

# Infanticide

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It is sometimes suggested that if a moral theory implies that infanticide can sometimes be permissible, that is sufficient to discredit the theory. I argue in this article that the common-sense belief that infanticide is wrong, and perhaps even *worse* than the killing of an adult, is challenged not so much by theoretical considerations as by common-sense beliefs about abortion, the killing of non-human animals, and so on. Because there are no intrinsic differences between premature infants and viable fetuses, it is difficult to accept that an abortion performed after the point of viability can be permissible while denying that infanticide can be permissible for a comparably important reason. This and other challenges to the consistency of our intuitions exert pressure on us either to accept the occasional permissibility of infanticide or to reject liberal beliefs about abortion.

## 1. THINKING ABOUT THE UNTHINKABLE

Elizabeth Anscombe once wrote that ‘if someone really thinks, *in advance*, that it is open to question whether such an action as procuring the judicial execution of the innocent should quite be excluded from consideration – I do not want to argue with him; he shows a corrupt mind.’<sup>1</sup> On this view, there are certain moral questions that a decent person simply will not ask. Thus when, in a recently published book, I asked whether infanticide could ever be permissible, I was cited by a reviewer as among those who reveal a corrupt mind by raising an unthinkable question – and, worse still, giving the wrong answer, as I had to concede that the claims I made about the moral status of the fetus committed me to the conclusion that infanticide could in principle be justified in certain cases. According to the reviewer, even to entertain the possibility that infanticide could be permissible is to harbor ‘evil thoughts’. And if a moral theory prompts us to have such thoughts, the obvious remedy is ‘to reject the theory’.<sup>2</sup> Yet, as I will try to show in this essay, the idea that infanticide can be permissible in certain cases is not just an implication of my theory or indeed any other *theory*, but is implied by beliefs that are both widely held and difficult to reject without becoming committed other indefensible claims.

Most people are unaware that there is any pressure to consider infanticide at all. In part this is because we tend to treat infanticide the

<sup>1</sup> G. E. M. Anscombe, ‘Modern Moral Philosophy’, *Philosophy* 33 (1958), reprinted in her *Ethics, Religion, and Politics*, Collected Philosophical Papers, vol. 3 (Oxford: Basil Blackwell, 1981), p. 40.

<sup>2</sup> Stephen Mulhall, ‘Fearful Thoughts’, *London Review of Books* 24 (22 August 2002), p. 16. This is a review of Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002).

way most people treat the issue of our moral relation to animals: we simply do not discuss it. Challenges to moral beliefs about animals and infants tend to make people uncomfortable in a way that, for example, a challenge to their beliefs about slavery would not; for such challenges may force people to confront an obscure sense that their complacency about harms inflicted on animals and their intuitive horror of infanticide may be considerably more difficult to justify than they would like to believe.

Although philosophers have conducted a wide-ranging debate about the morality of abortion for more than thirty years, generating in the process an extensive literature on the topic, they have, with very few exceptions, shrunk from extending the debate to include a discussion of infanticide. I know from discussions with prominent writers on ethics that some have been deterred from writing on the subject by fear of possible consequences for their reputations, careers and even physical security – a fear that appears well-grounded in view of the public vilification and physical threats endured by Peter Singer, largely because of his endorsement of the permissibility of infanticide in the case of certain severely ill or deformed infants.<sup>3</sup> My own experience is much more limited, but tends to confirm that discussing infanticide is not the best way to win friends or secure admiring book reviews.

It may well be that a careful and honest examination of the morality of infanticide will in the end reaffirm and even strengthen the sense that most people have that the practice is immoral, an abomination. If so, this should prompt a reassessment of certain common beliefs about abortion. We should follow the argument where it leads. But what we must not accept is the contention that infanticide is morally *unthinkable*, that it is evil even to raise the question of its permissibility. While I accept that there are some moral convictions that are genuinely beyond reasonable doubt or question, the belief that infanticide can never be permissible is not among them. For, as I will try to show, too much pressure is exerted on this belief by some of our other moral beliefs to make it conscionable for us simply to dismiss the possibility that our intuitions about infanticide may be wrong.

## 2. KILLING, LETTING DIE, AND THE INTRINSIC NATURES OF INFANTS AND FETUSES

The position that has earned Peter Singer a singular notoriety among contemporary philosophers is defended in his writings by a simple

<sup>3</sup> See, for example, Sylvia Nasar, 'Princeton Philosopher Draws a Stir', *New York Times*, 10 April 1999; Jeff Sharlet, 'Why Are We Afraid of Peter Singer?', *Chronicle of Higher Education*, 10 March 2000; and Michael Specter, 'The Dangerous Philosopher', *The New Yorker*, 6 September 1999.

challenge to the consistency of common-sense beliefs. He observes that all Western societies, and a great many non-Western ones as well, permit prenatal screening for fetal defects, followed by abortion in the event that a defect is discovered, even if the defect is comparatively minor. And we permit these practices even quite late in pregnancy – for example, when the test cannot be performed or is inaccurate until comparatively late in fetal development.<sup>4</sup> In some instances, however, defects are not or cannot be detected until birth. In many such cases, the infant is born prematurely and so may be chronologically younger than a fetus that could permissibly be aborted. And the infant's defect may be far more severe than that which would be regarded as a sufficient justification for an abortion. But even if the infant is younger and less developed and its defect more severe, infanticide is prohibited. Why, Singer asks, is infanticide different? Why should it matter morally whether an individual has been delivered or remains within the womb?<sup>5</sup>

Singer has also noted that, despite the pervasive belief that infanticide is immoral, our intuitions about the moral status of infants are mixed. He observes, for example, that it is a common practice deliberately to allow certain defective infants to die when they could be saved and that this practice, known as 'selective non-treatment', enjoys widespread support and approval.<sup>6</sup>

It is often suggested that selective non-treatment is a form of *passive euthanasia*. Yet this is very seldom true. Intentionally to allow an individual to die is not euthanasia unless death would be better *for that individual* than continued life (or, perhaps, unless it is reasonable to believe that it would be). Yet it is comparatively rare for congenital defects or disabilities to make an individual's life 'not worth living', or on balance bad for the individual whose life it is. Most people with even the severest disabilities compatible with continued life do not find life intolerable. And in any case the practice of selective non-treatment is not limited only to infants with the severest disabilities. As Singer points out, treatment for easily remediable defects has often been withheld from infants with Down syndrome, a condition that is certainly compatible with a life that is worth living. It seems, therefore,

<sup>4</sup> See Sjeff Gevers, 'Third Trimester Abortion for Fetal Abnormality', *Bioethics* 13 (1999), pp. 306–13.

<sup>5</sup> Peter Singer, *Rethinking Life and Death* (New York: St. Martin's Press: 1995), pp. 83–4 and 214–17. For other arguments, see Helga Kuhse and Peter Singer, *Should the Baby Live?* (Oxford: Oxford University Press, 1985).

<sup>6</sup> *Rethinking Life and Death*, pp. 115–31. For information on the prevalence of selective non-treatment and national policies regulating it in the US, the UK, Israel and Denmark, see Michael L. Gross, 'Abortion and Neonaticide: Ethics, Practice, and Policy in Four Nations', *Bioethics* 16 (2002), pp. 202–30.

that the common perception that selective non-treatment is a form of euthanasia is an instance of self-deception. The operative motive in most of these cases, even if it is sometimes not allowed to rise to the level of consciousness, seems to be to avoid the burden the diseased or disabled child would impose on the parents and the health care system.

If we accept that it can be permissible intentionally to allow certain infants to die, why should we not also accept that it can be permissible to kill them when similar conditions obtain? The obvious suggestion is that the distinction between killing and letting die makes a significant difference in this kind of case. Yet we do not accept that this distinction makes a significant difference in our treatment of *fetuses*. As I noted, many people, perhaps most, accept that abortion can be permissible when prenatal testing reveals a significant fetal abnormality. Even most people who generally oppose abortion on moral grounds recognize certain exceptions, and fetal abnormality is one of the most commonly acknowledged exceptions. In some instances of fetal abnormality, however, there is a significant probability that the defect will itself cause a spontaneous abortion. Yet I know of no one who suggests that in such cases one ought to postpone having an abortion in the hope that the fetus will die on its own, on the ground that it would be morally better to allow the fetus to die than to kill it. For killing it seems no worse than allowing it to die once it has been decided that it is better, all things considered, that it should not live.

The distinction between killing and letting die also seems to have little moral significance in parallel cases involving older children. One form that selective non-treatment has taken involves allowing an infant with Down syndrome to die by withholding treatment for some readily curable but otherwise fatal condition. Suppose that a child of six with Down syndrome develops such a condition and that it is not possible, for whatever reason, for the care of the child to devolve to anyone other than the mother. Just as in the case of an infant, no one accepts that it would be permissible for the mother to *kill* the six-year-old because she found it excessively burdensome to care for him. But neither would anyone think that it would be permissible for her to allow the child to die by denying him a simple life-saving treatment.

In short, if we consider a fetus, an infant, and an older child, all of which have (for example) Down syndrome as well as a different, potentially fatal but treatable condition, we find that common intuitions about killing and letting die differ in each case. Many people believe that it would be permissible to allow the fetus to die but also permissible to kill it via abortion. Many people also accept that it would be permissible to allow the infant to die via selective non-treatment, but most believe that it would not be permissible to kill it. Finally, most believe that it would not be permissible either to allow the six-year-old

to die or to kill him. In the latter case, to kill the child would generally be regarded as worse than refusing to save him, but not significantly worse. So, while the distinction between killing and letting die seems significant in the case of the infant, it seems much less significant, or hardly significant at all, in the cases of the six-year-old and the fetus.

One inference we might draw from the common intuitions about these cases is that most people intuitively sense that the moral status of newborn infants is intermediate between that of fetuses and that of older children. Yet there *cannot* be significant differences of moral status between newborn infants and *viable* fetuses. Let us make the usual, plausible assumption that moral *status* is a function of *intrinsic* properties only.<sup>7</sup> And let us also assume, again plausibly, that birth alone does not affect an individual's intrinsic properties in morally significant ways.<sup>8</sup> The reason why there cannot be intrinsic differences between newborn infants generally and viable fetuses is simply that viable fetuses could *be* newborn infants if they were delivered prematurely. A fetus can now be viable – that is, can be delivered alive and survive – at about five months. And a fetus's birth is sometimes delayed beyond nine months. So there is an approximate four-month chronological overlap between fetuses and infants. This leaves it open, of course, that there may be significant intrinsic differences in a particular case – for example, in the comparison

<sup>7</sup> This assumption is challenged by Elizabeth Harman in 'Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion', *Philosophy and Public Affairs* 28 (1999), pp. 310–24. Harman argues that an early fetus that has no intrinsic properties that confer moral status may nevertheless have *some* moral status by virtue of the extrinsic fact (when it *is* a fact) that it *will* later exist as a person. This is plausible only if the early fetus would be numerically identical with the later person, something that Harman appears to assume but that I would deny. An early fetus is the early phase in the life of a human organism but I believe that you and I are not human organisms. You are not an entire human organism or human animal but only the part of it that non-derivatively has the capacity for consciousness, and you may therefore come into existence after the organism of which you are a part does. (This view of our identity is defended at length in *The Ethics of Killing*, ch. 1.) But suppose that I am wrong about this and the early fetus would be identical with the later person. There are two ways of accommodating our moral intuitions about the fetus that do not require the assumption that extrinsic properties can be a basis of moral status. One is to claim that the basis of the early fetus's moral status is its being the kind of entity that will be identical with a person if it survives. This is not a property that it has only if it will survive. The second option, which I favor, is to claim that the moral reasons governing our treatment of the early fetus are reasons that derive from a concern for the *person* (where 'person' is understood as a phase sortal) that the fetus will become if it survives. On this view, the moral reason not to damage the fetus derives from the interests and status it will later have if it becomes a person. This reason is the same as the reason one had not to damage the gametes from which it was formed. For a discussion of the morality of prenatal injury, see Jeff McMahan, 'Paradoxes of Abortion and Prenatal Injury', *Ethics* 116 (2006), pp. 625–55.

<sup>8</sup> For a challenge to this assumption, see José Luis Bermúdez, 'The Moral Significance of Birth', *Ethics* 106 (1996), pp. 378–403.

between a 5½-month-old fetus and a newborn infant born just after nine months. But this could not support a general claim about intrinsic differences between infants and fetuses because the same intrinsic differences would exist between a 5½-month-old premature infant and a fetus whose birth had been delayed beyond nine months.

Even though there cannot be intrinsic differences generally between newborn infants and viable fetuses, we accept the permissibility of bringing about the death of an infant *only* if it is defective in some way *and* if it is not killed but merely allowed to die. Yet not only do we accept that it can be permissible to kill a viable fetus rather than merely allowing it to die, but many of us also accept that it is permissible to kill such a fetus even when it is *healthy*. This leads to a consistency problem more complex than that which arises from the fact that our intuitions about the significance of killing and letting die differ in the case of infants and in the case of viable fetuses, despite the absence of any morally significant intrinsic difference between the two.

### 3. COMMON BELIEFS ABOUT ABORTION

Consider what I will call the *Selfish Abortion*:

A woman who became pregnant through voluntary sex discovers, in the middle of the sixth month of gestation, that remaining pregnant will cause her to suffer moderate chronic pain for the rest of her life. At this point her fetus has the capacity for consciousness and is healthy and potentially viable; but to extract it alive would require a caesarian, which would be disfiguring and riskier to her than an abortion. In part for these reasons and in part because she has come to have serious doubts about whether she wants to be a parent, she decides to have an abortion instead of a caesarian.

Because the abortion is performed late in the second trimester, it is constitutionally protected in the United States. It would also be legally permitted in most European jurisdictions. These legal protections reflect a broad consensus that the woman's having an abortion in these circumstances is morally permissible, even though her reasons for having it are wholly self-interested.

Even most of those who believe that the abortion is wrong do not regard it as *murder*. This is not because they think her act is excused by duress, though they may believe that as well. It is, rather, because they accept that her act, though *wrong*, is less seriously wrong than the killing of an older child or adult would be. There are various forms of evidence that support this contention.

One is that most people accept that abortion becomes morally more serious as pregnancy progresses. The idea that the moral gravity of abortion increases the later the abortion is performed is manifest in various ways. It informs most legal codes, which tend to permit early

abortions but to restrict or prohibit late ones. And it is a presupposition of the tactics employed by anti-abortion activists, such as describing or displaying photographs of late-term fetuses rather than embryos, and focusing their campaigns on exceedingly rare late-term procedures such as the notorious 'partial-birth abortion' rather than on the far more common early-term procedures. But if the objections to abortion increase in strength or number as pregnancy progresses, so that it is more objectionable to abort a pregnancy in the third trimester than in the second, it follows that a second-trimester abortion (such as the Selfish Abortion) is less seriously morally objectionable, other things being equal, than the killing of an older child or adult, assuming (as virtually everyone does) that a third-trimester abortion is not *more* objectionable than the killing of an older child or adult.

Other evidence includes the fact that most opponents of abortion concede that there are exceptional cases in which abortion can be permissible. Commonly recognized exceptions include cases in which the pregnancy threatens the pregnant woman's life or health, cases in which it is the result of rape or incest, and cases of fetal abnormality. But if killing a fetus were as seriously wrong as killing a person, it is doubtful that many of these exceptions could be defensible. No matter how burdensome the care of a six-year-old might be, no one supposes that it could be permissible to kill the child on the ground that he was conceived as a result of rape or incest or because he is disabled.

A third and final piece of evidence is that even most opponents of abortion regard the killing of abortionists as morally unacceptable. Yet if they believed that abortion is murder and that there was no other effective means of preventing the many abortions performed every day, it seems that it would be reasonable for them to approve of this tactic. That they do not, even though abortions continue to be performed at the same rate despite their best efforts to stop them by other means, suggests that they do not really believe that abortion is murder.

It seems reasonable to conclude, therefore, that many people, and arguably most, would regard the Selfish Abortion as permissible, and that even among those who believe that it would be wrong, most would accept that it is less seriously wrong than murder. With this as background, consider the *Altruistic Abortion*:

A woman who became pregnant through voluntary sex discovers, in the middle of the sixth month of gestation, that her existing three-year-old child will die within days without an organ transplant. The necessary organ is a vital one and there are no suitable donors in prospect. But it is known that her fetus has exactly the right tissue type and that its organs are sufficiently developed to be transplantable. As it happens, there are three other small children in the same hospital whose lives could also be saved by an organ transplant from the fetus but will otherwise die.

Would it be permissible for the woman to have an abortion in order to use the fetus's organs to save the lives of the four older children? Those who think the Selfish Abortion is permissible are under some pressure to accept that the Altruistic Abortion is as well. For the fetuses are relevantly similar and what would be done to them is the same in each case, yet what is at stake in the Altruistic Abortion is vastly more important – that is, the harm that could be prevented by the Altruistic Abortion is the death of four young children, whereas the harm that could be prevented by the Selfish Abortion is only moderate chronic pain in the life of a single adult (and that harm could be prevented by alternative means). Even those who think the Selfish Abortion is wrong but not murder should consider the possibility that, because the considerations favoring abortion are so much stronger in the Altruistic Abortion, they might outweigh the reasons they have for thinking that abortion is in general wrong.

Yet even though most people accept that the Selfish Abortion would be permissible and that the reason for having the Altruistic Abortion is considerably more important, many people – perhaps most – would be reluctant to accept that the Altruistic Abortion is permissible. (My experience is that if I present the Altruistic Abortion to students and ask them whether it would be permissible, a majority say no. If instead I elicit their intuitions about the Selfish Abortion, a sizable majority say that it would be permissible. If, after having got them to reflect on the Selfish Abortion first, I *then* introduce the Altruistic Abortion, a majority say that it too would be permissible.)

One possible explanation of these divergent judgments is that in the Selfish Abortion the fetus is a threat, whereas in the Altruistic Abortion it is not. Many people may believe that the Selfish Abortion is permissible precisely because it can be justified by appeal to the woman's right of self-defense. But the Altruistic Abortion cannot be justified in this way.

The Selfish Abortion cannot, however, be justified on grounds of self-defense. It is true that the fetus's presence will harm the woman unless she has it removed, and that removing it via abortion will harm her less than removing it alive via surgery. But the best justification for self-defensive killing – and, in my view, the only really plausible justification – appeals to an asymmetry in responsibility between the individual who poses a threat and the potential victim.<sup>9</sup> In most cases in which self-defense is permissible, it is permissible because the threatening person has made himself *liable* to defensive harming

<sup>9</sup> See *The Ethics of Killing*, ch. 4, sect. 10.1, and the references cited there. For a more detailed discussion of liability to defensive killing, see Jeff McMahan, 'The Basis of Moral Liability to Defensive Killing', *Philosophical Issues* 15 (2005), pp. 386–405.



by virtue of his moral responsibility for a threat of unjust harm to the potential victim. In the Selfish Abortion, and in all cases in which a fetus's presence constitutes a threat to the pregnant woman, the fetus is in no way responsible for the threat it poses. It is what I call a 'non-responsible threat'. Most people, of course, believe intuitively that self-defense is permissible even against a non-responsible threat. But the justification for self-defense against a non-responsible threat – if there is one – has to be different from the justification in cases in which the threatener's responsibility makes him liable. In the Selfish Abortion, for example, the fetus cannot have done anything to make itself liable to defensive harming. I myself believe that there *is* no special justification for self-defense against a non-responsible threat and that one may do no more to a wholly non-responsible threat in self-defense than one would be permitted to do to an innocent bystander in self-preservation. But suppose that there is a special justification for self-defense against a non-responsible threat. Any such justification must, at a minimum, be substantially weaker than the justification in cases in which the threatening person's responsibility makes him liable. And in the case of the Selfish Abortion, this weaker justification, whatever it may be, is more than counterbalanced by the fact that the most important consideration – moral responsibility for the threat to which the potential victim is in no way liable – points in the other direction. For by having engaged in sex voluntarily, in the knowledge that being pregnant can sometimes become dangerous, the woman herself bears some responsibility for the fact that the fetus now threatens her. This is not to say that she has acted culpably or with fault, but only that the situation in which either she or the fetus must be harmed was a foreseeable though improbable risk of her own voluntary action. If, therefore, we put aside questions of moral status, there is a presumption, as a matter of justice, that she rather than the fetus ought to bear the costs of her own voluntary choice – as she will in the absence of intervention to shift the costs to the fetus by killing it.

#### 4. THE CONSTRAINT AGAINST HARMFUL USING

For this and other reasons, the Selfish Abortion cannot be justified by appeal to the woman's right of self-defense.<sup>10</sup> There is, however, a further possible basis for concluding that the Altruistic Abortion is not permissible even if the Selfish Abortion is. For there is a difference in the nature of the agency involved in the two cases. In neither case is the *death* or *killing* of the fetus necessarily intended as a means to the

<sup>10</sup> Other reasons are advanced in *The Ethics of Killing*, ch. 4, sect. 10.2.

woman's end.<sup>11</sup> Yet in both cases the woman does intend to act on or to affect the fetus in a way that she foresees will cause its death. The difference is that in the Selfish Abortion the woman treats the fetus as an *obstacle* to be removed, while in the Altruistic Abortion the woman treats it as a *resource* to be exploited for her own purposes. To borrow the terms that Warren Quinn used in introducing this distinction, the woman's agency in the Selfish Abortion is merely *eliminative*, while the agency in the Altruistic Abortion is *opportunistic*.<sup>12</sup> In the Altruistic Abortion, but not in the Selfish Abortion, the woman *uses* the fetus, in a way she reasonably believes will be seriously harmful to it, as a *means* of averting harms to others – harms for which the fetus would be in no way responsible. This may seem particularly objectionable. As Quinn notes, we seem to regard 'fatal or harmful exploitation as more difficult to justify than fatal or harmful elimination'.<sup>13</sup>

Some philosophers (though not many others) contend that neither eliminative nor opportunistic killing is in itself more seriously objectionable than killing that is a foreseen side effect of action that is not intended to affect the victim at all. These philosophers presumably also deny that the distinction between eliminative and opportunistic killing is relevant to the permissibility of killing. And presumably some of those who accept the moral significance of the broader distinction between effects that are intended and those that are foreseen but unintended nevertheless deny the significance of the narrower distinction (within the category of intended effects) between eliminative and opportunistic treatment. Yet for our purposes we may ignore these dissenting voices because our aim at this point is simply to attempt to identify the source of many people's reluctance to accept the permissibility of the Altruistic Abortion when they accept the permissibility of the Selfish Abortion. And the idea that it is specially objectionable to *use* the fetus in a way that will involve its death *as a means* of saving others is probably the best explanation of that reluctance.

Common-sense morality holds that, at least across a broad range of cases, the distinction between killing and letting die is morally significant, in that the presumption against killing is stronger than that against letting die. It also distinguishes morally between effects that are intended and those that, though foreseen, are not intended. When an effect is harmful, it is worse, if other things are equal, to intend to affect a person in a way that has that effect than it is foreseeably to affect a person in that way without intending to. And let us assume, following Quinn, that common sense also holds that

<sup>11</sup> See Warren S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy and Public Affairs* 18 (1989), pp. 317–33.

<sup>12</sup> Quinn, 'Actions, Intentions, and Consequences', p. 344.

<sup>13</sup> Quinn, 'Actions, Intentions, and Consequences', p. 344.

harmful opportunistic agency is more seriously objectionable than harmful eliminative agency. Combining these distinctions, common-sense morality imposes a special and quite stringent constraint against intentionally using an innocent individual in a way that one foresees will result in her death as a *means* of achieving one's ends. An *innocent* individual is, in this context, one who has done nothing to make herself morally *liable* to be used in this way. This special constraint – which I will call the *constraint against harmful using* – applies to both killing and letting die, though it is even more stringent in its application to the former. The constraint against harmful using is therefore most stringent in its application to killing certain innocent individuals without their consent as a means of achieving one's ends.<sup>14</sup>

Because my aim is to explore the implications of common-sense intuitions, I will not question the significance that common-sense morality attributes to the distinctions I have mentioned. In examining the common intuition that the Altruistic Abortion would be wrong, the question I will consider is not whether there really is a constraint against harmful using but, assuming that there is, whether a viable fetus is among the beings protected by it. For the constraint applies only to the killing of beings above a certain threshold on the scale that measures moral status.

## 5. FETUSES AND ANIMALS

### 5.1. *Common intuitions*

The most reliable way to determine whether a viable fetus comes within the scope of the constraint against harmful using would be to identify the property or properties that a being must possess to have the status that brings it within the scope of the constraint and then to determine whether a viable fetus has that property or set of properties. But the question of what properties make an individual morally inviolable by opportunistic agency is itself highly contentious.

An alternative approach to determining the scope of the constraint is to identify instances of beings that uncontroversially come within it as well as instances of beings that uncontroversially do not. We can then consider the respects in which viable fetuses differ from beings that clearly do not come within the scope of the constraint and ask whether these differences are plausible bases for inclusion.

Assuming that there is a constraint against harmful using, it is uncontroversial that innocent, cognitively normal adult human beings come within its scope. To take a familiar example, common-sense

<sup>14</sup> Harming someone as a means is not the same as treating someone merely as a means. For an exploration and analysis of the latter notion see chapter 7 ('Merely as a Means') of Derek Parfit's *Climbing the Mountain* (Oxford University Press, forthcoming).

morality holds that it would be wrong – because it would violate the constraint – to kill one person in order to use his organs for transplantation as a means of saving a greater number of others. Yet most of us believe that animals – even higher mammals such as dogs, monkeys and chimpanzees – lie outside the scope of the constraint. We accept, for example, that xenotransplantation can be permissible. If a person's three-year-old child could be saved only by the transplantation of a vital organ from a chimpanzee, that person, and most others as well, would almost certainly accept that the transplant would be morally permissible, even though it would involve intentionally using the chimpanzee in a way that would foreseeably cause its death.

If pressed to defend the view that animals are outside the scope of the constraint against harmful using, most people (at least in my experience) respond by appealing to their lack of certain higher psychological capacities that we possess and that seem to distinguish us from them – for example, capacities for self-consciousness, autonomy, and action on the basis of reasons, including moral reasons. But viable fetuses also lack those capacities. This narrows the range of properties that might plausibly be thought to bring fetuses within the scope of the constraint. Given that whether a being comes within the scope of the constraint is a matter of moral status, and given our earlier assumption that a being's moral status is determined by its intrinsic properties, the challenge is to identify the morally significant intrinsic properties a viable fetus has that a chimpanzee does not.

Before we explore this challenge, it will be helpful to indicate in a chart the common intuitions about whether certain types of action are subject to a special moral constraint. In each row is the type of being an agent's action would affect. In each column is a kind of action that results in death. All four forms of action involve an intention to affect a being, or to allow a being to be affected, in a way that the agent foresees will result in the being's dying earlier than it otherwise would. The cases represented in the chart exclude cases in which the being has done something to make it morally liable to be killed or allowed to die (for example, in self-defense or as punishment), as well as cases in which it would be good *for the being* to die (that is, euthanasia). The question posed in each case is whether common-sense morality holds that there is a special moral constraint against action of a certain sort directed against a certain kind of being. Thus the answer of 'no' given in column 1, row 3, indicates that there is no special constraint against selective non-treatment.

### 5.2. Questions about consistency

Consistency problems arise where a 'yes' and a 'no' answer are adjacent to one another, either vertically or horizontally. Where a 'yes' and a 'no'

Kind of being	Eliminative letting die	Eliminative killing	Opportunistic letting die	Opportunistic killing
Animal	NO	NO	NO	NO
Fetus	NO	NO	YES	YES
Infant	NO	YES	YES	YES
Person	YES	YES	YES	YES

*Note:* I am assuming, despite the reactions of my students who tend to approve of the Altruistic Abortion after they have reflected on the Selfish Abortion, that common-sense morality condemns the Altruistic Abortion. The possibility of killing fetuses to use their body parts is in fact sufficiently beyond the limits of what might be acceptable that it does not even come up for discussion.

answer are adjacent in a column, the challenge is to explain why a certain constraint applies to the treatment of the one kind of being but not to the treatment of the other. Thus the third and fourth answers in the first column represent intuitions that raise the problem noted in section 2: namely, how can it be permissible to allow a newborn infant to die by withholding treatment while it is not permissible to do this in the case of an older child with exactly the same condition? Where a ‘yes’ and a ‘no’ answer are adjacent in a row, the challenge is to explain why the treatment of that kind of being is subject to the one constraint but not the other. For example, the first and second answers in the third row point to the question raised in our discussion of selective non-treatment: namely, how can it be permissible to allow a defective infant to die by withholding treatment but not permissible to kill it painlessly? Finally, there are other consistency challenges raised even by different answers that are not adjacent. The ‘no’ in the third row of column one and the ‘yes’ in the third row of column three challenge us to explain how it could be permissible to allow an infant to die to avoid the burdens that its life might impose on others but not permissible to allow it to die in order, for example, to be able to use its organs for transplantation.

The challenge I will explore in this section concerns the first two answers in the fourth column, which indicate a common view of the scope of the constraint against harmful using. As I noted, virtually everyone believes that it is permissible to sacrifice an animal – even a mammal with comparatively high psychological capacities – as a means of saving the life of a person. Yet common sense also holds that it would be impermissible to sacrifice a viable fetus for the same reason. But what morally significant intrinsic property or properties does a viable fetus have that a higher animal lacks that bring the fetus within the scope of the constraint against harmful using?

5.3. *Potential*

Perhaps the commonest response to this challenge is that a viable fetus has the potential to develop the higher cognitive capacities that distinguish us morally from animals. Many people believe that this in itself gives the fetus a higher moral status, bringing it within the scope of the constraint against harmful using. One problem with this suggestion, however, is that not all viable fetuses have this potential. Human fetuses that are congenitally severely cognitively impaired lack the potential to develop higher cognitive capacities. If, therefore, it is this potential that brings a normal viable fetus within the scope of the constraint against harmful using and the absence of it that excludes an animal, it seems that it would be permissible for the woman to have the Altruistic Abortion *if* her fetus were congenitally severely retarded. But this alone seems unacceptable to common sense and many advocates of the rights of the disabled would regard this conclusion as perniciously discriminatory. The appeal to potential does not, therefore, adequately capture or explain common-sense intuitions about the difference in moral status between fetuses and animals.

Some claim that even a severely retarded human fetus has the potential for higher cognitive capacities – for example, because it possesses the genes that code for the development of those areas of the brain in which those capacities are realized.<sup>15</sup> It is just that the potential is somehow blocked. I think this view is mistaken, though I will not argue against it here.<sup>16</sup> For it still allows that the Altruistic Abortion would be permissible if the fetus lacked the physical basis for the potential – for example, if it lacked the genes that code for the development of the relevant areas of the brain. Even if such a defect were never to arise naturally, it could in principle be genetically engineered. And if such a human fetus were ever created, it could, on this view, be permissibly sacrificed in an Altruistic Abortion (and might, indeed, be produced for just such a purpose without any violation of the constraint against harmful using).

There is a second, more serious problem with the appeal to potential. It seems clear that a being's potential is morally significant insofar as the being has an interest in its realization – that is, if the realization of its potential would be good for it. This seems true of a viable fetus's potential to have higher cognitive capacities. Indeed, in this respect the fetus's higher potential constitutes a significant difference between it and an animal. But this is merely a claim about the viable fetus's

<sup>15</sup> A similar view has been advanced by Matthew Liao in 'Virtually All Human Beings as Rightholders', unpublished manuscript.

<sup>16</sup> I have argued against this view at length in 'Challenges to Human Equality', *Journal of Ethics* (forthcoming 2008).

*interests*. It is a different matter to claim that the fetus's potential gives it a higher moral *status*, bringing it within the scope of the constraint against harmful using. Suppose we were to discover that dogs have always had the potential to develop cognitive capacities comparable to those of a normal five-year-old child, but that this potential has never actually been realized because that would require subjecting the dog from earliest puppyhood to an intensive daily regimen of 'cognitive therapy' for the first five years of its life. I do not think that most people would then conclude that all dogs are and always have been within the scope of the constraint against harmful using. Rather, they would conclude that only those dogs, if any, in which this potential had been realized would have that higher status. If that is so, mere potential alone is not sufficient to bring a being within the scope of the constraint.<sup>17</sup>

#### 5.4. *Being human*

Many people believe that what distinguishes all human beings morally from all other animals is something occult – the soul. For this view to be credible, it has to provide a determinate and coherent conception of the soul that is compatible with what we know about the relation between consciousness and the functioning of the brain. It must provide evidence for the presence of the soul in all human beings as well as for its absence in animals (and also, perhaps, an account of the soul's appearance in the course of evolution). It must also offer an explanation of why the presence of a soul is a necessary and sufficient condition for being within the scope of the constraint against harmful using. I believe that none of these challenges can be satisfactorily met, though I cannot argue for that here.<sup>18</sup>

The only other intrinsic difference between a viable fetus and a higher mammal that might bring the former within the scope of the constraint while excluding the latter is whatever it is that is necessary and sufficient for membership in the human species. The idea that that which makes us human beings is also what brings us within the scope of the constraint avoids the problem of leaving retarded fetuses outside the scope of the constraint. Yet the fact that it gets all human beings within the scope of the constraint is not an unambiguously desirable result. Many people believe that there are *some* living human beings

<sup>17</sup> This argument is developed in more detail in *The Ethics of Killing*, pp. 315–16. For those who believe that a severely retarded fetus has the potential for higher cognitive capacities, we might pose a different thought-experiment in which it is discovered that all dogs possess the genetic basis for the development of rationality but that the action of the relevant genes is always systematically blocked by another component of the canine genome.

<sup>18</sup> I have, however, discussed the soul in more detail in *The Ethics of Killing*, pp. 7–24.

that it is permissible to use in a way that would foreseeably result in their death. There have been instances in which the parents of an anencephalic infant have asked that their child's organs be taken for transplantation while the child was still alive in an effort to ensure that the organs could be used before they deteriorated to the point of being unusable. Although these parents' requests have been denied by the courts, many people believe that they ought to have been honored. Indeed, in 1995 a committee of the American Medical Association recommended that living anencephalic infants be treated as acceptable sources of organs for transplantation and the parent body initially endorsed this recommendation, retracting its endorsement only under pressure from various religious groups.

Many people will be untroubled by the idea that living anencephalic infants may not be used as organ sources.<sup>19</sup> But there is another argument against treating membership in the human species as a source of moral status that is less easy to dismiss. Assume that our working genealogical criterion of species membership is undergirded by a deeper genetic criterion – in other words, that membership in the human species is determined by the possession of a characteristically human genome, which is in fact produced only by the fusion of gametes from human parents. But now imagine that the science of transgenics advances to the point at which it is possible to mix genes from different species more or less at will. We can then imagine a spectrum of possible cases – the *Transgenic Spectrum*:

The Spectrum begins with a chimpanzee with an unaltered genome. In the next case, a single human gene is inserted in a chimpanzee zygote. In the third case, two human genes are inserted. In each case further along in the spectrum, one more human gene is inserted while the corresponding chimpanzee gene is deleted, if necessary. Thus at the other end of the spectrum is a case in which *all* of the chimpanzee genes are replaced by corresponding genes from a human source. In all cases the genetically altered zygote is implanted in a natural or artificial uterus and thereafter allowed to grow to adulthood.

The Transgenic Spectrum consists of an enormous range of human-chimpanzee chimeras, with each individual differing from the individual prior to it in the spectrum only by having one more human gene. (We could, of course, imagine an even more extensive spectrum involving numerous individuals with different *mixes* of genes at each level at which the *proportion* of human to chimpanzee genes would be the same.)

Individuals at one end of the spectrum with only a tiny proportion of human genes are unambiguously chimpanzees; those at the other end

<sup>19</sup> The argument in the following two paragraphs is a slightly condensed statement of an argument in *The Ethics of Killing*, p. 213.



with only a tiny proportion of chimpanzee genes are unambiguously human beings. The relevant question is whether the *moral* status of any individual in the spectrum depends on whether it has a sufficiently high proportion of human genes to count as a member of the human species. I cannot believe that it does. It is hard to believe, for example, that an individual with genes that have endowed it with the brain of an unusually dull chimpanzee must come within the scope of the constraint against harmful using simply because the proportion of its other genes that are from a human source is high enough to make it biologically human. It is hard to believe, in particular, that this individual would come within the scope of the constraint when a neighboring individual in the spectrum would not because the overall proportion of its genes that were human fell just short of what would be necessary to make it human, even though its brain was formed by the operation of genes from human sources.

One may object that this argument assumes that there must be a sharp line between the human and the non-human. One coherent response to the Transgenic Spectrum is to accept that being human is a matter of degree so that the individuals within a certain broad range of the Spectrum are human to varying degrees. And their moral status could vary with the degree to which they are human.

There are, however, serious limitations to this response. One is that if it is thought that the moral significance of being human derives from the fact that all and only human beings have souls, then it would be unclear whether being human could be a matter of degree; but even if it could, moral status could not derive from the possession of a soul and still vary with the degree of humanness, since the possession of a soul cannot be a matter of degree.

A second limitation to the idea that being human is a matter of degree is that the constraint against harmful using is not typically thought to vary in strength in its application to different individuals. But to make sense of the idea that the moral status of an individual in the Transgenic Spectrum depends on the degree of its humanness or humanity, it would be necessary to suppose that it takes more to justify harmfully using an individual the more human that individual is – that is, the higher the proportion of human to chimpanzee genes in its genome. On this view, it would take more to justify harmfully using an individual with a high proportion of human genes but whose brain was essentially the brain of a chimpanzee than to justify harmfully using another individual with a lower proportion of human genes who might thus have a more simian appearance but whose brain was fully human. I take this to show that this view misidentifies the morally significant properties of these individuals, just as the related view that treats humanness as all-or-nothing does.

The Transgenic Spectrum helps us to see that mere membership in the human species, even if that could be considered a matter of degree, is not the criterion for inclusion within the scope of the constraint against harmful using. But if neither potential nor being human is sufficient for inclusion, and if we assume, as seems plausible, that whether an individual is within the scope of the constraint is a matter of its intrinsic properties, it is then difficult to claim that viable fetuses are within the scope of the constraint while denying that many animals are as well. It is therefore difficult to object to the Altruistic Abortion by appealing to the constraint against harmful using without also rejecting many or most forms of xenotransplantation.

### 5.5. *The equal wrongness thesis*

There is at least one other reason for doubting that viable fetuses come within the scope of the constraint. It derives from the fact that, according to common-sense morality, the morality of killing persons is distinguished from the morality of killing animals in two important respects. One is that the killing of persons is governed by the constraint against harmful using while the killing of animals is not. The other is that the wrongness of killing an animal varies, other things being equal, with the degree to which the animal is harmed by being killed, while the wrongness of killing a person does not.<sup>20</sup> The degree to which killing a person is wrong does not vary with such factors as the victim's age or life expectancy, temperament, quality of life, usefulness or value to others, and so on. Call this the *equal wrongness thesis*. The equal wrongness thesis is compatible with the claim that the wrongness of killing a person may vary with factors that do not bear on the status of persons as equals – for example, agent-centered considerations such as whether the killing is intended, whether it involves opportunistic agency, and so on.

It is reasonable to believe that the constraint against harmful using and the equal wrongness thesis go together – that is, that an individual's having a moral status sufficiently high to be within the scope of the constraint against harmful using is also necessary and sufficient for that individual to be within the scope of the equal wrongness thesis. If that is right, and if viable fetuses come within the scope of the constraint against harmful using, it should be as seriously

<sup>20</sup> This last assumption breaks down in instances in which a person could live only a very short time even if he were not killed. For powerful challenges to the equal wrongness thesis, see Kasper Lippert-Rasmussen, 'Two Puzzles for Deontologists: Life-Prolonging Killings and the Moral Symmetry between Killing and Causing a Person to be Unconscious', *The Journal of Ethics* 5 (2001), pp. 385–410; and Kasper Lippert-Rasmussen, 'Why Killing Some People is More Seriously Wrong than Killing Others', *Ethics* (forthcoming).

wrong, other things being equal, to kill a viable fetus as it is to kill an older child or adult. Yet the common attitudes to abortion that I cited earlier suggest that very few people actually believe this. Most people, for example, appear to believe that abortion becomes more seriously morally objectionable the later it is performed, and there is good reason to believe that this is true even of the period during which the fetus is viable – that is, most people believe that an abortion performed near the end of the normal period of gestation would be more seriously objectionable than one performed soon after the point of viability. This suggests that most people perceive a shift in the fetus's moral status over this period – one that corresponds to the development of its intrinsic nature over this same period. If that is right, and if the degree to which it is morally objectionable to kill it increases with this enhancement of its status, then the equal wrongness thesis does not apply to the killing of a viable fetus. If the equal wrongness thesis and the constraint against harmful using go together, viable fetuses should be outside the scope of both.

#### 5.6. Overgeneralization

These arguments may be insufficient to dispel the sense that many people have that harmfully using a viable fetus, as in the Altruistic Abortion, is subject to a special moral constraint. Yet it is salutary to reflect how readily our intuitions about the special wrongness of *using* are overgeneralized. One instance of this tendency to overgeneralization is arguably found in the United States' current policy on stem cell research. The Bush administration's policy is that, although researchers may receive federal funding to study stem cell lines derived from embryos that had already been killed prior to the president's speech in 2001, no funding will be provided for research involving embryonic stem cells acquired after that time. This restriction is intended to prevent the opportunistic killing of frozen embryos that will eventually be killed and disposed of anyway. While it *would* violate the constraint against harmful using to kill a *person*, without his consent, in order to use his tissues to benefit others, even if it was certain he would otherwise die soon anyway, it is implausible to suppose that this is true of killing an embryo less than a week after fertilization. An embryo just does not have a sufficiently high moral status to warrant this level of protection.

Here is another instance of apparent overgeneralization. Most of us believe that it is admirable for a person to sacrifice his life to save another. The soldier who could save himself but instead throws himself on a grenade to shield his comrades is the paradigm of a hero. But now imagine that an adolescent has a disease that will kill her tomorrow unless she receives a transplant of a vital organ today. There

is no possibility of securing an organ through normal channels but her mother's organ is of exactly the right tissue type. The mother entreats the surgeons to take her organ, knowing that the sacrifice would cause her death, since the organ is a vital one. We would regard her behavior as noble but we nevertheless refuse, as a society, to permit the surgeons to take her organ. Why? Because to take the organ would be an instance of opportunistic killing: it would be to use the mother in a way that would cause her death as a means of saving another. The mother's consent – indeed, her impassioned pleading – seems not to matter. I believe this is irrational. To take the mother's organ to save her daughter's life would not be an instance of wrongful using. To see this, note that the soldier who leaps on the grenade *uses himself* in a way that he foresees will result in his own death; and we applaud his self-sacrifice. If the mother could similarly use herself by giving her child her organ without the assistance of the surgeons, we would presumably applaud that as well. So why do we balk at recognizing the permissibility of third parties giving her organ to her child at her request, when she is unable to give it without their assistance? I think it is because our intuitions have difficulty registering the limits of the constraint against harmful using. Our moral aversion to harmful using is so strong that we fail to perceive that unforced consent can nullify the constraint. We intuitively overextend the reach of the constraint, just as the Bush administration and its supporters do.

There are, of course, reasons based on considerations of consequences for adopting a policy prohibiting living persons from voluntarily donating vital organs – for example, that otherwise we might be committed to assisting irrational sacrifices. These reasons, however, are not what explain the reluctance of most people to accept that it can be permissible for a surgeon to kill one person to save another, even with the consent of the former.

## 6. ELIMINATIVE AND OPPORTUNISTIC INFANTICIDE

Thus far I have argued that it is difficult to accept the permissibility of the Selfish Abortion, as most people do, without also accepting the permissibility of the Altruistic Abortion, which most people find impermissible. Although our commitment to the constraint against harmful using seems to provide the best explanation of this belief, I have argued that it is doubtfully consistent to suppose that the constraint against harmful using governs our treatment of viable fetuses but not our treatment of higher animals. I believe we must abandon the assumption that viable fetuses come within the scope of that constraint. If that is right, it seems reasonable to suppose that

the Selfish Abortion and the Altruistic Abortion stand or fall together: either both are permissible or neither is.

Return now to the chart on page. Note that the second column registers the common view that there is no special constraint against the eliminative killing of a viable fetus (which does not mean that there is no moral objection to it), though there is a constraint against the eliminative killing of a newborn infant. According to this pair of claims, there is no special constraint against the Selfish Abortion but there is against the eliminative killing of a newborn infant in comparable circumstances. The *Contagious Newborn* is an example of the latter.

A woman scientist goes by herself to a remote area for a year's experimental work. Shortly after her arrival she discovers that she is pregnant but decides not to leave but to persist with her work. On the day she gives birth to her baby, a few weeks prematurely, it is bitten by a dangerous insect. Later she tests its blood and discovers that it has been infected and is incubating a virus that will become highly contagious within a couple of days. This virus poses little threat to the infant but is more virulent in its effect on an adult. If she remains exposed to the infant, she will contract an illness that will cause her to suffer moderate chronic pain for the remainder of her life. If she signals for help, it will be two weeks before help can arrive. The only way for her to avoid exposure to the virus is for one or the other of them to stay outside her one-room cabin for at least a week. But during the days since the baby's birth the first winter storm has arrived and the cabin is now snowbound. If she puts the infant outside, she will not be allowing it to die from lack of nutrition but will be killing it by exposing it to conditions in which it cannot survive.

Almost no one believes that it would be permissible for the scientist to kill her newborn infant in these circumstances. This is, at least in part, because the constraint against eliminative killing is thought to apply in the case of a newborn infant. Yet if I am right in my earlier claim that there cannot be a general intrinsic difference between a viable fetus and a newborn infant, and if moral status is a function of intrinsic properties only, it seems that the constraint against eliminative killing either applies to the killing of both newborn infants and viable fetuses or applies to neither.

If this is right, those who want to retain the view that the Selfish Abortion is permissible may have to abandon the view that there is a special constraint against eliminative infanticide. Those who find this intolerable may have to reject the common belief that the eliminative killing of a viable fetus can be permissible in cases such as the Selfish Abortion. If, however, my earlier arguments are right and there is no morally significant intrinsic difference between viable fetuses and higher animals, and hence no difference of basic moral *status*, it seems that those who conclude that there is a special constraint against the eliminative killing of viable fetuses are under pressure to draw the same conclusion about the eliminative killing of higher animals. (This

is not to suggest that we cannot recognize significant moral differences between killing a viable fetus and killing a higher animal. The killing of a fetus may be more objectionable because of relational considerations, because the fetus's interests are stronger, and so on. What my arguments deny is that it is more seriously wrong because the fetus enjoys a higher degree of inviolability by virtue of its inherent nature.)

The reader will have anticipated what comes next. I have argued that there are reasons for doubting that viable fetuses come within the scope of the constraint against harmful using. If that is right, and if there are no general intrinsic differences between viable fetuses and newborn infants, it seems that newborn infants must fall outside the scope of the constraint against harmful using as well. Considerations of consistency thus pressure us to accept the permissibility of *opportunistic* infanticide as well. Consider, for example, the *Healthy Newborn*:

A woman dies in childbirth leaving a very premature but healthy infant, just a few hours old. The child's biological father died months ago and neither he nor the mother had any living relatives. Both were reclusive and had no friends; hence there is no one who is specially related, even indirectly, to the infant. Suppose there are four children in the same hospital, all of whom are three years old and need an organ transplant within the next twenty-four hours in order to survive. Because these children's organs have been impaired by illness, it is not possible to wait for one to die and use his or her organs to save the others; nor is it possible to sacrifice one (say, by lottery) to save the other three. But the newborn infant has the right tissue type and its organs could be used to save all four.

Most people strongly believe that it would be impermissible to sacrifice the healthy, orphaned newborn to save the lives of the four children. Yet suppose that this infant was born six and a half months after conception – that is, that it is at the same stage of development as the fetus in the Altruistic Abortion. Given that the infant and the fetus have the same intrinsic nature and thus the same moral status, it is difficult to reject the permissibility of sacrificing the infant without also rejecting the permissibility of the Altruistic Abortion. Most people, of course, would be happy to reject the latter as well; but I have argued that it is difficult to reject the permissibility of the Altruistic Abortion without also rejecting the permissibility of xenotransplantation using higher animals as organ sources. Furthermore, I have argued that if we reject the permissibility of the Altruistic Abortion, we cannot plausibly do so on the ground that the viable fetus comes within the scope of the constraint against harmful using. So it is not the fact that the Altruistic Abortion involves opportunistic killing that makes it impermissible. But if that is true, then whatever it is that makes the Altruistic Abortion wrong should make the Selfish Abortion wrong as well, especially given that the reasons favoring abortion are

considerably stronger in the case of the Altruistic Abortion and the only apparent reason for thinking that the Altruistic Abortion is more objectionable seems to be that it involves opportunistic rather than eliminative killing. If, however, we accept that the Selfish Abortion is wrong, this puts us under pressure to accept that the eliminative killing of higher animals is morally objectionable for the same reasons, at least insofar as these reasons derive from considerations of fetal status. There are, in other words, no easy options.

The reviewer to whom I referred in the opening paragraph criticized the brief discussion of the Healthy Newborn in my book on the ground that it assumed 'that the death of the newborn's mother removes her wishes and concerns entirely from the equation'; but surely, he suggested, those who would participate in or benefit from the killing of the healthy newborn might 'feel an obligation to the memory of the newborn's dead mother that might make them hesitate over its "sacrifice."' Attention to considerations such as these, the reviewer suggested, would help to get us beyond my artificially restricted and impoverished discussion to 'something resembling the texture and complexity of human reality'.<sup>21</sup>

I accept that these are relevant considerations. But I doubt that they are sufficient to override the importance of reducing the number of children's deaths by three. Suppose the mother attributed independent significance to special relations among the living but was otherwise a utilitarian. Given such views, she would have believed herself entitled not to sacrifice her infant had she lived but would have accepted that sacrificing it would be morally required if she were to die in childbirth. In that case her 'wishes and concerns' would *favor* the sacrifice. But those, such as the reviewer, who believe infanticide is unthinkable, would be no more inclined in this variant than in the original case to think the sacrifice permissible. If opportunistic infanticide is wrong, that is because of the infant's own nature and moral status, not because killing it would show a failure of respect for its parents.

## 7. THE THOMSON ARGUMENT

I have claimed that most people, including most opponents of abortion, believe that abortion is less seriously objectionable than the killing of an older child or adult. I have assumed that this reflects a widespread perception that the status of the fetus is lower. But some people argue that abortion is different not because of facts about the fetus's intrinsic nature or moral status but because of its *geography*: it is in the pregnant woman's body and depends for its survival on the use of her body as

<sup>21</sup> Mulhall, 'Fearful Thoughts', p. 16.

a source of life support. But because it has no right to the use of her body, she is entitled to expel it and even to kill it *if* that is necessary to end its imposition on her body. Call this the *Thomson argument* for the permissibility of abortion.<sup>22</sup>

This argument offers an explanation of common attitudes to abortion and supports the permissibility of many abortions without challenging the idea that the viable fetus has a high moral status and comes within the scope of the constraint against harmful using. According to this argument, the viable fetus could be the *kind* of being that it is normally wrong to kill for exactly the same reasons that it is normally wrong to kill a person; it is just that the circumstances of pregnancy are such that killing via abortion may not be wrong at all. Because the argument offers a justification for abortion that appeals to the circumstances of pregnancy rather than to the moral status of the fetus, it offers no corresponding justification for infanticide. Infants no longer occupy their mother's body and therefore need not be killed in order to prevent them from taking from anyone what they have no right to take in order to survive.

For these reasons, the Thomson argument may seem to answer at least some of the various consistency challenges I have cited that threaten to compel us, on the basis of our beliefs about abortion, to accept the permissibility of infanticide in certain cases. It seems, for example, to offer a justification for the Selfish Abortion that is compatible with the rejection of the permissibility of infanticide in the cases of the Contagious Newborn and the Healthy Newborn. It is true, of course, that the contagious infant threatens its mother with the same chronic pain with which the woman in the Selfish Abortion is threatened. But, according to the Thomson argument, it is not the threat of chronic pain alone that justifies the Selfish Abortion. Rather, it is the assumption that the fetus has no right to the use of the pregnant woman's body for life support that makes it permissible for her to expel the fetus if its presence threatens her with chronic pain. Because a person's rights to her body are very different from her right to a cabin, there seems to be no comparable basis for the permissibility of expelling the infant from the cabin in the case of the Contagious Newborn.

The Thomson argument is, however, limited in its ability to support common-sense intuitions. In particular, because it justifies the Selfish Abortion because of the fetus's imposition on the pregnant woman rather than because of its status, it seems to provide a justification for the Altruistic Abortion that parallels its justification for the Selfish

<sup>22</sup> This argument was first advanced in a justly celebrated article by Judith Jarvis Thomson called 'A Defense of Abortion', *Philosophy and Public Affairs* 1 (1971), pp. 47–66.



Abortion. In the Altruistic Abortion, the fetus has no right to occupy the pregnant woman's body and she has good reason to want it out – namely, that its organs will then be available for transplantation. Aborting it would arguably be permissible even if the fetus were to come within the scope of the constraint against harmful using. For the abortion itself would be justified by appeal to the fetus's lack of a right to occupy the woman's body; but once it has been aborted, using its organs for transplantation would not violate the constraint against harmful using since the fetus would already be dead. And it is generally conceded that parents have the authority to donate their dead child's organs for transplantation. That being so, it would be a pointless waste of valuable resources to fail to use the fetus's organs after it had ceased to need them. (This is analogous to the Bush administration's implicit recognition that the use of stem cells from embryos that have already been killed is not an instance of wrongful using.)

This could be disputed. One might claim that the abortion itself would be part of a plan that involves harmfully using the fetus and so would be objectionable even though the fetus has no right to occupy the pregnant woman's body. Others might agree that the Thomson argument justifies the Altruistic Abortion but accept that implication as the price of a consistent position that justifies many abortions but not infanticide. But we need not settle this issue. For the Thomson argument cannot in fact solve any of the consistency problems I have posed.

I believe that one reason why this is so is that the Thomson argument falls short of establishing the permissibility of abortion in most cases (though it may combine with claims about the status of the fetus to provide a decisive case for the permissibility of abortion in most instances).<sup>23</sup> But it would be unconvincing to reject this response to the consistency challenges by appealing to arguments that I cannot give here. So instead I will make the more limited argument that the Thomson argument cannot in fact justify either the Selfish Abortion or the Altruistic Abortion. (That it cannot justify the latter may come as a relief to many who are convinced by the Thomson argument; but that it cannot justify the Selfish Abortion will be seen by most of the argument's defenders as a serious deficiency.)

What the Thomson argument justifies is the termination of the fetus's trespass against the body of the pregnant woman. Let us grant for the sake of argument that it can justify the killing of the fetus when that is

<sup>23</sup> I have argued for this claim at tedious length in *The Ethics of Killing*, pp. 362–98. More recently I have argued that a fatal defect of the argument is that if it were to succeed in justifying abortion, it would also succeed in justifying the infliction of prenatal injury in similar circumstances and for the same reasons. But prenatal injury is not justifiable in most circumstances in which abortion can be. See McMahan, 'Paradoxes of Abortion and Prenatal Injury', p. 634.

necessary to terminate the trespass. But it does not follow that it can justify the killing of the fetus via abortion when that is *not* necessary to remove the fetus from the woman's body – a limitation that Thomson herself concedes.

The fetuses in the Selfish Abortion and the Altruistic Abortion are viable. They can be removed without being killed. And recall that we are assuming that a viable fetus has a high moral status and comes within the scope of the constraint against harmful using. (For the advantage of the Thomson argument, in this context, is to enable us to grant that infants, and therefore viable fetuses, have a high moral status and at the same time to claim that abortion can be permissible while infanticide is not.) Let us assume further that a caesarian section would be *significantly* worse for the pregnant woman than abortion but not *very substantially* worse. Given these assumptions, the Thomson argument may show that it is permissible for the woman to remove the fetus by caesarian, even if that would be worse for it than a later, natural delivery; but it does not show that it is permissible for her to kill it via abortion when it is possible to have it removed alive. Perhaps if the cost to her of removing it by caesarian were very substantially greater than the cost to her of an abortion, the Thomson argument would imply that it is permissible for her to have an abortion. For given that the fetus has no right to the use of her body, she is not required to accept great personal cost to avoid killing it in the process of terminating its trespass. But in the circumstances she *is* morally required to accept *some* costs in order to remove it alive rather than to kill it. For we are assuming that the fetus has a high moral status. And we are also assuming that in both cases (the Selfish Abortion and the Altruistic Abortion) the woman became pregnant intentionally. She, therefore, and not the fetus, is morally responsible for the situation in which its continued presence in her body threatens her with chronic pain. And, finally, the fetus is the woman's *own child*. It is simply not plausible to suppose that she may permissibly kill her own child rather than remove it alive, even at somewhat greater cost to herself, when her child is a being with high moral status whom she herself has caused to be a threat to her.

Many people believe that the Selfish Abortion is permissible. It would be legally permissible in most Western countries. But if we believe that it is permissible, we cannot appeal to the Thomson argument for justification. For in this case the Thomson argument justifies only a caesarian. To justify the Selfish Abortion, we must reject the assumption that a viable fetus has the same moral status that you and I have. We must accept that the constraint against the eliminative killing of a person does not apply to the eliminative killing of a viable fetus. Since, however, there is no general morally significant intrinsic

difference between a viable fetus and a newborn infant, it again seems that if the Selfish Abortion can be justified, so can infanticide in the case of the Contagious Infant. Similarly, if the viable fetus's lower status means that it also lies outside the scope of the constraint against harmful using, it seems that the Altruistic Abortion should also be permissible – in which case infanticide in the case of the Healthy Newborn should be as well.

## 8. A CONSISTENT MODERATE POSITION?

One option is to accept that the Thomson argument justifies only abortions that are performed prior to viability, with possible exceptions in cases in which the cost to the woman of live removal would be prohibitive. This position would enable us (1) to grant high moral status to infants and viable fetuses (and to non-viable fetuses as well, should we be so inclined), (2) to justify most *actual* abortions, since most actual abortions are performed prior to the point of fetal viability, and (3) to reject the permissibility of infanticide. This would be a threshold view of abortion, one that draws a sharp line at a fairly determinate point in fetal development before which abortion would be permissible but after which it would not be, unless the costs to the pregnant woman of live removal would greatly exceed the costs of abortion. But the threshold would not be arbitrary. Viability would be morally significant because it would be the point at which a pregnant woman could terminate the fetus's trespass in her body without killing it. Beyond this point, it is not necessary to kill the fetus to terminate the trespass. And what the Thomson argument justifies, at least in most cases, is only the removal and not the killing of the fetus.

If one believes, as I do not, that the Thomson argument provides a satisfactory explanation and defense of the permissibility of abortion prior to the point of viability, this position will have considerable appeal, as it seems to reconcile the common view that early-term abortions are permissible with the even more common view that infanticide is impermissible. But suppose the Thomson argument would also justify some post-viability live extractions of unwanted fetuses. How great a cost would people have to bear to keep premature infants alive? At present this would not be a significant practical problem. The cost of sustaining a premature newborn in an intensive-care unit is great but may be gladly borne by the parents or those who might adopt the infant.

But suppose that scientific advances move the point of viability to a much earlier stage of fetal development. Suppose, for example, that an artificial uterus makes viability coincide closely with the point at which pregnancy is initially detectable. And suppose that live delivery at this point would be no more costly to the woman than abortion. In these

circumstances, the Thomson argument would not justify abortion. But if it has any purchase, it presumably would continue to justify the expulsion of the fetus from the womb. What would be done with the many very premature infants? How much would the parents or society have to sacrifice to keep them alive? Might we come to think abortion permissible as an alternative to having to spend vast amounts in order to keep the premature infants alive?

One view might be that killing unwanted fetuses via abortion would be wrong but that once they were removed alive, we would not be required to provide them with expensive forms of life support and thus would be permitted simply to allow them to die. It is, however, hard to believe that that would be morally superior to simply killing them via abortion, particularly if both killing and letting die would be painless. It is unlikely that those who doubt the permissibility of abortion today would think that delivering fetuses alive and then allowing them to die would constitute a moral improvement.

Another possibility arises from the fact that many viable fetuses in this scenario would be chronologically younger than even the most premature infants are today and might therefore be intrinsically different from infants as we know them in morally significant ways. Thus it might be permissible to have an abortion in these circumstances without that having any implications for infanticide in contemporary conditions. For we could accept that the moral status of the fetus shifts radically between the very early stages of its development and the point at which it now becomes viable. Early abortions could be justified by appeal to the early fetus's lower moral status even though the early fetus would be viable, without that having implications for viable fetuses or infants now.

This view is not without moral costs. The abortion of an early though viable fetus would not be justified by the Thomson argument but by the claim that its moral status is lower. But an early fetus that was removed alive and placed in an artificial uterus would have the same low status. This view therefore implies that it would also be permissible to kill a newly delivered but very premature infant, provided there was a reason to kill it that would be sufficient to justify an early abortion: for example, deformity or, perhaps, to use its organs or tissues to save the lives of older children. We would still not have a consistent view that permitted abortion but prohibited infanticide.

As I have tried to show, the common view that infanticide is morally different in kind from abortion is difficult to defend, given that there can be no intrinsic differences between a viable fetus and a newborn infant of the same age (calculating age from conception rather than from birth). To achieve consistency, we may need to abandon either the view that post-viability abortions can be justified, even to avert a

significant harm to the pregnant woman, or the view that infanticide is morally just as serious as the killing of an older child or adult. I have tried to show that the first of these options, while seemingly acceptable or even welcome to some, has its own costs, given that it is also difficult to identify morally significant intrinsic differences – differences that are relevant to an individual's moral status rather than to the strength of its interests – between a viable fetus and certain higher non-human animals. These problems are serious and cannot be dismissed as the mere products of a corrupt mind.<sup>24</sup>

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