5. IS ABORTION A PSEUDO-PROBLEM?

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ABSTRACT. I argue that (1) whether abortions are morally permissible depends on whether the fetus has a right to life, (2) the only point of disagreement between the possible theories on this question—the Extreme Conservative, the Middle, and the Extreme Liberal—concerns the relevant temporal proximity to, or degree of probability of actualizing, some selected potential, (3) there is in principle no non-arbitrary way of resolving this disagreement, and hence the problem of abortion is a pseudo-problem inasmuch as it is not theoretically capable of being solved, and (4) legislators should, in the light of this, act as if the Extreme Liberal Theory were true.

1. INTRODUCTION

The problem of abortion has proven to be peculiarly intractable. While the many positions have been argued for with great vigor, ingenuity, and subtlety, the question is still no closer to resolution. I want to argue that this is exactly what we should expect, for the problem of abortion is a problem without a solution. I do not mean to contend for the mild view that we have not yet discovered the solution; I mean, rather, the stronger view that there is no solution to be found. If this is so, the problem of abortion turns out to be a pseudo-problem, since all genuine problems are at least theoretically capable of being solved.

To this end, I first argue, in secs. 2–3, that whether abortions are morally permissible turns crucially on whether the fetus has a right to life. In secs. 4–7, I take up the possible views one may hold on this matter, and argue that the only point of disagreement between the several theories concerns the relevant temporal proximity to or degree of probability of actualizing some selected potential. In sec. 8 I argue that there is, in principle, no non-arbitrary way of resolving this disagreement, and hence that the moral status of abortion must remain indeterminate. Finally, in sec. 9, I consider the stance the law should adopt in the light of this finding.

2. FORMULATING THE PROBLEM OF ABORTION

The central issue in the problem of abortion is frequently cast in terms of when, if at all, the fetus becomes a human being. But this is not a happy way of formulating the problem, for being such an organism
has moral implications for abortion only if there is a connection between being a human being and having a right to life, and that is not something which we can assume. If by "human being" is meant "member of the species homo sapiens", it is not clear that being such is necessary or sufficient for having a right to life. We cannot say it is necessary, for we cannot properly exclude extra-terrestrials (should they exist) or the higher non-human animals such as chimpanzees and dolphins from having a right to life in this way. Nor can we confidently say that it is sufficient, for it is not uncontroversially true that all members of the species homo sapiens have a right to life. Since the rights of children differ from the rights of adults, it is not implausible to suggest that even if fetuses are (very small) human beings, their rights will be somewhat different from the rights of both children and adults. And why, one may ask, should they be supposed to include a right to life? This is not to say that fetuses do not or could not have a right to life equal to that had by any innocent adult member of the species; it is only to say that we cannot properly infer that right from membership in the human species.

The term "human being", however, is ambiguous: it can be alternatively understood to mean "person", where this refers to an organism which has rationality and self-consciousness. But this understanding will not enable us to properly cast the problem of abortion in terms of whether the fetus is a human being either, for while being a person is a sufficient condition for having a right to life, it is not uncontroversially a necessary condition. It is not clear that potential persons do not have a right to life, and formulating the problem in this way begs the question against that important view.

For these reasons, I think it is best to start by asking directly whether the fetus has a right to life. I now want to explore what one is committed to by asserting or denying that the fetus has such a right.

3. THE RIGHT TO LIFE AND REASONS FOR ABORTION

To say that an organism has a right to life implies two things: (1) it is prima facie wrong to kill that organism, i.e., wrong to kill it in the absence of some countervailing reason, and (2) it is wrong to kill it for its own sake. This last qualification excludes from having a right to life organisms which one may think it prima facie wrong to kill, but wrong only because of bad side-effects. Thus, for example, if one thought it prima facie wrong to kill non-human animals simply because doing so would lessen respect for human life, or prima facie wrong to kill trees such as Giant Redwoods just because that would deprive future generations from experiencing them, these organisms would not be ascribed a right to life; to have a right to life in my usage (and, I think, in ordinary usage) it must be prima facie wrong to kill the organism even if no further untoward consequences were to come about.

If we say that the fetus has a right to life equal or superior to that of any full-fledged human being, it will be difficult to argue that abortions can be justified in many circumstances. For since the fetus is surely innocent, if it does have such a right, we can kill it in only those very few and special circumstances in which we can kill an innocent human being. We cannot kill it for the sake of convenience (whether this be of the order of not wanting to delay a trip to Europe
or not wanting to have another family member to care for), or even if its continued existence will cause the woman substantial distress or endanger her health. At most, abortion will be justified only when the woman's life is in jeopardy, and even that is problematical. If one accepts the principle that while it is not always wrong to let an innocent human being die, it is always wrong to kill such a being, then, on the supposition that the fetus has a right to life equal or superior to such a being, one is committed to saying that we cannot kill the fetus to save the life of the mother. If the fetus will live and the mother die if nothing is done, we must let the mother die, and if both the fetus and mother will die if nothing is done, we must let both die. If we reject that principle, as I think we should, there does not seem any moral obstacle to killing one of the parties involved in the latter case, for no one's lot is thereby made worse. But it is not clear that it should be the fetus that is killed. Indeed, if the fetus has a right to life superior to that of the mother, it should generally not be. If the fetus has a right to life equal to that of the mother, we can generally favor the mother, for her death will likely adversely affect the lives of others in a way in which that of the fetus will not. But if this is not so in any particular case, fairness would seem to dictate randomizing the decision as to who is to die. The moral legitimacy of killing the fetus is even less clear in those cases where the fetus will live but mother die if nothing is done. For to kill the fetus in such a case we would have to subscribe to the principle that we can take the life of an innocent human being when the mere continuing existence of that organism (as opposed to any action on its part, malevolent or otherwise) is incompatible with our own. And that is not obviously true.

On the other hand, if we merely say that the fetus has a right to life inferior to that of any full-fledged human being, we can adopt a more liberal policy on abortion. How liberal will depend on how inferior the right to life is deemed to be: if it is regarded as only mildly inferior, abortions will still only be permissible in few circumstances, whereas if it is regarded as dramatically diminished, abortions may be permissible in virtually all. Thus before an inferior right theory will yield any helpful guidance on the problem of abortion, its proponent must non-arbitrarily specify the strength of that right in such a way that we will know which reasons for abortion it will cancel, and which it will not. Whether it is possible to do this is a matter to which I will return in sec. 8.

Finally, if we say that the fetus has no right to life, there is a strong presumption in favor of abortion on demand. For a woman certainly has a right to control her body, and if the fetus has no right to life, her right would seem to carry the day. This seems to me unassailable with respect to early-term abortions; I also think it is true for late-term ones as well, but that matter is more complex, and I will return to it in sec. 9.

It thus emerges, if the above is right, that the morality of abortion depends largely or wholly on whether the fetus has a right to life, and if so, of what strength. I now turn to this question.
4. THE CONCEPT OF A MORALLY RELEVANT DIFFERENCE

Deciding whether or when a fetus has a right to life is inextricably bound up with a search for some morally relevant difference. What conditions must be satisfied in order for us to regard \( x \) as a necessary, sufficient, or necessary and sufficient condition for ascribing a right to an organism? There are, I think, two. First, subscribing to \( x \) must not entail any unacceptable consequences. Now certainly there will be disagreements over whether something constitutes an unacceptable consequence. For example, a conservative will regard the consequence that a fetus has no right to life as unacceptable; a liberal will similarly regard the consequence that it does; and so on. While this increases the difficulty in performing a reductio ad absurdum of the moral relevance of \( x \), it does not make it impossible, for there are a sufficient number of consequences no one wants to embrace.

But satisfying this condition is not enough. To avoid the charge of arbitrariness, a second must be satisfied: there must be some connection between \( x \) and the right in question. Sometimes this connection can be supplied by telling a causal story. For example, one can hold up age as a morally relevant determinant of the right to handle firearms, and the relevance of that is shown by demonstrating that there is a causal connection between persons of a certain age and their ability to use firearms in an appropriate way. At other times, however, it is not possible to connect the right with the difference causally. For example, we ascribe a (prima facie) right not to suffer to any organism which has a capacity to suffer, and here the link is not causal, but rather consists in the fact that the organisms dislike pain. But, causal or non-causal, some connection must be made out if the difference is not to be arbitrary.

I now want to apply this analysis of a morally relevant difference to the problem of ascribing a right to life to the fetus. Everyone must agree that a full-fledged conscious human being has a right to life. The question is: When and in what way does the organism gain that right? One may say that the right to life emerges at conception, or at some stage after conception but before birth, or only at some time after birth. Whichever position one holds, one can say that a right to life, equal or superior to that of a full-fledged human being, suddenly comes into being at that chosen time, or that it gradually begins to shade into existence at that time, starting as a weak right to life and progressively getting stronger. Proponents of each position may also hold that there is a threshold stage, i.e., a period during which the rights-status of the fetus is indeterminate, immediately preceding the emergence of the right to life. I shall call the position according to which a fetus has a right to life sufficient to cancel some reason for abortion (however weak) from conception onwards the Extreme Conservative position; I shall call the position according to which a fetus does not have a right to life sufficient to cancel any reason for abortion at any stage of its development the Extreme Liberal position; and I shall call the position according to which a fetus does not have a right to life capable of cancelling any reason for abortion up to a certain stage of development, but does have a right sufficient to cancel some reason for abortion after that stage, the Middle position. These are the only realistic positions on abortion, and I shall argue that none of them can draw its necessary discriminations in a way that simultaneously satisfies both conditions of a morally relevant difference.
relevant difference stated earlier. If so, the problem of abortion turns out to be a problem which does not have a solution: any position we adopt will saddle us with either repugnant consequences or moral arbitrariness. I shall begin by considering the Middle position.

5. THE MIDDLE POSITION

Any proposed cut-off point may isolate a certain property as morally relevant for one of two reasons: the claim may be either that it is morally significant in itself, or that the possession of it, while not morally significant in itself, gives the organism a potential for some other property which is in itself morally significant. To illustrate this difference, suppose one were to cite the possession of a functioning brain as a morally relevant difference in human fetal development. On both views the fetus would have a right to life once it had a functioning brain, but the reason why would differ. On the first view, the fetus would have it just because it has such an organ; so even if that organ did not give it potentiality for anything else, that would make no difference. On the second, the fetus would not have it just because it has such an organ, but rather because having such an organ gives the fetus a potential for something else (say, rational thought of a certain complexity).

Neither rationale, however, will allow us to find some problem-free middle-way position. If we cite some property as morally relevant in itself, we will be forced to make what most regard as odd judgments about non-human organisms. It is generally acknowledged that mere difference of species could no more justify giving one organism preferential treatment over another than could mere difference of skin-color or sex. Thus one who ascribes a right to life to the fetus on the basis of some property must be prepared to ascribe an analogous right to life to any non-human organisms possessing such a property. And since the human fetus is, potentiality apart, a fairly rudimentary type of organism right up to the time of birth—it does not possess any candidates for morally relevant properties which non-human organisms even quite low down on the evolutionary chain lack—singly out some property as in itself sufficient to bestow a right to life on the organism will force us to radically change our moral attitudes toward non-human organisms.

Thus, insofar as we confine our attention to properties of the fetus alleged to be morally significant in themselves, the attempt to find a morally relevant cut-off point will entail counter-intuitive consequences. But, one may reasonably suggest, we should not so confine our attention, for to do so ignores one crucial thing that human fetuses typically possess but which non-human organisms do not: the potential for a particular sort of complex development. Accordingly, the suggestion may run, the appropriate sort of properties to look for as being morally relevant are those which are valued not in themselves but for the sake of their potential. We must now see if this appeal to potentiality will help one to adopt a Middle position.

To say that an organism, A, has a potential for some property, P, is to deny that A actually possesses P; one cannot have a potential for something one already has. Thus to ascribe potentials to organisms is to ascribe a certain capacity for acquiring a certain property. Now there are two ways in which we can ascribe such a capacity. (1) we can say
that A has a potential for P if A already has certain structures, $S_2$, which, given favorable conditions, will result in A actually having P. I shall refer to this sense of potential as the "strong sense". Or, (2) we can say that A has a potential for P if A has certain structures, $S_1$, which, given favorable conditions, will result in A actually having structures $S_2$, where $S_2$ designates structures which, given favorable conditions, will result in A actually having P. I shall refer to this sense of potential as the "weak sense".

An example will make these two ways of ascribing potentials clear. Suppose one were to say that the potential for rational thought of a certain complexity makes a morally relevant difference in the developmental sequence of the human fetus. If one ascribes this potential in the strong sense, then the claim is that the fetus has a potential for rational thought when, but not before, the brain is fully formed. But if one ascribes it in the weak sense, then a fetus has a potential for rational thought at conception; for at conception the fetus has certain genetic structures, which, given favorable conditions, will result in its having a fully formed brain at some subsequent time.

It should thus be clear that anyone who wants to support a Middle position in the abortion debate, and yet who does not want to make certain judgments about non-human organisms, must not only appeal to the potentiality of the fetus, but also insist that it is the strong sense of potential that is relevant.

Now there are only two differences between an organism which has the potential for P in the weak sense and one which has it in the strong sense. The first is the time when the organism will actually come to have P. Since an organism which has a potential for P in the strong sense is further developed than one which has the same in the weak sense, it will actually have P sooner than the other. The second is the degree of probability with which the organism will actually come to have P, other things being equal. Since an organism which has a potential for P in the strong sense is closer to actually having P than one which merely has the potential in the weak sense, there is less time in which things could go wrong to prevent it from realizing its potential. So, other things being equal, it has a higher probability of actually coming to possess P. (Other things, of course, are not always equal, but we can suppose for the sake of the argument that they are.) Thus a Middle Theorist has to argue for the moral relevance of either a particular temporal proximity to, or degree of probability of actualizing, some selected potential. Whether he can do this will be discussed in Sec. 8, but if he cannot, the consequences are clear: he can save his theory from collapsing into that of the Extreme Conservative only by either embracing repugnant consequences or insisting on a morally arbitrary stipulation.

6. THE EXTREME CONSERVATIVE POSITION

The Extreme Conservative claims that the fetus has a right to life at all stages of its development from conception onwards. But if we go on to ask what justification can be provided for such a view, difficulties immediately arise. It does not seem possible to ascribe such a right just in virtue of the humanity of the zygote, for that presupposes (what is false) that being of the human species is in itself a morally relevant
feature. Thus the Extreme Conservative must ascribe the right on the basis of some other property or set of properties that the zygote possesses. But, as we found in the last section, it does not seem plausible to cite any property which the zygote actually possesses as morally relevant in itself, for that entails counter-intuitive consequences about the proper treatment of non-human organisms. So the potentiality of the zygote must be appealed to. But now, since some human organisms lack any sort of potentiality which would set them apart from fairly rudimentary non-human organisms, it becomes apparent that an Extreme Conservative cannot plausibly claim that all human zygotes have a right to life. For that would either involve the repugnant consequences of ascribing equal rights to quite primitive non-human organisms, or appealing to a morally arbitrary difference—difference in species. For the same reason, an Extreme Conservative cannot claim that all human organisms past the zygote state have a right to life. What humans will lack such a right will depend on the potential the Extreme Conservative selects as relevant, but it is clear that there will be some human fetuses, neonates, children, and adults who are so genetically defective that an Extreme Conservative must deny them a right to life. And, unless the Extreme Conservative can argue that once one has a right to life one does not lose that right even if he permanently loses the property in virtue of which the right was ascribed, the Extreme Conservative is committed to denying a right to life to certain mature human beings who, through misadventure, age, or disease have lost the property in question.

This may be upsetting to some Extreme Conservatives, but it does not spell the end of the theory. It is perfectly coherent to say that only—all—those fetal organisms which have some selected potential have a right to life, and to accept the above consequences. But the appeal to potentiality has further implications which are more repugnant. If what makes it wrong to destroy a non-defective fetus is the fact that we thereby prevent an organism of a certain complexity from coming into existence, there is a strong presumption that it is wrong to practice contraception and for a fertile woman to be celibate, for these do exactly the same. A full-fledged member of the species is equally prevented from coming into existence by being aborted or never conceived, and it surely could not matter to that potential or possible person which was the reason. If the wrongness of contraception and celibacy does indeed follow from the Extreme Conservative position, I think we can safely treat them as unacceptable consequences. For while one may, for a variety of reasons, wish to claim we have an obligation not to use contraceptives and an obligation to bring as many happy people into existence as possible, no one wants to say that these obligations are as stringent as the obligation to refrain from abortions. They are never regarded as such serious sins, or as difficult to override by contingencies of circumstances: it is absurd to say that the obligation not to use contraception or be celibate cannot be set aside because of the mental or physical well-being of the woman. However, since the same ground on which the Extreme Conservative ascribes a right to life to the fetus gives rise to the presumption that we have an obligation not to engage in these practices, this is exactly what he must maintain—unless, of course, he can provide some morally relevant difference between abortion and these practices. Can he do this?

Let us take the case of contraception first. At first sight, it might seem easy to distinguish it morally from abortion. Fetal organisms from the zygote stage onwards, one may claim, are potential persons whereas
eggs and sperms are not, and this, one may go on to say, is sufficient to mark the difference in question. But it is not clear that eggs and sperms are not potential persons, or, for that matter, that zygotes are. John Woods defines a potential F as follows:

x is a potential F if and only if there is some distinct property G such that x has G, and such that if x is maintained in healthy and biologically normal G-hood for as long as it can remain a G, it will, if its development is not arrested, cease to be a G and become an F.

This definition will indeed allow us to say that a zygote is a potential person but eggs and sperms are not. The problem is that all sorts of things which we would normally regard as potential Fs fail the test. We normally would say that a person with particular hand-eye coordination and game sense is a potential tennis champion, lemon crystals potential lemonade, and apple blossoms potential apples. Thus if the "only if" is to be justified, we must weaken the definition to allow for the addition of some essential component or components to G in order to yield an F, e.g., tennis instruction, water, pollen. But if we do so weaken the condition, then it is not clear why eggs and sperms cannot be potential persons. For a sperm, when suitably mixed with an egg, will, if its development is not arrested, become an actual person.

On the other hand, one cannot simply say that x is a potential F if x has G, and if G is conjoined with H, I, J, etc., then x will become an F, other things being equal. For on this account lemon crystals are potential poison, a brick a potential church, and all of us potential mass murderers. But we would not normally regard any of these things as a potential F, but rather as a possible F or a part of a possible F. To avoid this, it is typically stipulated that for x to be a potential F the G in question must, in the normal course of events, either develop by itself into an actual F or combine with H, I, J, etc., to do so.

The phrase, "in the normal course of events", however, is ambiguous. It can be understood as a purely statistical claim where "normal" means "usual"; or it can be understood as a claim about the function or purpose or natural end of the entity in question, on which reading it could be normal for Gs to become Fs even if most do not. Now if we read the phrase in question in the second way, and count zygotes as potential persons on the ground that the function or natural end of a zygote is not merely to develop into an embryo, but into that and then through the fetus and child stages to become an actual person, we must also count germ cells as potential persons. For it would then be hard to deny that the function or natural end of a sperm is to combine with an egg to form a zygote and to pass from thence through the above stages to become an actual person. If, on the other hand, we read "normal" in the phrase in question to mean "usual", while eggs and sperms are then not potential persons, it is not clear zygotes are either. Estimates of the incidence of spontaneous abortion range from 15% to 69%; thus, unless one can rule out the 50% statistics as mistaken, we can only problematically describe zygotes as potential persons, and an empirical discovery would quickly force any Extreme Conservative who relied on this classification for this reason into the Middle camp.

But it is not clear that the phrase "in the normal course of events", however understood, states a necessary condition for x to be a
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potential F. We can properly describe a person with certain coordination and game sense as a potential tennis champion, but it would be odd to say that it is his function or natural end to become one. Nor does the x have to usually become an actual F if undisturbed. The coordinated person just discussed again serves as a counterexample, as does the paradigm case of a potential F: most acorns do not develop into oak trees. They would if placed in suitable soil, had sufficient light and water, and were left undisturbed. But to allow acorns to be potential oaks on this ground is to blur once again the distinction between a potential F and a possible F, for there are all sorts of things which we would not regard as potential Fs which would become actual Fs if placed in suitable environments.

If we remove the "in the normal course of events" condition, however, we are left with the problem of finding some other which will draw the possible F/potential F line so that germ cells will fall on the former side, and zygotes on the latter. Given the difficulty of this task, an Extreme Conservative may try another tack. Rather than boldly claim that fetuses are potential persons whereas germ cells are not, he may more modestly contend that fetuses are potential persons in a way in which germ cells are not: they do not have to undergo any combinatorial process like the latter in order to become actual persons; they are complete. This difference seems uncontroversial, and the Extreme Conservative may now try to exploit it by arguing that only thus complete potential persons can have a right to life.

But it is not clear on what principles we can properly so restrict the right to life. One clear right-restricting principle is that only beings which have or will have interests can have rights. But this will not do the job, for zygotes have no more interests than germ cells do. Nor will they ever come to have: as long as an organism is a zygote, it will be interestless in the way a germ cell is. It might become something which will have an interest, but then so might a germ cell. To be sure, something has to be added to the germ cell, but what principle limiting right-bearers can we confidently appeal to here to say that zygotes can have rights but germ cells cannot? Maybe some such principle can be found, but none comes quickly to mind.

If we cannot find any such principle, we are still without any reason sufficient to overturn the presumptive case provided above for morally bracketing abortion and contraception. However, even if we can, and it emerges that germ cells cannot have a right to life, it still will not follow that there is any material moral difference between abortion and contraception. We would then certainly be able to say that the two are morally different in that the former can be an act of injustice (since a right is possibly violated), whereas the latter cannot be, but this will not enable us to say that if one ascribes a right to life to a zygote and thus condemns abortion, one can consistently condone contraception. The system of objects (to use Tooley's phrase) which contraception interferes with contains the potential for a full-fledged human being coming into existence. Thus if it is morally wrong to interfere with the potential contained in a zygote by abortion, there is a presumption that it is wrong to interfere with that contained in this system by practicing contraception. It is true that in one case we take a complete potential being with (let us grant) a right to life out of existence, whereas in the other we only prevent such a being from coming into existence. But why this should be regarded as morally significant has yet to be explained. In
both cases, we cancel the possibility of a particular full-fledged human being coming into existence. If it is wrong to do this by taking a complete potential person out of existence, the presumption remains that it is equally wrong to do the same by preventing a complete potential person from coming into existence, even if none of the components which go into its formation has a right to life.

Is there, then, anything about the fact that abortion destroys a single organism with a complete genetic complement whereas contraception does not which will enable us to distinguish morally between the two? It is implausible to claim that the fact that the complete genetic code occurs in a single organism is in itself morally significant. Suppose we were to discover a race of beings which are indistinguishable from ourselves except in prenatal development. Whereas in our case the egg and sperm unite (if they do) shortly after intercourse to form a zygote with a complete genetic code which, other things being equal, develops into a child some nine months later, in the case of this race the pattern of development is somewhat different. Shortly after intercourse either the egg and sperm start to develop or they do not. If they do, they do not unite but undergo complex changes and grow independently, each working out its own genetic code, until nine months, at which time they fuse together to form a being exactly the same as a human fetus of that age. Surely one who thinks it is seriously wrong to kill a human zygote must think it as wrong to kill the egg and sperm of this race once they have started to develop. But if so, then difference in number of organisms does not count.

Perhaps, then, the Extreme Conservative will say that the relevance of a single organism with a complete genetic code lies in the uniqueness of the organism: the particular combination of genes found in a zygote will never be replicated, and hence the destruction of that organism will prevent a unique human being from coming into existence. But this will not supply the difference in question, for contraception likewise prevents a non-replicable human being from coming into existence: the egg and sperm which contraception brings about the destruction of contain the possibility of a genetic combination which will now have to be forever foregone.

In the light of the preceding, I think the Extreme Conservative can only try to locate the moral relevance of a zygote's being a single organism with a complete genetic code in the fact that once such an organism is formed, a dramatic jump in the probability of a full-fledged human being coming into existence takes place. If the probabilities of a full-fledged human being eventuating from an unprotected act of intercourse and an undisturbed zygote were identical, it is hard to see how one could distinguish morally between abortion and contraception. Thus if one is to distinguish morally between the two, it must be done in terms of probability. This is the only place wherein the moral significance of existing as a complete potential person can lie; it is also the place where some Extreme Conservatives have located it.

It is also the same, as I shall now argue, with the distinction between abortion and deliberate sexual abstinence (which I will refer to as "celibacy"). These differ in only two ways. (1) Celibacy, like contraception, differs from abortion in that it cancels a full-fledged human being by preventing a complete potential person from coming into existence, and (2) Celibacy differs from both abortion and contraception in that
whereas they involve doing something (e.g., inserting a coil, scraping the uterus, taking a pill), it involves refraining from doing something (not being sexually active during fertile periods). Thus whether celibacy can be distinguished from abortion in any way that contraception cannot be depends on whether (2) marks a morally relevant difference.

It is, however, hard to see that it does. Suppose that a full-fledged human being would eventuate from an unprotected act of intercourse with the same degree of probability as it would from an undisturbed zygote. If the degree of hardship or sacrifice involved in both cases were the same, I do not see how one could place celibacy and abortion on a different moral footing. One who deliberately refrains from sex and one who has an abortion are equally causally responsible for preventing a full-fledged human being from coming into existence; it could not matter to that cancelled being why he/she did not come into existence; they both bring about that outcome with equal certainty; in both cases, the outcome is equally foreseen; and, finally, it is not as if one can have obligations to refrain but not to do.

Thus if the Extreme Conservative is to avoid treating a fertile woman's desire not be sexually active as justifying celibacy only to the extent that he is prepared to treat a woman's equally strong desire not to carry a child as justifying abortion, he must attach moral significance to the jump in the degree of probability of an actual person coming into existence which occurs at conception. This, as we found earlier, is what (1) amounts to, and hence celibacy and contraception are in the same moral boat. Whether moral significance can be so attached is a matter we will discuss in sec. 8, but we can here see that the Extreme Conservative has a similar problem to that of the Middle Theorist, and the result of failure is the same: repugnant consequences or moral arbitrariness.

7. THE EXTREME LIBERAL POSITION

While the Extreme Conservative is willing to ascribe a right to life to organisms on the basis of properties they will probably come to have if left alone, the Extreme Liberal typically is not. He insists that the right to life can only be ascribed to organisms on the basis of properties they already possess, and goes on to claim that the fetus lacks the properties needed to confer such a right. It is now incumbent on the Extreme Liberal to specify the property or set of properties which a being must have if it is to have a right to life, for insofar as he claims that a human fetus does not have a right to life, but that more mature members of the species do, he must be able to point out some morally relevant difference between the classes.

What can the Extreme Liberal cite to fill this need? The most hopeful proposal yet advanced cites the possession of a concept of self as the needed morally relevant difference. The basic intuition here is that it is not morally required to protect the life of an organism in the interest of that organism until it matters to the organism; and since continuing to exist does not matter to an organism until it has a concept of self, i.e., can recognize itself as itself, knows that it has a history, and can envisage a future, an organism lacking such a concept does not have a right to life.
This criterion does not purport to draw a sharp and precise boundary between organisms which possess and which lack a right to life. Nor is it possible to do that, for we cannot mark out with any exactitude the time at which an organism comes to possess a concept of self. Nonetheless, the criterion is quite serviceable from a practical point of view, for while we cannot say exactly when an organism comes to have a concept of self, we can without difficulty identify classes of organisms which possess such a concept and which lack it; and this is all we need.

Applying this criterion, the Extreme Liberal can get certain conclusions he wants. He can withhold a right to life from all fetuses and most non-human organisms—for such beings lack a concept of self—and at the same time generally ascribe such a right to the more mature members of the human race—for such beings typically possess that concept. Nonetheless, the criterion seems to commit him to other views which many find more awkward. Since newly-born infants lack a concept of self, they must be denied a right to life. And so must some more chronologically mature human beings. Certainly, an Extreme Liberal must place adult human beings who are so defective that they never have had, and never will have, a concept of self in the same moral boat as fetuses and infants. It also seems to me that he must do the same for adult humans such as, for example, the irreversibly comatose and some of the incurably insane, who once had, but now have permanently lost, a concept of self. One could here try to argue that once one acquires a right to life, one keeps it even if he loses that property in virtue of which it was ascribed. But this line is not open to an Extreme Liberal, for it conflicts with his basic intuition, namely that it could not matter to such an organism whether it lives or dies. There is nothing to choose between being rendered dead, rendered permanently unconscious (though still alive), and rendered permanently without a concept of personal identity. Thus an Extreme Liberal cannot have any grounds for ascribing a right to life to such organisms.

But while an Extreme Liberal is committed to withholding a right to life from a whole variety of organisms we typically ascribe such a right to, this cannot be taken to refute the theory. Certainly, it does not follow that we can rightly kill such organisms at will, for there may be side-effects which would militate against doing so. For example, anxiety and fear may be caused in the public at large by the widespread practice of killing the debilitated; the practice of infanticide may deprive people who want a child but cannot have one of their own; feelings of extreme repugnance may be aroused by liberalizing any such killings; and so on. And since there typically would be these sorts of consequences present in any practical solution, an Extreme Liberal can avoid endorsing the wholesale slaughter of those who do not possess a concept of self. The Extreme Liberal is only committed to saying that if such side-effects were not present, no moral hesitations could arise about killing an organism lacking that concept. But if such a situation were to arise, one might be hard-pressed to find rational grounds on which to oppose this position.

There is, however, another consequence of the Extreme Liberal theory which cannot be so easily handled. It would, I take it, be clearly wrong to say that persons who are temporarily unconscious (whether because they are asleep or have met with some mishap) lack a right to
life. An Extreme Liberal now has to find some way of granting them that right which will also allow him to withhold it from fetal organisms.

If the Extreme Liberal insists that one must have an occurrent concept of self before one has a right to life, he can avoid ascribing a right to life to fetuses but cannot ascribe it to temporarily unconscious adults. He need not, however, ascribe a concept of self in that way; nor, indeed, is it natural to do so. In ordinary usage, we do not say that a person has a concept of self until he actually has the ability to make certain discriminations, but once he acquires that ability, we continue to ascribe it to him through periods of temporary unconsciousness. In this respect, ascribing a concept of self is similar to ascribing a belief or a skill. Thus the Extreme Liberal can perfectly naturally ascribe a concept of self to the temporarily unconscious and at the same time withhold it from fetal organisms.

The Extreme Liberal must now explain why a concept of self, thus explained, is a necessary condition for having a right to life. After all, while a fetus does not have a concept of self, it is in a strikingly similar position to the temporarily unconscious adult; it too, in time, and other things being equal, will come to actually be aware of itself as itself. The only difference between the two cases is that the temporarily unconscious adult has actually exercised a concept of self whereas the fetus has not. Why should this be regarded as a morally relevant difference?

Michael Tooley tries in two ways to persuade us that it should. First, he asks us to suppose a scientist has constructed an adult human being in his laboratory out of inorganic materials. This being—call it Frankenstein—has never had self-consciousness, but now resides in a deep freeze, and all that is needed to bring him to a state in which he has the self-consciousness together with the beliefs, desires, and distinct personality of a normal adult is to let him thaw out. Now, Tooley asks, would it be wrong to destroy our frozen Frankenstein? Tooley anticipates that most people would say no, but would also say that once we let Frankenstein thaw out, it would be wrong to dispatch him when he next dozed. But if this is what we want to say here, Tooley invites us to say the same in the case of the sleeping man and the fetus: since the sleeping man has had self-consciousness, he has a right to life, but since the fetus has not, it does not.12

This "intuitive" justification (as Tooley calls it) suffers from two problems. First, I have not found that the agreement Tooley anticipated on the basic intuition is there: in my experience, many people say it would be wrong to destroy the frozen Frankenstein. But, second, even if there were agreement on the matter this would not settle anything. Suppose that not so many years ago we could have gotten widespread agreement that blacks could be kept as slaves. Clearly that would not settle the issue; similarly in the Frankenstein case. In both instances, what is needed is a spelling out of why difference in question should produce the agreement. In particular, in the abortion case, we need a convincing explanation of why having exercised a concept of self is sufficient to justify ascribing different rights to the organisms in question.

Tooley's second justification is this. We can ascribe a right to life to sleeping adults on either of two grounds: the potentiality such persons possess for self-consciousness, or the fact that they have had
self-consciousness in the past. But the appeal to potentiality entails repugnant consequences. Specifically, we are not merely led to the view that a fertilized egg has a right to life (which would be repugnant to an Extreme Liberal, but not an Extreme Conservative), but also to consequences which should be repugnant to anyone: in the ways described in sec. 6, we are led to condemn both contraception and celibacy. Thus we should base the right to life of sleeping persons on the fact that they have actually exercised a concept of self.13

But insofar as Tooley has still not explained the connection between having exercised a concept of self and the right to life, the above is inadequate. Suppose the Extreme Conservative ascribed sleeping persons a right to life on the basis of potentiality, and then sought to avoid repugnant consequences by saying that it is only single organisms with a complete genetic code which can have a right to life. The Extreme Liberal would quickly say, and rightly, that this condition is arbitrary. But unless the Extreme Liberal can provide some further justification for having exercised a concept of self being a necessary condition for a right to life, insisting on that is in exactly the same logical boat: it preserves a wanted inference-pattern at the cost of moral arbitrariness. Thus Tooley's second justification also fails to satisfy.

Can any connection of the required sort be provided? Two possibilities remain to be examined. First, one could argue that if one has exercised a concept of self one has tasted life, and therefore it would be cruel and hence wrong to take it away. But if one has not, it would not. But this argument is unsatisfactory, for if a person is killed in his sleep, no physical or mental suffering is visited upon him. Thus, insofar as the argument depends on someone suffering, it contains a false premise, and if we cleanse it of that, it does nothing to justify having exercised a concept of self as a necessary condition for having a right to life.

Second, one could claim that having exercised a concept of self provides a reliable index of the person having mixed labor with his life. And just as mixing labor with resources gives one the right to those resources, so mixing labor with one's life gives one a right to that life. But this argument will not support the claim that one has a right to life if and only if one has a concept of self. If we mean by "mixing labor with life" something like "developing one's personality, interests, talents, etc.," then it is probably untrue that one has done this by the time one first develops a concept of self. On the other hand, if we mean something weaker, say, "having struggled against various adversities", then it is probably true that the fetus has also mixed labor with life. Even if this problem were not present, however, one would have to strengthen the argument so that mixing labor with life is not merely a sufficient condition for having a right to life, but also a necessary one. For otherwise the Extreme Liberal could account for why sleeping persons have a right to life, but not for why fetuses do not. And it is hard to see how this can be done without radically revamping in a non-obvious way our ordinary views about property-acquisition.

It thus seems that insofar as the Extreme Liberal tries to develop his theory without appeal to potentiality, he is faced either with the repugnant consequence of not being able to say that sleeping persons have a right to life or moral arbitrariness. In the light of this, the Extreme Liberal must, I think, admit the relevance of potentiality for self-
consciousness, but then try to limit this to that of a certain temporal proximity to, or degree of probability of, actualization. On this account, a sleeping person will have a right to life because he has a potential of the requisite sort, whereas a fetus will not, because it has not. It thus emerges that the Extreme Liberal has the same problem as do the Extreme Conservative and Middle Theorist—that of showing that a certain sort of potentiality is morally relevant, but that others are not.

8. THE RELEVANCE OF TIME AND PROBABILITY

We have just found that proponents of all the serious positions on abortion can stipulate conditions which would enable them to avoid obviously repugnant consequences. The Middle Theorist can limit the right to life to organisms which have a potential for a certain property in the strong sense; the Extreme Conservative to single organisms with a complete genetic code; and the Extreme Liberal to organisms which have a concept of self. Now if the only condition which a morally relevant difference must satisfy is that it not license clearly unacceptable inferences, then all these differences must count as morally relevant, and hence all these positions on abortion must be equally acceptable. But, as I suggested earlier, there is another condition which any genuine morally relevant difference must satisfy: there must be some connection between that difference and the right in question. And we found that proponents of the different positions on abortion can try to satisfy this condition only by appealing to various accounts of a particular temporal proximity to, or degree of probability of realizing, some selected potential. We must now ask whether there is any way of showing that one of these accounts, to the exclusion of the others, is suitably connected with the right to life.

It does not seem possible to find any such morally relevant difference in the differences in temporal proximity, for they are not great. The time in question covers approximately nine months, and it is difficult to see why the relatively small temporal differences which can be marked out within that span should provide a sufficient moral basis for such a significant difference in moral status. We must, therefore, look to differences in probability of realizing some potential for the difference in question.

But when we do, insofar as we confine our attention to the case of abortion, no one account stands out as self-evidently correct. There is no degree of probability of realizing some selected potential which obviously gives the fetus a right to life: sensitive and reflective persons who have studied the issue have widely differing intuitions. In the light of this, the natural move is to try to find some non-abortion case in which our judgment is firmly entrenched and depends on probability considerations, and to use that as a philosophical anchor point which will give guidance on the abortion case.

Such cases, however, do not spring to mind. Indeed, I can think of only one actual case that can be plausibly presented; it is put forward by Edward A. Langerak, who writes as follows:

Consider the other end of the life-span. Those who believe that it is sometimes permissible to cease striving officiously to keep humans in an irreversible coma artificially alive,
must agree that the irreversibility of the coma is seldom, if ever, absolutely guaranteed. But we believe it is morally irresponsible to allow the rare "miraculous recovery" to prevent acting on the best medical prognosis, when it indicates no reasonable hope of recovery. To shut off a respirator when there is a 50 percent chance of recovery, (or even a 5 percent chance, given our laudable bias towards erring in favor of personal life), is morally wrong, but not when the probability of recovery approaches (without reaching) zero. In an uncertain world, judgments of high probabilities are often the only kind we have. This makes dramatic shifts in probabilities morally significant.¹

Now, Langerak continues, since a zygote typically has a probability of reaching maturity which exceeds that which would justify switching off a respirator, consistency forces us to conclude that the right to life begins at conception.

This argument is indecisive for two reasons. First, in one case we are talking about the conditions for ascribing a right to life, and, in the other, the conditions for preserving the life of one who already has a right to life. There is no necessity that these coincide; indeed, we know that sometimes right-preserving conditions diverge from right-ascribing conditions. For example, the conditions which must be satisfied if one is to continue to be ascribed the basic rights of citizenship are quite different from those which must be met if one is to be originally ascribed those rights: once a citizen, one cannot be deprived of citizenship as easily as a prospective immigrant can be denied citizenship. Thus, before a proponent of the above argument can draw the inference in question, he has to argue that in the case of the right to life, the right-preserving conditions are also sufficient for ascribing a right to life. Unless this is argued, it is perfectly coherent to grant that a certain degree of probability of survival would not justify switching off a respirator, but still refuse to ascribe a right to life to a fetal organism which had that degree of probability of reaching maturity. But it is far from clear that the match-up in question can be argued for. To what can one conceivably appeal to support it? Second, even if we allow the extrapolation, a proponent of the argument gets much more than the conclusion that a zygote has a right to life. Specifically, he is led to the view that the use of contraception by non-sterile couples at fertile periods is wrong, for there can be no serious doubt that the probability of a full-fledged human being emerging from such a union exceeds the probability which we would deem appropriate to justify turning off a respirator.

But if we cannot get guidance from actual cases, hypothetical ones are no more helpful. When we try to construct such a case, we find it difficult to devise one which is both sufficiently analogous to the abortion case and which will yield a clear intuition. The general difficulty we face here is that insofar as we remove disanalogies, we tend to lose our grip on the intuition; and insofar as we preserve the intuition, there are worrisome disanalogies.

It thus seems that there is no well-entrenched convention concerning the moral relevance of degrees of probability of realizing some potential. We cannot confidently say that no such convention will emerge on this matter in the future, but there are grounds for pessimism on
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that score. It is hard to see how one would go about selecting an account of the probability in question that would be a serious candidate for agreement. Furthermore, any account which is selected will conflict with most positions on the status of the fetus. And since those positions are characteristically held with great firmness, we could reasonably expect many—perhaps most—to take the account refuted by those positions rather than to revise those positions in the light of the account.

But even if there were, or we could produce, agreement on the moral relevance of a certain degree of probability of realizing some potential, that would not show that that degree of probability was morally relevant, only that it was commonly supposed to be morally relevant. And, unless some further argument for the moral relevance of that degree of probability is forthcoming, we are in no better a position than one who argues for the legitimacy of anti-witchcraft laws or black slavery on the ground of popular moral sentiment. But it does not seem possible to spell out that argument. How could one even begin to do so?

If, however, we cannot decide the question of the moral relevance of probability in any of the ways examined above, how can we decide it? Surely it would be unacceptable just to make a decision—a stark choice—for insofar as that is not backed by any rational support, no one could be considered morally bound by it. And, as suggested above, insofar as we look for rational support we come up against a blank wall. It thus appears that we cannot discover any degree of probability of realizing some potential which will enable us to sort between the competing theories of the status of the fetus. Because we cannot find any such degree of probability which is necessary and sufficient for ascribing a right to life, we cannot specify any magic moment at which a right to life, whether it be inferior, equal, or superior to that of a full-fledged human being, suddenly springs into existence. And while we may perhaps grant that it is a necessary condition for ascribing a right to life that the organism have some degree of probability, however small, of realizing some potential, and that actually realizing that potential constitutes satisfying a sufficient condition for a right to life, we cannot discover any other more exclusive necessary or sufficient conditions. This makes it impossible to bracket a threshold—a period during which the rights-status of the organism is indeterminate but before which we can say it does not have a right to life, and after which we can say it does—in any way that enables any theory of the status of the fetus to emerge victorious. It also makes it impossible to exploit the satisfaction or non-satisfaction of a necessary or sufficient condition to establish or exclude any theory of the status of the fetus.

It is worth emphasizing that if the above is right we can not only rule out as unjustified any account of the status of the fetus which maintains that a right to life, equal or superior to that of a full-fledged human being, abruptly comes into existence at any point, but also any gradualist account according to which an inferior right comes into existence at some point during fetal development and grows as the fetus develops.

If a gradualist account is to yield practical judgments on abortion it must do two things: (1) specify the point at which the right to life begins to shade into existence, and (2) provide a schedule correlating the growth of that right with the weightier reasons for abortion that it is supposed to be able to successively cancel. But insofar as doing ei-
other of these means selecting points on the basis of the strength of an organism's potential, and insofar as this amounts to ascribing moral significance to certain degrees of probability of realizing that potential, neither of these things can be done. Given the foregoing failure to discover the moral relevance of probability, it is utterly arbitrary to say that the right to life comes into existence at one point rather than any other, and equally arbitrary to go on to claim that when such-and-such stages of fetal development are reached, such-and-such reasons for abortion are cancelled.

To avoid arbitrariness, then, the gradualist theorist must draw his necessary discriminations in a way which does not depend on the growth of the potentiality of an organism. But what else he could plausibly appeal to here is most unclear. Certainly he cannot appeal to the commonly held intuition that reasons for abortion such as not wanting to delay a trip to Europe are sufficient to justify very early abortions, but that for later ones we need much stronger reasons, say those relating to the health or life of the mother. For not only is this intuition not shared by all--there are the more radical Extreme Conservatives and Extreme Liberals of the world--without some rational support, to write it into the theory would constitute a grotesque begging of the question.

In the light of the above, one might be tempted to adopt one or the other of two radical theories. First, one might be tempted to argue that since we cannot find any morally relevant difference which will enable us to nonarbitrarily draw a cut-off line, if we ascribe a right to life to full-fledged adults of the human species we must go on to condemn contraception and celibacy. And since that is absurd, we have a *reductio* of the view that any human being has a right to life. The belief that such organisms do have such a right ought to be treated as the belief in the divine right of kings. Alternatively, one may be tempted to draw the exact opposite conclusion. One may argue that since we cannot without absurdity deny that full-fledged human beings have a right to life, and since we cannot find any morally relevant difference which will enable us to nonarbitrarily oppose contraception and celibacy, we should proceed to condemn those practices. We hitherto thought condemning those practices absurd, but rational considerations have shown that we should revise that view.

There is nothing incoherent about either of these views, but also nothing in the arguments to force them on us. When faced with either argument, one may appeal to the other to neutralize it: one may suggest that the attempt to force one to a conclusion should be treated as a *reductio*, and that any attempt at a *reductio* should be treated as a demonstration. And, unless (as seems impossible) we can show that one of these arguments has priority over the other, no conclusion can emerge from either.

The moral we should draw from the above is quite different: it is that the problem of abortion is a pseudo-problem. To see this, consider the familiar fact that the boundaries of many common words are indeterminate. Take the word "chair", for example. We can clearly identify some objects as chairs, and equally clearly identify others as not chairs. But there is also a range of objects which are problem-cases. If one presented us with a three-legged object with a seat and half-back, we couldn't say whether that was a chair (as opposed to a stool). The concept of chair is not hard-edged and determinate enough to enable us to
decide the question, and it is silly to think that there is a right answer to it. The question does not have an answer. Now what we have in the case of abortion, I want to suggest, is a moral analogue of this situation. We can without difficulty say that certain organisms (e.g., full-fledged human beings) have a right to life; we can also unproblematically say that other human organisms (e.g., germ cells) do not; and in between there is a threshold about which we do not know what to say. All this is widely agreed on. However, if the main argument of this section is right, this threshold is not limited to some relatively small zone within fetal development, but rather covers all stages of fetal development. If so, the question "Does the fetus have a right to life?" should be treated in the same way as the question "Is a three-legged object with a seat and half-back a chair?", i.e., as a question without an answer. This, together with our earlier finding that this is the crucial question in the problem of abortion, yields the promised conclusion that the problem of abortion is a pseudo-problem. We can now see that the answers of the Middle Theorist, the Extreme Conservative, and the Extreme Liberal are all fundamentally misguided: to defend any of these positions is as absurd as taking sides on the correct classification of an object which falls squarely in the area of uncertainty surrounding a word with an indeterminate boundary.

9. LEGISLATIVE IMPLICATIONS

I have just argued that the question of the morality of abortion is undecidable. This is an unorthodox view, but if we reflect, it should not take us greatly by surprise. Morality is a system of rules designed primarily to facilitate harmonious social life, and since we can certainly set up a society which will run perfectly smoothly with or without protecting fetal life, the question of fetal rights falls outside the mainstream of morality. Of course one may, for a variety of reasons, wish to bring fetuses under the protective umbrella of morality, but nothing forces us to do so, for there is no rule, essential to the central aim of morality, which entails any such protective moral rules. Thus the indeterminate moral status of abortion is only to be expected.

This, however, still leaves us with the problem of what stance the law should take. Given the undecidability of the question of the morality of abortion, the natural course of drawing legal boundaries to correspond with the moral ones is unavailable. Still, the law must at some point afford protection to members of the human species, and it must not draw that boundary in a completely arbitrary way. How, in the light to the preceding, can it do this?

One position that immediately recommends itself is that since we do not know whether the fetus has a right to life, we should select a legislative policy which gives it the benefit of the doubt, and hence should legislate as if the Extreme Conservative view according to which a full right to life comes into existence at the time of conception were true. This policy would make good sense if the logical situation were that either the fetus has a right to life or it does not, but we just have not been able to discover which. But if the argument in sec. 8 is right, that is not the situation; rather, it is that it is in principle impossible to resolve the issue of the status of the fetus. The most that we could ever do is reach agreement on the issue, and that is not enough. Thus it can never turn out that we will one day discover abortion to be mor-
ally wrong, and hence the view that legislators should play it safe in the way described loses its point.

Nor would this legislative position gain any support if it were true that all that we need to do to establish that the fetus does (or does not) have a right to life is secure agreement on the matter. Suppose, to recall an analogy used earlier, that at some time in the future agreement were secured on the question of whether a three-legged object with a seat and half back is a chair. That would not have the slightest tendency to show that such objects were (or were not) chairs all along only we did not realize that: at T₁ they genuinely did not fall under either description, and at T₂ they genuinely came to fall under one of those descriptions. Similarly in the unlikely event of reaching agreement on the status of the fetus: however the question is answered at T₂, it will not follow that those who answered it differently at T₁ were wrong. But if not, the view that we ought to gamble on the side of caution once again loses its point.

This suggests another legislative model: since the morality of abortion is undecidable on rational grounds, the question of how the law should read ought to be thrown open to public opinion for resolution, and communities legislate according to the feelings of their members. But this decision-procedure is unattractive for a number of reasons. It is repugnant in that it allows the tastes of some to control the lives of others. It is dangerous to personal liberty in that, suitably generalized, it puts at risk any individual or group which deviates from the norms of society. And that, in turn, is damaging to society at large in that, as Mill argued, society benefits from a diversity of character and experiments in living, and to endorse the above legislative model is to endanger these things. But even setting these considerations aside, there is still an objection to the procedure in question. There are clear and objective disutilities attending a conservative stance which it would be wrong not to take into account, and there is no guarantee that letting the public decide the issue in the way described will do justice to them. But, as I shall now argue, if we give those disutilities due weight, we must be moved towards a liberal legislative position.

Baruch Brody has compiled an impressive list of disadvantages which attend anti-abortion legislation:

1. Laws prohibiting abortions interfere with a woman's right to control her body.

2. Laws prohibiting abortions are harmful to the practice of medicine, partially because they lead to state intrusion into what should be a private relation between the doctor and his patient, and partially because they prevent the doctor from practicing medicine as he sees fit.

3. Abortion laws that allow abortions only in a few cases (e.g., when necessary to save the life of the mother) are necessarily vague and therefore result either in a doctor's avoiding performing abortions when they should be performed, in order to play safe, or in a doctor's having to gamble that the law will uphold his decision.
4. Laws prohibiting abortions lead to the birth of unwanted children, children who often suffer psychologically because of this, and who therefore sometimes grow up to be social problems.

5. Laws prohibiting abortions open the door to tragedies for the pregnant woman and her family, tragedies due to the cause of the pregnancy (rape, incest), or to the events occurring during the pregnancy (certain types of maternal illness or certain drugs taken by the mother), or to the family's circumstances (its inability to support another child, the mother's mental or physical health).

6. Laws prohibiting abortions are commonly disregarded, and, like prohibition laws, all that they produce is a disrespect for the law.

7. Laws prohibiting abortions force pregnant women who need abortions to go to quacks, and this results in many deaths and much harm to these women's physical and mental health.

8. Laws prohibiting abortions discriminate against the poor, who, unlike the rich, cannot get legal or safe abortions. Brody has convincingly argued that if the fetus has a right to life, and hence abortion is generally wrong, these considerations are insufficient to justify a pro-abortion legislative stance. But if, as I have argued, we cannot demonstrate the wrongness of abortion in principle, these considerations must be overridden, if they are to be overridden, in some other way. Can they be?

As long as the danger and discomfort of abortion is less than childbirth, the only thing one can with any plausibility contend cancels Brody's considerations is that by condoning abortions we thereby lessen respect for life, and so promote callousness towards living things. The difficulty with this, however, is that there is no firm evidence available to support the claim, and thus what we have to balance against the unquestionable hardship placed on individuals is merely an unsubstantiated speculation about possible ill-effects of allowing them. In any such a weighing, the latter must appear very weak.

Once the risk or discomfort of abortion is equal to or exceeds that of childbirth—roughly from the second trimester on—there is more of a case for cancelling Brody's considerations. For at that time, abortion becomes less attractive, and that, combined with the ready availability of abortions during the first trimester, reduces the disutilities of prohibiting such abortions. With this reduction in disutilities of prohibiting abortions, we have to take more seriously some disutilities of allowing them. Besides the paternalistic disutilities of danger and discomfort to the woman, which not everyone will acknowledge the law can properly take cognizance of, there is a host of non-paternalistic considerations which everyone must regard as relevant, specifically: any suffering abortion may cause the fetus (the allegation of which at this time becomes plausible), depriving prospective adoptive parents of something they badly want, the extreme repugnance many in society have to abortion, especially late-term abortion, the distaste the medical profession
generally has to participating in or witnessing such abortions, and the increased medical costs due to the greater complexity of the procedure. By the time of viability—roughly from the third trimester on—and given that extraction at that time is as possible as foeticide, these disunities of allowing abortion gain in strength, as does the claim that abortions will engender an unhealthy lowering of respect for life, while only two disunities of prohibiting abortion retain significant force. We still compromise a woman’s freedom to control her body, as well as her freedom to determine the destiny of the fetus, a consideration which Brody, curiously, does not consider. It may be that a woman is so psychologically constituted that the mere thought of its continuing existence, even if reared by someone else, is a serious impediment to her happiness or welfare. By the time of birth, only the second of these disunities attending prohibiting abortion remains, and there is a corresponding increase in the weight of the disunities of allowing abortions and the ease of avoiding them.

Balancing non-quantifiable utilities is a notoriously difficult task, and the results often tell us more of the values of the evaluator than how the world is. Nonetheless, as I have already indicated, it seems to me that there is a clear case for allowing abortion on demand until the danger and discomfort of abortion at least equals that of childbirth. It also seems to me that there is an equally clear case for affording human organisms full legislative protection from birth onwards: the putative right of a woman to kill her newborn for reasons of her psychological well-being pales in the light of the disunities of allowing that practice. The utilities are much more difficult to balance in the intermediate cases. The principle of least harm entails that second and third trimester abortions should be discouraged in favor of first trimester ones whenever possible. Nonetheless, it seems to me that the rights of a woman to control her body and protect her psychological well-being are of such great importance that abortion on demand at those times is not wrong, and therefore such abortions should not be discouraged in favor of none at all. The problem facing legislators is that we cannot place restrictions on second and third trimester abortions to encourage the behavior we want without also thereby prohibiting behavior we should not. Given this, I am inclined to say that the law should not interfere, and we should rely on the natural unattractiveness of late-term abortions together with the ready availability of early-term ones to do the desired controlling. My main concern here, however, is not to settle this question, but to establish that women must be given ample opportunity for abortion on demand, and that newborns which still lack a clear right to life nonetheless deserve full protection of the law. If we can agree to this, the rest is fine tuning. The contingencies of circumstances on which these judgments are based may change, of course, and if they do, the law may have to change with them. But that is the way with all utilitarian judgments, and if the argument of my essay is right, it is on such judgments that the law of abortion must rest.
ENDNOTES

1 I use the term "fetus" to refer to any fetal organisms from conception onwards. It thus encompasses the zygotal stage (first five weeks), the embryonic stage (next four weeks), and the fetal stage proper (the remaining weeks before birth).

2 While there are many writers who have defended the view that the fetus has a right to life equal to that of the mother, I know of no one who has seriously advocated that the fetus' right is superior. But, as Michael Tooley has argued ("A Defense of Abortion and Infanticide", in The Problem of Abortion, ed., Joel Feinberg (Belmont, California: Wadsorth, 1973), 53, n. 3), the theory is supported by two considerations which cannot easily be dismissed. First, it is reasonable to suppose that whatever gives a full-fledged human being a right to life is something which is necessary for a worthwhile life. But if so, then an organism which actually has that property or set of properties has had a chance at a worthwhile life, whereas one who has only got it potentially has not. So on the principle that, other things being equal, it is only fair to give those who have had less of a thing preferential treatment over those who have had more, the fetus ought to be granted a superior status to that of a full-fledged human being. Second, the fetus typically has a greater life expectancy than do more developed beings, and having that is often regarded as giving an organism a preferred status. It is a common claim that, in allocating scarce medical resources, children should be weighted more heavily than adults. But if so, we again get the presumption that the right to life of the fetus is stronger than that of adults.


4 As opposed to the only logically possible ones. It is logically possible to hold that the fetus alternates between having a right to life and not during fetal development, e.g., that it has a right to life from conception until it is an embryo, lacks such a right until it is a fetus, and then gains that right again. But such accounts are not serious contenders for our moral allegiance.


6 Engineered Death: Abortion, Suicide, Euthanasia and Senecide (Ottawa: University of Ottawa Press, 1978), 44.

7 Edward A. Langerak, "Abortion: Listening to the Middle", Hastings Center Report, 9, No. 5 (October 1979), 26. See also 28, n. 11.


I shall formulate the Extreme Liberal theory in terms of this property, but what I say will apply *mutatis mutandis* to formulations in terms of any other property.

The rationale for tying the right to life to beings which have a concept of self is spelled out in more detail by Tooley, *Op. Cit.*, sec. III.


*Op. Cit.*, sec. IV.


These judgments find rational support in social utility. According a right to life to full-fledged human beings contributes enormously to the security of such beings, whereas withholding it from germ cells enables us to avoid socially disastrous policies. But these judgments form no essential part of my argument. If we could not make either or both of them, that would do nothing to make the question of whether and when the fetus has a right to life any easier to decide.

Subject to my argument in the next section that there are no considerations which would enable us to say that late-term abortion on demand is wrong, even though the fetus has no right to life. But even if that argument is unsound, we will find that the issue is of no great practical or philosophical importance.

This position is advocated by John Woods, *Op. Cit.*, Ch. 4, Sec. 5.