

Class 27 - [May 4](#)
Abortion and Personhood

I. Abortion and the Law

Our final topic for the term is the morality of abortion.

We are engaging questions about the permissibility of abortion for two reasons.

First, and more narrowly, it gives us an opportunity to look at how Kantian ethics differs from utilitarian ethics in practical application.

Second, and more broadly, this topic connects our studies of personal identity, philosophy of mind, and ethics.

Abortions were generally not illegal in this country until the late nineteenth century.

At that time, before antibiotics, it was a dangerous procedure for women and the mortality rate was high. Even the Catholic Church didn't have an official anti-abortion stance.

The topic was mainly left as a practical matter to women and their midwives.

In large part in response to the high mortality rate, state laws were passed prohibiting abortion.

So, anti-abortion laws, as an historical matter, were paternalistic laws enacted to protect, in some sense, mothers.

We generally oppose paternalism.

But we do have some paternalistic laws, e.g. drug laws, suicide prohibitions, and motorcycle helmet and seat belt laws.

In 1973, after a period of emphasis on civil rights in the United States, and, in particular, women's rights, the Supreme Court ruled in *Roe v Wade* that states may not ban abortions.

They also ruled that states may impose certain limits on abortions.

In *Roe v Wade*, the Supreme Court considered three classic anti-abortion arguments.

A1: To discourage illicit sex

A2: To protect the mother

A3: To protect pre-natal life

The Court responded that A1 is not appropriate for the Court to regulate.

Responding to A2, the Court observed that with current medicines and procedures, carrying to term is more dangerous than an abortion early in the pregnancy.

This is especially true for very young women.

As the fetus grows, abortion procedures become more dangerous.

To A3, the Court claimed that the fetus is not protected by the fourteenth amendment, which provides legal protection of our rights to life.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Roe v Wade*, the court ignored the question of when life begins, citing differences among expert opinions.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer (Justice Blackmun, *Roe v Wade* 410 U.S. 113, 1973).

Thus, the Court ruled that there is no defense for outlawing abortions absolutely. The State's interest in both A2 and A3 grow as pregnancy progresses. Eventually there is a "compelling point" at which states may prohibit abortions. States enacting laws may focus on two questions.

- Q1. When is the fetus viable?
- Q2. Is a given procedure dangerous enough to prohibit?

If the fetus is viable, the State has a greater interest in protecting it. Viability grows earlier as medicine progresses, though it is still extremely rare for a fetus younger than 24 weeks to survive. At this point, it seems unlikely that even with the most advanced medical technology we will be able to move the date of viability much earlier any time soon.

Notice that Q1 and Q2 are different kinds of considerations. Q2 is a consequentialist, or utilitarian, consideration. Q1 naturally supports Kantian considerations about personhood though answers to Q1 would also be useful to the utilitarian. We have to know when to count a thing as a member of our moral community.

Technically, the Court ruled that in the first trimester, no restrictions on abortion may be made. In the second trimester, states may restrict abortion to protect maternal health. In the third trimester, states may limit abortions, either for reasons of maternal health or protection of potential life.

Today, state laws prohibiting abortion are proposed more-or-less regularly. They tend to be voted down or ruled unconstitutional. But recent laws banning certain late-term procedures have been upheld by the courts. I'll mention four notable post-Roe rulings. In *Webster v Reproductive Health Services* (1989), the Court ruled in favor of a Mississippi state law restricting state aid for abortions, declaring that there is no constitutional right to an abortion. In *Planned Parenthood v Casey* (1992), the Court upheld Roe, but adjusted the details of that ruling, especially the strict trimester division, since they observed that viability may come much earlier than the beginning of the third trimester. The Pennsylvania legislature had passed four restrictions on access to abortions.

1. An informed consent rule required doctors to provide women with information about the health risks and possible complications of having an abortion before one could be performed.
2. A spousal notification rule required women to give prior notice to their husbands.
3. A parental consent rule required minors to receive consent from a parent or guardian prior to an abortion.
4. A fourth provision imposed a 24-hour waiting period before obtaining an abortion.

The Court in *Casey* rejected spousal notification, but upheld the rest of the restrictions.

In *Stenberg, Attorney General of Nebraska, et al. v. Carhart* (2000), the Court ruled that a Nebraska law prohibiting dilation and excision, or partial birth, procedures was unconstitutional, since the state should not try to dictate to doctors which procedures are the safest.

Lastly, in *Gonzales v. Carhart* (2007), the Court upheld the Partial-Birth Abortion Ban Act, enacted by the United States Congress in 2003, and signed into law by President Bush.

Some non-philosophical questions surrounding abortion include:

1. What is the law?
2. When is a fetus viable?
3. How does the fetus develop?

Some philosophical questions surrounding abortion include:

1. Who has rights?
2. What kinds of obligations do we have toward others?
3. What is a person?

Abortion is a difficult subject in large part due to the emotional nature of many discussions of abortion. In the philosophical literature, we look toward easier cases to refine our intuitions.

We wonder about those cases, and then apply them here.

Some of those cases look pretty weird.

But their oddity is not necessarily relevant.

We are exploring a question which has no obviously right solution.

II. Abortion and the Right to Life

The standard contemporary argument against abortion invokes competing rights.

There is a general right to decide what happens in and to one's body.

There is also a right to life for all persons.

Rights, as we saw, tend to be Kantian considerations, troublesome for utilitarians who focus on welfare instead.

Here is the classic anti-abortion argument, regimented.

- AA AA1. Every person has a right to life.
- AA2. The fetus is a person.
- AA3. So the fetus has a right to life.
- AA4. The right to life, for the fetus, is stronger than the right to choose what happens in and to one's body, for the mother.
- AAC. So, abortion is impermissible.

The most interesting work in recent years on abortion rejects the fourth premise.

It is difficult to know how to compare competing rights.

If we had more time, we would examine that claim.

Notice that AA is inapplicable in the rare, sad cases in which a pregnant woman will die if she carries to term.

Such cases are more common with very young women.
They contain competing rights to life instead of a contrast between different kinds of rights.
We generally let people kill in self defense.
A legal right to an abortion for the protection of the mother's life is consistent with our other laws.

We often hear politicians and others opposing abortion except in cases of rape and incest.
Notice that this is an intellectually irresponsible position.
If the fetus is a person, and the right to life is stronger than the right to choose what happens to one's body, then abortion is immoral, no matter who the parents of the fetus are.
The fact that a parent may be a rapist or incestuous should be irrelevant to the fetus's rights.
If abortion is permissible in the case of rape or incest, then it must mean either that the fetus is not a person, or the right to life does not outweigh the woman's right to choose.
In either case, abortion should be widely permissible.
Bans on abortions with exceptions for rape and incest may be politically expedient, appealing to our emotional instincts.
But they are not philosophically defensible.

We will put questions about AA4 aside, here, and focus on AA2.
Noonan argues in favor of AA2.
Warren argues against AA2.
We have some tools already to evaluate whether something is a person, given our studies of personal identity and of the nature of mind.
We bring those studies to our evaluation of the arguments from Noonan and Warren.

III. Noonan and Probabilities

Noonan argues against the permissibility of abortion from the premise that the fetus is a human being.
The core of his claim is that we have to find a time at which a human being's life begins.
Conception is a non-arbitrary moment for ascribing the beginning of life.

“Moral judgments often rest on distinctions, but if the distinctions are not to appear arbitrary fiat, they should relate to some real difference in probabilities. There is a kind of continuity in all life, but the earlier stages of the elements of human life possess tiny probabilities of development”
(Noonan 355b).

According to Noonan, all other moments are arbitrary.
In any ejaculation, any sperm has only a 1/200,000,000 chance of developing into a zygote.
A woman starts with 100,000 to 1,000,000 oocytes, only a few hundred of which become eggs.
After conception, there is an eighty percent likelihood of survival.

In addition to the probability shift at conception, Noonan relies on a characteristic of human beings that we saw in our discussion of personal identity.

The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving human being. A being with a human genetic code is a man
(Noonan 356b).

Kripke, recall, argued that the Queen of England, and hence all of us, could not have come from different parents than we do, that our genetic code is essential to who we are.

Kripke did not argue that genetics were sufficient for establishing personal identity.

There may be other characteristics that are also essential to who we are.

He also did not argue that having a human genetic code is sufficient to establish that one is a human being, or even a person.

Noonan does hold those positions.

In order to support his claim that the fetus is a human being from the moment of conception, Noonan argues that other attempts to find a point of distinction are arbitrary.

Viability, Noonan argues, depends on the concept of dependence.

The reason why an unviable fetus might not be considered a human being is because of its dependence on its mother.

Noonan points out that dependency extends into youth, and often longer.

The most important objection to this approach is that dependence is not ended by viability. The fetus is still absolutely dependent on someone's care in order to continue existence; indeed a child of one or three or even five years of age is absolutely dependent on another's care for existence; uncared for, the older fetus or the younger child will die as surely as the early fetus detached from the mother (Noonan 354a).

Fetuses start gaining experience before birth, and no particular experience seems necessary to be human. We can not trust the feelings of adults or social viability to ground a non-arbitrary distinction between human beings and non-humans because our perceptions themselves vary widely and need not reflect any important difference.

The distinction in probabilities seems like a different kind of distinction than any of these.

The problem of finding points of distinction is a general problem, not merely in the case of personhood.

Consider the sorites paradox and the related phenomenon of vagueness.

'Sorites' is Ancient Greek for 'heap', and the paradox is often constructed in terms of heaps.

Many predicates admit of borderline, or vague, cases.

I'll talk about baldness instead.

There are paradigm instances of baldness which are incontrovertible.

There are also paradigm instances of non-baldness.

But, there are also cases in which we don't know what to say.



Tyra Banks is bald.



Devendra Banhart is not bald.



Is Richard Jenkins bald?

Between Tyra Banks and Devendra Banhart, there is a penumbra, a shadowy area in which the cases are not so clear.

We want to find a distinction between bald and non-bald people.

An average person has 100,000 -150,000 hairs on his/her head.

Is the line at 10,000 hairs? 5000 hairs? 1000 hairs?

There seems to be no non-arbitrary line between bald people and non-bald people even though there is clearly a difference between paradigmatically bald and paradigmatically non-bald people.

Given any particular paradigm of baldness, or non-baldness, adding (or subtracting) one single hair will never change a person's status.

You don't turn a bald person into a non-bald person by adding one, tiny hair to her head.

Similarly, you don't turn a non-bald person bald by removing one hair.

There are bald people.

There are non-bald people.

Any point of distinction will be arbitrary.

But, that doesn't mean that there is no distinction.

Noonan provides a point of distinction between human beings and non-human beings.

He defends that point of distinction by claiming that it is non-arbitrary.

But, the property of being a human being might just be a vague property, like that of being bald, which admits of no non-arbitrary distinction.

'Human being' may be a vague predicate.

If 'human' is vague, then we can not expect a non-arbitrary distinction between humans and non-humans.

Noonan's argument, depending on a preference for a non-arbitrary distinction, is thus unmotivated.

Noonan's stated goal is a definition of 'human being', rather than personhood.

'Human being' is a biological category.

As we have seen, personhood is only implausibly a matter of biology.

Mary Ann Warren seeks a broader characterization of personhood.

'Person', too, appears vague, given the difficulties we had determining necessary and sufficient conditions for personhood.

IV. Personhood

Warren asks us to imagine we are space travelers discovering a new substance.

We want to know whether it is morally permissible to eat it, or if it is a life form worthy of protection.

Relatedly, we might want to know whether replicants are worthy of respect or dignity.

For example, we might want to know if their ends are the kinds of ends that rational persons should consider in formulating maxims for the purposes of the categorical imperative test.

Or, we might want to know if their happiness is important to maximize in our utility calculations.

We need criteria for personhood that go beyond merely biological factors.

In arguing that there is a difference between human beings (which is a biological category) and persons (which is a social or moral category), Warren shows, against Noonan, that genetic humanity is not sufficient to establish moral personhood.

Some humans are not persons.

Among the humans who are not persons are brain dead people, and strictly dead ones.

Human cancer cells have the genetic code of human beings.

We might protect brain-dead persons, but our consideration of their welfare may stem from our sympathy,

rather from their rights.

Conversely, some persons are not, or may not be, humans.

We have discussed both aliens and sentient machines already.

A person is a member of the moral community.

For Kant, this entails rationality; for Mill, this entails the ability to have happiness.

So, Warren argues, we need criteria to determine in all cases, and so in difficult cases, what is a person.

She argues that we use these five central concepts of personhood.

- WP1. Consciousness (of objects and events external and/or internal to the being), and in particular the ability to feel pain;
- WP2. Reasoning, (the *developed* capacity to solve new and relatively complex problems);
- WP3. Self-motivated activity (activity which is relatively independent of either genetic or direct external control);
- WP4. The capacity to communicate, by whatever means, messages of an indefinite variety of types, that is, not just with an indefinite number of possible contents, but on indefinitely many possible topics;
- WP5. The presence of self-concepts, and self-awareness, either individual or racial or both (Warren 359b)

Warren argues that we need not possess all of WP1 - WP5 to be a person.

The paradigms are us adult humans.

A person will have to be like us in some ways, but need not be like us in all ways.

All we need to claim, to demonstrate that a fetus is not a person, is that any being which satisfies *none* of [WP1 - WP5] is certainly not a person. I consider this claim to be so obvious that I think anyone who denied it, and claimed that a being which satisfied none of [WP1 - WP5] was a person all the same, would thereby demonstrate that he had no notion at all of what a person is - perhaps because he had confused the concept of a person with that of genetic humanity (Warren 360a).

Warren argues that the fetus is not at all like an adult human in terms of WP1 - WP5.

It lacks consciousness and ability to reason.

It has no real self-motivated activity or capacity to communicate.

It has no self concepts.

Even an eight-month old fetus is not a lot more like a paradigmatic human than an embryo.

Indeed, many rudimentary animals possess WP1 - WP5 in far greater degree than a fetus.

In the *relevant* respects, a fetus, even a fully developed one, is considerably less personlike than is the average mature mammal, indeed the average fish (Warren 361a).

The fetus is thus not a person, on Warren's criteria.

WP1 - WP5 obviously and uncontroversially distinguish normal adult humans from animals (even dolphins, chimps and crows) and from human fetuses.

Some animals and the fetus have rudimentary versions of our abilities.

Against Warren, one might argue that the possession of even rudimentary, potential versions of WP1 - WP5 is the correct criteria for personhood.

That is, one might think that persons are any things that have the potential to have these characteristics.

The fetus is a potential person, unlike a fish.
So, on this alternative to Warren's criteria, the fetus is a person.

Warren denies that potential personhood is sufficient for moral personhood.
She considers aliens turning all my cells into replicas.
I am morally permitted to escape.
Similarly, the fetus, which is a potential person, has no right to life over the (actual person) mother.
If every speck of dust were a potential life, then we would not value potentiality at all.
We are misled by the rarity of potential into thinking that it constitutes some element of the proper criteria for rationality.

V. Summary

Noonan and Warren present competing criteria for personhood.
We should not decide between the two criteria on the basis of the conclusions they yield.
That is, one should not argue for Warren's criteria on the basis of the claim that abortion is permissible.
Conversely, we should not argue for Noonan's criteria on the basis of the claim that abortion is impermissible.
Such arguments would beg the question.

Warren provides a broader set of criteria for personhood.
We could consider Noonan's criteria as an attempt to define personhood as well.
But a theory of personhood based on the possession of a human genetic code would be chauvinist.
Still genetic material seems essential to our conception of self.
Perhaps we need a particularly human definition of personhood before we can develop more abstract criteria for aliens and sentient machines.

There are something like a million and a half abortions each year in the United States.
About a quarter of all pregnancies in North America end in abortion.
Abortion is a surgical procedure, which can be dangerous at times.
While many women chose abortions as their best option, few if any think of it as a welcome experience.
Everyone can agree that there are too many abortions.
The left has lost sight of the fact that abortion is a bad thing.
The right has alienated many women who seek abortions by vilifying them.
For an example of unproductive characterizations, consider that Warren's article, which I took from an edited collection, was there entitled "The Personhood Argument in Favor of Abortion."
No one favors abortions; that's a literally crazy view.
The title of our selection was given by the editors of the collection from which I copied it.
The original title of Warren's paper is "On the Moral and Legal Status of Abortion."

It seems to me that there is a reasonable middle ground to be found in the abortion debate.
But, it won't gain any traction until people stop misrepresenting each other's opinions and calling each other names and using the issue for political gain.
In John Irving's *The Ciderhouse Rules*, the lead character comes to recognize the moral dilemma surrounding abortion as, "Abortions or orphans."
In the absence of abortion rights, many women will die from poorly-handled illegal abortions.
In cases of unwanted pregnancies, all choices are bad ones.
Recognizing that there are no easy options is the first step to a rational discussion of the topic.