6. ISSUES IN REPRODUCTIVE HEALTH

1. ABORTION

The sharpest conflict in the discussion of abortion arises between those who assert that a woman has an unqualified *right to choose* abortion and those who argue that, since every fetus has a *right to life,* abortion is equivalent to murder. The U.S. Supreme Court ruled in the landmark *Roe* v. *Wade* decision of 1973 that state laws restricting abortion were unconstitutional except under narrowly defined conditions. While the ruling made abortion legal, controversy about its ethical acceptability continues. Early in 1989 the Court announced that it would rule on a case involving abortion laws in the state of Missouri. The decision could result in a reversal of *Roe* v. *Wade.*

In another ruling (*Harris* v. *McRae,* 1980), the court upheld the constitutionality of the so-called Hyde Amendment, which restricted Medicaid funding of abortions to cases in which the mother's life is threatened or where the pregnancy is a result of rape or incest. Since the Medicaid program provides federal financing for the health care of the poor, the decision means that impoverished women seldom obtain abortions paid for out of public funds. Although abortion is no longer against the law, it is out of reach for many. Right-to-choose forces argue that the policy is ethically unsound on grounds of social injustice.

One way of approaching the ethical problem of abortion is to examine the moral status of the fetus. The issue of moral status (of animals, plants, and nonliving objects) has also been raised by writers concerned with environmental protection. **[See Business, Chapter 11, Section 2.]** What moral position should be assigned to the fetus: Is it or is it not a person? Those who take a *conservative* position on abortion contend that the developing organism is a person and has the same rights we accord to any human being. If we are willing to grant full moral status to the fetus, it follows that abortion is equivalent to killing and can be justified only under very limited conditions, as when the mother's life is in danger. Proponents of this view maintain that the state, which is under obligation to protect its weaker members, should extend that protection to the unborn.

If, on the other hand, the fetus does not have the moral status of a person, then abortion is no more ethically problematic than the removal of any other piece of tissue—the tonsils, say, or the appendix. The typically *liberal* position assigns no rights to the fetus and instead stresses the right of a pregnant woman to self-determination. From this standpoint, abortion is morally similar to contraception, the preventing of a possible person.

A *moderate* position on abortion grants partial moral status to the fetus, on grounds of its potential personhood or its strong resemblance in later stages of development to a person. On this view, some abortions are justifiable while others are not. What factors are relevant to making the determination?

Some hold that the pregnant woman's reasons for seeking an abortion bear on whether or not it is justified. Others believe that the fetus's stage of development is a consideration.

Attempts have been made to draw the line at some point in the biological development of the fetus after which it possesses the moral status of a person. Such points as implantation, quickening, and viability have been suggested as appropriate places to draw the line. The Supreme Court addressed the line-drawing problem in *Roe* v. *Wade* and drew the line at viability, ruling that states may regulate or prohibit abortion after that point. However, it has proven difficult to establish the moral relevance of any particular point in a continuous process of fetal development.

Conservatives often argue that conception is the only nonarbitrary point at which the line can be drawn. They sometimes employ what is referred to as a *slippery slope*-type argument, maintaining that wherever the line is drawn, it will necessarily slide back to the point of conception. At the other extreme, some liberal ethicists have proposed criteria for personhood which would exclude newborn infants. A position of this kind suggests that the line can be drawn at some point *after* birth and leads to the moral justifiability of infanticide as well as abortion.

While drawing the line is one way of developing a moderate position, other strategies have been employed. Moderates argue that even if the fetus has full moral status (as conservatives typically contend), abortion is permissible in some cases. Others moderate the liberal position by granting the libertarian assumption that the fetus has no moral status, while denying that all abortions are acceptable. In the following article Jane English first argues that it is not possible to determine (1) whether the fetus is a person or (2) where to draw the line. Using strategies similar to those outlined above, she develops two arguments aimed at moderating both the liberal and the conservative positions.

JANE ENGLISH

Abortion and the Concept of a Person

The 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.[1] 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 exam-

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the 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.

I

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[2] 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[3] uses brain waves. Michael Tooley[4] 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[5] claims a certain gene structure is the defining characteristic. John Noonan[6] 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 unsentimentally.

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.[7] 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 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.[8]

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.[9] 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

Next let us consider what follows if a fetus is a person after all. Judith Jarvis Thomson's landmark article, "A Defense of Abortion,"[10] 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.

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.[11]

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.

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 in-

jury 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 is 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 the 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

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 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.[12] 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 need 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.[13] 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.[14] 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 the 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 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 harm—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.[15]

Notes

1. 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.

2. Mary Anne Warren, "On the Moral and Legal Status of Abortion," *Monist* 57 (1973), p. 55.

3. Baruch Brody, "Fetal Humanity and the

Theory of Essentialism," in Robert Baker and Frederick Elliston (eds.), *Philosophy and Sex* (Buffalo, N.Y., 1975).

4. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2 (1971).

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

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

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

8. 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.

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

10. J. J. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971).

11. Ibid., p. 52.

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

13. 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.

14. Op. cit., pp. 40, 60–61.

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

Suggested Further Reading

Armstrong, Robert L., "The Right to Life," *Journal of Social Philosophy,* 8 (January 1977), 13–19.

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2. SELECTIVE ABORTION AND GENETIC SCREENING

The issue of selective abortion has emerged with the development of technologies which predict many characteristics of an unborn child. Such techniques as amniocentesis, ultrasound, and *chorionic villi* sampling make it possible to determine the sex of a fetus, along with possible abnormalities in its development. Prenatal diagnosis is frequently undertaken with the idea that if serious defects are found, the pregnancy will be terminated. The possibility that amniocentesis may be used for purposes of sex selection is disturbing to critics. Some health facilities refuse to administer prenatal tests to patients who intend to abort purely on grounds of the fetus's sex. A number of ethical questions concerning reproductive responsibility are associated with selective abortion. Similar concerns have been voiced by critics of gene-splicing technology. [See Business, Chapter 12, Section 3.] Do parents have an unqualified right to abort a possibly defective fetus? Do they have a right to abortion on the basis of the sex of the fetus? (One should bear in mind that certain genetic diseases—hemophilia, for example—

cannot be diagnosed prenatally but are known to affect children only of a particular sex.)

Some argue that it is unethical knowingly to bear children likely to be physically or mentally handicapped. Arguments of this nature are based on primarily utilitarian considerations. Such children place a severe burden on public resources in addition to the problems borne by their families. Other writers hold that each child born has a right to an acceptable quality of life. On this deontological view, persons who knowingly enable the birth of a defective child are violating the infant's rights.

Genetic screening also involves problems of reproductive responsibility. Screening programs fall into two categories. One type is designed to identify *carrier states* in prospective parents that would cause offspring to be born with serious defects or health problems. Some writers warn that genetic screening for carrier states involves the risk that persons identified as having "defective" genes will be traumatized by the knowledge and stigmatized by society.

The second type of genetic screening program is aimed at detecting genetic diseases in the fetus or newborn infant. When programs are voluntary and function to detect diseases for which treatment is available, they present few ethical difficulties. Problems arise if the testing is made mandatory or if the disease cannot be treated. Mandatory (adult) participation in programs of either type raises the issue of paternalism. Both genetic screening and prenatal testing for abnormalities carry a risk that the state might attempt to impose standards for who has the right to be born or to reproduce.

In the following article Leon R. Kass discusses the issue of selective abortion of fetuses determined by prenatal testing to be genetically defective. Kass contends that acceptance of the practice erodes our belief in the "radical moral equality of all human beings." As a result, those who escape detection and are born with defects will be viewed more negatively. In addition, he argues, acceptance of the practice implies acceptance of a dangerous principle, namely that "defectives should not be born."

LEON R. KASS

Perfect Babies: Prenatal Diagnosis and the Equal Right to Life

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.
>
> —DECLARATION OF INDEPENDENCE

> All animals are equal, but some animals are more equal than others.
>
> —GEORGE ORWELL, Animal Farm

It is especially fitting on this occasion to begin by acknowledging how privileged I feel and how pleased I am to be a participant in this symposium. I suspect that I am not alone among the assembled in considering myself fortunate to be here. For I was conceived after antibiotics yet before amniocentesis, late enough to have benefited from medicine's ability to prevent and control fatal infectious

Excerpt reprinted with permission of the author and publisher from *Ethical Issues in Human Genetics*, ed. Bruce Hilton et al. (New York: Plenum Publishing Corp., 1973). A longer version of the article appears in the author's current book, *Toward a More Natural Science: Biology and Human Affairs* (New York: The Free Press, 1985; paperback ed. 1988).

diseases, yet early enough to have escaped from medicine's ability to prevent me from living to suffer from my genetic diseases. To be sure, my genetic vices are, as far as I know them, rather modest, taken individually—myopia, asthma and other allergies, bilateral forefoot adduction, bowleggedness, loquaciousness, and pessimism, plus some four to eight as yet undiagnosed recessive lethal genes in the heterozygous condition—but, taken together, and if diagnosable prenatally, I might never have made it.

Just as I am happy to be here, so am I unhappy with what I shall have to say. Little did I realize when I first conceived the topic, "Implications of Prenatal Diagnosis for the Human Right to Life," what a painful and difficult labor it would lead to. More than once while this paper was gestating, I considered obtaining permission to abort it, on the grounds that, by prenatal diagnosis, I knew it to be defective. My lawyer told me that I was legally in the clear, but my conscience reminded me that I had made a commitment to deliver myself of this paper, flawed or not. Next time, I shall practice better contraception.

Any discussion of the ethical issues of genetic counseling and prenatal diagnosis is unavoidably haunted by a ghost called the morality of abortion. This ghost I shall not vex. More precisely, I shall not vex the reader by telling ghost stories. However, I would be neither surprised nor disappointed if my discussion of an admittedly related matter, the ethics of aborting the genetically defective, summons that hovering spirit to the reader's mind. For the morality of abortion is a matter not easily laid to rest, recent efforts to do so notwithstanding. A vote by the legislature of the State of New York can indeed legitimatize the disposal of fetuses, but not of the moral questions. But though the questions remain, there is likely to be little new that can be said about them, and certainly not by me.

Yet before leaving the general question of abortion, let me pause to drop some anchors for the discussion that follows. Despite great differences of opinion both as to what to think and how to reason about abortion, nearly everyone agrees that abortion is a moral issue.[1] What does this mean? Formally, it means that a woman seeking or refusing an abortion can expect to be asked to justify her action. And we can expect that she should be able to give reasons for her choice other than "I like it" or "I don't like it." Substantively, it means that, in the absence of good reasons for intervention, there is some presumption in favor of allowing the pregnancy to continue once it has begun. A common way of expressing this presumption is to say that "the fetus has a right to continued life."[2] In this context, disagreement concerning the moral permissibility of abortion concerns what rights (or interests or needs), and whose, override (take precedence over, or outweigh) this fetal "right." Even most of the "opponents" of abortion agree that the mother's right to live takes precedence, and that abortion to save her life is permissible, perhaps obligatory. Some believe that a woman's right to determine the number and spacing of her children takes precedence, while yet others argue that the need to curb population growth is, at least at this time, overriding.

Hopefully, this brief analysis of what it means to say that abortion is a moral issue is sufficient to establish two points. First, that the fetus is a living thing with some moral claim on us not to do it violence, and therefore, second, that justification must be given for destroying it.

Turning now from the general questions of the ethics of abortion, I wish to focus on the special ethical issues raised by the abortion of "defective" fetuses (so-called "abortion for fetal indications"). I shall consider only the cleanest cases, those cases where well-characterized genetic diseases are diagnosed with a high degree of certainty by means of amniocentesis, in order to sidestep the added moral dilemmas posed when the diagnosis is suspected or possible, but unconfirmed. However, many of the questions I shall discuss could also be raised about cases where genetic analysis gives only a statistical prediction about the genotype of the fetus, and also about cases where the defect has an infec-

tious or chemical rather than a genetic cause (e.g., rubella, thalidomide).

My first and possibly most difficult task is to show that there is anything left to discuss once we have agreed not to discuss the morality of abortion in general. There is a sense in which abortion for genetic defect is, after abortion to save the life of the mother, perhaps the most defensible kind of abortion. Certainly, it is a serious and not a frivolous reason for abortion, defended by its proponents in sober and rational speech—unlike justification based upon the false notion that a fetus is a mere part of a woman's body, to be used and abused at her pleasure. Standing behind genetic abortion are serious and well-intentioned people, with reasonable ends in view: the prevention of genetic diseases, the elimination of suffering in families, the preservation of precious financial and medical resources, the protection of our genetic heritage. No profiteers, no sex-ploiters, no racists. No arguments about the connection of abortion with promiscuity and licentiousness, no perjured testimony about the mental health of the mother, no arguments about the seriousness of the population problem. In short, clear objective data, a worthy cause, decent men and women. If abortion, what better reason for it?

Yet if genetic abortion is but a happily wagging tail on the dog of abortion, it is simultaneously the nose of a camel protruding under a rather different tent. Precisely because the quality of the fetus is central to the decision to abort, the practice of genetic abortion has implications which go beyond those raised by abortion in general. What may be at stake here is the belief in the radical moral equality of all human beings, the belief that all human beings possess equally and independent of merit certain fundamental rights, one among which is, of course, the right to life.

To be sure, the belief that fundamental human rights belong equally to all human beings has been but an ideal, never realized, often ignored, sometimes shamelessly. Yet it has been perhaps the most powerful moral idea at work in the world for at least two centuries. It is this idea and ideal that animates most of the current political and social criticism around the globe. It is ironic that we should acquire the power to detect and eliminate the genetically unequal at a time when we have finally succeeded in removing much of the stigma and disgrace previously attached to victims of congenital illness, in providing them with improved care and support, and in preventing, by means of education, feelings of guilt on the part of their parents. One might even wonder whether the development of amniocentesis and prenatal diagnosis may represent a backlash against these same humanitarian and egalitarian tendencies in the practice of medicine, which, by helping to sustain to the age of reproduction persons with genetic disease has itself contributed to the increasing incidence of genetic disease, and with it, to increased pressures for genetic screening, genetic counseling, and genetic abortion.

No doubt our humanitarian and egalitarian principles and practices have caused us some new difficulties, but if we mean to weaken or turn our backs on them, we should do so consciously and thoughtfully. If, as I believe, the idea and practice of genetic abortion points in that direction, we should make ourselves aware of it. . . .

Genetic Abortion and the Living Defective

The practice of abortion of the genetically defective will no doubt affect our view of and our behavior toward those abnormals who escape the net of detection and abortion. A child with Down's syndrome or with hemophilia or with muscular dystrophy born at a time when most of his (potential) fellow sufferers were destroyed prenatally is liable to be looked upon by the community as one unfit to be alive, as a second-class (or even lower) human type. He may be seen as a person who need not have been, and who would not have been, if only someone had gotten to him in time.

The parents of such children are also likely to treat them differently, especially if the mother would have wished but failed to get

an amniocentesis because of ignorance, poverty, or distance from the testing station, or if the prenatal diagnosis was in error. In such cases, parents are especially likely to resent the child. They may be disinclined to give it the kind of care they might have before the advent of amniocentesis and genetic abortion, rationalizing that a second-class specimen is not entitled to first-class treatment. If pressed to do so, say by physicians, the parents might refuse, and the courts may become involved. This has already begun to happen.

In Maryland, parents of a child with Down's syndrome refused permission to have the child operated on for an intestinal obstruction present at birth. The physicians and the hospital sought an injunction to require the parents to allow surgery. The judge ruled in favor of the parents, despite what I understand to be the weight of precedent to the contrary, on the grounds that the child was Mongoloid, that is, had the child been "normal," the decision would have gone the other way. Although the decision was not appealed to and hence not affirmed by a higher court, we can see through the prism of this case the possibility that the new powers of human genetics will strip the blindfold from the lady of justice and will make official the dangerous doctrine that some men are more equal than others.

The abnormal child may also feel resentful. A child with Down's syndrome or Tay-Sachs disease will probably never know or care, but what about a child with hemophilia or with Turner's syndrome? In the past decade, with medical knowledge and power over the prenatal child increasing and with parental authority over the postnatal child decreasing, we have seen the appearance of a new type of legal action, suits for wrongful life. Children have brought suit against their parents (and others) seeking to recover damages for physical and social handicaps inextricably tied to their birth (e.g., congenital deformities, congenital syphilis, illegitimacy). In some of the American cases, the courts have recognized the justice of the child's claim (that he was injured due to parental negligence), although they have so far refused to award damages, due to policy considerations. In other countries, e.g., in Germany, judgments with compensation have gone for the plaintiffs. With the spread of amniocentesis and genetic abortion, we can only expect such cases to increase. And here it will be the soft-hearted rather than the hard-hearted judges who will establish the doctrine of second-class human beings, out of compassion for the mutants who escaped the traps set out for them.

It may be argued that I am dealing with a problem which, even if it is real, will affect very few people. It may be suggested that very few will escape the traps once we have set them properly and widely, once people are informed about amniocentesis, once the power to detect prenatally grows to its full capacity, and once our "superstitious" opposition to abortion dies out or is extirpated. But in order even to come close to this vision of success, amniocentesis will have to become part of every pregnancy—either by making it mandatory, like the test for syphilis, or by making it "routine medical practice," like the Pap smear. Leaving aside the other problems with universal amniocentesis, we could expect that the problem for the few who escape is likely to be even worse precisely because they will be few.

The point, however, should be generalized. How will we come to view and act toward the many "abnormals" that will remain among us—the retarded, the crippled, the senile, the deformed, and the true mutants—once we embark on a program to root out genetic abnormality? For it must be remembered that we shall always have abnormals—some who escape detection or whose disease is undetectable *in utero,* others as a result of new mutations, birth injuries, accidents, maltreatment, or disease—who will require our care and protection. The existence of "defectives" cannot be fully prevented, not even by totalitarian breeding and weeding programs. Is it not likely that our principle with respect to these people will change from "We try harder" to "Why accept second best?" The idea of "the unwanted because

abnormal child" may become a self-fulfilling prophecy, whose consequences may be worse than those of the abnormality itself.

Genetic and Other Defectives

The mention of other abnormals points to a second danger of the practice of genetic abortion. Genetic abortion may come to be seen not so much as the prevention of genetic disease, but as the prevention of birth of defective or abnormal children—and, in a way, understandably so. For in the case of what other diseases does preventive medicine consist in the elimination of the patient-at-risk? Moreover, the very language used to discuss genetic disease leads us to the easy but wrong conclusion that the afflicted fetus or person is rather than has a disease. True, one is partly defined by his genotype, but only partly. A person is more than his disease. And yet we slide easily from the language of possession to the language of identity, from "He has hemophilia" to "He is a hemophiliac," from "She has diabetes" through "She is diabetic" to "She is a diabetic," from "The fetus has Down's syndrome" to "The fetus is a Down's." This way of speaking supports the belief that it is defective persons (or potential persons) that are being eliminated, rather than diseases.

If this is so, then it becomes simply accidental that the defect has a genetic cause. Surely, it is only because of the high regard for medicine and science, and for the accuracy of genetic diagnosis, that genotype defectives are likely to be the first to go. But once the principle, "Defectives should not be born," is established, grounds other than cytological and biochemical may very well be sought. Even ignoring racialists and others equally misguided—of course, they cannot be ignored—we should know that there are social scientists, for example, who believe that one can predict with a high degree of accuracy how a child will turn out from a careful, systematic study of the socio-economic and psycho-dynamic environment into which he is born and in which he grows up. They might press for the prevention of socio-psychological disease, even of "criminality," by means of prenatal environmental diagnosis and abortion. I have heard rumor that a crude, unscientific form of eliminating potential "phenotypic defectives" is already being practiced in some cities, in that submission to abortion is allegedly being made a condition for the receipt of welfare payments. "Defectives should not be born" is a principle without limits. We can ill afford to have it established.

Up to this point, I have been discussing the possible implications of the practice of genetic abortion for our belief in and adherence to the idea that, at least in fundamental human matters such as life and liberty, all men are to be considered as equals, that for these matters we should ignore as irrelevant the real qualitative differences amongst men, however important these differences may be for other purposes. Those who are concerned about abortion fear that the permissible time of eliminating the unwanted will be moved forward along the time continuum, against newborns, infants, and children. Similarly, I suggest that we should be concerned lest the attack on gross genetic inequality in fetuses be advanced along the continuum of quality and into the later stages of life.

I am not engaged in predicting the future; I am not saying that amniocentesis and genetic abortion will lead down the road to Nazi Germany. Rather, I am suggesting that the principles underlying genetic abortion simultaneously justify many further steps down that road. The point was very well made by Abraham Lincoln:

> If A can prove, however conclusively, that he may, of right, enslave B—Why may not B snatch the same argument and prove equally, that he may enslave A?
>
> You say A is white, and B is black. It is color, then; the lighter having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet with a fairer skin than your own.
>
> You do not mean color exactly? You mean the whites are intellectually the superiors of the blacks, and, therefore have the right to enslave

them? Take care again. By this rule, you are to be slave to the first man you meet with an intellect superior to your own.

But, say you, it is a question of interest; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.[3]

Perhaps I have exaggerated the dangers; perhaps we will not abandon our inexplicable preference for generous humanitarianism over consistency. But we should indeed be cautious and move slowly as we give serious consideration to the question "What price the perfect baby?"[4] . . .

Notes

1. This strikes me as by far the most important inference to be drawn from the fact that men in different times and cultures have answered the abortion question differently. Seen in this light, the differing and changing answers themselves suggest that it is a question not easily put under, at least not for very long.

2. Other ways include: one should not do violence to living or growing things; life is sacred; respect nature; fetal life has value; refrain from taking innocent life; protect and preserve life. As some have pointed out, the terms chosen are of different weight, and would require reasons of different weight to tip the balance in favor of abortion. My choice of the "rights" terminology is not meant to beg the questions of whether such rights really exist, or of where they come from. However, the notion of a "fetal right to life" presents only a little more difficulty in this regard than does the notion of a "human right to life," since the former does not depend on a claim that the human fetus is already "human." In my sense of terms "right" and "life" we might even say that a dog or fetal dog has a "right to life," and that it would be cruel and immoral for a man to go around performing abortions even on dogs for no good reason.

3. Lincoln, A. (1854). In *The Collected Works of Abraham Lincoln*, R. P. Basler, editor. New Brunswick, New Jersey, Rutgers University Press. Vol. II, p. 222.

4. For a discussion of the possible biological rather than moral price of attempts to prevent the birth of defective children see Motulsky, A. G., G. R. Fraser, and J. Felsenstein (1971). In Symposium on Intrauterine Diagnosis, D. Bergsma, editor. *Birth Defects: Original Article Series*, Vol. 7, No. 5. Also see Neel, J. (1972). In *Early Diagnosis of Human Genetic Defects: Scientific and Ethical Considerations*, M. Harris, editor. Washington, D.C., U.S. Government Printing Office, pp. 366–380.

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DECISION SCENARIO 2

Selective Abortion

Sandy Harriman is a 31-year-old lawyer working for an advertising agency. She is fifteen weeks pregnant. Her husband is a tax accountant. The demands of her position have for some time placed a strain on the marital relation, since she often has to work late hours and travel overseas.

After a stressful period, Sandy experienced discomfort and nausea. Her obstetrician referred her to a genetic counselor. Sandy revealed that she had taken Lithium, a tranquilizer, and heavy doses of an antibiotic to contain a nagging throat infection. The physician recommends amniocentesis to help evaluate the condition of the fetus.

The results of the genetic evaluation, the counselor reports, indicate a risk of webbed fingers and/or cleft palate. The risk is nine or ten times that of a normal fetus and, according to the doctor, a minor defect in the field of possibilities. Furthermore, though Sandy is over 30, the genetic counselor finds nothing in her medical background, or that of her husband, to warrant mentioning other concerns.

The news disturbs Sandy, who is being considered for an important promotion in her department. She tells the physician that she will discuss the situation with her husband.

At the visit the next week, Sandy announces that even the minimal risk is more than she wants to subject the fetus to. She confides that the strain the pregnancy is causing on her job and marriage is more than she can bear. She asks for an abortion.

Questions

1. Are the reasons, stated and unstated, behind Sandy's decision strong enough to support the option of abortion?
2. What is the role of the genetic counselor in the decision-making process? Did the doctor fulfill it?
3. If Sandy's husband favors having the child and facing the consequences, what rights does he have? Do they ever outweigh the mother's right to choose?
4. If the genetic screening had shown that the fetus had Down's syndrome (mongolism, having a mental handicap, but otherwise normal), what decision-making factors would change?
5. Sandy consented to an abortion. Was the consent informed? How much information is needed to inform consent?

3. REPRODUCTIVE TECHNOLOGIES

The natural process of human reproduction involves sexual intercourse, fertilization in the fallopian tube, and implantation and gestation in the uterus. The term *reproductive technologies* applies to procedures developed to replace one or more of the steps, usually to overcome infertility. Among the techniques are artificial insemination, *in vitro* (literally, "in glass") fertilization, and egg donation. Artificial insemination is designed to achieve tubal fertilization by the artificial introduction into a fertile female of sperm obtained from her husband (AIH) or from a donor (AID). The technique is used when the husband is infertile or has a genetic disorder that endangers offspring. AID also is employed by unmarried women who wish to bear children. *In vitro* fertilization

involves uniting sperm (of a husband or donor) with ova (of a wife or donor) in a glass laboratory dish, followed by implantation of the resulting embryo in a woman's uterus. This procedure may be successful for women whose infertility results from fallopian tube obstruction. Egg donation is employed when a woman has infertility problems caused by absent or nonfunctioning ovaries. If her uterus is functional, an ovum obtained from a donor is united with sperm from the woman's husband and the embryo is implanted in her uterus. A woman with functioning ovaries but a nonfunctional uterus can donate an egg to be fertilized *in vitro* with her husband's sperm and subsequently implanted in another woman's uterus for gestation. The latter arrangement represents one type of so-called surrogate motherhood.

A brief look at some of the reproductive technologies in use today indicates their complexity as well as that of the moral questions surrounding their use. Other techniques are currently under development, among which is *cloning*. This technique, if successful, produces a human being with a genetic makeup identical to that of one donor "parent."

Ethical concerns about reproductive technologies were highlighted by the controversy surrounding the "Baby M" case. In that case, a New Jersey woman contracted with a childless couple to be artificially inseminated with the husband's sperm and bear his child. After the child's birth, the surrogate mother attempted to breach the contract and retain custody of the child. Following a lengthy hearing, a judge ruled in favor of the genetic father and his wife, but the case was appealed to a higher court, which restored some of the surrogate's parental rights. To some observers, the bitter custody battle over Baby M was a vivid demonstration that surrogate motherhood arrangements produce undue suffering and should be outlawed.

In March 1987, at the same time that testimony was being heard in the case of Baby M, the Vatican issued a document condemning the use of many reproductive technologies. The basis of the statement was the Catholic Church's doctrine that birth should result only from the sexual union of a married couple. The Vatican raised moral objections to procedures resulting in the destruction of fertilized ova. (For example, during *in vitro* fertilization a number of ova may be fertilized, but only one implanted.) These objections are based on the view that a fertilized egg has the moral status of a human being and should not be unnecessarily harmed (see the arguments under Abortion in this chapter).

While some moral questions about reproductive technologies stem from religious beliefs (for instance, AID is viewed by some as a form of adultery), objections arise on other grounds. Some writers argue that surrogate motherhood arrangements are little more than trafficking in human lives and are ethically equivalent to the practice of slavery. Others view the use of surrogates as a form of economic exploitation leading to the creation of a class of female "breeders" for wealthy couples. Supporters of the practice point to the humanitarian value of providing infertile couples with much-desired children having genetic kinship with at least one of the parents.

Other ethical objections center around the perceived "unnaturalness" and depersonalizing effect of technological intervention on human reproduction. These objections are answered by an appeal to the benefits gained by couples for whom infertility is an anguishing condition. Arguments exist charging that reproductive technologies inflict unforeseen harm on the developing embryo. Cloning is viewed as an ominous possibility belonging to a "Brave New World," because it compromises the genetic uniqueness of individual persons. Others warn that if cloning becomes widespread, it could undermine the adaptability of the species by limiting the variety of human genotypes.

In the following article George J. Annas examines ethical issues arising from surro-

gate motherhood contracts. Annas maintains that the well-being of the child must be the primary consideration when one is making decisions about surrogate parenting. The author argues that the surrogate mother has a clear legal right to custody of the baby: ". . . if she wants to keep it, she almost certainly can." In fact, he suggests that she may even be able to sue the biological father for child support. The argument is interesting in light of the Baby M case, in which the surrogate mother was denied custody.

GEORGE J. ANNAS

Contracts to Bear a Child: Compassion or Commercialism?

Many medical students (and others) supplement their income by selling their blood and sperm. But while this practice seems to have been reasonably well accepted, society does not permit individuals to sell their vital organs or their children. These policies are unlikely to change. Where on this spectrum do contracts to bear a child fall? Are they fundamentally the sale of an ovum with a nine-month womb rental thrown in, or are they really agreements to sell a baby? While this formulation may seem a strange way to phrase the issue, it is the way courts are likely to frame it when such contracts are challenged on the grounds that they violate public policy.

In a typical surrogate-mother arrangement, a woman agrees to be artificially inseminated with the sperm of the husband of an infertile woman. She also agrees that after the child is born she will either give it up for adoption to the couple or relinquish her parental rights, leaving the biological father as the sole legal parent. The current controversy centers on whether or not the surrogate can be paid for these services. Is she being compensated for inconvenience and out-of-pocket expenses, or is she being paid for her baby?

Two personal stories have received much media attention. The first involves Patricia Dickey, an unmarried twenty-year-old woman from Maryland who had never borne a child, and who agreed to be artificially inseminated and give up the child to a Delaware couple without any compensation. She was recruited by attorney Noel Keane of Michigan, known for his television appearances in which he has said that for a $5,000 fee he will put "host mothers" in touch with childless couples. Ms. Dickey explained her motivation in an interview with the *Washington Post:* "I had a close friend who couldn't have a baby, and I know how badly she wanted one. . . . It's just something I wanted to do" (Feb. 11, 1980, p. 1). The outcome of Dickey's pregnancy—if one occurred—has not been reported.

More famous is a woman who has borne a child and relinquished her parental rights. Elizabeth Kane (a pseudonym), married and the mother of three children, reportedly agreed to bear a child for $10,000. The arrangement was negotiated by Dr. Richard Levin of Kentucky, who is believed to have about 100 surrogates willing to perform the same services for compensation. Levin says, "I clearly do not have any moral or ethical problems with what we are doing" (*American Medical News,* June 20, 1980, p. 13). Mrs. Kane describes her relationship to the baby by saying, "It's the father's child. I'm simply

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growing it for him" (*People*, Dec. 8, 1980, p. 53).

Even this brief sketch raises fundamental questions about the two approaches. Should the surrogate be married or single; have other children or have no children? Should the couple meet the surrogate (they were in the delivery room when Mrs. Kane gave birth to a boy)? Should the child know about the arrangement when he grows up (the couple plans to tell the child when he is eighteen)? Is monetary compensation the real issue (the sperm donor has agreed to give Ms. Dickey more sperm if she wants to have another child for her own—could this cause more problems for both him and her)? What kind of counseling should be done with all parties, and what records should be kept? And isn't this a strange thing to be doing in a country that records more than a million and a half abortions a year? Why not attempt to get women who are already pregnant to give birth instead of inducing those who are not to go through the "experience"?

These questions, and many others, merit serious consideration. So far legal debate has focused primarily on just one: can surrogate parenting properly be labeled "baby selling"? Some have argued that it can be distinguished from baby selling because one of the parents (the father) is biologically related to the child, and the mother is not pregnant at the time the deal is struck and so is not under any compulsion to provide for her child. But the only two legal opinions rendered to date disagree. Both a lower court judge in Michigan and the attorney general of Kentucky view contracts to bear a child as baby selling.

Court Challenge in Michigan

In the mid-1970s most states passed statutes making it criminal to offer, give, or receive anything of value for placing a child for adoption. These statutes were aimed at curtailing a major black market in babies that had grown up in the United States, with children selling for as much as $20,000. Anticipating that Michigan's version of this statute might prohibit him from paying a surrogate for carrying a child and giving it up for adoption, attorney Keane sought a declaratory judgment. He argued that the statute was unconstitutional since it infringed upon the right to reproductive privacy of the parties involved. The court was not impressed, concluding that "the right to adopt a child based upon the payment of $5,000 is not a fundamental personal right and reasonable regulations controlling adoption proceedings that prohibit the exchange of money (other than charges and fees approved by the court) are not constitutionally infirm." The court characterized the state's interest as one "to prevent commercialism from affecting a mother's decision to execute a consent to the adoption of her child," and went on to argue that: "Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strike at the very foundation of human society and are patently and necessarily injurious to the community."

The case is on appeal, but is unlikely to be reversed. The judge's decision meant that Ms. Dickey, and others like her, could not charge a fee for carrying a child. It did not, however, forbid her from carrying it as a personal favor or for her own psychological reasons.

The Kentucky Statutes

One of the prime elements of surrogate mother folklore held that contracts to bear a child were "legal" in Kentucky. On January 26, 1981, Steven Beshear, the attorney general of the Commonwealth of Kentucky, announced at a Louisville news conference that contracts to bear a child were in fact illegal and unenforceable in the state. He based his advisory opinion on Kentucky statutes and "a strong public policy against 'baby buying.'"

Specifically, Kentucky law invalidates consent for adoption or the filing of a voluntary petition for termination of parental rights prior to the fifth day after the birth of a child. The purpose of these statutes, according to the attorney general, is to give the mother time to

"think it over." Thus, any agreement or contract she entered into before the fifth day after the birth would be unenforceable. Moreover, Kentucky, like Michigan, prohibits the charging of a "fee" or "remuneration for the procurement of any child for adoption purposes." The attorney general argued that even though there is no similar statute prohibiting the payment of money for the termination of parental rights, "there is the same public policy issue" regarding monetary consideration for the procurement of a child: "The Commonwealth of Kentucky does not condone the purchase and sale of children" (Op. Atty. Gen., 81–18). The attorney general has since brought an action to enjoin Dr. Levin and his corporation from making any further surrogate-mother arrangements in the state.

Who Cares?

Surrogate parenting, open or behind a wall of secrecy, is unlikely ever to involve large numbers of people. Should we care about it; or should we simply declare our disapproval and let it go at that? I don't know, but it does seem to me that the answer to that question must be found in the answer to another: what is in the best interests of the children? Certainly they are more prone to psychological problems when they learn that their biological mother not only gave them up for adoption, but never had any intention of mothering them herself. On the other hand, one might argue that the child would never have existed had it not been for the surrogate arrangement, and so whatever existence the child has is better than nothing.

A Surrogate Mother's View

> "Elizabeth Kane" says she felt regret only once—during labor. "I thought to myself, 'Elizabeth, you're out of your mind. Why are you putting yourself through this?' But it was only for a moment." She also says she "felt so many emotions during the pregnancy that I wrote a book," now in the hands of an agent (*Washington Post*, Dec. 4, 1980).

One of the major problems with speculating on the potential benefits of such an arrangement to the parties involved is that we have very little data. Only anecdotal information is available on artificial insemination by donor, for example. It does not seem to harm family life. But the role of the mother is far greater biologically than that of the father, and family disruption might be proportionally higher if the mother is the one who gives up the child. The sperm donor in the Patricia Dickey case is quoted as having said:

> It may sound selfish, but I want to father a child on my own behalf, leave my own legacy. And I want a healthy baby. And there just aren't any available. They're either retarded or they're minorities, black, Hispanic. . . . That may be fine for some people, but we just don't think we could handle it.

Is this man really ready for parenthood? What if the child is born with a physical or mental defect—could he handle that? Or would the child be left abandoned, wanted neither by the surrogate nor by the adoption couple? The sperm donor has made no biological commitment to the child, and cannot be expected to support it financially or psychologically if it is not what he expected and contracted for.

Perhaps the only major question in the entire surrogate mother debate that does have a clear legal answer is: Whose baby is it? On the maternal side, it is the biological mother's baby. And if she wants to keep it, she almost certainly can. Indeed, under the proper circumstances, she may even be able to keep the child and sue the sperm donor for child support. On the paternal side, it is also the biological child of the sperm donor. But in all states, children born in wedlock are presumed to be the legitimate children of the married couple. So if the surrogate is married, the child will be presumed (usually rebuttable only by proof beyond a reasonable doubt) to be the offspring of the couple and not of the sperm donor. The donor could bring a custody suit—if he could prove beyond a reason-

able doubt that he was the real father—and then the court would have to decide which parent would serve the child's "best interests."

It is an interesting legal twist that in many states with laws relating to artificial insemination, the sperm donor would have no rights even to bring such a suit. For example, to protect donors the Uniform Parentage Act provides that "The donor of semen provided . . . for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." The old adage, "Mama's baby, papa's maybe" aptly describes the current legal reaction to a surrogate who changes her mind and decides to keep the child.

Should There Be a Law?

The Science and the Family Committee (which I chair) of the Family Law Section of the American Bar Association is currently studying the surrogate mother situation (and the broader issue of *in vitro* fertilization) in an attempt to determine what, if any, legislation is appropriate in this area. DHEW's Ethics Advisory Board's final recommendation on *in vitro* fertilization and embryo transfer was that a "uniform or model law" be developed to "clarify the legal status of children born as a result of *in vitro* fertilization and embryo transfer." This seems to make some sense—although it does seem to be premature. We need a set of agreed-on principles regarding artificial insemination by donor and surrogate mothers—both technologies currently in use—if legislation on *in vitro* fertilization and embryo transplant is to have a reasonable chance of doing more good than harm.

Suggested Further Reading

Callahan, Daniel, et al., "In Vitro Fertilization: Four Commentaries," *Hastings Center Report,* 8 (October 1978), 7–14.

Eisenberg, Leon, "The Outcome as Cause: Predestination and Human Cloning," *The Journal of Medicine and Philosophy,* 1 (December 1976), 318–31.

Kass, Leon R., "New Beginnings in Life," in *The New Genetics and the Future of Man,* ed. Michael Harrington. Grand Rapids, Mich.: Eerdmans, 1972, pp. 15–63.

McCormick, Richard A., "Reproductive Technologies: Ethical Issues," *Encyclopedia of Bioethics,* 4 (1978), 1454–64.

Walters, LeRoy, "Human In Vitro Fertilization: A Review of the Ethical Literature," *Hastings Center Report,* 9 (August 1979), 23–43.