopted by some individuals for their own guidance, but are not imposed upon others. The second may be called "mandatory". No dissent to these mandatory principles is tolerated by the social majority. An example of the first type would be religious pluralism; an example of the second would be monogamy. Social life is dependent on some moral standards being of the second class. Every society has the right to protect its own existence and thus has the right to insist on conformity to moral standards of the second type. Just as a society may use its law to prohibit treason, so it may use it to prevent a corruption of the moral conformity which is the source of its cohesion:

> "Society may use the law to preserve morality in the same way it uses it to safeguard anything it regards as essential to its existence." 10

But this right to use the law to enforce mandatory moral standards should be used sparingly and be subject to several restraining moral principles in recognition of the possible adverse effects of legal intervention. The most important of these principles is that there "must be toleration of the maximum individual freedom that is consistent with the integrity of society."[11] Thus, the law should only intervene when the practice induces feelings of intolerance, indignation or revulsion in the general public.[12] If, however, there is genuine doubt, or benign tolerance or simply uninterested acquiesence then the law should refrain from intervention.

Devlin's second argument concentrates on justifying society's

right to follow its own moral beliefs and prevent distasteful social changes from occurring. If a practice threatens an adverse change in social life then this is not prima facie adequate grounds for prohibiting the practice. But it does signify that the society's legislators must take heed of the majority's disquiet and make decisions on some moral issues.

They must decide whether the social institution threatened by the practice is sufficiently valuable to justify the restriction of freedom which is resultant from its proscription. Where the practice is immoral, that is, arouses revulsion in the community, then the threshhold of prohibition is lowered, since the individual does not have a moral right to perform the practice. Thus, less of a case is needed to justify the prohibition on cheating than a prohibition on the freedom to choose your place of work or the books you wish to read. This does not make immorality identical with criminal conduct, rather it argues that on occasion, immoral conduct should be made criminal.

The legislator's guide to the practice's immorality is public opinion. If the vast majority of the community is agreed upon the practice's immorality, then the legislators ought to implement that consensus, even if an educated minority disagree. The basis of the legislator's obligation is first that democracies should settle moral issues by democratic principles.

Second, since it is the community which acts in the enforcement of legal norms, then the community must also take the moral responsibility for this enforcement. Consequently, it should act according to its own moral standards.[13]

As Lord Devlin's argument stands abortion is not an immoral practice suitable for legal proscription, since there is no clear cut, unqualified public acceptance of its immorality. Rather, there is general confusion and equivocation over the issue. But supposing for a moment that abortion did induce widespread revulsion, are Devlin's arguments a sound basis for it being banned?

H.L.A. Hart considers the answer to this question to be a firm "no". While he agrees with Devlin that social stability is dependent on some degree of shared morality:

> "a consensus of moral opinion on certain matters is essential if society is to be worth living in" 14

He does not agree with the opinion that any conduct which "makes the man on the Clapham omnibus sick"[15] ought to be forbidden by law.

Instead of blind acceptance of widespread moral mores, the legislator should look to whether this general morality is based "on ignorance, superstition, or misunderstanding."[16] In addition, a revised Millian test should be applied to the practice in question. It is ludicrous to lump treason with, for example, homosexuality. The practice should be referred to this two level question instead:

> "First does this act harm anyone independently of its repercussions on the shared morality of society? And secondly ..... does this act affect the shared morality and thereby weaken society?" 17

Only if these two questions are answerable in the affirmative does a society have the grounds to employ the law to eradicate the practice.

Devlin's problem according to Hart, is that he fails to treat the statement that immoral practices jeopardise society as a matter of empirical fact. Instead, he believes it to be a necessary truth or a

priori assumption.[18] Devlin mistakenly treats all forms of immorality, sexual or otherwise, as a "single seamless web"[19] instead of social phenomena which can be rationally differentiated by using the two level criterion. Devlin seems to be unable to distinguish between social change and social catastrophe:

> "He appears to move from the acceptable proposition that some shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history so that a change in morality is tantamount to the destruction of society ..... the latter proposition is absurd. Taken strictly, it would prevent us saying that the morality of a given society has changed, and would compel us instead to say that one society had disappeared and another one taken its place." 20

Devlin's counter argument against Hart is to brand his approach as smacking of elitism. In a democratic society, the moral instincts of the overwhelming majority have to be respected and implemented by the law, regardless of how silly or prejudiced the intellectually advanced may find them. The alternative is a quasi platonic oligarchy. Supporters of Hart on the other hand, would argue that he is introducing light and shade into the moral discussion. Instead of lumping all immoral practices together, he is discriminating between them by determining the nature of their consequences. Do they threaten social life as a whole or are their results limited to those who indulge in them? Only practices in the former group should be legislated against. Devlin's thesis justifies various historical atrocities such as the killing of witches, religious dissidents and ethnic minorities.

How does abortion fit into Hart's theory? Clearly, if the status of the foetus is non-decidable, then it cannot be said that the

practice harms any third party over and above the woman and her doctor, who are voluntary parties to it. The abortion conservative could argue that the practice was a threat to social life because it reduced respect for human life. He would have to produce evidence to substantiate this assertion, over and above the mere feelings of the anti-abortion coalition. For by Hart's thesis, the burden of proof rests with those who wish the practice to be banned.

Both Devlin and Hart's theses support the view that abortion should not be made a legal delict where the status of the foetus is non-decidable. In Devlin's theory this tolerance is contingent on abortion not arousing widespread revulsion. Hart's theory offers a stronger protection, namely that it is permissible provided it cannot be shown to be harmful or an acute threat to social life as a whole.

(b) Justifiability and Legal Orders in General

If abortion is merely one sector of the moral area explored in the Hart/Devlin debate, then in turn their theories are merely bit players (to change metaphors) in a grander philosophical drama whose plot fixes on whether it is possible to justify the imposition of any coercive normative order on the individual.

Robert Paul Wolff argues that there are no good reasons to justify the state's authority over the individuals who make up the population within its given territory. It can only show why it has power over them. The distinction between the two concepts is that authority "is the right to command and correlatively the right to be obeyed."[21] Power "is the ability to compel compliance."[22]

Wolff postulates that moral philosophy presumes men to be

responsible for their actions. This responsibility is the product of their ability to choose between various courses of conduct by use of a sophisticated conceptual framework which presumes they can predict outcomes; formulate personal interests; reflect on motives and so on. Man can both choose and explain his choice. Responsible man is bound by moral constraints but these restraints are not imposed on him by others. He may listen and take heed of the advice of others but he is not ultimately bound by it. Responsible man is also autonomous man.

Autonomy is alienable whereas responsibility is not. The first is relinquished by the individual submitting him or herself to the commands of another without regard for their content. But the individual, although no longer autonomous is still responsible for the actions he performs "under orders" because he retains his capacity for choice.

The primary moral obligation of man is autonomy. The defining mark of the State is authority or the right to rule other men. Wolff considers that these two states of affairs are mutually exclusive. The state can force you to obey its laws or you can choose to obey some or all of them. There are no compelling reasons however, to justify the State regulating your behaviour at all, nor to punish you for breaking its laws. The State may exercise power, but it cannot exercise authority.

As a test of his thesis, Wolff examines the case of the so called "just" State, that is, the political pluralist democracy. Can its citizens be said to have a moral obligation to obey its laws? Can it be said to reconcile autonomy and authority? Wolff believes it cannot. Whilst the majority in any particular social issue remain autonomous in obeying the laws relating to the issue, the minority have their autonomy

impinged upon. The moral conclusion they have rejected is coerced upon them by a stronger power.

Every attempt to justify the democratic state by reference to its benefits for individual freedom are in reality justifications of the autonomous individual's desire to co-operate with it. They are not proofs of the State's right to command the individual. Nor are they proofs of the individual's obligation to obey the democratic state's commands. To retreat into social contract theory of the Hobbes/Locke variety is equally futile. If every member of a group agree to abide by the decisions of a majority, this does not endow such decisions with moral authority because the price of such an agreement is the contracting individual's autonomy. They have effectively submitted themselves to a form of voluntary slavery. Thus, authority and autonomy are not reconciled. The latter is sacrificed to the former.[23]

Wolff's conclusion on the philosophical consequences of the authority/autonomy disjunction are as follows:

> "Either we must embrace philosophical anarchism and treat all governments as non legitimate bodies whose commands must be judged and evaluated in each instance, or else we must give up as quixotic, the pursuit of autonomy in the political realm and submit ourselves .... to whatever form of government appears most just." 24

Wolff prefers the former course.

Applying Wolff's theory to abortion, the pregnany woman is not under any obligation to obey laws prohibiting abortions unless she wishes to do so. Equally, her physician enjoys a similar freedom relative to his decision to perform the operation.

If the abortion conservative wishes to argue that the obligation

to obey anti-abortion laws is incumbent upon the parties then he must accept the "all or nothing" implications of his position. These are that he cannot legitimately disobey any of the State's laws, including those which he finds repugnant. If he feels he wishes to retain the option of discriminating between laws, he feels obliged to obey and those he does not, then he cannot deny such autonomy to the pregnant woman and her doctor.

Robert Nozick, whilst espousing a manifesto of individual rights and self determination every bit as uncompromising as Wolff's, believes that it is possible to conceive a state which both comes into existence and continues as a form of social organisation without anyone's rights being violated.

Nozick's argument proceeds from the premise that human beings have certain inalienable rights which cannot be violated, regardless of the increase in overall social welfare the violation would obtain.[25]

The fundamental right in Nozick's scheme of rights is that of free exchange. It might be described as the basic norm of his rights system. Individuals ought to be allowed to trade, sell, barter or gratuitiously alienate their goods and services free from any external interference. From this fundamental right a number of subsidiary rights can be predicated. These would include rights to protect the individual's property and person and rights to ensure freedom of speech, free flow of information and so on.

Without such attendant rights, the ability of individuals to engage in free exchange would be inhibited, since the individual would not be certain of retaining the profits of his transactions. He would

be unsure of which contracts would be kept. He could not depend on the accuracy of the information on which he based his dealings, and so on. Now is there any form of state consistent with this emphasis on rights? Nozick thinks there is one, namely the nightwatchman or minimal state:

> "The nightwatchman state of classical liberal theory limited to the function of protecting all its citizens against violence, theft and fraud and to the enforcement of contracts and so on" 26

The Nozickian legitimate state may provide courts to adjudicate on contractual disputes and alleged delicts committed against its citizens. It can provide law enforcement agencies; prisons and forces for external defence. These are the limits of its functions. For it to do more would entail the rights of its citizens being infringed and that is morally impermissible.

To show how the minimal state can come into existence without anyone's rights of free exchange being violated, Nozick takes us back to the state of nature where self help is all and no central agency enjoys a force monopoly over a particular territory. In such a situation, argues Nozick, people are going to want protection for their property and themselves and they will be prepared to pay for it. Private protection agencies will come into existence to meet this demand. Individuals will contract to be members of these agencies and receive their protection.

At first there will be several competing agencies, but one will eventually emerge as the most successful. Nozick's intelligent consumers will contract to join it since it offers the best service in this field. By this process, one centralised protection agency

exercising a force monopoly over the inhabitants of a well defined geographical area will come into existence solely through individuals engaging in voluntary contracts.

This state of affairs is the ultra-minimal state. The State has a force monopoly in its territory (with the exception of force exercised in immediate self defence)[27] and so self help is excluded. But the State only provides protection to its subscribers, if you do not pay then you do not get protected.[28]

The minimal state goes further than this. It protects everyone within its area regardless of whether they have paid for such protection. To save his thesis, Nozick has to show why this redistribution of wealth between those who are willing to pay for protection and those who are not, does not vitiate his principle that coercive redistribution of holdings is impermissible.

His defence is that the subscribers to the state are not paying for the non subscribers, they are compensating them. That is to say, by creating a force monopoly over the community they are prohibiting non subscribers from engaging in risky self help activities and thus the non subscribers have a moral right to be compensated for this restriction on their freedom of action. The form this compensation takes is the free provision of protection:

> "The dominant protective association with the monopoly element is morally required to compensate for the disadvantages it imposes upon those it prohibits from self help activities against its clients." 29

In the Nozickian free state there is no justification for the majority imposing their own moral misgivings on the individual to

prevent him or her from making contracts relating to his or her own body. Only if such contracts interfere with other citizens' rights of free exchange are there grounds for prohibition. Assuming the foetus' status as an agent to be uncertain then no such infringement exists and thus abortion is Nozickian permissible.

John Rawls attempts to provide a justification of the state's authority (in the Wolffian sense) by use of social contract theory. He asks us to imagine a congress of men and women who have been brought together to decide upon a proto constitution for their society. These constitutional conventioneers are remarkable in that they have been struck by a selective amnesia. They are unaware of their race, sex, religion, age, personal morality,[30] physical and mental capacities, etc. They are aware that disparities of wealth, ability, class and social status will exist in their society but they are ignorant of their place in the social hierarchy. That is whether they are members of the most advantaged or disadvantaged groups.

In this "original position"[31] separated by a "veil of ignorance"[32] from the self interest which might colour their judgement what sort of society would these rational contractors opt for? Rawls postulates that they would legislate for a social, political and economic safety net. Uncertain of whether they will be at the bottom or at the top of the social heap, they would construct their social order round "two principles of justice" namely:

> "First: each person is to have an equal right to the most extensive basic liberty compatible with a liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b)

attached to positions and offices open to all" 33

The first principle guarantees the conventional political liberties such as those of freedom of speech, assembly, religion privacy, due process and so on. The second stipulates that no redistribution in resources is to be effected unless the worst off group in society benefits absolutely from it. These principles are ordered by the principle of priority[34] which is that the first principle takes precedence over the second. Political liberties may not be abridged regardless of the net economic advantage that might accrue to the worst off.

Members of a Rawlsian just society are under an obligation to obey its laws because they have contracted to do so. Where a society is not Rawlsian just then no such obligation exists. There is one limited exception to this latter statement. Citizens of nearly just societies in which most, if not all, Rawlsian requirements are met, are under an obligation to obey all its laws in order to avoid jeopardising the nearly just conditions which presently endure.

Given the emphasis placed upon individual liberty by the first principle it seems likely that laws forbidding abortions would be impermissible in the Rawlsian just society, assuming that the status of the foetus is non decidable. This conclusion is not nearly as unequivocal as the one which is deducible from Nozick's theory. In a nearly just society, anti-abortion laws would still be legitimate despite their individual injustice.

An interesting auxillary question is whether Rawlsian methodology can be profitably applied to the abortion issue. An exercise of this

sort resembles Hare's dealings with the golden rule. The rational contractors could be informed that they might be foetuses in their future society and asked to formulate rules relating to their treatment.

This type of analysis is guilty of the same bias as Hare's modified golden rule, namely, the interests of only one party to the dispute are being considered. The rational contractors could just as easily be asked to picture themselves as pregnant women, threatened by physical psychological, or economic harm if they take their pregnancies to term. In such circumstances, they would probably formulate laws permitting abortions. Thus, Rawlsian disinterestedness properly applied takes us to rights and discussion of how the conflicting interests of mother and foetus are to be valued relative to each other. This is precisely the issue discussed in the previous chapter.

(c) The Insight from Jurisprudence

Up to this point, discussion of the legitimacy of anti-abortion laws[35] has been couched in the language of moral and political science rather than that of legal science. It is as if the matter had to be decided independent of the existing legal order and then integrated into it as opposed to the issue being decided within the legal system.

Under the conditions of non-decidability, the conflict of interests in the abortion question is between the woman's interests in her bodily freedom and the interests of those who find the practice morally repugnant not to have their moral sensibilities outraged. Can this conflict be resolved intra legally without resort to extra legal output such as moral principles or norms?

There is one theory of law which holds that it is possible to

resolve this conflict intra legally. This theory is the causal theory of law as formulated by Professors Sam Coval and J. C. Smith. Before this theory is discussed in detail, it would be helpful to present summaries of the other main philosophies of law to show why they consider external input to the legal order to be a necessary requirement in making decisions of the type detailed in the previous paragraph.

At one polarity of the jurisprudential spectrum lies positivism. Chief amongst its adherents are H. L. A. Hart and Hans Kelsen. Hart believes modern legal orders to be systems of rules.[36] The system consists of a union between primary rules of obligation which require individuals to perform or refrain from performing certain actions. There are also secondary rules or recognition, adjudication and change which regulate how the primary rules are identified, created, altered and eliminated.

The secondary rules provide a mechanism for determining when breaches of the primary rules have been committed and a means of executing sanctions against the delinquent.[37] Hart does not regard the law as a closed system of rules. There is a "core of certainty and penumbra of doubt" to every legal rule and the judge should refer to the values of morality, economics, history, etc. as an aid to deciding cases which fall within the penumbral shadow.[38]

Applying Hart's theory to the interests conflict set out supra, if there is an explicit legal rule covering the situation then that rule must be applied. But if no such rule exists and one party cites legal rules which protect bodily privacy and the other cites rules which

restrict bodily privacy in deference to prevailing moral mores then the Hartian judge has to go beyond the law and refer to morality, history, sociology and so on to reach his decision. His reasons for decision have to be founded on the precepts of other disciplines and then incorporated into the law's framework in the form of the judicial decision.

Kelsen regards law as a system of norms[39] rather than rules - those being the statements used by legal commentators to describe the contents of legal norms. Each norm derives its validity from a higher norm in the system. This chain of command extends back to the so called "basic" or ultimate norm whose validity cannot be demonstrated by reference to another higher norm, but has to be hypothetically presupposed for the purposes of the Kelsenite system's logic.[40]

For Kelsen, every law applying act is only partly determined by law. The higher level norms may determine not only the procedure by which the lower norms are created, but also - possibly - the contents of these norms. This determination can never be complete. The higher norm cannot bind in every direction, the acts by which it is applied.[41]

Thus, like Hart, Kelson acknowledges the scope for judicial discretion and equally like Hart he believes the judge refers to other disciplines when exercising his discretion. His philosophy is that the study of law should be purely analytical, that is a pure legal science whose cognitive limits extend only to the contents of existing legal norms.[42]

Any attempt to value the worth and relative importance of one set of legal norms (such as those protecting bodily privacy) against another

(those restricting bodily freedom in deference to the moral sensibilities of others) is an exercise in legal politics not legal science. It only becomes an object of legal cognition after it is incorporated into the legal system as a norm either in the form of a judicial decision or as a statute.

At the opposite polarity to positivism is natural law. This is a generic term which covers a number of theories whose common theme is that there is a valid omnicompetent legal system to which all positive legal systems ought to conform.

The contents of positive legal orders which are inconsistent with natural law are invalid, that is literally not law, and as such not binding on the legal subject. The theories of natural law can be divided into two types "namely" rationalistic" and "pseudo metaphysical". The former attempt to deduce a system of immutable omnicompetent norms from a general precept such as reason or justice. The latter involve an ability to recognise the will of God since these natural law norms are purportedly derived from divine law.

The problems with natural law theory arise when one looks for a systematic delineation of this immutable legal system. Like Heinz canned goods they come in fifty seven varieties. Thus far, not one of the numerous theories has succeeded in defining the content of this divinely or rationally just order in a manner even approaching the exactness and objectivity with which natural science can determine the laws of nature or legal science the contents of a positive legal order.

The postulated dualism of the perfectly just natural legal order determined by "God" or "Reason" and the imperfect positive law made by

man parallels Plato's metaphysical dualism of the real and the ideal.[43] The first is the visible world perceptible to our senses. The other is the invisible world of ideas. Justice belongs to the realm of ideas. It can only be grasped via a quasi mystical vision incapable of being subsequently described. Thus, justice can only be known, it cannot be explained.

Natural law ultimately involves a similar exercise in irrationality. It is possible to claim that abortion is contrary to God's will or the dictates of reason and thus ought to be proscribed but justification of this view is limited to personal conviction. Resort to natural law is essentially extra legal since this so called legal order is nothing more than a camouflage for personal moral values.

Ronald Dworkin believes that there is an additional element to law neglected by the positivists. This additional element is legal principles. The problem with rule oriented positivism is that rules are all or nothing affairs; they either fit the facts of a case or they do not.[44] Principles on the other hand are a matter of "more or less". They are infinitely more flexible than rules and permit a dynamic method of judicial decision making. He defines a principle as:

> "a standard to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." 45

Thus, Dworkin would analyse the conflict between personal privacy and the sincere moral sentiments of others in terms of the principles underlying each. The more important of these principles should be the one upheld by law. The weakness in Dworkin's theory is similar to the

one suffered by natural law. He is unable to provide an exhaustive list of his principles because their content is constantly changing. Further, Dworkin is unable to provide an ordering of his principles in terms of their relative importance.

Thus, his model of decision making consists of a set of intangibles, variable in content and lacking any coherent structure save the one chosen by the judging individual. The model invites abuse and allows the maverick judge to pluck so called "legal principles" from the air and adopt them as a basis for his decision. In reality, these principles are merely a cloak for his own values. Consequently, Dworkins principles are as extra legal as those non legal elements of law applying acts specified by Kelsen and Hart.

The causal theory of law's central premise is that law is a teleologically orientated system of rules.[46] The theory rests on three assumptions about the nature of legal system. First, law is a kind of rule structure which cannot be viewed in isolation from teleological factors. Second, some of these teleological factors are incorporated into the very fabric of the law in the form of higher order of deep structure priority setting rules. Third at least some of the higher order rules generate new legal rules without resort to new legislative input.

Coval and Smith argue that Dworkin was wrong to consider principles to be logically distinct from rules, fit only to be used when rules broke down. They are an intrinsic part of rules and can be extended and expanded in the same way.[47]

The causal theory eliminates the traditional disjuctivism between

goal and the rule dominated jurisprudence. It chooses between rules according to the nature and value of goals the rules are intended to achieve.

As Coval and Smith put it:

> "The extent to which conflict exists between first order rules and is resolvable within the law is the extent to which such hierarchical matters are integral to the law." 48

The second order goals are causally related to the first order rules in the sense that the latter are instrumental in obtaining the former. Thus, the use of goals in adjudicating between conflicting sets of interests is not a retreat into some mysterious "black box" of discretion but is a formal property of the institution of law itself.

Coval and Smith consider that the goals of the legal system fall under two main headings.[49] The first are 'a' type goals such as decisiveness, clarity, publicity, predictability, impartiality, consistency and so on. The second or 'b' type goals are socially orientated such as peace, order, dignity, physical and economic well being, privacy, freedom of action, security, knowledge, etc. Both sets of goals are mutually dependent rather than one taking precedence over the other. 'A' type goals are necessary if 'b' type goals are to be attained and the existence of 'b' type goals produce the necessity for 'a' type goals to be incorporated into legal systems.

If the premise that law is a teleologically orientated system of rules is accepted, then it has to be agreed that where conflicting claims are made under differing rules of law, which in turn have as their object differing goals, then the relative importance of the goals should be the basis of decision between the claims.

In the case of abortion, the woman's physical liberty, economic welfare and ability to pursue her self selected interests are all harmed by her being forced to carry her pregnancy to term. On the other hand, given conditions of non decidability - those who wish to oppose her request for an abortion on the basis of their moral disquiet concerning the practice would argue that their interests in emotional peace of mind should be preferred. The question is which of the goals embodied by the two parties claims ought to be regarded as the more important?

There are numerous legal rules relating to privacy, protection of the person, and freedom of action which attempt to maximise these goals and minimise their restriction. Thus, individuals may not - ceteris paribus - be assaulted, killed, arbitrarily imprisoned, detained against their will and so on. Equally, there is a striking absence of laws interfering with these goals, even though such interference would benefit overall social welfare. For example, there are no laws to prevent us smoking or drinking or requiring us to eat a proper balanced diet.

Both these factors indicate the very high value placed on the goals of personal freedom of action and bodily privacy by Western legal systems. To forbid women from obtaining abortions would constitute a serious interference in their fulfilling these goals.

Against this goal matrix are the more nebulous goals of those who do not wish abortions to be permitted. These might include their dignity, their emotional well being, and on a more general level, social stability.

They can refer to legal rules which proscribe certain drugs, such as marijuana, or which compel individuals to wear crash helmets or seat

belts, as analogous examples of bodily freedom being restricted by the law.

The counter to this line of thought is that the degree of interference to bodily freedom, created by these rules, is not nearly as serious as that which would result from anti-abortion laws. The goals behind the restrictive norms are the protection of the individual's ability to perform as an agent. The individual is compromising this ability by his "folly" in taking drugs, or not wearing a seat belt and so on. No such threat exists in the abortion example. Indeed, the woman's ability to act as an agent is itself under threat from her being unable to obtain a safe abortion.

From the available evidence, it seems clear that personal freedom takes precedence over the goals of the anti-abortionists in Western legal systems. Thus, in conditions of non-decidability, the prohibition of abortion is unjustifiable in terms of the law's goals.

Pragmatism

For "pragmatism" it would be as easy to read "social utility" or "overall social welfare". The term has no special significance in itself. It is simply a convenient label for a particular policy making technique which can be brought to bear on the abortion issue. The essence of its approach is that given the absence of any definitive solution to the foetus's moral status, it would be wise to switch to an alternative criteria for evaluating the permissibility of abortion which offers a sounder basis for decision making. Social cost benefit analysis seems to meet this standard. The question it poses of abortion is "what are the net social costs or net social benefits of

permitting abortions compared with those of proscribing them?" The option which comes out most favourably on the social balance sheet should be the policy adopted.

Before outlining the methodology of a social cost benefit analysis of abortion it would be prudent to dispose of one abortion argument which might muddy the cost benefit calculus. Pro life groups have a tendency to concoct examples of abortions killing the second Mozart or Einstein. They solemnly tell you that Beethoven would probably have been aborted if the operation had been available in the eighteenth century because he was a victim of a congenital disease.

The argument would indicate that some lives are to count for more than others. The death of one potential Plato in a batch of a thousand or even a million abortions, is a cost which far outweighs any countervailing benefit derived from the practice. Such a tactic only invites reciprocal second guessing. That batch of aborted foetuses which included the next Ghandi, included the successors to Hitler and Stalin as well; so on balance, the killings were worth it. If the pro lifer quotes the philosophical genius, the pro choicer will quote the master criminal in retaliation and it then becomes a sort of bizarre auction of the "how many Himmlers am I bid for my Lincoln" type.

More importantly, the argument strikes against the notion that disparity in abilities is not a basis for inequality of treatment in either the legal or the moral sphere. This concept is fundamental to Western legal and moral consciousness.

The data under analysis is best divided into two sections. The first consist of those costs and benefits to which a dollar and cent

value can be applied with a reasonable degree of accuracy. The second consists of what might be termed the emotional costs and benefits to which no monetary value which is not purely arbitrary can really be applied. In the latter case, it is a matter of judging which course of action provides the greater overall degree of emotional and physical pain.

The measurable financial benefits of forbidding abortions would consist of the medical resources saved by not performing the operations. The costs of employing nurses, doctors, drugs, operating facilities, etc. would all be foregone if the practice was proscribed. Another way of looking at it is in terms of the opportunity costs of using scarce medical resources in this way. The resources that went into killing foetuses could be used to perform heart and kidney transplants, reduce the waiting time for certain less major operations, and so on.

The emotional benefits consist of the sense of personal well being of the women who would have had an abortion if the procedure had been available, but are now pleased that they carried their pregnancy to term. There is also the happiness of childless couples who can adopt because there is a regular supply (sic) of young children in need of care. A trickier problem is whether the feelings of children (and adults) who would have been aborted if the action had been legally permitted but were not, due to restrictive laws, can be taken into account. Is there not a danger that they are being asked to indulge in Hare-like exercises of trying to picture themselves as foetuses? The answer is probably not. All that is being asked of them is an answer of whether they were happy they were not aborted - that answer

is not per se being used as the foundation of a prescriptive view on abortion. To exclude them from analysis might seem like gerrymandering.

The fiscal gain derived from legally permitting abortions is made up of several components. There is the saving from not having to treat the victims of unsafe abortions, that is the women who have either botched, or have had botched for them, their attempted abortion and are now seriously ill from internal infection. There is the saving of not having to care for the children who would otherwise have been aborted.

The savings in human misery would be equally substantial. There is the misery of the parent(s) resentful of the unwanted child. There is the unwanted child's own unhappiness. There is the anguish of the relatives of the women who have died in inept back street abortions. There are the repercussions on the quality of life from having too many people chasing too few resources - although obviously contraception is a more cost effective form of population control. All these forms of unhappiness would be ameliorated by letting the woman abort rather than carry her pregnancy to term.

The results of the cost benefit analysis will be dependent on the conditions existent in the society under review. For this reason, there shall be no attempt to conduct a "potted" version of such a study within the body of this thesis, although there is plenty of data to be gleaned from the literature.[50] The list of social factors listed is not exhaustive. There may be other costs and benefits relevant to the calculus which have not been mentioned here. What has been sketched out is a potential model for decision making.

It may seem that there is a bias in favour of listing the

disadvantages of forbidding abortions. Such bias if it exists, is unintentional. It is simply the case that examples of the disadvantages spring more readily to mind than instances of the benefits from prohibition. It is hard to argue with Wertheimer's conclusion on the matter.

> "the social costs of the present abortion laws are so drastic that only the preservation of human lives could justify them." 51

Footnotes to Chapter Four

(1) Wertheimer op. cit. p. 50.

(2) B. A. Brody "Abortion and the Law" Journal of Philosophy v. 58, No. 2, 1971, pp. 368-369.

(3) Ibid p. 358.

(4) Ibid p. 359.

(5) Ibid p. 361.

(6) Ibid p. 361.

(7) Ibid p. 361.

(8) See his article "Abortion and the Sanctity of Human Life" op. cit. p. 133.

(9) John Stuart Mill "On Liberty" Essay in Utilitarianism, Liberty and Representative Government Pub. (Everymans) p. 72.

(10) Lord Patrick Devlin "The Enforcement of Morals" (Oxford) 1965, p. 11.

(11) Ibid p. 16.

(12) Ibid p. 17.

(13) Ibid Chapter 5-7.

(14) H.L.A. Hart "Immorality and Treason" Essay in "Morality and the Law" edited by Richard Wassenstrom (Wadworth) 1971 p. 52.

(15) Ibid p. 54.

(16) Ibid p. 54.

(17) H.L.A. Hart "Law, Liberty and Morality" (Standford) 1963, pp. 49-50.

(18) Ibid p. 50.

(19) Ibid p. 51.

(20) Ibid pp. 51-52.

(21) Robert Paul Wolff "In Defence of Anarchism" (New York), 1970, p. 3.

(22) Ibid p. 4.

(23) Ibid pp. 38-42.

(24) Ibid pp. 71-72.

(25) Robert Nozick "Anarchy, State and Utopia" (New York), 1974, p. 1.

(26) Ibid p. 26.

(27) In such a case it could be said per Kelsen that the individual is acting as an organ or the legal order.

(28) Ibid pp. 26-27.

(29) Ibid p. 119.

(30) That is their idea of what lives are good lives, e.g. whether it is better to hetro or homosexual.

(31) John Rawls "A Theory of Justice" (Harvard) 1971, p. 11.

(32) Ibid p. 136.

(33) Ibid p. 60.

(34) Ibid p. 61.

(35) Discussion that is founded on the premise of non decidability.

(36) H.L.A. Hart Concept of Law (Oxford) 1961, pp. 89-90.

(37) For a detailed analysis of the rules see "Concept of Law" op. cit. pp. 91-93.

(38) H.L.A. Hart "Positivism and the Separation of Law and Morals" 1958, Harvard Law Review No. 4, p. 600.

(39) Hans Kelsen "A Pure Theory of Law" (Berkeley and Los Angeles) 1967, p. 4.

(40) Ibid pp. 193-197.

(41) Ibid pp. 233-236. esp. p. 235.

(42) Ibid p. 1.

(43) Plato Laws 663b 662a.

(44) Ronald Dworkin "Taking Rights Seriously" (Harvard), 1977, pp. 26-28.

(45) Ibid p. 22.

(46) S. C. Coval and J. C. Smith "Casual Theory of Law". Cambridge Law Journal (1977) v. 36, p. 110.

(47) Ibid p. 112-114.

(48) Smith and Coval "Some Structural Properties of Legal Decisions" Cambridge Law Journal. v. 32 (1973) p. 94.

(49) "Casual Theory of Law" op. cit. p. 111.

(50) See Callahan op. cit. pp. 123-298. Grisez op. cit. pp. 35-67 and 250-263. Glanville Williams "The Sanctity of Life" (New York) pp. 192-248.

(51) Wertheimer op. cit. p. 51.

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