

# Abortion and the Concept of a Person

**Jane English**

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**T**he abortion debate rages on. Yet the two most popular positions seem to be clearly mistaken. Conservatives maintain that a human life begins at conception and that therefore abortion must be wrong because it is murder. But not all killings of humans are murders. Most notably, self defense may justify even the killing of an innocent person.

Liberals, on the other hand, are just as mistaken in their argument that since a fetus does not become a person until birth, a woman may do whatever she pleases in and to her own body. First, you cannot do as you please with your own body if it affects other people adversely.<sup>1</sup> Second, if a fetus is not a person, that does not imply that you can do to it anything you wish. Animals, for example, are not persons, yet to kill or torture them for no reason at all is wrong.

At the center of the storm has been the issue of just when it is between ovulation and adulthood that a person appears on the scene. Conservatives draw the line at conception, liberals at birth. In this paper I first examine our concept of a person and conclude that no single criterion can capture the concept of a person and no sharp line can be drawn. Next I argue that if a fetus is a person, abortion is still justifiable in many cases; and if a fetus is not a person, killing it is still wrong in many cases. To a large extent, these two solutions are in agreement. I conclude that our concept of a person cannot and need not bear the weight that the abortion controversy has thrust upon it.

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<sup>1</sup>We also have paternalistic laws which keep us from harming our own bodies even when no one else is affected. Ironically, anti-abortion laws were originally designed to protect pregnant women from a dangerous but tempting procedure.

The several factions in the abortion argument have drawn battle lines around various proposed criteria for determining what is and what is not a person. For example, Mary Anne Warren<sup>2</sup> lists five features (capacities for reasoning, self-awareness, complex communication, etc.) as her criteria for personhood and argues for the permissibility of abortion because a fetus falls outside this concept. Baruch Brody<sup>3</sup> uses brain waves. Michael Tooley<sup>4</sup> picks having-a-concept-of-self as his criterion and concludes that infanticide and abortion are justifiable, while the killing of adult animals is not. On the other side, Paul Ramsey<sup>5</sup> claims a certain gene structure is the defining characteristic. John Noonan<sup>6</sup> prefers conceived-of-humans and presents counterexamples to various other candidate criteria. For instance, he argues against viability as the criterion because the newborn and infirm would then be non-persons, since they cannot live without the aid of others. He rejects any criterion that calls upon the sorts of sentiments a being can evoke in adults on the grounds that this would allow us to exclude other races as non-persons if we could just view them sufficiently un sentimentally.

These approaches are typical: foes of abortion propose sufficient conditions for personhood which fetuses satisfy, while friends of abortion counter with necessary conditions for personhood which fetuses lack. But these both presuppose that the concept of a person can be captured in a strait jacket of necessary and/or sufficient conditions.<sup>7</sup> Rather, 'person' is a cluster of features, of which rationality, having a self concept and being conceived of humans are only part.

What is typical of persons? Within our concept of a person we include, first, certain biological factors: descended from humans, having a certain genetic makeup, having a head, hands, arms, eyes, capable of locomotion, breathing, eating, sleeping. There are psychological factors: sentience, perception, having a concept of self and of one's own interests and desires, the ability to use tools, the ability to use language or symbol systems, the ability to joke, to be angry, to

<sup>2</sup>Mary Anne Warren, "On the Moral and Legal Status of Abortion," *Monist* 57 (1973), [*supra*, pp. 102–119].

<sup>3</sup>Baruch Brody, "Fetal Humanity and the Theory of Essentialism," in Robert Baker and Frederick Elliston (eds.), *Philosophy and Sex* (Buffalo, N.Y., 1975).

<sup>4</sup>Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2 (1971). [Revised version *supra*, pp. 120–134.]

<sup>5</sup>Paul Ramsey, "The Morality of Abortion," in James Rachels, ed., *Moral Problems* (New York, 1971).

<sup>6</sup>John Noonan, "Abortion and the Catholic Church: A Summary History," *Natural Law Forum* 12 (1967), pp. 125–131.

<sup>7</sup>Wittgenstein has argued against the possibility of so capturing the concept of a game, *Philosophical Investigations* (New York, 1958), § 66–71.

doubt. There are rationality factors: the ability to reason and draw conclusions, the ability to generalize and to learn from past experience, the ability to sacrifice present interests for greater gains in the future. There are social factors: the ability to work in groups and respond to peer pressures, the ability to recognize and consider as valuable the interests of others, seeing oneself as one among "other minds," the ability to sympathize, encourage, love, the ability to evoke from others the responses of sympathy, encouragement, love, the ability to work with others for mutual advantage. Then there are legal factors: being subject to the law and protected by it, having the ability to sue and enter contracts, being counted in the census, having a name and citizenship, the ability to own property, inherit, and so forth.

Now the point is not that this list is incomplete, or that you can find counterinstances to each of its points. People typically exhibit rationality, for instance, but someone who was irrational would not thereby fail to qualify as a person. On the other hand, something could exhibit the majority of these features and still fail to be a person, as an advanced robot might. There is no single core of necessary and sufficient features which we can draw upon with the assurance that they constitute what really makes a person; there are only features that are more or less typical.

This is not to say that no necessary or sufficient conditions can be given. Being alive is a necessary condition for being a person, and being a U.S. Senator is sufficient. But rather than falling inside a sufficient condition or outside a necessary one, a fetus lies in the penumbra region where our concept of a person is not so simple. For this reason I think a conclusive answer to the question whether a fetus is a person is unattainable.

Here we might note a family of simple fallacies that proceed by stating a necessary condition for personhood and showing that a fetus has that characteristic. This is a form of the fallacy of affirming the consequent. For example, some have mistakenly reasoned from the premise that a fetus is human (after all, it is a human fetus rather than, say, a canine fetus), to the conclusion that it is *a* human. Adding an equivocation on 'being', we get the fallacious argument that since a fetus is something both living and human, it is a human being.

Nonetheless, it does seem clear that a fetus has very few of the above family of characteristics, whereas a newborn baby exhibits a much larger proportion of them—and a two-year-old has even more. Note that one traditional anti-abortion argument has centered on pointing out the many ways in which a fetus resembles a baby. They emphasize its development ("It already has ten fingers . . .") without mentioning its dissimilarities to adults (it still has gills and a tail). They also try to evoke the sort of sympathy on our part that we only feel toward other persons ("Never to laugh . . . or feel the sunshine?"). This all seems to be a relevant way to argue, since its purpose is to persuade us that a fetus satisfies so many of the important features on the list that it ought to be treated as a person. Also note that a fetus near the time of birth satisfies many more of these factors than a fetus in the early months of development. This could provide reason for

making distinctions among the different stages of pregnancy, as the U.S. Supreme Court has done.<sup>8</sup>

Historically, the time at which a person has been said to come into existence has varied widely. Muslims date personhood from fourteen days after conception. Some medievals followed Aristotle in placing ensoulment at forty days after conception for a male fetus and eighty days for a female fetus.<sup>9</sup> In European common law since the Seventeenth Century, abortion was considered the killing of a person only after quickening, the time when a pregnant woman first feels the fetus move on its own. Nor is this variety of opinions surprising. Biologically, a human being develops gradually. We shouldn't expect there to be any specific time or sharp dividing point when a person appears on the scene.

For these reasons I believe our concept of a person is not sharp or decisive enough to bear the weight of a solution to the abortion controversy. To use it to solve that problem is to clarify *obscurum per obscurius*.

## II

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Next let us consider what follows if a fetus is a person after all. Judith Jarvis Thomson's landmark article, "A Defense of Abortion,"<sup>10</sup> correctly points out that some additional argumentation is needed at this point in the conservative argument to bridge the gap between the premise that a fetus is an innocent person and the conclusion that killing it is always wrong. To arrive at this conclusion, we would need the additional premise that killing an innocent person is always wrong. But killing an innocent person is sometimes permissible, most notably in self defense. Some examples may help draw out our intuitions or ordinary judgments about self defense.

Suppose a mad scientist, for instance, hypnotized innocent people to jump out of the bushes and attack innocent passers-by with knives. If you are so attacked, we agree you have a right to kill the attacker in self defense, if killing him is the only way to protect your life or to save yourself from serious injury. It does not seem to matter here that the attacker is not malicious but himself an innocent pawn, for your killing of him is not done in a spirit of retribution but only in self defense.

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<sup>8</sup>Not because the fetus is partly a person and so has some of the rights of persons, but rather because of the rights of person-like non-persons. This I discuss in part III below.

<sup>9</sup>Aristotle himself was concerned, however, with the different question of when the soul takes form. For historical data, see Jimmie Kimmey, "How the Abortion Laws Happened," *Ms.* 1 (April, 1973), pp. 48ff, and John Noonan, *loc. cit.*

<sup>10</sup>J. J. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971). [*Infra*, pp. 173–187.]

How severe an injury may you inflict in self defense? In part this depends upon the severity of the injury to be avoided: you may not shoot someone merely to avoid having your clothes torn. This might lead one to the mistaken conclusion that the defense may only equal the threatened injury in severity; that to avoid death you may kill, but to avoid a black eye you may only inflict a black eye or the equivalent. Rather, our laws and customs seem to say that you may create an injury somewhat, but not enormously, greater than the injury to be avoided. To fend off an attack whose outcome would be as serious as rape, a severe beating or the loss of a finger, you may shoot; to avoid having your clothes torn, you may blacken an eye.

Aside from this, the injury you may inflict should only be the minimum necessary to deter or incapacitate the attacker. Even if you know he intends to kill you, you are not justified in shooting him if you could equally well save yourself by the simple expedient of running away. Self defense is for the purpose of avoiding harms rather than equalizing harms.

Some cases of pregnancy present a parallel situation. Though the fetus is itself innocent, it may pose a threat to the pregnant woman's well-being, life prospects or health, mental or physical. If the pregnancy presents a slight threat to her interests, it seems self defense cannot justify abortion. But if the threat is on a par with a serious beating or the loss of a finger, she may kill the fetus that poses such a threat, even if it is an innocent person. If a lesser harm to the fetus could have the same defensive effect, killing it would not be justified. It is unfortunate that the only way to free the woman from the pregnancy entails the death of the fetus (except in very late stages of pregnancy). Thus a self defense model supports Thomson's point that the woman has a right only to be freed from the fetus, not a right to demand its death.<sup>11</sup>

The self defense model is most helpful when we take the pregnant woman's point of view. In the pre-Thomson literature, abortion is often framed as a question for a third party: do you, a doctor, have a right to choose between the life of the woman and that of the fetus? Some have claimed that if you were a passer-by who witnessed a struggle between the innocent hypnotized attacker and his equally innocent victim, you would have no reason to kill either in defense of the other. They have concluded that the self defense model implies that a woman may attempt to abort herself, but that a doctor should not assist her. I think the position of the third party is somewhat more complex. We do feel some inclination to intervene on behalf of the victim rather than the attacker, other things equal. But if both parties are innocent, other factors come into consideration. You would rush to the aid of your husband whether he was attacker or attackee. If a hypnotized famous violinist were attacking a skid row bum, we would try to save the individual who is of more value to society. These considerations would tend to support abortion in some cases.

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<sup>11</sup>*Ibid.*, [p. 187].

But suppose you are a frail senior citizen who wishes to avoid being knifed by one of these innocent hypnotics, so you have hired a bodyguard to accompany you. If you are attacked, it is clear we believe that the bodyguard, acting as your agent, has a right to kill the attacker to save you from a serious beating. Your rights of self defense are transferred to your agent. I suggest that we should similarly view the doctor as the pregnant woman's agent in carrying out a defense she is physically incapable of accomplishing herself.

Thanks to modern technology, the cases are rare in which a pregnancy poses as clear a threat to a woman's bodily health as an attacker brandishing a switchblade. How does self defense fare when more subtle, complex and long-range harms are involved?

To consider a somewhat fanciful example, suppose you are a highly trained surgeon when you are kidnapped by the hypnotic attacker. He says he does not intend to harm you but to take you back to the mad scientist who, it turns out, plans to hypnotize you to have a permanent mental block against all your knowledge of medicine. This would automatically destroy your career which would in turn have a serious adverse impact on your family, your personal relationships and your happiness. It seems to me that if the only way you can avoid this outcome is to shoot the innocent attacker, you are justified in so doing. You are defending yourself from a drastic injury to your life prospects. I think it is no exaggeration to claim that unwanted pregnancies (most obviously among teenagers) often have such adverse life-long consequences as the surgeon's loss of livelihood.

Several parallels arise between various views on abortion and the self defense model. Let's suppose further that these hypnotized attackers only operate at night, so that it is well known that they can be avoided completely by the considerable inconvenience of never leaving your house after dark. One view is that since you could stay home at night, therefore if you go out and are selected by one of these hypnotized people, you have no right to defend yourself. This parallels the view that abstinence is the only acceptable way to avoid pregnancy. Others might hold that you ought to take along some defense such as Mace which will deter the hypnotized person without killing him, but that if this defense fails, you are obliged to submit to the resulting injury, no matter how severe it is. This parallels the view that contraception is all right but abortion is always wrong, even in cases of contraceptive failure.

A third view is that you may kill the hypnotized person only if he will actually kill you, but not if he will only injure you. This is like the position that abortion is permissible only if it is required to save a woman's life. Finally we have the view that it is all right to kill the attacker, even if only to avoid a very slight inconvenience to yourself and even if you knowingly walked down the very street where all these incidents have been taking place without taking along any Mace or protective escort. If we assume that a fetus is a person, this is the analogue of the view that abortion is always justifiable, "on demand."

The self defense model allows us to see an important difference that exists between abortion and infanticide, even if a fetus is a person from conception. Many have argued that the only way to justify abortion without justifying infanticide would be to find some characteristic of personhood that is acquired at birth. Michael Tooley, for one, claims infanticide is justifiable because the really significant characteristics of person are acquired some time after birth. But all such approaches look to characteristics of the developing human and ignore the relation between the fetus and the woman. What if, after birth, the presence of an infant or the need to support it posed a grave threat to the woman's sanity or life prospects? She could escape this threat by the simple expedient of running away. So a solution that does not entail the death of the infant is available. Before birth, such solutions are not available because of the biological dependence of the fetus on the woman. Birth is the crucial point not because of any characteristics the fetus gains, but because after birth the woman can defend herself by a means less drastic than killing the infant. Hence self defense can be used to justify abortion without necessarily thereby justifying infanticide.

### III

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On the other hand, supposing a fetus is not after all a person, would abortion always be morally permissible? Some opponents of abortion seem worried that if a fetus is not a full-fledged person, then we are justified in treating it in any way at all. However, this does not follow. Non-persons do get some consideration in our moral code, though of course they do not have the same rights as persons have (and in general they do not have moral responsibilities), and though their interests may be overridden by the interests of persons. Still, we cannot just treat them in any way at all.

Treatment of animals is a case in point. It is wrong to torture dogs for fun or to kill wild birds for no reason at all. It is wrong Period, even though dogs and birds do not have the same rights persons do. However, few people think it is wrong to use dogs as experimental animals, causing them considerable suffering in some cases, provided that the resulting research will probably bring discoveries of great benefit to people. And most of us think it all right to kill birds for food or to protect our crops. People's rights are different from the consideration we give to animals, then, for it is wrong to experiment on people, even if others might later benefit a great deal as a result of their suffering. You might volunteer to be a subject, but this would be supererogatory; you certainly have a right to refuse to be a medical guinea pig.

But how do we decide what you may or may not do to non-persons? This is a difficult problem, one for which I believe no adequate account exists. You do not want to say, for instance, that torturing dogs is all right whenever the sum of its

effects on people is good—when it doesn't warp the sensibilities of the torturer so much that he mistreats people. If that were the case, it would be all right to torture dogs if you did it in private, or if the torturer lived on a desert island or died soon afterward, so that his actions had no effect on people. This is an inadequate account, because whatever moral consideration animals get, it has to be indefeasible, too. It will have to be a general proscription of certain actions, not merely a weighing of the impact on people on a case-by-case basis.

Rather, we need to distinguish two levels on which consequences of actions can be taken into account in moral reasoning. The traditional objections to Utilitarianism focus on the fact that it operates solely on the first level, taking all the consequences into account in particular cases only. Thus Utilitarianism is open to "desert island" and "lifeboat" counterexamples because these cases are rigged to make the consequences of actions severely limited.

Rawls' theory could be described as a teleological sort of theory, but with teleology operating on a higher level.<sup>12</sup> In choosing the principles to regulate society from the original position, his hypothetical choosers make their decision on the basis of the total consequences of various systems. Furthermore, they are constrained to choose a general set of rules which people can readily learn and apply. An ethical theory must operate by generating a set of sympathies and attitudes toward others which reinforces the functioning of that set of moral principles. Our prohibition against killing people operates by means of certain moral sentiments including sympathy, compassion and guilt. But if these attitudes are to form a coherent set, they carry us further: we tend to perform supererogatory actions, and we tend to feel similar compassion toward person-like non-persons.

It is crucial that psychological facts play a role here. 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. If our moral rules allowed people to treat some person-like non-persons in ways we do not want people to be treated, this would undermine the system of sympathies and attitudes that makes the ethical system work. For this reason, we would choose in the original position to make mistreatment of some sorts of animals wrong in general (not just wrong in the cases with public impact), even though animals are not themselves parties in the original position. Thus it makes sense that it is those animals whose appearance and behavior are most like those of people that get the most consideration in our moral scheme.

It is because of "coherence of attitudes," I think, that the similarity of a fetus to a baby is very significant. A fetus one week before birth is so much like a newborn baby in our psychological space that we cannot allow any cavalier treatment of the former while expecting full sympathy and nurturative support for the latter. Thus, I think that anti-abortion forces are indeed giving their strongest arguments when they point to the similarities between a fetus and a baby, and

when they try to evoke our emotional attachment to and sympathy for the fetus. An early horror story from New York about nurses who were expected to alternate between caring for six-week premature infants and disposing of viable 24-week aborted fetuses is just that—a horror story. These beings are so much alike that no one can be asked to draw a distinction and treat them so very differently.

Remember, however, that in the early weeks after conception, a fetus is very much unlike a person. It is hard to develop these feelings for a set of genes which doesn't yet have a head, hands, beating heart, response to touch or the ability to move by itself. Thus it seems to me that the alleged "slippery slope" between conception and birth is not so very slippery. In the early stages of pregnancy, abortion can hardly be compared to murder for psychological reasons, but in the latest stages it is psychologically akin to murder.

Another source of similarity is the bodily continuity between fetus and adult. Bodies play a surprisingly central role in our attitudes toward persons. One has only to think of the philosophical literature on how far physical identity suffices for personal identity or Wittgenstein's remark that the best picture of the human soul is the human body. Even after death, when all agree the body is no longer a person, we still observe elaborate customs of respect for the human body; like people who torture dogs, necrophiliacs are not to be trusted with people.<sup>13</sup> So it is appropriate that we show respect to a fetus as the body continuous with the body of a person. This is a degree of resemblance to persons that animals cannot rival.

Michael Tooley also utilizes a parallel with animals. He claims that it is always permissible to drown newborn kittens and draws conclusions about infanticide.<sup>14</sup> But it is only permissible to drown kittens when their survival would cause some hardship. Perhaps it would be a burden to feed and house six more cats or to find other homes for them. The alternative of letting them starve produces even more suffering than the drowning. Since the kittens get their rights second-hand, so to speak, *via* the need for coherence in our attitudes, their interests are often overridden by the interests of full-fledged persons. But if their survival would be no inconvenience to people at all, then it is wrong to drown them, *contra* Tooley.

Tooley's conclusions about abortion are wrong for the same reason. Even if a fetus is not a person, abortion is not always permissible, because of the resemblance of a fetus to a person. I agree with Thomson that it would be wrong for a woman who is seven months pregnant to have an abortion just to avoid having to postpone a trip to Europe. In the early months of pregnancy when the fetus hardly resembles a baby at all, then, abortion is permissible whenever it is in the interests of the pregnant woman or her family. The reasons would only need to outweigh the pain and inconvenience of the abortion itself. In the middle months, when the

<sup>13</sup>On the other hand, if they can be trusted with people, then our moral customs are mistaken. It all depends on the facts of psychology.

<sup>14</sup>*Op. cit.*, pp. 40, 60–61.

<sup>12</sup>John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), § 3–4.

fetus comes to resemble a person, abortion would be justifiable only when the continuation of the pregnancy or the birth of the child would cause harms—physical, psychological, economic or social—to the woman. In the late months of pregnancy, even on our current assumption that a fetus is not a person, abortion seems to be wrong except to save a woman from significant injury or death.

The Supreme Court has recognized similar gradations in the alleged slippery slope stretching between conception and birth. To this point, the present paper has been a discussion of the moral status of abortion only, not its legal status. In view of the great physical, financial and sometimes psychological costs of abortion, perhaps the legal arrangement most compatible with the proposed moral solution would be the absence of restrictions, that is, so-called abortion “on demand.”

So I conclude, first, that application of our concept of a person will not suffice to settle the abortion issue. After all, the biological development of a human being is gradual. Second, whether a fetus is a person or not, abortion is justifiable early in pregnancy to avoid modest harms and seldom justifiable late in pregnancy except to avoid significant injury or death.<sup>15</sup>

## Being a Person—Does It Matter?

Loren E. Lomasky

Within the domain of the physical universe, persons constitute a statistically insignificant part of the whole. But in the moral realm persons bulk overwhelmingly large. It is not necessary to claim that they are its only inhabitants; that, for example, torturing an animal is of moral concern only insofar as it affects the sensibilities of persons. It is reasonable to believe that the simple possession of sentience is itself sufficient to establish the existence of certain minimal moral claims. But sentience is not the entire story.<sup>1</sup> There are numerous moral considerations that apply to persons but either do not apply at all or only with lessened force to nonpersons. One may kill an animal but (logically) cannot murder it. Nor can an animal *be* a murderer. Conventional actions creating obligations such as making a promise can only be performed between persons. Similar cases could be indefinitely multiplied. But what point would there be to doing so? Is it not clear that the mere fact of P's being a person is itself crucial in determining the moral status P enjoys? That is, should we not say that “P is a person” provides a sufficient moral *reason* for treating P in certain ways?

What I shall argue in this paper is that it does *not*; that no debates over normative issues are likely to be advanced by determining whether some affected party is or is not a person. While this claim may seem to be inconsistent with what was said above about the preeminent status of persons, in fact it is not. Persons *are* special, but not because *being a person* is a morally significant property. The nine occupants of a room enjoy a unique judicial status if they happen to be the nine justices of the Supreme Court. But ‘occupying room R at

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<sup>1</sup>For an account suggesting that it is see Peter Singer's “Animal Liberation,” *New York Review of Books* (April 5, 1973), pp. 17–21. While Singer argues persuasively that animals are not moral nonentities, his statement of the root of rights and concomitant obligations is simplistic.

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<sup>15</sup>I am deeply indebted to Larry Crocker and Arthur Kuflik for their constructive comments.