Reproduction, Technology, and Rights

BIOMEDICAL ETHICS REVIEWS

Edited by

James M. Humber and Robert F. Almeder

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Preface

In 1994 we announced that the discussion topic for *Biomedical Ethics Reviews* would be "Ethics, Technology, and Reproductive Choice" and that it would be our policy in selecting articles for publication to interpret this topic most broadly. The articles included in this volume admirably reflect our stated desire for breadth, since they include discussions of issues as diverse as the relationship between abortion and fathers' rights, and various ethical problems arising from the utilization of such new reproductive techniques as blastomere separation and cloning.

Given this diversity in subject matter, we have attempted to aid the reader in his or her approach to the readings in this volume by loosely grouping them into three sections. The essays included in Part I constitute an extended debate on whether it is unjust to grant women an unqualified right to abortion and at the same time to insist that men have an absolute duty to support their children once they are born. The articles in Part II deal with a variety of ethical issues associated with in vitro fertilization. Finally, the articles in Part III are concerned with the issue of how parents and society should respond to knowledge gained from prenatal testing.

Reproduction, Technology, and Rights is the thirteenth annual volume in a series of texts designed to review and update the literature on issues of central importance in bioethics today. Each volume in the series is organized around a central theme; the theme for the next volume of *Biomedical Ethics Reviews* will be "Defining Disease." We hope our readers will find the present volume of *Biomedical Ethics Reviews* to be both enjoyable and informative, and that they will look forward with anticipation to the publication of "Defining Disease."

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Part I

Part I: Introduction

The following three articles, "Abortion and Fathers' Rights," "Maternity, Paternity and Equality," and "More on Fathers' Rights," constitute an extended debate on the issue of whether or not it is possible to assert:

1. That women have an absolute right to abortion on demand;

2. That men and women have equal moral rights and duties and should have equal legal right and duties; and

3. That parents have a moral duty to support their children once they are born and legal duties of support should supervene on this moral duty.

In "Abortion and Fathers' Rights," Steven Hales argues that the conjunction of these three principles is prima facie *inconsistent and that this inconsistency can (and should) be eradicated by acknowledging that men have no absolute duty to provide material support for their children. In "Maternity, Paternity, and Equality," James Humber attacks Hales' argurment, contending that these principles are not jointly inconsistent, and furthermore that it is not unjust to grant women an unqualified right to abort and at the same time insist that men have an absolute obligation to support their children once they are born. In the final article, "More on Fathers' Rights," Hales rejects Humber's arguments and in the process clarifies the position he first staked out in "Abortion and Fathers' Rights."*

Abortion and Fathers' Rights

Steven D. Hales

> [S]acrifice all desirability to truth, *every* truth, even plain, harsh, ugly, repellent, unchristian, immoral truth.—For such truths do exist.
>
> —Friedrich Nietzsche, *On the Genealogy of Morals*, essay I §1

The Problem

In this chapter I argue that three widely accepted principles regarding abortion and parental rights are *prima facie* jointly inconsistent. These principles are probably accepted by most who consider themselves feminists, so the conundrum posed is particularly acute for them. There is one obvious way of resolving the inconsistency. However, as will be made clear, this solution is prevented by a fourth principle—that fathers have an absolute obligation to provide material support for their children. I argue that this principle is false, that fathers have no such absolute obligation, and thereby provide a way of making the first three principles consistent.

These three principles are apparently inconsistent.

1. Women have the moral right to get abortions on demand, at their discretion. They can make unilateral decisions whether or not to abort, and are not morally obligated to consult with the father, or any other person, before reaching a decision to abort. Moreover, neither the father nor any other person can veto or override a mother's decision about the disposition of the unborn fetus. She has first and last say about what happens in, and to, her body.

The principle formulated here is an extreme one. More moderate versions might replace it. For example, one might think that maternal motives are relevant as to whether the abortion is a permissible one, or that if having the abortion breaks a promise then it is impermissible, or that the fetus becomes a moral person at some developmental stage and cannot then be permissibly aborted. Such modifications will not substantially affect what will be said about fathers' rights, given suitable changes, *mutatis mutandis*, in the description of those rights.

2. Men and women have equal moral rights and duties, and should have equal legal rights and duties.[1] It is, of course, a matter of some sensitivity as to just what satisfies the equality requirement. More will be said about this later.
3. Parents have a moral duty to provide support for their children once they are born.[2] Any legal duties of support (e.g., child welfare laws or court-enforced child support) should supervene on this moral duty.

Given both (2) and (3), we can conclude that the mother and father have equal moral obligations toward their child once it is born. Although it is an interesting question as to *why* (3) is true (even granting that it is),[3] the issue before us here is the distribution of rights and duties *before* the child is born, particularly during the pregnancy of the mother. Principle (1) tells us that the mother has the right to an abortion during her pregnancy. Since (2) tells us that men and women have equal moral rights, it seems

that we can therefore conclude that men also have a right to an abortion. On the face of it, this seems either absurd or trivial: absurd because men clearly cannot get pregnant, and so it is silly to talk about them having a right to an abortion; and trivial because it may be true that this conditional right is trivially true of men: If one is pregnant, then one may get an abortion. So for a man to insist on his right to an abortion appears pointless. However, it is pointless only if we understand the right to an abortion in a certain way, viz, the right to an abortion is the right to end one's *own* pregnancy.

Why would anyone care about having a right to an abortion? There are a variety of reasons some women no longer want to be pregnant: They cannot afford another child, they are not psychologically prepared to be a parent, a child would hinder the lifestyle they wish to pursue, they do not want to endure the hardship of pregnancy, and so on. All of these reasons have to do with burdens or hardships that the mother faces in the future. For whatever reason, the mother is not (currently) willing to suffer these hardships, and so has an abortion in order to avoid them. Fortunately, the duties and burdens that the mother wants to escape are ones that she can in fact morally escape. She has no obligation to endure the hardship of pregnancy (according to [1]), nor any absolute, inevitable duty to shoulder the burden of an infant. True, these are burdens and duties that she faces if she continues with the pregnancy, but they are ones that she can avoid by having an abortion. Thus, it seems that the motivation for wanting a right to an abortion is because a mechanism is wanted to avoid future duties and burdens. Abortion constitutes just such a mechanism.

If it were immoral to avoid these future duties of childrearing (i.e., if they were absolute and morally inexorable), then clearly there could be no *right* to an abortion. Her right to an abortion is a liberty right; that is, having the right tells us that it is morally permissible for her to have an abortion. Now, if doing X entails an immoral state of affairs Y (a state of affairs that is morally worse than some state of affairs Z that the agent could have caused to obtain instead), then it cannot be permissible to do X.

Thus, given (1), it must be morally permissible to avoid future hardships, burdens, and duties of the sort described herein. We might characterize this as a *right to avoid future duties*.[4] This is not to imply that persons have a right to avoid future duties of any sort, or that they are at liberty to do whatever it takes to avoid them, or that the right could not be bounded or abrogated by various promises and commitments. The right to avoid future duties as discussed in this chapter is the right to avoid duties of childrearing and child support that, given a pregnancy successfully brought to term, one will have. The right to an abortion seems logically dependent on this right. The mother does not especially have a right to kill the fetus; rather, what she has is a right not to have to deal with it any more in the future.[5] Abortion itself might be looked at as a means, or a mechanism, of avoiding certain future duties. Women, therefore, have the right to avoid future duties (of the sort described herein), and abortion provides them with a way of exercising this right.

Now consider the case of the father. He, too, is facing future duties; in fact (aside from pregnancy itself), the same ones as the mother, as (2) and (3) specify. However, the father, having participated in conception, cannot escape the future duties he will have toward the child. The father can decide that he cannot afford another child, that he is not psychologically prepared to be a parent, that a child would hinder the lifestyle he wishes to pursue, and so on, to no avail. He is completely subject to the decisions of the mother. If she decides to have the child, she thereby ensures that the father has certain duties; duties that it is impossible for him to avoid. Even more, the mother is solely in charge: If she wants to have an abortion and the father does not want her to, she may anyway. If she does *not* want to have an abortion and the father does want her to, it is permissible for her to refuse to have one. If there is any conflict between the mother and the father here, the mother's wishes win out.

If we analyze the right to an abortion in the way suggested herein—as a right to end one's own pregnancy—so that the father may possess this right, but only in an absurd or trivial way,

the father still lacks something that the mother possesses: a legitimate mechanism for avoiding future duties. We cannot rectify this by redefining the right to an abortion so that the father will have some say as to whether the mother may permissibly abort, since this will violate (1). Thus, the mother has the right to abort at any time, and the father lacks the right to "abort" at any time. That is, (1)–(3) tell us that the father has a right to avoid future duties; however, since he cannot personally get an abortion (owing to biology) and cannot justly force the mother to abort (owing to [1]), he apparently has no way to exercise this right. Without any way to exercise this "right," the father *de facto* lacks a right that the mother has, and so (2) is violated, and (1), (2), and (3) are inconsistent.

It might be argued that, although true, this is an unavoidable (and hence acceptable) consequence of biology. The mother has some kind of absolute right over the disposition of her body, and in a battle of rights, these rights over one's body trump all other rights in the fray. So the fact that the fetus is in her body ensures that she has final say over it.[6] Not only is this "right over one's body" supposed to guarantee that the mother can abort over the father's objections,[7] but also that she can carry the child to term even if the father insists on an abortion. Here I am not particularly concerned with the conflict generated when the father wants to have the child and the mother wants an abortion. Although I am somewhat suspicious of the content and extent of a "right over one's body," it makes no difference to the arguments to be presented if the support for principle (1) comes from an appeal to such a right.

The difficulty is that it seems that we might agree to all of this and still argue that the father is ill treated. Even if biology prevents men and women from having *absolutely identical* means to exercise their rights, it remains that what we should do is try to achieve equal opportunity to exercise rights as much as possible.[8] Perhaps we will never attain complete equality (biology may prevent us), but we should try our best.

Another objection is that since the father does *eo ipso* have a right to avoid future duties (he just has no opportunity or mecha-

nism to exercise this right), (2) is satisfied, and (1)–(3) are consistent. However, I think it is plausible that genuine equality insists that not only do persons have various liberty rights, but also that they should have equality of opportunity to exercise these rights. So long as some, but not all, persons are equipped with the means to exercise their rights, we cannot say that people have *really* been provided with equal rights. So, even if fathers do have a right to avoid future duties, without any way of acting on this right, the equality principle (2) has *not* been satisfied.

Of course, we might consider that having the opportunity to exercise a right is not itself a matter of rights. Having such a mechanism is more a matter of fortuitous circumstance. Therefore, the fact that fathers cannot act on their right to avoid future duties does not involve a violation of their rights, and (2) is not contradicted. I confess that my own intuitions about this matter are not entirely clear. Nevertheless, this much seems true: What we should do is try to equalize the powers people have with respect to the exercise of rights as much as possible. We might look at this as striving for parity among actualizable rights. The need for such equality of opportunity can be seen in the case of a poll tax. Suppose we have a reconstruction-era tax that one must pay in order to vote, and that the tax is in place precisely to prevent or discourage some class of citizens (blacks, say) from exercising their voting privileges. Now, a defender of the tax might say that blacks are not being deprived of their right to vote; after all, they still have just as much of a right to vote as anyone else. All they have to do is pay the tax. Moreover, since all would-be voters must pay the tax, blacks are not being unfairly singled out in any way. Nevertheless, such a poll tax seems morally pernicious. The reason for this, I maintain, is because formal parity in rights is not enough—after all, whites and blacks have this under the poll tax. We also need to have equality of opportunity to exercise rights. This is what is lacking in the poll tax case. Whites have the opportunity to exercise their right to vote (since they have the money to pay for the tax), but blacks do not (since they do not have the money). It is not too important whether equality of

opportunity to exercise rights is itself seen as a right or not. All that is needed to make my case is agreement that something has gone seriously wrong in the moral realm when such equality of opportunity could be satisfied (as in the poll tax case), but is not. Formal parity between trivial and useful rights is insufficient to fulfill the requirements of morality. It is this fact I mean to capture in saying that the acceptance of (1) and (3) is at odds with the precept expressed in (2).

Another case is that of birth control. It is often claimed that both men and women have an equal obligation to provide birth control, and that it is unfair to force women to shoulder the brunt of this responsibility. But why should this be the case? After all, women voluntarily run the risk of pregnancy by having sex and (setting aside socially imposed requirements and risk of disease) they are the ones who will be affected, not men. On the principle that those knowingly at risk from their own activities are also responsible for risk prevention, some case can be made for the claim that the exigencies of biology ensure that birth control is solely, or at least largely, the responsibility of women. That this conclusion is wrong apparently stems from the intuition that duties and responsibilities should be distributed between the sexes as evenly as possible. Biological differences should be minimized so that moral parity can be maximized. Thus, men should have an equal obligation to provide birth control.

So, in order for us to satisfy our goal of achieving equality as best we can, we should not only admit that fathers have a right to avoid future duties, but there needs to be some mechanism by which they can, by personal fiat, exercise that right. Mothers have the right and a mechanism—the mechanism of abortion. The mechanism employed by fathers, of course, need not be abortion. The important thing to note is that even if we grant that the father cannot avail himself of *abortion* as a way out, it is a giant step from here to conclude that he cannot avail himself of *any* way out. Perhaps it will do to say that, sometime during the span of time that a mother may permissibly abort, a father may simply declare that he refuses to assume any future obligations. If we are

prepared to speak loosely of mothers having the right to an abortion, we might also loosely talk of fathers having the right of refusal. By admitting that fathers have this right, we more closely approximate the ideal of moral parity. The right of refusal is to be designed as a parallel (as demanded by [2]) of the mother's right to an abortion (as specified in [1]). Let us put it this way: A man has the moral right to decide not to become a father (in the social, nonbiological sense) during the time that the woman he has impregnated may permissibly abort. He can make a unilateral decision whether to refuse fatherhood, and is not morally obliged to consult with the mother or any other person before reaching a decision. Moreover, neither the mother nor any other person can veto or override a man's decision about becoming a father. He has first and last say about what he does with his life in this regard.

Suppose that the mother is pregnant and the father tells her during the time that she may permissibly abort, "I think this was a big mistake, we should not have done this, I regret that you are pregnant, and wish you would have an abortion." The mother, according to principle (1), may fairly respond, "Sorry, I want the child, and will carry it to term even though you want me to abort." If the father has the right of refusal, he can justly respond, "OK, if that is your decision, have the child, but it will be solely your responsibility. I want out of the deal, and I do not want to have anything to do with the child or any responsibilities toward it." More than this will be needed, of course. The mother's declared intention to have an abortion does not constitute having one, nor is her declaration as expensive, difficult, and unappealing as the actual abortion. An adequate legal implementation of a father's right of refusal will involve written contracts and sufficient penalties to the father to make the exercise of his right of refusal as costly to him (in the broadest sense) as the mother's exercise of her right to an abortion is to her. Fathers should not find exercising a right of refusal to be more appealing than mothers generally find getting an abortion, but they should not find it less appealing either.

The right of refusal solved the problem of inconsistency among our three moral principles. However, this solution is blocked by a fourth commonly accepted principle:

4. Fathers are under an absolute moral obligation to provide for the welfare of their children, despite the intentions or desires of the father before the birth of the child.[9] Something close to this is reflected in the law, and serves to underwrite paternity suits and at least some of the complaints about "deadbeat dads."

There are whole range of cases here, some of which make (4) look pretty good, others that make it look false. In the latter camp, suppose that a man donates sperm to a sperm bank, which is subsequently used in artificial insemination. Surely the father has no duties toward any children that are the result of this anonymous donation. Suppose a woman gets pregnant as the result of anonymous sex engaged in at a club like (the now-defunct) Plato's Retreat. Here, too, it does not seem that the father has any obligations to her offspring. What of the results of a one-night stand? Things begin to get murkier. How about a lost weekend? A two-week fling? Does it matter if birth control was used or not? The waters are muddied indeed. Fortunately, as we will see later, the line-drawing debate can be completely avoided.

Those willing to defend something like (4) often have in mind a case of a longish relationship in which the woman gets pregnant and the father, unwilling to be burdened with a child, ends the relationship, or leaves town. Surely the father should not be allowed to just saddle the mother with the child and get off scot-free. He willingly and voluntarily engaged in sex and knowingly took the risks in full awareness of the possibility of pregnancy. For him just to leave the mother and have no future duties toward the child is to dump 100% of the burden on the mother when she only assumed 50% of the risk. This, advocates of (4) claim, is manifestly unfair—it means that (ignoring disease and such) sex has no consequences for men, and massive consequences for women. This is why we need a principle like (4) that

ensures that there are consequences for men too, and one of the reasons that we must protect a woman's right to an abortion, à la principle (1).

It is important to note that in the discussion of (4) that will follow, I will not be discussing the obligations of fathers to continue to support children that they have already been voluntarily supporting. So, in the case of a newly divorced father with a two-year-old child that he has been supporting all along, it may be the case that he will continue to have future material obligations toward this child despite a desire not to. Court-ordered child support may well be justified in such a case, but the justification will come from a different principle than (4). Principle (4) has solely to do with the connection between paternal obligations and prenatal paternal desires.

Admitting that fathers have the right of refusal provided a way of making principles (1), (2), and (3) consistent. The introduction of (4) rejects this solution, and once again generates inconsistency. The mother has the right to do something that the father does not have the right to do: get out of any future commitment to the (yet unborn) child by personal fiat. The mother can get out of it by terminating the life of the fetus, and the father cannot get out of it in any way, not even by refusal. Again principle (2) is violated.

There seem to be only four options. The first is that we can abandon principle (1). There are two ways of giving up (1). The first is to say that the conservative is right after all, and abortions really are impermissible. The second is to maintain that abortions continue to be permissible, but there must be some sort of mechanism for paternal consent. Mothers will have to consult with fathers before they are allowed to have abortions, and (perhaps) fathers will be allowed to insist that mothers have abortions if the father so decides. Women will no longer have complete control over their bodies, and will be subject (at least in part) to the decisions of men.[10]

We can abandon principle (2). Men and women do not have equal rights and duties, or striving for a balance of powers with

respect to the exercising of rights is not a valuable goal. Somehow the biological asymmetry of childbirth gives rise to an insuperable moral asymmetry. I suspect that most who accept all three principles will opt for rejection of (2), the equality principle. However, even though one might (with some plausibility) argue that biology prevents fathers from having a right to procure an abortion or insist that the mother have one, it is *much* harder to argue that biology forbids fathers from having a right of refusal. At the very least, such a right has no obvious connection to biology.

We can reject principle (3). Parents do not have an obligation to provide support for their children. Among other problems with this approach, it will entail the rejection of principle (4), whereas rejecting principle (4) will not require us to jettison (3). Thus, other things being equal, if getting rid of the comparably weaker (4) alone will restore consistency, we are better off doing that than getting rid of both (3) and (4).

The last alternative is that we can abandon principle (4) and grant that fathers have a right of refusal. If a father-to-be declares his refusal to accept fatherhood (with attendant legal details) and skips town, abandoning his pregnant girlfriend, he is perhaps callous and unfeeling, but he has not done anything morally wrong. He is no more unfeeling than if the mother intentionally aborted over his strong objections. Just as she can abort the fetus at her discretion, so too can he exercise the right of refusal at his. She can get out of the deal when she wants, and so can he.[11] To reject (4) and accept a father's right of refusal is a radical change in most people's ordinary beliefs. If taken to heart in a broader social context, I believe it would ultimately result in considerable legal change with respect to paternity suits and court-ordered child support. This is the position for which I will argue.

The Solution

Since all four of the principles seem plausible, and rejecting any one is distasteful, an argument in favor of rejecting any particular one over the others is needed. I will first marshall the argu-

ments in favor of rejecting (4), and then consider other solutions to the dilemma. I will argue that rejecting (4), counterintuitive as it is, is the most cogent solution available. This is why I claimed above that no line-drawing project is needed to adjudicate the cases seemingly relevant to evaluating (4). Principle (4) is false in every case. There are three arguments that I will develop to support the rejection of (4). Two arguments are suggested by positions taken by Judith Thomson in her well-known "A Defense of Abortion," and the last is an analogy that imports our moral intuitions from a logically parallel case.

Thomson's arguments are meant to support (1), and they do. But they also pave the way for abandoning (4). Thomson writes, "[Unless they implicitly or explicitly accept special responsibility] nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive."[12]

It is this lemma that provides much of the support for principle (1). Without accepting some kind of special responsibility for the gestating fetus, the mother is under no obligation to keep it alive, even if it is a person. It is a direct consequence of (1) that the act of conception alone is insufficient to require of the mother that she make major personal sacrifices—most immediately the sacrifice of pregnancy and childbirth. Yet the father has done no more than participate in conception, and as a result he is required to make major personal sacrifices once the child is born. If conceiving alone does not count as accepting any special responsibility for a person for the mother, then it does not count as accepting any sort of special responsibility for a person for the father either. But (4) seems to deny this.

Another Thomsonian argument also supports this position. Her famous violinist case shows that someone who is the victim of a selfish, unilateral act (such as being kidnapped by the Society of Music Lovers, or being raped) is not obligated to make major personal sacrifices. By "unilateral" here, I mean that the victim had no say in what would happen, or, put another way,

was kept out of the decision-making loop. Yet if the mother were to carry on with a pregnancy over the father's strong objections, it seems that her act is a selfish, unilateral one. Continuing with the pregnancy was her personal decision, and executed with regard only for her motives and desires. The father was kept out of the loop entirely. That the mother can do all of this is ensured by (1). So it seems on Thomsonian grounds that the father should then be exempt from having to make major personal sacrifices (such as 18 years of child support). But (4) tells us that he is not exempt.

Analogies that capture the relevant data in the case of pregnancy also support the rejection of (4). For example, suppose Mary and Juan go into business together. They agree to build a factory, and each partner will put up half of the money at the start. The factory is to be built on property that Mary already owns. Suppose further that Juan is a quadriplegic and is incapable of physically assisting in the construction of the factory. Thus, Mary has agreed to build the factory herself, using the money they jointly supplied. Now, suppose that the factory is half finished and Mary decides that her finances will not be able to support the business in the future, and that she is not psychologically prepared to run a company. Mary wants to stop building the factory and dismantle what is already built (to sell off the pieces, say, or to restore her land to its original condition). She tells Juan that it is her property that the factory is on, and so Mary can do what she wants with her property.

If we agree with Mary that she should be allowed to break her agreement with Juan (by personal fiat), and thereby avoid any future obligation toward the company, does it not seem that Juan too should be allowed to back out if he wants?[13] We might, of course, argue that Mary should not be allowed to quit without first persuading Juan that the factory was a bad idea, and that it would be best for both of them to stop construction. After all, they are partners, and each put up half the money. But still this conditional seems true: If Mary is allowed unilaterally to quit the company without further obligation, then surely Juan is allowed to do so as well. The fact that the factory is on Mary's land does not seem

relevant to allowing Mary but not Juan to quit. After all, they both knew in advance and agreed that it would be on Mary's land. Nor does the fact that Mary is personally building the factory seem relevant. Again, both parties knew this in advance, and Juan is incapable of helping in the construction. If Mary is allowed to back out, then so is Juan. If Juan is bound to stick with the company despite his wish to leave, then surely Mary is as well.

It might be argued against this analogy that *no* analogy, no matter how carefully crafted, can mirror our intuitions about our bodies and pregnancy. The difference between the factory case and pregnancy is that the factory is not in Mary's body. It is on her land, sure, but it is not *inside* her, and this a crucial disanalogy. Our intuitions about our bodies and the rights surrounding abortion are unlike our intuitions about anything else. These intuitions are unique and primitive.

It is almost impossible to argue against this response. Any position that is defended on the grounds that the truth of the position is a brute fact is unassailable. The dialectic grinds to a halt. This state of affairs is unsatisfying for a couple of reasons. The first is that the brute-fact move seems like a last-chance act of desperation to save a position from a counterexample it cannot otherwise defeat. Argument from logical analogy is a classic and forceful way to philosophize, and we should be wary of attempts to close it off. Second, it is a surprising strategy for an abortion liberal to endorse. Many of the real advances in the abortion debate—ones helpful to the liberal position—have been carried along on the backs of analogies.[14] Resorting to the claim that no analogy can capture the moral facts surrounding pregnancy effectively rejects these arguments out of court, and so defends the liberal position at a costly price.

Competitors and Their Problems

There are, of course, other ways out. One is to find a way to resolve the inconsistency among the four principles without giving any up. Another is to give up either (1) or (2) while retaining (4).

A third approach is to agree that fathers have a right of refusal, and find some way of ensuring that fathers pay child support anyway, in spite of this right. The arguments for rejecting (1) are legion, well-known, and will not be rehashed here. I suspect that (2) will be a likely target of those wishing to keep (4), but I have no idea how an argument against retaining (2) (at least as an ideal) might proceed, and so I cannot evaluate such an argument here. But I have been able to identify two arguments that purport to resolve the inconsistency among the four principles, and one that tries to accommodate my results while keeping the feminist preanalytic data, and will consider these in turn.

The first argument that attempts to resolve the inconsistency is this: It is not that the father especially has a commitment to the future child, but rather he has an obligation toward the mother. This commitment consists in something like a responsibility to help support their progeny. So there are not any future duties toward a child that he could escape by having a right of refusal. His duties are toward the mother.

However, this does not seem right, because the mother has no analogous commitment toward the father. She has no responsibility to help the father support their progeny, since such a responsibility would entail a duty to the fetus that it be carried to term. One cannot support something by killing it. Yet the mother clearly has no such duty toward the fetus, as (1) tells us.

But perhaps I am misconstruing the strategy. Maybe what is going on is that the father has this conditional obligation: If the child is born, then the father has a duty to help the mother support it. This is all well and good, since it seems that the mother has a similar conditional obligation: If the child is born, she has an obligation to help the father support it. Equality is restored.

However, this response only sidesteps the issue, since it is within the mother's power to make sure that the antecedent of her conditional obligation never becomes true, and the father cannot similarly ensure the same about the antecedent of his obligation. True, the relevant duties are now between the parents, and not between the parents and the child, but this shift is a red herring.

The mother can avoid future duties through abortion, and the father can not. And principle (4) rules out the analogous paternal right of refusal. The problem remains.

A second argument that purports to resolve the inconsistency is this: The mother undergoes the burden of pregnancy, and receives the benefit of guaranteed paternal support. The father, by contrast, has the benefit of not having to suffer the burden of pregnancy and childbirth, and instead shoulders the burden of necessarily having to help support the child once it is born. Each party has their respective burdens and benefits, and these benefits and burdens are distributed more or less evenly. Thus, the equality principle (2) is satisfied, and (1), (3), and (4) are retained.

I think that there are several difficulties with this approach. The first is that although pregnancy is undoubtedly a burden of some sort, it is relatively short compared to the legal burden under which the father labors. The mother is pregnant for nine months, and in most cases is not suffering for much of that time. The father, by contrast, is obliged to pay considerable sums of income over a period of 18 years. The father's burden lasts 27 times as long. The distribution of burdens hardly seems equitable. It will not help to say that the mother has the same 18-year burden of support, since she *volunteered* to support the child by having it. The father, we are supposing, would have preferred the mother to have an abortion. Since the mother volunteered to support the child and the father did not, it does not seem right to say that she has the same *burden* as the father. We can appeal to the maxim of *volenti non fit injuria* here.

Another problem is this: If anyone should have more duties toward the child, it ought to be the mother, not the father. After all, she is the one who allowed (or is allowing) the fetus to gestate and mature in her body. Thus, it seems that she is establishing some kind of agreement with the fetus that when it is born she will provide for its well-being. The father, on the other hand, has not allowed the fetus to gestate and continue, and, let us suppose, strongly opposes its existence. Moreover, he explicitly rejects the idea that he has duties or future obligations toward the fetus or

the child it will become. It is strange, then, to insist that the duties the father acquires after the child is born are just as strong as the mother's. If anything, it would seem that the mother should have *more* and *stronger* duties than the father.

But these are really just side concerns. The central problem with the argument is that it, too, only sidesteps the real issue. We can grant the burden/benefit argument and still generate inconsistency. The mother can escape her burden of pregnancy by personal decision—having an abortion as guaranteed by (1). The father cannot escape his burden of support, either by abortion or by refusal (as insisted on by [4]). So the mother still has something he lacks—a morally permissible escape from future duties.

The final objection I will consider grants that (4) is false—fathers have a right to avoid future duties, and ought to be legally granted the mechanism of refusal in order to have a means of exercising this right. Nevertheless, the objection goes, society can override the individual rights of fathers if it is in the best interest of society as a whole. Just as society can declare the right of eminent domain, and occasionally override the individual rights of property owners by building a highway through their front lawns, so too can society decide that the general public welfare is benefited by placing strong duties on fathers, and the individual rights of fathers are justifiably outweighed by these policy concerns. Moreover, we are generally prepared to grant that it is morally permissible for social concerns to outweigh the concerns of individuals. Thus, recognizing the falsity of (4) need not give rise to major social change. The intuitions behind (4) can be preserved even if (4) is jettisoned.

There are two main paths this objection can take: The interest of the state in benefiting children, and the interest of the state in benefiting mothers. Bear in mind that this objection takes it for granted that neither children nor mothers have a *right* to financial support from fathers. This is one of the lessons drawn from the conclusion that fathers have a right to avoid future duties through refusal. No one can have a right against a father that he not be allowed to act in a way that is permissible for him.

Consider, then, the first path of this objection. The state decides that it is in the interest of society at large that children be assured of a certain level of financial security or material comfort. To promote this interest, the state does not distribute the burden evenly across all citizens, but instead levies a special tax on a subset. More specifically, the biological parents of these children are obliged to pay for their upbringing (of course, special provisions will have to built into the law to excuse biological parents when the child is adopted). In the case where the mother voluntarily submits to this (by not exercising her right to an abortion), and the father does not (by actively exercising his right to refusal), the father's rights are overridden, and he is still legally bound to pay child support.

One difficulty specific to this strategy is that we are on thin ice if we are prepared to engage in a wholesale suppression of individual rights for the pecuniary benefit of children. There are many children who would be better off living with adoptive parents than with their natural parents. Children born into poverty will, *ceteris paribus*, have worse life prospects that those children born to well-off parents. It would benefit these children, *ceteris paribus*, to take them from their natural parents and place them with wealthy adoptive parents. But surely this is wrong, and it is wrong because it unjustly usurps the rights of natural parents to keep their children. There are cases (e.g., child abuse) in which we might allow society to take children from their parents, but poverty is not one of them. Yet this case and the case of the father seem parallel: Society overrides the right of a biological parent(s) for the financial benefit of children. If we refuse to allow society to take children away from poor parents, so too should we refuse to allow society to override a father's right of refusal.

Let us consider the second path the social welfare objection might take. The state decides that as a contingent matter of fact, women have unequal standing in our society. They make statistically significantly less amount of money than men doing equal jobs, and they are not proportionately represented in positions of power in the government and in business. One practical result of

this is that single mothers raising children have a much more difficult time, and a greater burden, than single fathers raising children. Thus, in order to alleviate this burden, the state decides to override systematically the father's right to refusal. This amounts roughly to an affirmative action program for women: Equal treatment in one domain is temporarily suspended with the intention of addressing inequalities in another domain. Once other social inequities between men and women have been adequately resolved, fathers will be allowed to resume their exercise of a right of refusal.

Again, one should note that this path accepts the main conclusion of this chapter—that fathers have a right of refusal. What the argument rejects is the inference from this right to immediate social and legal change. There are several difficulties with the second path of the social welfare argument, and it is hard to tell *a priori* which of these is the most serious. One is that much more argument is needed to show that overriding the father's right of refusal is the best way to address the issue of unequal burdens in single parenting. Since it is presumably in the *state's* interest, or the interest of society in general, to sponsor such an affirmative action program, it may be that society in general ought to pay for it. Another problem is that even if overriding the father's right of refusal is shown to be the best solution, considerable argument is then needed to demonstrate that it is also fair or just to suppress this right. For example, suppose that the national economy (and hence society as a whole) is best served if slavery were still allowed. This in no way means that we are therefore justified in reinstating slavery. Moreover, the reason that we are not thereby justified in reinstating slavery is because slavery impermissibly violates individual rights.

In addition, there are two wholly general problems with the strategy of appealing to the general social welfare in order to maintain the *status quo*. One is this: Suppose that on the ground of eminent domain, the state decided to build a highway across the front lawns of all and only Jewish citizens, all the while maintaining that Jews have a right to own property unmolested. Clearly this "right" would then amount to nothing but a ruse. So too, by

telling fathers that they have a right to get out of future obligations through refusal but then invariably forcing these obligations on them anyway, it is clear that their "right" is an empty one. Granting such a right is mere trickery with words. One might object here that fathers do indeed have the right of refusal, it is just that their right is overridden—and there is nothing unusual or odd about overriding a right. This is true. But if a right is uniformly and consistently overridden, to the point that no one can exercise it except at some vague point in the distant future, one becomes suspicious as to whether there is a real right here. If a woman's right to an abortion is consistently overridden by society throughout her life, with a promise of allowing her to exercise it in the nebulous future, there is legitimate question of whether she really has this right.

The second problem is a danger looming for the partisans of principle (1). If a father's right of refusal can easily be trumped by society, then it might well be that a mother's right to an abortion can also easily be trumped. Society might decide, for example, that mothers do indeed have a right to elective abortion, but that social unrest over the abortion issue would be best alleviated by universally suppressing this right. Or perhaps nothing so drastic—maybe the state, in the name of civil accord, could decide that a right to an abortion will be upheld, but severely curtailed by waiting periods, "gag rules," physician lectures, restrictions as to time and reason, and so on. Minimally, the defenders of (1) are compelled to provide some fancy arguing to show that mothers' rights to avoid future duties via abortion are sacrosanct and absolute, whereas fathers' rights to avoid future duties via refusal are the weakest and most *prima facie* of rights.

So appeal to the general social welfare is a dangerous move at best, and a mere trick at worst. I conclude that it does not provide a plausible alternative to the conclusion for which I have argued—that the intentions and desires of the father before the birth of his child are in fact relevant to his duty to provide for the welfare of his children. If the mother can escape future duties to her progeny via the mechanism of abortion, the father also can escape future duties to his progeny via the mechanism of refusal.[15]

Notes and References

[1]Indeed, Beverly Wildung Harrison (1983), in *Our Right to Choose: Toward a New Ethic of Abortion,* Beacon Press, Boston, p. 7, defines feminism as "the contention that women as a group ought to have the same basic standing as 'rational moral agents' as do men, with all the rights and responsibilities attendant to that status."

[2] N.B.: The duty stipulated in principle 3 is a transferable one. The parents may decide to give the child up for adoption, and thereby transfer the duty of support to someone else willing to accept it. Such transference would constitute a morally permissible discharge of duties. So it is clear that 3 does not insist that the parents *personally* provide support for the child. Support is provided, and 3 satisfied, if someone else is found who will personally support the child.

[3]For some discussion, *see* Jeffrey Blustein (1982), *Parents and Children*, Oxford University Press, Oxford.

[4]With the right qualifiers, of course. The duties are specifically parental ones, and the right is dated—i.e., it can only be exercised during pregnancy. But these niceties are irrelevant to what follows.

[5]A defense of this can be found in Heather J. Gert, "Viability," presented at the 1991 meetings of the Eastern Division of the American Philosophical Association. I believe that sympathy for the view can be found in Mary Anne Warren, "On the Moral and Legal Status of Abortion," reprinted in Joel Feinberg, ed. (1984), *The Problem of Abortion* 2nd ed., Wadsworth, Belmont, CA, *see* especially p. 117.

[6]An example of this kind of argument can be found in Rosalind Pollack Petchesky (1984), *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom*, Longman, New York, pp. 354–356.

[7]For some criticism of this, *see* Wesley D. H. Teo (1975), Abortion: the husband's constitutional rights, *Ethics* **85,** and George W. Harris (1986), Fathers and fetuses, *Ethics* **96**. But note the US Supreme Court's ruling in *Planned Parenthood of Missouri v. Danforth, Attorney General of Missouri* (428 US 52 [1976], majority opinion by Mr. Justice Blackmun), reprinted in O. O'Neill and W. Ruddick (eds.), Oxford University Press, Oxford: The mother is allowed to make a unilateral decision regarding the disposition of the fetus "since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy." p. 68.

[8]Petchesky, p. 354, thinks that biology prevents the having of equal rights. She does not discuss whether striving for equality as an ideal is a laudable goal.

[9]It is hard to find defenses of this principle, since it is so widely assumed. Acceptance of it is implicit in, for example, C. R. Castner and L. R. Young (1981), *In the Best Interest of the Child: A Guide to Child Support and Paternity Laws*, National Conference of State Legislatures; Carol Smart (1987), There is of course the distinction dictated by nature: law and the problem of paternity, in *Reproductive Technologies*, Michelle Stanworth (ed.), University of Minnesota Press, Minneapolis; L. M. Purdy (1976), Abortion and the husband's rights: a reply to Wesley Teo, *Ethics* **86**; Alison Jaggar (1984), Abortion and a woman's right to decide, in R. Baker, and F. Elliston (eds.), *Philosophy and Sex,* Prometheus Books, Buffalo; and Francis J. Beckwith (1992), Personal bodily rights, abortion, and unplugging the violinist, *Int. Philos. Quart.* **32,** esp. pp. 111,112. In "Fathers and fetuses" Harris may reject this principle; at least, he rejects something similar to it. But his project is different than mine, and he does not discuss paternal obligations in any sustained way.

[10]Harris offers an interesting defense of this in "Fathers and fetuses."

[11]Citing statistics showing that many fathers are noncompliant with respect to mandatory child support is irrelevant here. Rejection of principle 4 means that it can often be wrong to demand a father to provide support in the first place.

[12]Judith Jarvis Thomson, "A defense of abortion," reprinted in Feinberg, *The Problem of Abortion*, p. 184.

[13]This analogy gains additional momentum for those who consider corporations to be moral persons.

[14]Most famous is, of course, Thomson, but *see also* Jane English, Abortion and the concept of a person, reprinted in Feinberg, *The Problem of Abortion*, pp. 151–160.

[15]This chapter is the result of conversations with Timothy Johnson, a physicist who should have been a philosopher. It could not have been written without his insight. I am also indebted to David Blumenfeld, Susan Hales, and Steven Rieber for lengthy and helpful discussions about this topic, and to Stephen Beck, Angelo Corlett, James Dreier, Michael Ialacci, and George Rainbolt for criticisms of earlier drafts.

Maternity, Paternity, and Equality

James M. Humber

In "Abortion and Fathers' Rights,"[1] Steven Hales argues that there is a *prima facie* inconsistency in asserting that:

1. Women have a moral right to abortion on demand, at their discretion, i.e., a right that cannot be vetoed by the father or any other person;
2. Men and women have equal moral rights and duties and should have equal legal rights and duties; and
3. Parents have a moral duty to provide support for their children once they are born, and legal duties of support should supervene on this moral duty.

For Hales, (1), (2), and (3) generate a *prima facie* inconsistency because (1) gives women a mechanism that men do not possess for avoiding the duties of (3). More explicitly, if, during pregnancy, a woman wishes to avoid the duties imposed by (3), she can do so because she has the right to abort. However, men have no comparable right. Indeed, after a woman has conceived, the right to abortion gives her the right to determine not only whether she will shoulder the burdens imposed by (3), but also whether the father will do so. Thus, if women have a right to abortion as specified in (1), it seems that (2) must be regarded as

false. To resolve the apparent inconsistency, Hales argues that fathers should be given the right to avoid the duties of (3) simply by declaring that they do not wish to support their children once they are born.

Hales' argument is subtle, sophisticated, and no doubt appealing to many men. At the same time, as Hales himself realizes, acceptance of his argument would require a gigantic revision in most people's ordinary beliefs and "would ultimately result in considerable legal change with respect to paternity suits and court-ordered child support" (AFR, 14). Clearly, before we even consider undertaking any of the changes Hales visualizes, we must be thoroughly convinced of the truth of his analysis. As a first step toward achieving a consensus on this matter, I intend to criticize Hales' argument, and then provide Hales with the opportunity to respond to those criticisms in this volume of *Biomedical Ethics Reviews*. If this procedure does not succeed in either invalidating or substantiating Hales' position, perhaps the discussion will spur further debate—debate that ultimately will be successful in resolving the issue.

On the surface Hales' argument appears clear. However, when the argument is carefully scrutinized it becomes obvious that it is subject to more than one interpretation. First, Hales tells us that women seek abortions in order to avoid future duties and burdens, and that the right to abortion makes it morally permissible for women to avoid these hardships. He then continues:

> We might characterize this as a *right to avoid future duties.* The right to an abortion seems logically dependent on this right...Abortion itself might be looked at as a means, or a mechanism, of avoiding certain future duties. Women, therefore, have the right to avoid future duties...and abortion provides them with a way of exercising this right. (AFR, 6)

On one construction of the above passage, what Hales is saying is this: Women have a right to avoid future duties; the right to abortion is "logically dependent on this right," because if women lacked the right to avoid future duties they could not have the right

to abort. Men are not able to abort and so lack a right to avoid future duties. Thus, men and women do not have equal rights, and to rectify the situation men must be granted a "right of refusal," i.e., a right to avoid the duties of parental care, simply by declaring that they will not provide support for their children once they are born.[2]

If the preceding accurately represents Hales' argument it must be rejected, because it misconstrues the relationship between the right to abort and the putative "right to avoid future duties." Let us say, for example, that we visit the home of Jane Doe, a young mother who simply refuses to care for her baby. Doe does not feed the child, refuses to change soiled diapers, ignores the infant's crying, and so on. When confronted, Doe argues that she is doing nothing wrong because at approximately six weeks into her pregnancy she declared that she wished to exercise her right to avoid future duties. She tells us that she knows she has such a right because she has a moral right to abort and could legitimately have avoided her duties of child care by aborting her child when it was a fetus. However, Doe says, at the time she voiced her desire to avoid future duties she also decided that she wanted the experience of childbirth and so made it clear that she would not use abortion as the means for exercising her right to avoid future duties, but rather would exercise that right by refusing to care for her child once it was born. Now it seems clear that this argument is absurd, that Doe's refusal to care for her child is wrong, and that it is wrong because possession of the right to abort does not give Doe a separate "right to avoid future duties." If all of this is true, however, Hales' argument fails to show that we must grant men a "right of refusal"; because Hales has failed to demonstrate that recognition of the right to abortion creates an inconsistency among principles (1), (2), and (3) by endowing women with a right (viz, the right to avoid future duties) that men do not possess.

When responding to the preceding, Hales could argue that the criticism has force only because it assumes that possession of the right to abort gives pregnant women a *separate* or *independent* right to avoid future duties and it was never his intention to endorse this view. His opinion, he could say, has all along been that

the right to abort and the right to avoid future duties are inextricably linked because the right to abortion is really nothing more than the right to avoid future duties by means of abortion (or alternatively, the "right to use abortion to avoid future duties").[3] Furthermore, if we accept this view, it clearly would be wrong for Doe to declare that she had no desire to care for her child and then to delay action on that declaration until after her child was born, because Doe possesses no independent, freestanding "right to avoid future duties," but only the right to use abortion to avoid future duties. Still, Doe does have the right to avoid future duties by means of abortion, and if she were to exercise this right, she could avoid future duties without doing anything wrong. Because men cannot abort they cannot possess the right to avoid future duties by means of abortion, and so they clearly do not possess equal rights with women. On the other hand, we *can* rectify matters; because although men cannot be given the ability to abort, they can be given a right that is comparable to women's right to use abortion to avoid future duties; specifically, men can be granted a "right of refusal."

Any argument along the discussed lines also must be rejected because it construes the right of abortion too narrowly. For example, let us say that a pregnant woman, Frankie Fae, undergoes prenatal testing and discovers that her child will be born with Down syndrome. Fae knows that many parents of Down syndrome children speak lovingly of their relationships with their offspring. Fae is convinced that if she were to give birth she would love her child and enjoy the parenting experience. However, on reflection, Fae becomes convinced that Down syndrome children have a quality of life that imposes great hardships on them, that it would be cruel to place this burden on her child, and that if she were to give birth it would be for totally selfish reasons, viz, she would give birth merely to experience the pleasures of parenthood. Thus, although Fae does not want to avoid the future duties of parenting, she nevertheless wants to have an abortion in order to do what she feels is in the best interest of her fetus. Now, if the right to abortion were merely the

right to use abortion to avoid future duties, Fae could not appeal to this right to justify having an abortion in order to benefit her fetus. Clearly, though, this is not how pro-choice advocates wish to interpret the right to abort; they would insist that this right *does* apply to the case at hand, and that we would violate Fae's right to have an abortion if we did not allow her to use abortion to benefit her fetus. Thus, although men do not have the right to use abortion to avoid future duties, this is not the right that pro-choice advocates ascribe to women when they say that they possess a moral right to get abortions on demand. If this is so, though, Hales cannot appeal to a supposed "right to use abortion to avoid future duties" in order to show that there is an inconsistency in conjoining (1), (2), and (3).

Perhaps Hales does not want to say that the moral right to have an abortion is simply the right to avoid future duties by means of abortion. Instead, his position might be that those who say that women have an unrestricted moral right to abortion really assert that women have a right to use abortion as a mechanism for achieving *any* goal that they find desirable. Thus, if women have a moral right to abort, they have a right to:

1. Avoid future duties by means of abortion;
2. Benefit their fetuses by means of abortion;
3. Avoid morning sickness by means of abortion; and so on.

Now, given such a view we can see why pro-choice advocates would say that it is permissible for Frankie Fae to have an abortion even though she does not wish to avoid future duties: Possession of the right to abort automatically endows Fae with (2); thus, Fae's right to abortion covers the case at hand. Still, the right to abort also encompasses (1)—a right men must lack given their inability to abort. Thus, Hales could argue, those who hold that women have a moral right to abortion on demand do not ascribe right equally, and to rectify matters they must grant men a right of refusal.[4]

The problem with the described view is that there are good reasons to believe that those who say that women have an abso-

lute or unrestricted right to abortion do *not* mean to assert that women have a right to use abortion as a means for achieving any goal that they find desirable. Assume, for example, that Jenny Joe has had numerous abortions because her fetuses have all been female. Would pro-choice advocates assert that Joe has a right to use abortion to assure that she gives birth to a male child? Or again, assume that Robin Roe hates her husband, Ron, and takes great pleasure in causing him pain. Robin knows that Ron's greatest desire is to have a child. Robin purposely becomes pregnant and announces the pregnancy to Ron. Once Ron becomes excited about the impending birth, Robin has an abortion, tells Ron she had a miscarriage, and takes great joy in watching her husband suffer. Not content, Robin repeats the process again and again. Does anyone seriously believe that pro-choice advocates would say that Robin Roe has a right to torture her husband by means of abortion? Finally, assume that woman W has repeat abortions for no other reason than that she gets perverse joy out of killing her fetuses. If pro-choice advocates thought that the right to abort was really the right to use abortion as a mechanism for achieving any goal at all they would have to allow that W has a right to use abortion to kill her fetuses. But Hales quotes a well-known pro-choice advocate as claiming that women do "not especially have a right to kill the fetus...." (AFR, 6). Once again, the analysis of the moral right to abort as endowing women with the right to achieve any goal by means of abortion seems suspect.

In the end, the truth of the matter seems to be something like this. Those who say that women have an absolute or unrestricted moral right to abort conceive of that right as nothing more than the right to terminate one's pregnancy at will. To be sure, pro- choice advocates recognize that women can and do achieve a variety of goals by means of abortion, but when they say that women have a moral right to abortion that cannot be vetoed, they do not wish to imply that possession of this right endows women with any right beyond the ability to terminate their pregnancies at will. Rather, they would say that possession of the absolute right to terminate pregnancy *allows* women to use abortion as a mechanism for achieving

numerous goals, but does not guarantee that they have a *right* to any of those goals. More explicitly, the claim is this: If women have an unrestricted, moral right to abortion, they must be *allowed* to terminate their pregnancies in order to avoid future duties, to benefit their fetuses, to avoid morning sickness, to get perverse pleasure from killing fetuses, to torture their husbands, to ensure the birth of a male child, and so on. Still, because women must be *allowed* to achieve these goals by means of abortion, it does not follow (as Hales would have us believe) that women have a *right* to get perverse pleasure from killing fetuses, or a *right* to torture their husbands, or (even) a *right* to avoid future duties. The distinction between these two ways of speaking is important; because Hales' argument rests on the claim that possession of the right to abort gives women a right that men do not possess, viz, the right to avoid future duties. If possession of the former right does not require recognition of the latter, Hales' argument fails.

To summarize, Hales argues that it is inconsistent to assert principles (1), (2), and (3) because (1) both grants women and denies men the right to avoid the duties imposed by (3); thus, if (1) is true (2) must be false. Further, to resolve the inconsistency Hales argues that we should grant men a right to refuse the duties of (3). We have shown that it is possible to accept the truth of (1) and yet deny that women have a right to avoid the duties of (3). Hence, the "inconsistency" that Hales finds so troubling need not exist, and Hales' conclusion is left without support. Still, there is another possible way to interpret Hales' argument, and before we can feel totally secure in rejecting Hales' position we must examine that interpretation in some detail.

If women have a right to terminate their pregnancies whenever they choose, there is no escaping the conclusion that the right to abortion makes it morally *allowable* for women to avoid the duties referred to in principle (3). This being the case, Hales could claim that although there is no *inconsistency* in asserting principles (1), (2), and (3), possession of the right to abort nevertheless provides women with a benefit that is unjustly denied to men. More specifically, Hales could argue as follows: To grant women a right

of abortion is to allow them to avoid the future duties of parenting; men have no similar mechanism for avoiding the duties imposed by (3); therefore, granting women a right to abort provides them with a benefit that is denied to males. This state of affairs is manifestly unfair or unjust, and to set the scales of justice in balance we must provide men with a corresponding "right of refusal."[5]

Obviously, if we ascribe a moral right of abortion to women while denying any comparable right to men, we produce an inequality between men's and women's abilities to avoid future duties. Still, the principal question remains: Is the creation of this inequality unjust? If we knew that it always was unjust to ascribe rights in such a way that benefits were allocated unequally between or among different groups there would be no difficulty in answering this question. However, there is good reason to believe that it is not always unjust to ascribe rights in this way. For example, most people allow that handicapped persons have a right to park in special spaces reserved for them in parking lots. Once we acknowledge this right, though, we automatically allow handicapped persons to secure benefits that nonhandicapped individuals are refused. For instance, handicapped parking spaces are always close to building entrances. Thus, when weather is bad disabled persons need not travel very far to escape the inclement conditions, whereas nonhandicapped persons often have to walk hundreds of yards. Again, when all regular parking spaces are full, nonhandicapped persons cannot park in empty handicapped spaces. However, the reverse is not true; if all handicapped spaces are taken, a handicapped driver can park in any open spot in the lot. Still, the fact that these inequities exist does not prompt most people to claim that it is unjust to ascribe a special "parking right" to handicapped drivers. Indeed, so far as I know, no one has argued that handicapped parking is unfair and that in order to set the scales of justice in balance we must: (a) allow nonhandicapped persons to park in handicapped spaces when all other parking places are taken, and (b) provide taxi service for those nonhandicapped persons who are forced to park far from building entrances.

When all is said and done there is one point on which Hales is undoubtedly correct. If we assert that women have a right to abortion on demand and then deny men any ability to refuse parental responsibilities, we create a situation in which women are allowed a benefit that men are denied. The question, however, is whether creation of this benefit is unjust. That we should not view it in this way would seem to be indicated by the fact that there are a great number of similarities between ascription of a right of abortion to women and ascription of a special "parking right" to handicapped persons. To see that this is so, let us look more closely at each case.

First, disabled persons find it difficult to travel. This puts them at a disadvantage when it comes to competing for jobs, shopping outside the home, or contributing to society in any way that requires a great deal of mobility. Recognizing that the disabled suffer from these disadvantages, society attempts to reduce the inequality by providing for special handicapped parking. Now when society acts in this way it does not treat disabled and nondisabled persons "equally," i.e., in exactly the same manner; rather it *favors* the handicapped, because it provides a right to members of this group that it simultaneously denies to all others. Still, most people admit that it is not unfair to give disabled individuals special treatment, and in this admission they tacitly recognize that Aristotle was correct when he said that the principle of justice requires not merely that equals be treated equally but also that unequals be treated unequally.[6] On the other hand, we have seen that ascription of a special parking right to the handicapped permits special benefits for members of that group. Even so, people do not think that ascription unjust, and although it is not totally clear why people hold this view there are certain characteristics of the situation that seem especially noteworthy. First, the benefits that are produced by the ascription of a special "parking right" to handicapped persons are both unintended and necessary consequences of the attempt to eliminate the original inequality between disabled and nondisabled persons. Second, and even more importantly, the special benefits that we create

for disabled persons when we allow for handicapped parking are trivial, and outweighed by benefits that redound to the non-handicapped in society. That is to say, in return for allowing disabled persons to park anywhere in lots and to be less inconvenienced by nasty weather, nonhandicapped individuals are rewarded economically—the disabled become more self-sufficient, take employment outside the home, spend money at stores, restaurants, movies, sports events, concerts, colleges, gas stations, and so on. In sum, although creation of handicapped parking produces special benefits for the disabled, such action is not unjust because the benefits that accrue to members of this disadvantaged group are fairly balanced by benefits that distribute throughout the rest of society.

When we compare the consequences of ascribing an abortion right to pregnant women and granting a "parking right" to disabled persons, we find that they are quite similar. First, before a woman becomes pregnant, she and her male sex partner possess relatively equal status regarding their abilities to avoid future parental duties. That is to say, both male and female can escape the duties of child care by having minor operations or by keeping their pants on, and it makes little more sense to say that nonpregnant women can avoid future duties by aborting than it does to say that their male lovers possess that ability. However, once a woman becomes pregnant an immediate inequality is created between her and her sex partner. If the woman is not married there will come a time when her pregnancy will become known to others in society and her reputation could suffer. This is not the case for a man. Even if the woman's reputation is not an issue, there are many burdens of pregnancy—morning sickness, doctor visits, doctor bills, work-related problems, dietary regulations, discomfort, dangers to the mother's health, and so on. The male suffers none of these hardships, even though he participated equally in the act of conception.[7] Now if we allow that pregnant women have a right to abortion on demand, we recognize that they, and *only they,* are properly empowered to determine whether or not their pregnancies will be terminated. Since men

cannot decide to terminate their sex partners' pregnancies, recognition of an abortion right clearly favors pregnant women over men. However, when we grant pregnant women a right to abort we provide them with a means for reinstating equality between themselves and their male sex partners—an equality that they lost when they became pregnant. This being so, our action need not be seen as being in violation of the principle of justice, because it would seem to be exactly like the decision to grant handicapped persons special parking places. In both instances we favor one group over another for the sake of attenuating inequality, and in both instances we recognize that we must treat unequals unequally if we are to satisfy the demands of justice.

Some may take exception to the above reasoning and argue that there is a significant difference between granting pregnant women an abortion right and providing handicapped persons with reserved parking spaces. In both cases ascription of a right provides those who are granted the right a mechanism for achieving unintended benefits. However, we have seen that when we grant a parking right to the handicapped we allow the disabled to secure benefits that are merely trivial and balanced by other goods that accrue to the nonhandicapped in society. The situation appears to be quite different when we recognize a right to abortion on demand; because when we acknowledge this right we provide pregnant women with a special ability to avoid the duties of parenthood. This is a *significant* benefit, and unless we provide men with a similar ability to avoid future duties by granting them a "right of refusal," we act unjustly.

It seems to me that any argument crafted along the described lines must fail. First, granting pregnant women a right to terminate their pregnancies clearly provides them with a means that men do not possess for achieving certain benefits. However, this is an unintended and necessary consequence of ascribing the abortion right to pregnant women. In this regard, then, ascribing an abortion right to pregnant women and ascribing a parking right to disabled persons are similar actions. Second, if pregnant women have a right to abort they can choose either to exercise

that right or not to exercise it. Hales does not seem to be bothered by cases of the former sort; because in these instances men and women receive exactly the same benefit, i.e., both avoid the "onerous" duties of parenthood. Rather, Hales seems to be troubled by those cases in which a woman chooses to give birth and then demands child support from the father. Here is where Hales perceives injustice; because in these cases the mother has freely chosen to shoulder the burdens of parenting, whereas the father has been denied such an option. However, the injustice is chimerical. At conception, both male and female share equally the responsibility for the onset of pregnancy. If a woman decides not to have an abortion, her share of responsibility for the continuation of pregnancy and the ultimate birth of her child increases significantly. This being so, it would be unjust for anyone to force the father to share equally with the mother in child-rearing activities. But this never happens. At most, the father is required to provide child support, and usually this is far less than what is actually required to provide for the child's financial needs. On the other hand, the mother provides financial resources for the care of the baby, *and for everything else that the child requires.* Anyone who has ever engaged in parenting knows that this makes her share of the child- rearing activity far, far greater than the father's. The mother must wake up at night for feedings; she must potty train; she must arrange for child care while she works; she must cook and clean; she must help with homework; she must nurse the child through sickness and take him/her to the doctor and dentist; she must attend school functions in which the child participates; she must arrange for the child's transportation to parties, sports events, movies, and friends' houses; she must lie awake and worry when her child fails to come home on time, and so on, and so on. The father must do none of this; all he needs to do is to contribute some financial resources to his child's upbringing. In these circumstances it is difficult to see how a father who is required to provide monetary support for an unwanted child could say that he is being treated unfairly. To be sure, if women are granted the right to abort they must be seen as bearing greater

responsibility for the births of their children than the men who impregnated them; however, these women also shoulder a far greater share of the burdens of parenting. Moreover, men still bear *some* responsibility for their children's births, and if they are required to pay child support for their children's welfare, this paltry contribution is proportionate to their degree of responsibility.

If our reasoning thus far is correct, ascribing an abortion right to pregnant women must once again be seen as being similar to the case in which we grant a special "parking right" to disabled persons. In the latter case we judge that it is not unfair to ascribe a parking right to disabled individuals because the benefits that flow to the handicapped from this process are balanced by benefits that flow to the nonhandicapped. Similarly, it is not unjust to ascribe an abortion right to pregnant women because the benefit that they receive (viz, possession of a special mechanism for avoiding parental duties) is balanced by one of two benefits that men receive. Specifically, either women will decide to abort, in which case their sex partners will receive the benefit of not having to assume the duties of parenthood; or women will not abort, in which case their sex partners' share of responsibility for the birth of their children will be reduced, and they will not be required to contribute as much as women to the parenting process.

When all is said and done, it does not seem that Hales has succeeded in demonstrating either that there is an inconsistency involved in asserting principles (1), (2), and (3) or that it is unjust to grant pregnant women a right to abort while denying men a "right of refusal." Still, there might be other grounds for arguing that it is unjust to grant pregnant women an unrestricted right to abortion on demand. In his argument Hales appears simply to assume that men want to be relieved of the burdens of child support and that they do not view the parenting experience as something that is good. This might be true of many men—perhaps even most—but certainly not all. Now, if we allow that pregnant women have a right to abortion on demand we admit that they have no duty to consult with their lovers when they choose whether or not to have an abortion. This means that men who

want to assume the role of father have absolutely no right to demand that their wishes be considered as one factor influencing the abortion decision. This seems problematic; especially if it is true, as we have argued, that it is fair to force men to pay child support because women's possession of a right to abortion on demand does not relieve men of all responsibility for their children's births. At any rate, the possibility of developing a sound argument along these lines is intriguing, and further thought on the matter might be justified.

Acknowledgments

I am indebted to George Rainbolt for helpful comments on an earlier version of this chapter.

Notes and References

[1]Steven D. Hales, *Abortion and Fathers' Rights,* in this volume, pp. 3–25 (Hereafter, AFR).

[2]Ordinarily, we do not think that men possess the right to abort. Thus it might appear that Hales could drop all reference to principle (3) and simply argue that the conjunction of (1), and (2) is inconsistent. However, Hales does not take this tack because he allows that this inconsistency could be avoided by either: (a) declaring (trivially) that men have the right to abort, or (b) by saying that principle (2) applies only when biological differences do not make it absurd to ascribe the same rights to men and women (AFR, 5).

[3]This is one possible interpretation of what Hales means when he says: "The mother does not especially have the right to kill the fetus: rather, what she has is a right not to have to deal with it any more in the future. Abortion itself might be looked at as [a] means, or a mechanism, of avoiding certain future duties." (AFR, 3).

[4]Stating Hales' position in this way assumes that Hales is operating with some sort of ascriptive theory of rights. However, the tenor of Hales' essay is such that this assumption seems justified.

[5]Although Hales clearly wants to claim that possession of the right to abort gives women a *right* to avoid future duties and that this creates an *inconsistency* among principles (1), (2), and (3), there

are times when he intimates that he would be willing to accept the above reformulation of his argument. For example, he says that abortion is a right that makes it "morally permissible [for women] to avoid future hardships..." (AFR, 6), thus suggesting that it is a right that does nothing more than *allow* (or permit) women to avoid the duties of (3). Moreover, when Hales conceives of abortion as simply the right to end one's pregnancy, i.e., as not entailing a supposed "right" to avoid future duties, he asserts that "the father still lacks something that the mother possesses: a legitimate mechanism for avoiding future duties." He then assumes that this state of affairs needs to be "rectified," thus implying that it is unjust (AFR, 7).

[6]Aristotle, *Nicomachean Ethics,* Book V.

[7]Hales seems to assume that men and women are equally responsible for conception, and here I simply accept this presupposition as true. It is worth noting, however, that the assumption of equal responsibility is very often false, and that there are many cases where men are more responsible than women for the onset of pregnancy. For example, women are sometimes tricked into having intercourse by lies and deception; there also are numerous cases where women use birth control mechanisms that just happen to fail, while their male partners show a total lack of responsibility in this regard. In all such cases it is possible to argue that allowing women to abort is fair because it provides them with a mechanism for avoiding the deleterious consequences of their lovers' coercive and/or negligent actions.

More on Fathers' Rights

Steven D. Hales

I am grateful for the opportunity to clarify my position on paternal rights and to rebut the criticisms leveled by Professor Humber. To briefly restate my basic position, I regard a woman's right to an abortion as a morally permissible way of avoiding certain future duties with respect to parenting. For fathers I argue for a right of refusal as a morally permissible way of avoiding certain future duties with respect to parenting. In principle (1) I offered a very liberal reading of this right—that women may get abortions at their discretion for basically any reason. I presented an extreme version of this right for dialectical purposes, in the hopes that my basic argument would be most clearly delimned by a simplistic version of (1). The only thing really crucial in (1) is the clause that women may make unilateral decisions as to whether to abort. In all other respects (1) can be abridged with no damage to my central thesis. Perhaps in the best future theory about abortion it will turn out that we need assorted qualifications and restrictions on abortion rights; qualifications having to do with whether the mother has made binding commitments to others with respect to the disposition of the fetus, when (if ever) the fetus becomes a person, the motives of the mother, and so on. These qualifications can be written into principle (1) without harm to my claims about the rights of fathers. A father's right of refusal will just be qualified analogously.

Unfortunately, this strategy seems to have misled Humber. He thinks that one plausible interpretation of my view is that a right to abort entails some absolute right to avoid future parental duties at any time. Thus Jane Doe, possessing a right to abort at six weeks of pregnancy that she does not exercise, therefore possesses a right to ignore her child after it is born. Humber is right about one thing—if my account is committed to this, it is absurd. However, I am not committed to this. The right to avoid future duties is a *dated* right, and can only be exercised during pregnancy, something I said explicitly in Note 4. So Doe's attempt to avoid duties to her child after the child's birth is wrong. Plenty of rights are dated in this way. To give one example, my legal right to vote is a dated one—I cannot vote after the election has passed, nor can I vote three months in advance.

Humber thinks that another worthwhile interpretation of my position is that a woman has a right to abort only if she desires the abortion as a means of avoiding future duties. Thus Frankie Fae, who wishes to abort her Down syndrome fetus on the grounds that the abortion "is in the best interest of the fetus," may not permissibly do so. Humber correctly points out that such a restricted conception of abortion is unlikely to satisfy abortion liberals. However, my account is in no way committed to this narrow view. I suppose that abortion is a morally permissible way of avoiding certain future parental duties. This does not entail, as Humber apparently thinks, that abortion is *only* morally permissible when it is done with the intent of avoiding future duties. I assume that abortion is an acceptable mechanism of avoiding future duties, just as an opposable thumb is a grasping mechanism. If I use my thumb to stir my coffee, this does not show that the thumb is not a grasping mechanism. Likewise, if Fae uses abortion in the interests of the fetus, this does not show that abortion is not an acceptable mechanism of avoiding future duties.

From an overly narrow construal of my view Humber then swings to an extremely wide one. He suggests that my "position might be that... women have a right to use abortion as a mechanism for achieving *any* goal that they find desirable," and then

trots out the villains Jenny Joe and Robin Roe as counterexamples to my ostensible view. Humber's contention that the wide view is false is plausible, and shows that some qualifications will have to be built into principle (1). This is hardly surprising and totally innocuous. I noted earlier that (1) was bluntly formulated to make my subsequent arguments simpler and clearer, and building in the qualifiers Humber suggests does no harm to my central theses. That abortion is a morally permissible way of avoiding future duties implies nothing about the permissibility of using abortion to accomplish other goals, whether they be benefiting fetuses, avoiding morning sickness, ensuring a male child, or causing pain to others. The moral permissibility of accomplishing these other goals through abortion will have to be considered on a case-by-case basis.

Humber goes on to claim that if women are allowed to achieve goals x, y, and z by means of abortion, then it does not follow that they have a right to these goals. Particularly, even if a woman is allowed to avoid future duties by means of abortion, this does not entail that she has a right to avoid future duties. If Humber is thinking of liberty rights, then I find this assertion strange in the extreme. To say that someone is morally allowed to do X is to say nothing other than they are at moral liberty to do X. But to say that someone is at moral liberty to do X is equivalent to saying that they have a liberty right to do X. So being morally allowed to avoid future duties by means of abortion certainly does mean that you have a (liberty) right to avoid future duties (by means of abortion). It is precisely this right that I assume women possess. The analogous right I defend on behalf of men is a (liberty) right to avoid future duties (by means of refusal).

The most interesting argument Humber gives against my view is his handicapped analogy, which merits a detailed response. His argument goes like this. Pregnant women are analogous to disabled persons. Pregnant women are faced with "morning sickness, doctor visits, doctor bills, work related problems, dietary restrictions, discomfort, dangers to the mother's health, and so on." These burdens are similar to the ones faced by disabled per-

sons, who have difficulty traveling, "competing for jobs, shopping outside the home, or contributing to society in any way that requires a great deal of mobility." Men are analogous to abled persons. The former do not have the burdens of pregnant women, and the latter do not have the burdens of the handicapped. Society has provided the benefit of special parking spaces for handicapped drivers. Despite the fact that this benefit tends to impose burdens on the nonhandicapped (e.g., they sometimes will have to park hundreds of yards away from shelter even when there is an open handicapped space), no one thinks that special parking rights for the handicapped are unjust. By parity of reasoning, no one should think that granting women a special right to avoid future duties (through the mechanism of abortion) but not granting men such a right (through any mechanism) is unjust. At least this seems to be his conclusion. He writes that "granting pregnant women a right to terminate their pregnancies clearly provides them with a means... for achieving certain benefits. However, this is an unintended and necessary consequence of ascribing the abortion right to pregnant women." Surely his second sentence is a misstep. Realization of these benefits is the entire motivation for caring about a right to abort, just as the motivation for parking rights for the handicapped is the realization of the benefits of not having to walk far, and so on.

This argument has several difficulties. The first is that the case of the handicapped is not genuinely analogous to pregnancy. To really make them analogous, we will have to imagine that every handicapped person in America could legally pay a few hundred dollars, undergo a low-risk surgical procedure, and thereby become completely able-bodied. The only handicapped people that would be left would be those that freely chose to remain handicapped, or those that could not afford the operation. We also need to suppose that no one is ever handicapped longer than nine months, even if they do not get the operation. At the end of nine months the disabled can give their handicap to the state and return to being able-bodied. Under these conditions—handicaps are always temporary and may be removed with a

medically minor operation—would we still feel compelled to provide special parking spaces? I doubt it.

Humber thinks that in the actual world the burdens and benefits accruing to the handicapped and nonhandicapped drivers are balanced out by granting handicapped drivers special parking rights. I grant this for the sake of argument. He also thinks that the burdens and benefits accruing to men and women are balanced out by granting women but not men a right to avoid future duties. This I deny, and argued against in my original paper. These arguments bear further elaboration. There are two types of burdens faced by the mother that Humber discusses: those associated with pregnancy, and those associated with childrearing. Let us consider them in reverse order.

The scenario imagined is that of an absentee father, who would have preferred that the mother get an abortion, and now grudgingly sends money under court order, and that of a hands-on mother who wanted the child and now must deal with all of the issues involved in raising it. Humber argues at length that the father's burden of child support is "paltry" compared with the burdens of childrearing faced by the mother.

The problem is that what Humber considers to be the burdens of childrearing shouldered by the mother are burdens in a loose sense only. Strictly speaking, they *are not properly considered harms or burdens at all.* The mother volunteered to support and raise the child by having it and keeping it, when she could have had an abortion or given it up for adoption instead. She freely chose the consequences of childrearing, presumably with fair knowledge of what these would be. Under the widely held principle that where there is consent there is no harm (the *volenti* maxim), these "burdens" of childrearing are not rightly considered harms, and she is not entitled to any redress for them. In short, the mother not only knew what she was getting into, but asked for it. The father, on the other hand, did not volunteer for anything having to do with the child and was coerced by the state to pay child support. Therefore his coerced support is a burden on him.[1] Thus the father is burdened and the mother is not—which seems manifestly unfair.

Humber's other account of maternal burdens focuses on pregnancy. Even though many women view pregnancy as a desirable state and a worthwhile experience (especially by those who intentionally continue with their pregnancies, as in the case we are imagining), I will provisionally grant Humber that it is a burden. The burden faced by the father is 18 years of child support. There are two problems. First, the father's burden is 27 times as long as the mother's, so it is pretty hard to see how imposing such a duty on the father constitutes just compensation for the mother. Second, again, the mother freely decided to continue with the pregnancy when she could have aborted and under the *volenti* maxim she deserves no redress.

To help illustrate this, let us consider an analogy to the handicapped more accurate than Humber's. Suppose Clark and Melinda are out driving—specifically, Clark is driving and Melinda is his (willing) passenger. As they cruise along, Clark nonculpably totals the car into a telephone pole (we can imagine that the roads are icy, or that the brakes failed). Clark is unhurt, but Melinda is temporarily paralyzed from the waist down. Given routine medical treatments and physical therapy, Melinda will be back to normal within nine months. Given more controversial medical treatments that cost a few hundred dollars more, she can be back to normal in a couple of weeks. Clark and Melinda both knew that driving is a risky activity, ice tends to form on road surfaces, and that brakes sometimes fail, and yet they both voluntarily chose to undertake the risk. It is certainly unfortunate that Melinda was injured, but I do not think that we want to say that it was unjust. Nor does it seem reasonable to write laws allowing Melinda to sue Clark and attach his wages as compensation for her injury. It does not become more reasonable even if we strengthen the analogy to pregnancy. Suppose that Clark is in fact Clark Kent and cannot be injured in car crashes, just as men cannot become pregnant. His invulnerability does not suddenly make him culpable for the accident or morally responsible for Melinda's condition. Let us imagine further that Melinda eschews modern medicine (on religious grounds, say) and refuses both the

routine medical treatment as well as the extraordinary one and so remains a paraplegic for the next 20 years. Even adding this parameter does not obligate Clark to support her or somehow make him liable for her paralysis. Indeed, I think we would consider it supererogatory of him to send her part of his paycheck every month.

The key feature in this case is choice. Melinda chose to run certain risks and chose to reject or accept certain medical treatments. It seems to me that this issue of choice is an important one for abortion liberals. Abortion, they say, should be allowed to provide women a choice in whether they become mothers even after they have become pregnant. We must be careful that admitting women a means of making their own reproductive decisions does not entail that they thereby make parental choices for others. This is all I am really arguing for—that men be permitted the same sorts of choices as women, and that no one else be allowed to decide for them whether they shall become fathers in a legal or social sense.

Note

[1]One might be tempted to make the blithe rejoinder that he voluntarily had sex and so did know what he was getting himself into. This move is a blunder for anyone hoping to hang on to principle (1) since it plainly paves the way for forbidding abortions—the mother, too, knew what she was getting into when she had sex. Why should she be allowed a way of escaping the consequences when he is not?

Part II

Introduction

Kathleen Ganss Gibson and Joe Massey begin their discussion in "Ethical Considerations in the Multiplication of Human Embryos" by describing two new reproductive techiques: blastomere separation and cloning. Next, Gibson and Massey contend that one's view concerning the moral propriety of these reproductive procedures will be determined by: (a) whether one accepts deontology or consequentialism in ethics, and (b) whether one believes the embryo is, or is not, human. Finally, Gibson and Massey survey the principal arguments for and against blastomere separation and cloning on each of the four assumptions included in (a) and (b).

Ethical Considerations in the Multiplication of Human Embryos

Kathleen Ganss Gibson and Joe B. Massey

Introduction

Although progress in the area of human reproduction continues to provide physicians and patients with increasingly successful means to solve infertility problems, significant difficulties remain. At present, no more than 30% of oocytes retrieved from a woman for in vitro fertilization (IVF) are likely to result in a pregnancy carried to term, with a national average term pregnancy rate of only 15.2% in 1991.[1] However, a significant number of women cannot produce an adequate number of oocytes during any one cycle to ensure a firm likelihood of one of the oocytes being fertilized, implanted, and carried to term. Although we have drugs to stimulate oocyte production, many women produce only one or two eggs per 28-day cycle, and with IVF procedures ranging from $8000–12,000 for each attempt, couples are often unable to repeat these procedures. Two new reproductive techniques, blastomere separation and cloning, are currently being considered as treatment for women unable to produce an adequate amount of oocytes. The blastomere is the cell of the early cleaved embryo at the 2–32 cell stage. In October, 1993, the George

Washington University Medical Center in Washington, DC reported having successfully duplicated genetically defective human embryos by blastomere separation.[2,3] Although the same procedure has not been attempted with normal human embryos, animal studies indicate that duplication of normal human embryos by blastomere separation is achievable.[4] Blastomere separation (dividing the cell at the 2–8 cell stage) and cloning (transfer of nuclei) of embryos could serve two main purposes: therapeutic, to increase the number of healthy children carried to term; and research, focused on such areas as improved methods of embryo preservation (freezing and thawing) and experimentation with substances known or suspected to be teratogens (birth defect-causing substances). However, there are ethical problems that arise with any manipulation of human embryos, the largest problem being whether any manipulation of embryos should be performed.*

Historically, blastomere separation for the purpose of producing multiple offspring began in the late 1950s in mouse embryos,[5] and later progressed to experimentation in sheep.[6] Experimentation with IVF originally began in the 1960s, although various types of experimentation with human embryos began much earlier, in the 1940s.[7] The first so-called "test-tube baby," Louise Brown, was born in England in 1978.[8] At that time, many ethical concerns were raised, and these continue today.

With respect to research on human embryos, a 14-day limit has been recommended as a cutoff point by advisory boards for any research activity on the embryo.[9] This stage in embryonic development was chosen for several reasons. First of all, the primitive streak, the progenitor tissue of the nervous system dividing the embryo into two distinct halves, develops by 14 days. Prior to formation of the primitive streak, an embryo consists of undifferentiated cells that will eventually become the placenta

*Much of the discussion in this area assumes that once an entity is determined to be a human being or a person, that it possesses all "human rights." For the sake of argument, we will use "person" and "human" synonymously and if an entity is human, it possesses all human rights.

and the fetus, although at this stage there is no differentiation. For many persons, this differentiation is of great moral significance, since prior to the primitive streak's development, the true fetal tissue is not recognizably different from that of the placenta's supporting cells, but is simply a mass of undifferentiated cells with no sentience. In addition, the nervous system's cells have not developed prior to the primitive streak's development, allaying concern that the preimplanted embryo could experience pain. The issue of whether an embryo (even prior to cell differentiation) is a human being remains, however, and is a major focus of the embryo manipulation debate.

The question of when human life begins, and when the embryo therefore possesses human rights, is difficult to answer. Doubtless, the egg and sperm are alive (although not generally considered indispensable), the group of cells that they form at conception is alive, and certainly the embryo and fetus are also alive. The question, however, that haunts those asking "When does human life truly begin?" is, as John Marshall states, one of "'When did I as a person come into existence?' rather than 'When did a certain stage in the biological development happen?'"[10] The answer to this question is one that will, in part, determine whether embryo manipulation is ethically permissible at any stage of development. Currently, the National Institutes of Health (NIH), the major government agency for medical research, does not fund research involving human embryos.

Assuming that the embryo is a human being, and so endowed with the same rights as a human after birth, there are arguments in support of manipulation as well as against it. Similarly, assuming that the embryo is not a human being, there are also arguments for and against any manipulation. Views on the ethical acceptance of manipulation of embryos can be divided into four broad categories:

1. Acceptable, since the embryo is not a human being;
2. Not acceptable, although the embryo is not a human being;
3. Acceptable, although the embryo is a human being; and
4. Not acceptable, since the embryo is a human being.

This chapter will discuss these four views based on rights and consequences.

We shall first describe the procedures of blastomere separation and cloning, then consider the ethical issues involved, and reach conclusions based on these arguments. Although it would be tempting to argue for one ethical position, prudence dictates that we refrain from doing so because it is unlikely that we will be able to argue successfully that the embryo is or is not a person without reopening the argument that has already been debated extensively. It is perhaps more beneficial that we see clearly the arguments and implications of the current technology and defer making claims on the nature of the embryo as a person, since such claims are open to debate.

Blastomere Separation

Blastomere separation involves the splitting of the embryo at the 2–, 4-, or 8-cell stage to produce two embryos with identical genetic material. The resulting two embryos would be the equivalent of identical twins that occur naturally, in which the embryo splits during the preimplantation phase and forms two embryos with the same genetic material.[11] The two primary uses for this procedure are IVF (therapeutic) and various research purposes.

Therapeutic use of blastomere separation involves increasing the number of available embryos for implantation after IVF when the number of suitable embryos is not adequate. Generally, three or four embryos are transferred following IVF. The woman who produces less than this number (despite hormones to stimulate production of mature eggs) could increase her chance of carrying a child to term through blastomere separation.[12,13] Mature eggs are retrieved from the woman, fertilized by the sperm, and then split to increase the number of embryos for implantation. If more embryos than necessary for implantation are produced, excess embryos may be stored for future use. Although successful implantation is not guaranteed with blastomere separation, having more embryos does increase the chance of implantation.[14]

Research involving the process of blastomere separation has numerous theoretical uses: the study of embryo maturation in vitro; detection of genetic defects; development of contraceptives; and the evaluation of the effects of known or suspected teratogens on the human embryo. The ability to study embryo maturation in vitro may make it possible to more accurately assess genetic or other developmental abnormalities in the embryo prior to implantation and may result in greater success rates for bringing an embryo to term following IVF. At present, physicians are not able to predict, prior to implantation, which embryos will continue development to term.[15] Study of the effects of teratogens on the human embryo could help to prevent abnormalities.

Cloning

"Cloning," as the term is commonly used in animal reproduction research literature, is the nuclear transfer procedure that results in a new individual with a set of chromosomes identical to the original cell from which it was taken. A clone of an embryo is produced by removing the nucleus (the structure in the cell controlling growth, metabolism, and reproduction, and that contains the genetic information for the cell) from the egg at an early stage and replacing it with another embryonic nucleus.[16] Although this process could produce multiple genetically identical embryos, the resulting individuals would vary slightly owing to different environmental conditions and differing genetic expression. A concern, however, is that at the present time, cloning in animals has been shown to result in an increased incidence of limb deformities.[17]

Therapeutic uses of cloning would be similar to that of blastomere separation. Increasing the number of embryos available for implantation could increase the chance of bringing a viable fetus to term. As well, if a large number of embryos could be produced, research could be performed on numerous experimental embryos, without relying only on donated spare embryos.

There are distinctions to be made between cloning (nuclear transfer) and blastomere separation. At this time, blastomere

separation is limited functionally to producing two embryos from one, where there is no direct manipulation of the nucleus and no combining of cell structures to form a new cell. In contrast, cloning, which involves nuclear transfer, has the potential to produce multiple copies. In addition, cloning is a much less efficient procedure than blastomere separation; there is a 3–31% chance of an embryo surviving successful nuclear transfer, and of these, only approximately 23% are likely to produce a live birth in animals. There is no reason to believe that cloning statistics for humans would be any better.[18,19]

Ethical Issues

Consideration of the ethical implications of embryo multiplication technology is needed prior to evaluating the efficacy of specific techniques. It is not appropriate to strive to perfect techniques, and then after employing them, to wonder whether what we did was ethical. Of course, efficacy of a particular technology would be a factor bearing on the morality of such practices; if the process were to progress to a point where it was safe and effective, then science would not be using the embryo to advance technology, but would be using technology obtained through embryo research to benefit mankind. We first, however, must examine the ethics of such technology. If the embryo is seen as a nonhuman, having none of the usual rights accorded human beings, the perception of ethics regarding manipulation and experimentation of the embryo is likely to be quite different than if the embryo is perceived as a human being.

The Embryo as Nonhuman

There are those who feel that because the embryo is not truly a person, that manipulation, in most instances, is justified. This position can be based on the balance of harm vs good for society and/or the lack of justification for avoiding such research and therapeutic interventions. Regarding the good of society, the perceived right to bear children can be seen as justification for increasing the ability to bear children. Feldman argues that if fail-

ing to perform an act causes harm, then not to perform the act would be morally wrong.[20] This would apply to those who believe that humans have an inalienable right to bear children, and that not to be permitted to do so would cause psychological harm to those involved. Siegel (1992) states that one of the basic human rights is the right to bear children, and that this "desire to perpetuate the race" is an attempt to lessen the fear of mortality.[21] In fact, Siegel goes on to say that society has a responsibility to ensure that parents are financially supported, if necessary, in their quest for children. If we are to interpret Siegel as saying that the ability to bear children is a right, required to be provided by society, if necessary, then he believes that research on the human embryo is not only justified, but morally required, since many solutions to human infertility are currently unknown. The right to bear children is not, however, an absolute one; there are some situations in which that right may be overridden. This right to bear children is a *prima facie* one, in that it is a right that may be set aside if the consequence of producing children produces more pain than the suffering that may be experienced with infertility.

To determine whether manipulation of the human embryo should be permitted, the burden of proof is on those who believe that this manipulation should not be permitted. If we assume that the embryo is not a human being, and is without the rights accorded a human being, then the argument against embryo manipulation does not stand up. The good that could arise from therapeutic uses and research, for both parents and embryos themselves, potentially outweighs objections to such manipulation. Further justification for not performing embryo manipulation is needed.

Most persons who accept that research on the embryo is justified, however, do not agree that any and all research should be permitted. Conditions required for acceptable research are often cited as:

1. Morally acceptable goals of the research;
2. Research only for clinical or therapeutic purposes;
3. Research for "important scientific purposes" (i.e., research to obtain information that cannot be acquired through research using animals);

4. Informed consent from individuals donating embryonic cells;
5. Research performed on spare embryos only, and not on embryos produced solely for the purpose of research; and
6. No research on embryos beyond the development of the primitive streak.[22]

If the embryo is not perceived as a human being, rights based on "humanness" do not exist. Also, one can argue that some humans do not possess rights equal to others (e.g., persons in an irreversible coma). From this viewpoint, limitations of manipulation based on rights do not exist, provided that those with the authority for decision-making consent to such manipulation.[23]

There are still others who feel that although the embryo is not considered a human being, we may have cause to conduct research on it, although we are not justified in manipulating it for all therapeutic and research purposes. This is generally based on the belief that any condoning of embryo research will likely lead to uncontrolled manipulation of embryos; or although the human embryo is not accorded the same rights as a human being, it should be given a "special moral status," because of its innate humanness.

Objections to manipulation of embryos are often based on the argument that once even the most simple procedure of this type is permitted, there will be little control over other experimentation and manipulation that would occur using embryos and fetuses, such as total artificial reproduction.[24,*] There is little support for this objection; it is the logical fallacy referred to as the "slippery slope." Various regulatory bodies are currently in place to control and monitor both therapeutic and research procedures in this area, particularly since it involves susceptible subjects. Thus, manipulation of the embryo for both research and therapeutic purposes would be conducted following set guide-

*Although the possibility for harm specified by Robertson for embryo research is logically possible, ethics committees, advisory panels, and various regulatory bodies are currently in place to control and monitor both therapeutic and research procedures in this area, particularly since they involve susceptible subjects.

lines, without the consequences envisioned by the "slippery slope" objection.

Another objection from those opposed to manipulation of human embryos is based on the belief that the embryo should be accorded a special moral status, in light of the fact that the embryo is human tissue, with human potential. Let us examine these reasons. The human embryo is decidedly different from any other type of tissue, be it other human tissue, or that of an animal or plant. This difference includes the potential that human embryonic tissue has to become a human being. It is true that other tissues have the potential to become, for example, trees or dogs, but it is generally accepted that a human being is of greater importance than a tree. From this point of view, the embryo is worthy of respect "greater than that accorded to human tissue but not the respect accorded to actual persons."[25] From a consequentialist perspective, however, manipulation can be justified from a "greatest good for the greatest number" perspective, although some embryos are lost through therapeutic or experimental manipulation. Simply because a number of embryos are lost, does this mean that there is a lack of respect or consideration? It must be decided what constitutes special consideration and how this equates with the lack of human pleasure (or good) that results from the ability to bear children.

The Embryo as Human

There are those who believe that both therapeutic and experimental procedures involving embryos may be allowed, although the embryo is seen as a human being. This belief is based on the consequences of these actions for the individual involved and the consequences of these actions for society as a whole. The deontologist will find no justification for manipulation that may result in the destruction of the embryo for any purpose. In contrast, the consequentialist may find justification for manipulation, although the embryo is perceived as a person, in the principle of utility: If performing an act causes more overall good than harm, then performing the act is morally correct, or at least permissible

(i.e., performing the act has greater utility than not performing the act). The consequences of performing embryo multiplication for therapeutic purposes could result in large numbers of otherwise childless couples experiencing parenthood. Further, research with embryos produced through blastomere separation or cloning would allow for progress in areas such as IVF, including in vitro embryo maturation, detection of genetic defects, and effects of teratogens on the embryo. Success in these areas could lead to additional progress in treatment of persons with fertility problems. The possible good produced through the ability to alleviate the suffering of society as a whole through the reduction of infertility can be seen as the greater good for the greater number.

With respect to the reproductive technologies in general, Roy, Williams, and Dickens cited the beliefs expressed in both Anglican and Roman Catholic publications in the 1980s that the separation of procreation from the human sexual relationship was fundamental in threatening the integrity of the human person.[26] Although the American Fertility Society and the Roman Catholic Congregation for the Doctrine of the Faith agreed on the criteria that "the integrity of the human person and the human good" should be used to evaluate reproductive technologies, the two groups disagreed completely on the ethical acceptability of such technologies.[27] The American Fertility Society based its analysis on "inductive and experiential" methods (consequentialist view); the Roman Catholic congregation based its analysis on "deductive and authoritative methods" (deontological or nonconsequentialist view).[28] As a result, the Roman Catholic Congregation felt that any interference with natural procreation was not ethically acceptable, because such technologies interfere with the natural conception of a child through sexual intercourse. The American Fertility Society, in contrast, did not understand why "conceived as a fruit of parental love," as stated by the Roman Catholic church, should necessarily mean conceived through sexual intercourse.[29]

Another point of view is that the concept of manipulation of the human embryo for any reason, either therapeutic or experimental, is unacceptable. This can be based on:

1. A belief that life, in its basic form, should not be tampered with;
2. A belief that human embryos should not be used for research;
3. Lack of informed consent; and
4. Harm vs good for society.

The belief that life should not be manipulated in any "unnatural" way is a foundation for much of the concern about embryo manipulation. It does not follow, however, that anything "unnatural" is necessarily not beneficial, and that the "natural" way is the best way. For example, advances in science that allowed for vaccines and treatments of diseases are not "natural," but would certainly be seen as beneficial and preferable to succumbing to the diseases that naturally occur. Similarly, IVF is not a "natural" procedure, although it is generally considered a beneficial treatment for infertility.

Many concerns regarding research manipulation from the deontological or nonconsequentialist perspective hinge on a fundamental objection: that human embryos should not be used for research simply because they are human. Further, because research would result in the embryo being unable to fulfill its potential for life, some claim that experimentation should not be permitted.[30] As Marshall has noted, the deontological perspective rejects any experimentation that results in the destruction of the embryo, since according to this view, to do so would result in the death of a person.[31] Concerning embryo manipulation for therapeutic purposes, deontologists would find no justification in sacrificing any embryo for the sake of producing further embryos. This manipulation of human life could have no benefit from the strict deontological perspective. In light of these objections, neither embryo research to improve IVF procedures nor therapeutic manipulation would be permitted, since both could result in death of the embryo.

Informed consent is a central issue if the embryo is considered to be a human being. A basic prerequisite for any manipulation of a human being for research or therapeutic intervention is that the individual involved, or a designated surrogate, give con-

sent to such intervention. To those who believe that the embryo is a human being from the moment of conception, possessing rights equal to that of a human following birth, the question of embryo manipulation is not an issue, since the embryo is unable to give consent, and to manipulate the embryo without its consent would be morally wrong.[32] However, what is often overlooked is that the woman is also deeply involved in the process; the embryo is not the only consideration. From a consequentialist perspective, both the benefits for the woman and the embryo must be considered. As Gaze and Dawson discuss, a major consideration is whether the interests of the embryo should prevail over those of the woman.[33] If this is so, there will be incongruencies at times between the rights and interests of the woman and those of the embryo, with regard to both research and therapeutic procedures. Further, although the embryo is unable to give consent for any manipulation, it is accepted practice to allow proxy consent (i.e., parental consent) for minors for both therapeutic and research purposes.

The concept of harm vs good for society is of great importance from the consequentialist perspective. For those who hold the belief that the embryo is human, the therapeutic manipulation that results in duplication of the embryo, or research that furthers such technology, may be deemed acceptable. This potential to increase the chance for couples to have children through natural means or standard IVF does not directly benefit the embryo, however, unless one considers that such manipulation might increase the chance of the embryo actualizing its potential should implantation occur. Since manipulation in an attempt to increase the number of embryos for implantation could result in the direct destruction (or inability to implant, with subsequent destruction) of even one embryo, this manipulation could be seen by the consequentialist as unjustifiable. The right to bear children is not necessarily an absolute right, but is a *prima facie* right: A person has a right not to be prevented from having children without good reason. The societal implication in this instance would require consideration of both the good for parents as a whole in society,

as well as the impact of allowing the sacrifice of a certain number of persons for the benefit of a number of others, in which case the greatest good for the greatest number would be the overriding influence in the decision.

Psychological Considerations

With any advancement in technology regarding human multiplication, consideration must be given to the psychological impact of this technology on those individuals involved, and not only to the technical aspects of such technology. Practices such as embryo multiplication could result in donation of spare embryos, bringing with it considerations of the effect on the resulting offspring. The separation of production of the ovum, manipulation and conception, and birth of the ovum, theoretically could occur in separate individuals (such as with egg donation), and separate the usual direct parent–child social relationship. With such practices as egg and sperm donation, embryo multiplication (through blastomere separation or cloning), cryopreservation, and delayed gestational completion, unusual relationships may be set up where, for example, the resulting offspring could have both a biological mother (the egg donor) and a social mother, a biological father (as well as possibly a different social father), and a genetic twin separated gestationally by several years. Situations such as these pose significant psychological considerations. As Roy et al. state, "The transformation of traditional reproductive behavior and reproductive values, rendered possible by various applications of the reproductive technologies, jostle the biological and social foundation of personal identity, of parenthood, marriage, and family."[34]

Although it is difficult to speculate what the impact on both individuals and society as a whole will be, significant consideration is justified. As Roy et al. claim, there is reason for concern regarding the impact that new technologies, such as embryo multiplication, may have on the resulting children:

> These bonds linking a child with nature and history are not insignificant. One's genetic history links one to a network of persons. Grandparents, great-grandparents, and the collateral relationships of uncles, aunts, cousins, are integral strands in the pattern of human connections essential to one's sense of personal identity.[35]

Conclusion

The strength of the arguments involving multiplication of embryos can only be analyzed in the context of whether the embryo is perceived as a human being; the conclusions based on these perceptions will be dramatically different. The risks of embryo multiplication should not be taken lightly. The physical risks to the mother and embryo inherent in egg retrieval for either cloning or blastomere separation are similar to those in IVF. However, the physical risks to the embryo following cloning can be significant. Blastomere separation, at this time, appears to pose little additional physical risk to the embryo. Psychological issues must also be taken into consideration. It is unknown what the psychological ramifications of human embryo multiplication will be. The potential for difficulty is likely to be similar to that of IVF, which has not been shown to be a significant problem. It is not appropriate to dismiss such technology simply because an adverse effect *may* occur. It is possible that the psychological effects of blastomere separation or cloning will be very similar to that of IVF. However, in light of the fact that cloning has been shown to have greater inherent risks than blastomere separation or IVF in general, it would not be prudent to pursue any studies of human cloning at this time.

With respect to the embryo as a nonhuman, the most convincing conclusion that can be derived is that although multiplication may be justified based on the consequentialist perspective, the embryo, being composed of human tissue with human potential and having risen from human beings, should be given a special moral status. This allows for both research and therapeutic manipulation, while it maintains that not all manipulation is

acceptable. The guidelines for manipulation must be based on the fact that the embryo is human tissue, with human potential, and must be treated as such.

If the embryo is perceived as a human being, the most viable conclusion that can be drawn is that embryo multiplication is not justified, based on the fact that the right to procreate is a *prima facie* right and not an absolute right, and the consequence of much of this manipulation (the destruction of large numbers of embryos) is not consistent with the rights that human beings possess. From this perspective, technology that allows the multiplication of human embryos has no overriding justification because there is no absolute need to create children at the expense of others, particularly in light of the fact that the embryo, as a human being, has no part in the informed consent process. The pleasure and good for society that could be achieved through increasing the ability of couples to bear children is an important factor to be considered, although it is not the only consideration. It is accepted that the acquisition of knowledge is good, and that the freedom of inquiry should be preserved. In this respect, the limitation of these should only occur with good reason.

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Introduction

Much of the ethics discussion regarding in vitro fertilization (IVF) has focused on the process itself and on the social implications of human reproduction through the use of this technology. A different sort of ethical question is being addressed here: In a just and caring society, under what circumstances would IVF be provided as a part of health care coverage?

Although a strong case can be made for recognizing a basic right to some level of health care, justice does not require that medical assistance for reproduction be provided to everyone who seeks it and could benefit from it. There is no basic right to have a baby. On the other hand, if safe and effective means do exist to assist infertile persons have children of their own, a just society will make those means available through the health care system (provided other health care treatments that have a higher priority do not consume all of the limited resources).

A review of the criteria for allocating limited resources suggests that a major emphasis should be placed on how effective a medical intervention is in treating the problem. If the findings of the Canadian Royal Commission on New Reproductive Technologies are correct, there is only one indication for which IVF is sufficiently effective to rate very high in any priority listing: as treatment for complete fallopian tube blockage.

In Vitro Fertilization and the Just Use of Health Care Resources

Leonard J. Weber

Introduction

One of the ethical questions raised by the development of new human reproductive technologies is the social justice question of the circumstances under which these techniques should be services that are provided in health care plans. In a just and caring society, when would these services be available to whom?

Presuming that there are patients and physicians who find a new procedure for fertility enhancement ethically acceptable and who think that it may be of value to try it in a particular case, there still remains the question of how central or fundamental to the provision of health care it should be considered. Is it to be considered necessary care? Is it even appropriate use of health care resources?

The reproductive technology considered in this chapter is in vitro fertilization. Before turning to the specific question of what justice requires in regard to access to IVF, however, it is important to reflect more generally on patient rights and on the appropriate criteria for allocating limited health care resources.

Patient Rights

Much of the emphasis in health care ethics during the last generation has been focused on patient rights. The emphasis on patient rights has led to a more extended understanding of some patient prerogatives than previously acknowledged. It has become widely accepted, for example, that, except in unusual circumstances, an informed patient's refusal of unwanted medical treatment should be respected, even if the treatment is likely to be quite beneficial and even if the patient may die as a result of refusing the treatment. A patient's right to informed consent means that she or he should not be treated without permission. This is much more clearly recognized now than it was a generation ago.

Not every claim to a right is of the same sort, however. It is one thing to claim that we all have a basic right to refuse unwanted medical treatment. It is something quite different to claim that we all have a basic right to a medical treatment or technology simply because we think it would meet our needs or wants. These are very different claims about rights.

The right to consent to, or to refuse, proposed treatment is best understood as a negative right. It is a right to be left alone, a claim not to be coerced or compelled or interfered with as one lives according to his or her beliefs and values. A physician may not agree with my decision to refuse treatment. She or he may, in fact, think that I am doing myself great harm and may try to persuade me to change my mind. But, if I am not harming someone else and understand the consequences of my decision, I have a justifiable claim that others let me act according to my understanding of what is best for me. This right is closely related to the right to freedom of worship or to freedom of speech. The claim is that others should let me live and express myself according to my own values.

The recognition that we have basic negative rights does not take us very far in understanding the legitimate claim that patients can make on society to have certain health care services available. This is a different sort of claim. Negative rights are based on the

need that we all have for self-determination and for privacy. Positive rights are claims that we legitimately make on society that certain needs be met or certain services be available for our use. To claim a positive right is to claim that others have a responsibility to facilitate one's claim, not simply to leave one alone. These rights are based on the recognition that social goods should be distributed in a way that meets everyone's basic needs. They are based on the principle of justice rather than on the principle of self-determination.

To claim that everyone with a certain condition has a right to medical treatment (or a particular type of medical treatment) is to assert a positive right. It is to say that, if society is be just, it has a responsibility to make that treatment available. The emphasis given in medical ethics on a patient's negative rights, such as the right to refuse proposed treatment, has no implications whatsoever for the question of whether society has an ethical responsibility to make a certain type of medical technology available.

John Robertson has argued that there is a close connection between traditional concepts of reproductive freedom and the right to assisted reproduction. He says, for example, that infertile couples have "the same right to have and rear offspring through the assistance of medical technology that fertile couples have through sexual intercourse." This comparison confuses rather than helps to understand the issue, it seems to me. The right to procreate should primarily be recognized as a negative right, the right to make one own decisions regarding whether or not to reproduce. That is very different from a right to medical assistance in reproduction or the right to have a baby. It is confusing a negative right with a positive right. If we come to recognize that persons do, in fact, have a legitimate claim (a right) to demand medical assistance in human reproduction, it would be because we have determined that the right to reproduce is a positive right. That recognition does follow automatically, however, from the traditional recognition of the negative right to reproduction.

No Consumer Sovereignty

Justice does require that certain health care services be made available to those who can benefit from them (even if they may not be able to purchase these services). In this sense, there is a positive right to a level or type of health care. There will be further discussion of this a little later, but first it may be helpful to try to address another potential source of confusion.

Although market mechanisms are often used in the provision of health care, the model of a private economic exchange is not very helpful for understanding what are appropriate claims that patients can make. Patient claims for services should not be confused with "consumer sovereignty." The concept of consumer sovereignty suggests that customers are always right; they can have whatever they want, provided, of course, they can arrange payment. Consumer sovereignty may make good sense when talking about private marketplace purchases of commodities. It does not serve as an adequate principle, however, when individuals seek services from professionals or when we as a society determine what sorts of professional services should be available to the public, or when decisions are made about what services should be covered in a health care plan. I can choose a blazer that the salesperson thinks will not "do anything" for me. I cannot (and should not be able to) choose a surgery that the surgeon thinks will not "do anything" for me.[2]

Respect for patient rights does not mean that patients should be able to get whatever health care services they want or are convinced that they need. It does not mean the recognition of a right to demand and get what is not considered medically appropriate or what is judged contrary to professional ethics. It does not mean that one has a right to demand "everything" and get it. A just health care system is one that seeks to base decision-making on need, on benefit, and on a consideration of alternative uses of resources. George Annas has claimed that professional associations have failed in their responsibility to establish criteria for the appropriate use of assisted reproduction techniques and that this

failure is the result, in large part, of the acceptance of a market-consumer model:

> Current practice is to provide consumer-patients whatever they want (and can pay for), rather than to attempt to develop a professional model that sets meaningful practice and ethical standards or that takes the welfare of resulting children seriously.[3]

Whether Annas' judgment about current practice is correct or not, the concern is very much to the point. There is a problem when professional services are provided as though they are simply consumer items.

Health care is best thought of as a social or public good that should be used to meet the health care needs of the community. Even in the United States, where there is a strong effort to maintain a private dimension to health care, many practices reflect this public dimension. The government invests in and subsidizes health care extensively (in medical education, research, and facilities, for example); the state licenses those who are permitted to practice in the health professions; the public provides health care for (some of) those who are unable to meet their own needs. What should be available to individuals in the health care system is, at least in part, a question of the appropriate use of public resources. The market model of simple exchange between private parties is not adequate.[4]

If patients are not consumers who can have whatever they want and are able to pay for, what are the legitimate demands that patients can make? In a just and caring society, individual patients:

1. Have a legitimate claim to a basic level of health care; and
2. Have a legitimate claim to their fair share of limited resources; but
3. Have no legitimate claim to treatment judged by professionals to be nonbeneficial; and

4. Have no legitimate claim to treatment that is being withheld as part of a just rationing or allocation system.

This formulation is proposed as one way of expressing the nature and limits of the patient's positive rights in health care. It provides a framework for reflecting on the question of whether justice requires that a particular medical procedure be available to those who find it ethically acceptable.

Allocation of Limited Health Care Resources

Society is not able or willing to invest all the resources necessary to provide everyone with all potentially beneficial treatment. Furthermore, there are limits on what we as a society ought to spend on health care, given other social goods (like education, safety, recreation, economic security). We cannot have everything; we must make some choices. Health care rationing, the policy of limiting the availability of potentially beneficial treatment, is a necessity. It is both a practical necessity and a moral necessity.

Once we acknowledge that everyone cannot have all potentially beneficial treatment, we are faced with the question of how to decide who gets what. This is the question of the just allocation of limited health care resources or the question of just rationing. One method is to let the market make this determination: Those who are able to pay the market price have access to particular treatments, those who cannot do not.

A market-based allocation of limited health care resources is usually not referred to as rationing, but it is clearly a method of deciding who gets what limited resources. I think that we can find a better approach to rationing, one that meets justice standards more satisfactorily.

Respect for the dignity of each individual is the essential foundation of a just and caring society. Respect for human dignity means that all of us, regardless of our power, our race, our abilities, our achievements, or our financial resources can make binding claims on others and on the society in which we live. We can make a legitimate claim that our fundamental freedoms be respected

(negative rights), and that our most basic and essential needs be met (positive rights). There is something fundamentally and morally wrong when they are not.

As a society, we have a responsibility to assure that persons do not starve or suffer serious malnutrition simply because they are unable to buy food, that they do not freeze to death or live without shelter simply because they cannot pay rent, and that they have an opportunity for basic education even if they cannot buy education. Meeting these needs is indispensable to the protection of human dignity. So also, I think, is access to a basic level of health care. A just society assures access to a basic level of medical care and to a basic level of public health services, even if one cannot afford to buy health care.

The very first principle of just allocation is, therefore, that *a basic level of health care must be provided for everyone.* The requirement that everyone be assured access to a basic level of health care does not mean, of course, that everyone must have access to all potentially beneficial treatments or all the treatments that he or she wants, just as the right to education does not mean a right to unlimited education or to whatever type of education one desires.

The second principle is a response to a different concern. Before withholding any treatment that has a reasonable expectation of some benefit, it is important that limited resources not be wasted on nonbeneficial treatments. Justice requires that *no one be provided treatment that is expected to be futile or nonbeneficial.* Where research and experience indicate that a patient at a certain stage of a particular condition is, in the best medical judgment, not going to benefit from a particular intervention, it should not be done, even if the patient or family insists that it be done. Professional standards should clearly not permit such health care delivery and a just health insurance should not include it as a covered service.

Just Rationing

Basic health care should be provided for everyone; nonbeneficial health care should be provided for no one. The third category is treatment that is not required as basic health care (essential to

minimal respect for human dignity), but may provide benefit. Limited health care resources are not so limited that none of the potentially beneficial treatment that goes beyond the basic level can be provided. On the other hand, the limited resources are not so vast that nearly all of the potential beneficial treatments can be provided for everyone. It is in this third category that we must make the hard decisions regarding what should be available for whom.

The third principle of just allocation is that *allocation criteria for potentially beneficial treatment should be established in a public and democratic (open) process.* There are a variety of possible methods to be used to determine who gets what when not everyone can get everything. It is essential that the decisions be made as policy decisions and not by individuals "at the bedside." It is also essential that the process of setting policy be one that permits all those affected to have the opportunity to know what is at issue and the opportunity to have their points of view considered.

This is a requirement for a fair or just procedure. What is ethically unacceptable is what is sometimes referred to as implicit or invisible rationing. Fair policies and practices are ones in which nothing needs to be hidden.[4]

A good rationing policy requires the determination of how high a particular treatment is in a priority listing. As a caring society or as a group of caring persons joined together in a common health care plan, we would like to have as many potentially beneficial treatments available as possible. Since we cannot provide all treatments for everyone, however, it makes sense to cover first those that have a higher priority.

A statement of proposed priority principles may be helpful in identifying the kinds of questions that need to be answered when making decisions about how high a priority a particular treatment should have in the allocation of limited health care resources. Such principles might include the following:

1. Treatment that, if successful, provides a significant benefit to the patient takes priority over treatment that, if successful, provides only marginal benefit.

2. A treatment that can benefit many persons generally takes priority over a treatment that can benefit only a few.
3. A treatment that is less expensive generally takes priority over a treatment that is more expensive.

These first three principles are simply different expressions of the belief that it makes good ethical sense to try to get as much benefit as possible out of limited resources. It is reasonable to try to achieve as much good as possible.

It is also important to include priority principles that help to minimize bias and the influence of the powerful in the determination of who should get what. For example:

4. Allocation decisions should not be made on the basis of who personally "merits" or "deserves" treatment.
5. Special consideration should be given to prevent a major negative impact of allocation decisions on persons with disabilities or on those who are the least powerful members of the society.

These last principles are necessary to reduce the likelihood that efforts at democratic decision making will lead to the implementation of widely shared negative biases or to decision making simply for the majority. True democracy protects the interests of all the people, including those who are not vocal in speaking for themselves.

There is no guarantee, of course, that an open and public process for establishing rationing policy will adopt principles or guidelines like the ones that I have just proposed. The discussion that follows regarding coverage of in vitro fertilization in a just allocation system is, however, based on these principles as well as on the understanding of patient rights outlined in the preceding.

IVF and a Basic Level of Health Care

Whether the in vitro fertilization process, as used, is so ethically questionable and so filled with serious negative social implications that it should not be permitted at all is a question that is

beyond the parameters of this chapter. The assumption here is that it will not be prohibited in all cases and that there will continue to be infertile couples who personally find this an ethically acceptable method to use in trying to achieve parenthood. In these circumstances, when should it be an insured service?

Applying the general approach to just allocation of health care resources outlined earlier, the first question that must be asked about IVF is whether it should be understood to be part of the basic level of health care that should be provided for everyone.

If the right to have a baby is a positive human right, then society has a responsibility to provide services like IVF to all those who desire them and could benefit from them. I do not think, however, that a convincing case can be made that becoming a parent is necessary in order to meet basic human needs. It is certainly very important to many individuals and couples, but it does not rate as essential to human dignity in same way that food and shelter do. As was suggested earlier, and as Mary Mahowald concludes, it "seems clear that the right to have a baby is at most a... negative right of individuals."[5]

To say that there is no basic right to medical assistance to have a baby is not to say that such medical assistance should not be available at all. It is simply to say that a health-care allocation plan without guaranteed access to this service for everyone is not, by that fact, unjust.

Sometimes the term "medically necessary" is used to describe the procedures that should be included in a basic health insurance plan. The problem with the concept of medical necessity is that it can be a very elastic term. Physicians sometimes say that a patient "needs" a particular treatment when they mean that the patient will suffer serious harm without the treatment and that, with the treatment, there is a good possibility of preventing the harm. They sometimes say that a patient "needs" a particular treatment when they mean that the treatment may or may not help, but is the only medical intervention available. For "medical necessity" to be a useful term for what types of medical treatments should be provided for everyone, we need greater clarity and precision regarding the meaning of the term.

In an article focusing on the meaning of "medical necessity" in mental health care, Sabin and Daniels consider different ways of understanding the concept.[6] Although their focus is on mental health care, their discussion may be helpful in reflecting on a condition like infertility. In particular, I find the distinction made between the "normal function model" and the "capability model" of medical necessity an important one.

> In the normal function model, the central purpose of health care is to maintain, restore, or compensate for the restricted opportunity and loss of function caused by disease and disability. Successful health care restores people to the range of capabilities that they would have had without the pathological condition or prevents further deterioration.[6]

It is not the fundamental purpose of health care to try to correct all disadvantages, according to this view. Thus, health care insurance coverage should be focused primarily on those disadvantages caused by disease or a specifically diagnosed disability.

In the capability model, health care should strive to give greater opportunity to people of diminished capacity, whatever the cause of the diminished capacity. "The capability model makes no moral distinction between treatment of illness and enhancement of disadvantageous personal capabilities."[6] The very fact that one is disadvantaged in the ability to function is sufficient reason to say that treatment is medically necessary.

Sabin and Daniels argue that a well-grounded understanding of medical necessity is essential for the development of a just and practical system of health insurance in an age of limited resources. They conclude, and I agree, that the normal function model provides for a better understanding of medical necessity. Although there are important moral considerations in the capability model (society should be concerned about assisting those with disadvantages), the concept is too broad to distinguish between what health insurance should necessarily cover and what might be considered optional. Enhancing human capabilities is an important social goal, but health care is not the only way in which society should respond to the disadvantages of individuals.

There may well be situations in which health care technology can and should be used to enhance fertility. The point here is simply that the fact of infertility does not itself make such treatment medically necessary or one that should be covered as a basic service. As George Annas has noted, new technologies can quickly get perceived as medically necessary: "Thus it was not surprising to see the indications for IVF expand quickly from an initial indication of blocked fallopian tubes to a point where idiopathic infertility is a sufficient indication."[3] When we are unable to make a distinction between what is necessary and what is desirable, it is very difficult to place any reasonable limits on the kind of health care that must be provided to everyone in order to provide necessary care.

There is no basic right to assisted reproduction. It is not medically necessary to provide IVF in every case where it might be considered an option for infertile couples seeking parenthood. Society's responsibility to meet everyone's essential and basic health care needs does not require guaranteed access to IVF.

IVF and the Rationing of Health Care

To recommend that IVF not be part of basic health care guaranteed to everyone who can benefit from the treatment is not to say that IVF should never be available for anyone. I agree with the conviction expressed by the Canadian Royal Commission on New Reproductive Technologies: "if ethical, safe, and effective medical procedures are available to assist people to have children, a caring society should provide them through the health care system."[7] I would add an additional qualifier that the Commission also uses in its work: provided these medical procedures are not overly costly.

Infertility is a serious misfortune for those who would like to have children. Although it is essential to evaluate the ethical nature and the social effects of the methods used to assist those who are or appear to be infertile, the goal of improving their chances of having children is a highly desirable one.

IVF was originally used to assist in reproduction for women who have fallopian tube blockage resulting from disease. Over the years it has come to be applied in a much wider variety of indications (such as unexplained infertility, ovulation defects, endometriosis, and menopause). The Canadian Royal Commission researched the effectiveness of IVF and concluded that: "despite the proliferation of its use for other diagnoses, we found that IVF has been demonstrated to be effective only for the indication it was originally developed to treat — fallopian tube blockage."[7] The criterion for effectiveness used was that IVF should be considered effective if couples with IVF had a greater likelihood of having a live birth than infertile couples who did not undergo IVF.[7]

The Commission adopted the concept of "evidence-based medicine" for its work. Medical practice should be based on knowledge gained from evaluation of treatments and their results. It is not enough that there is a problem that a particular intervention "might" help. The Commission took a strong stand in regard to the use of procedures that have not been proven effective:

> It would be unethical...to offer services or assistance in the form of unproven procedures or treatment. It would be irresponsible to devote public resources to such procedures in the absence of knowledge about their risks and effectiveness, and about their costs and benefits relative to other approaches to solving the problem and other calls on available resources.[7]

Applying this principle to IVF, the Commission concluded that it is "unethical and unsafe to permit IVF to be used as a treatment for indications for which it has not been found effective."[7] The use of IVF for other diagnoses than complete fallopian tube blockage should be restricted to research trials to determine effectiveness and safety. In the future, there may be reason to expand the number of approved uses of IVF as a treatment, but not at this time. The Commission recommended that IVF as a treatment for complete fallopian tube blockage be covered by provincial health insurance plans.

Although the Canadian Royal Commission is making its recommendations in a health care system that is very different from the one in effect in the United States, it might well be followed in determining when health care plans in the US should cover IVF. The Commission's principles and criteria for the allocation of health care resources are quite similar to those advocated in this chapter. Treatment that does not provide a reasonable expectation of benefit should ordinarily not be provided. Treatment that does have a reasonable likelihood of providing a significant benefit should be quite high in priority listing.

If the Commission's findings on the effectiveness of IVF are accurate, it seems reasonable to conclude that a just allocation of health care resources would include IVF in cases of complete fallopian tube blockage as a covered treatment, if possible. That is, it would be covered unless available resources are such that, when compared with other desired health care treatments for other problems in terms of cost, benefits, effectiveness, and number of persons affected, it cannot be afforded. Although it is desirable to cover IVF in these cases, no one's rights are being violated if it is not.

If the Commission's findings on the effectiveness of IVF are accurate, IVF as a treatment for the other indications for which it is sometimes used would not be covered as a just health care plan at this time. Until there is evidence that IVF is truly effective for some other indication, it would be extremely hard to justify using limited health care plan resources for its use.

There remains, of course, one other option available to some infertile couples who are considering IVF for noncovered indications: the private pay/private clinic option. This remains an option, but not, it seems, one to be enthusiastically promoted. Reasons to hesitate regarding the use of IVF as a privately paid option, outside the health care plan, include the lack of evidence regarding the effectiveness of IVF for most diagnoses of infertility and the commercialization of reproduction that may result from purchasing IVF outside shared health care plans.

Conclusion

A just and caring society would make medical assistance available through the health care system to infertile persons who want to have a baby, if the methods used do not undermine important social and ethical values, the methods used are safe and effective in achieving their goals, and this use of health care has a high enough priority when compared with other types of safe and effective medical treatments.

The question of the social and ethical impact of IVF technique and the actual ways in which the procedure is used has not been addressed here. The conclusion proposed here is that, even if we are satisfied that ethical and social considerations should not lead to the prohibition of the use of the technique, IVF can claim a relatively high priority only as a treatment for complete fallopian tube blockage.

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Introduction

In "The Morality of Selective Termination," Walter Glannon discusses the moral significance of a recent issue in reproductive medicine. Multiple gestations, caused either by the use of fertility drugs or in vitro fertilization, pose significant risks both to the fetuses and to the pregnant woman carrying them. Glannon argues that medical reasons for selectively terminating some fetuses can be justified on moral grounds, but only if those grounds are spelled out in consequentialist rather than deontological terms. On this view, fetal reduction is likely to minimize overall harm at the same time that it maximizes overall benefit, given the risks in a multiple pregnancy. In addition, Glannon argues that we can justify the pregnant woman's decision to undergo fetal reduction by appeal to the imperfect duty she has to the fetuses, which shows that there is no real conflict in the maternal–fetal relationship in such cases. More generally, the discussion shows how numerical considerations can affect our choices and actions that have morally significant consequences.

The Morality of Selective Termination

Walter Glannon

Introduction

One of the most morally vexing issues to have arisen in reproductive medicine recently is that of selective termination. In this procedure, the number of fetuses in a multiple pregnancy is reduced for sound medical reasons.[1] In vitro fertilization (henceforth IVF), followed by the transfer to and subsequent implantation of embryos in the wall of the uterus, as well as the use of fertility drugs, may lead to multiple gestations. These pose significant risks both to the fetuses and to the woman carrying them.[2]

The risks involved in a multiple pregnancy of, say, four fetuses, recommend that fetal reduction of two through selective termination is the most viable alternative to the complications that are likely to arise in trying to bring all four to term. My aim in this chapter is to examine the extent to which the numbers involved in weighing probable benefit against probable harm figure in the moral evaluation of selective termination. In particular, this issue bears importantly on the moral and legal aspects of the maternal–fetal relationship. More generally, in presenting this case I illustrate how numerical considerations can play a significant role in situations of moral conflict, a role that tells against deontological intuitions concerning the loss of potential and actual lives.[3]

Rationale and Risks

Ordinarily, infertility is the reason why couples initiate the process that leads to multiple gestations, which can result from either of the two main treatments for the problem. Pelvic inflammatory disease (PID), endometriosis, and anovulation are some of the causes of female infertility. Low sperm count, sperm mobility problems, and other unknown factors cause infertility in males. Let us focus on the woman for present purposes.

Use of fertility drugs, such as Clomid and Pergonal, in order to cause the pituitary gland and hypothalamus to release the appropriate hormones to stimulate ovulation, may result in the release of multiple eggs. Nevertheless, I shall confine the discussion of selective termination to cases of IVF, because the problem that arises in virtue of the causal connection between IVF and multiple gestations is especially acute. Assuming that surgery to correct the blockage is unsuccessful, obstruction of the woman's fallopian tubes may make IVF her *only* means of having a natural child. And yet the probability of an IVF embryo implanting in the uterine wall and developing into a fetus is low. More precisely, although the fertilization rate in vitro is around 80%, the probability of an embryo developing into a fetus once it has been transferred to the uterus is considered to be between 16 and 17%.[4] The rationale for wanting many embryos to be transferred to and implanted in the uterus hinges on this low rate of development, coupled with the risks entailed by the implantation process itself, risks that tell against performing the procedure on more than one occasion. Specifically, there is risk of infection to the pregnant woman and of tubal pregnancy. Furthermore, the procedure is time-consuming. Thus it seems that, for the woman who must rely on IVF, the prospect of having *one* natural child—much less many—is not a bright one.

PID, for instance, can lead to obstruction in a woman's fallopian tubes, thereby preventing fertilization of an egg. IVF may be her only means of conceiving. In what is a more unlikely situation, a woman who has had her ovaries removed must resort to

IVF if she wants to conceive. The uterus would be an adequate medium for conception in such a case, although an egg from another woman's ovary, with the addition of the appropriate hormones, would be needed in order for fertilization, implantation, and subsequent fetal development to take place.

Consider the following case. A woman with obstructed fallopian tubes wants multiple eggs fertilized with the aim of increasing the probability of conception. She decides to have more than one egg removed from an ovary and then placed in a culture medium in a Petri dish, at which time sperm are added and fertilization occurs. Typically, the resulting embryos are allowed to continue to grow in culture to the eight-cell (and not beyond the twelve-cell later blastocyst) stage.[5] Multiple embryos are then transferred to the uterus, where they implant in the uterine wall and result in a pregnancy with multiple fetuses. At this point, the decision to abort two of the four fetuses is made.

Why terminate two rather than one? There is a 10–15% risk of spontaneous abortion in any pregnancy, a risk that is higher in IVF pregnancies, and it is not clear to what extent selective termination affects this risk.[6] Even if fetal reduction does not affect this probability, the general risks in a multiple pregnancy are high enough to justify terminating more than one. The likelihood of harm and loss in attempting to bring all four to term is very high. Thus, the probable benefit of reduction from four to two fetuses outweighs the probable harm and loss in trying to bring all four to term, given the risks.

There are a number of risks entailed by multiple pregnancy. With respect to the fetuses, antepartal complications include cord compression, competition for nutrition, and developmental anomalies, all of which make fetal death *in utero* much more common than in a single pregnancy. Intrapartal complications are the most common cause of fetal loss in a multiple pregnancy, since they are likely to lead to premature delivery, which occurs in 75% of quadruplet pregnancies.[7] Among these complications are abnormal and breech presentation, where prolapse of the cord is seven times more frequent, circulatory interference by one fetus with another, and the risk of conjoined twins. Concerning

postpartal complications, intracranial injury is much more common in premature infants and may lead to death in the neonatal period. Moreover, premature infants with immature germinal matrices are at greater risk for grade IV intracranial hemorrhage (i.e., bleeding in the white matter of the brain), and any grade IV hemorrhage has a high likelihood of causing severe brain damage. In addition, respiratory distress syndrome, which is more likely the more premature the infant is, may cause permanent primary damage to the lungs and permanent secondary damage to the brain, which may make for a very low quality of life through and beyond the neonatal period. Maternal risks include pre-eclampsia–eclampsia, which occurs three times as often in multiple pregnancies as in single ones, premature labor and delivery, and postpartal hemhorrage.

Admittedly, quality of life is a notoriously vague notion.[8] It proves intractable to interpersonal comparisons of welfare, since what counts as the threshold above which life is worth living for one person may not count as the same for another. Furthermore, being handicapped or impaired does not necessarily imply a lack of quality in the way one lives, because a person can have a fulfilling life despite being in such a condition. Thus, there does not appear to be any absolute objective standard on the basis of which the notion of quality of life can be applied equally to all persons. Nevertheless, we do have basic intuitions about the meaning of this notion, and these should suffice for present purposes. Intuitively, quality of life for a neonate would include absence of pain and suffering and the potential for the cognitive and physical capacities necessary to initiate and complete projects over the course of its life. Concerning the mother, the criteria would include the absence of chronic pain and suffering and the potential for retaining the cognitive and physical capacities necessary to continue initiating and completing projects over the course of a normal lifespan. With this in mind, and in the light of the risks of morbidity and mortality entailed by simultaneous multiple births, fetal reduction by two in quadruplet pregnancies is the most viable way to minimize complications and thereby ensure a

reasonable quality of life for the pregnant woman and the two fetuses who are brought to term.

Persons and Fetuses: Interests and Rights

Virtue theorists, moral pluralists, and proponents of the Sanctity of Life Principle (SLP) would object to this recommendation.[9] Since SLP poses the most serious challenge to the moral permissibility of selective termination, I shall confine my attention in the following sections to this opposing view. Against the case made earlier, proponents of SLP would argue that it is morally impermissible to intentionally terminate a life on the basis of projected hypothetical quality of life considerations. They would claim that selective termination is a blatant violation of the second formulation of Kant's Categorical Imperative, to wit: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[10] Presumably, by adhering to the two fundamental tenets of SLP, namely, the inviolability and equal value of human life, and by including potential persons, or fetuses, within the class of humanity, critics of selective termination can appeal to the Kantian notion of respect for potential as well as actual persons to support their claims. In this way, they can defend the nonviolation of the right of the fetus to become an actual person.

But those who do not accept this view have a ready reply. Only actual persons have the moral status in virtue of which they possess rights and interests. A necessary condition of personhood is sentience, and since prior to viability (23–24 weeks) a fetus is not sentient, it is not a person in the early stages of gestation. If only persons have rights and interests, and fetuses are not persons, then it follows that fetuses have no rights to be violated and no interests to be thwarted. Hence they cannot be harmed or wronged by being terminated.[11] The belief that fetuses have rights rests on a confusion between metaphysical and moral status. To be sure, fetuses have metaphysical status insofar as they are

potential persons. Yet potential persons, *qua* potential, are not sentient; thus they are not, properly speaking, persons. Because they are not persons, they lack rights, interests, and therefore moral status. At most, they have a morally neutral status. Potential and actual persons have distinct essential properties. Whereas it is the potentiality of a fetus to become a person that essentially defines what it is, sentience is an essential property of actual persons. The terms "actual" and "potential" are not coextensive.

Given this line of reasoning, we can follow Jeff McMahan and his claim that, in the early prevital stages of gestation, the fetus cannot be the same person who would have existed if fetal development had not been terminated. McMahan articulates the metaphysical and moral implications of this claim:

> Thus if a fetus dies early in its career, *it* suffers no loss at all. Since it has no mental life, its death cannot involve the loss of anything that is of value to it at that time, and the loss of the future life that its death involves is also no loss *to* it; since that would not have been *its* life but would instead have belonged to the person.[12]

We are moving too swiftly through dense and complex terrain, however. What is at issue here, one might argue, is whether fetuses can be harmed or wronged, *qua* fetuses. If they have rights and interests to the extent that they are fetuses, then the answer would seem to be affirmative. By terminating fetuses, we thwart the interests they have in becoming persons, as well as the interests they likely would have pursued and fulfilled in the future, had they been brought to term. Similarly, we violate their rights to become persons, as well as the rights they would have had and exercised in the future. These two points are quite consistent with the plausible thesis that we become persons not suddenly but gradually.[13]

Although some might concede these points, others still could reinforce the earlier claims about moral status and loss by showing that causing someone not to exist cannot harm or wrong that putative person. Assuming that there are no known genetic abnor-

malities or malformations in the fetus, merely causing the fetus to exist as a neonate cannot by itself be either good or bad for it. Rather, it depends on how good or bad its entire life as a person is. If a person has a very low quality of life because of constant pain and suffering, then she probably would not say that having been caused to exist was beneficial to her. On the contrary, it may be rational for her to prefer never having existed to existing in her actual state. Even if one were to insist that we are fortunate to have been brought into existence, this would not imply that *not* having been brought into existence would have been bad for us.

There is an important asymmetry at issue here. If it can be determined that it is good to have been caused to exist, then it would be bad to be caused to cease existing. But causing someone not to exist at all admits of no comparison with any other state of affairs in which that individual exists. By not actually existing, an individual lacks the properties possessed by one who does actually exist. The latter is able to pursue interests and to have and exercise rights in respects that are not open to her nonexistent counterpart. So there is no basis for a comparison between existing and nonexisting individuals, or equivalently, between what is actual and what is merely potential, at least not one that involves moral considerations.[14] Indeed, on reflection, the question of whether causing someone not to exist, or preventing someone from existing, is good or bad for that individual cannot even be raised, on pain of incoherence. I cannot ask whether *I* would have been better or worse off if I had been prevented from existing in the early stages of gestation. For if I had been terminated, I would not exist. Nonexistence cannot be a condition that applies to *me*. Thus it cannot be good or bad for "someone" to be prevented from coming into existence.

Why Consequences May Trump Rights

Let us concede that a fetus has a *prima facie* right to become a person. Following a line of reasoning consistent with the Sanctity of Life Principle in a multiple pregnancy would lead to harm-

ful consequences and in fact would be self-defeating. Proponents of SLP (perhaps virtue theorists and moral pluralists as well) would maintain that, in a quadruplet pregnancy, each fetus counts as one inviolable entity. In addition, each has interests, rights, and therefore a moral status equal to that of the mother and the other three. Yet given the risks that I spelled out earlier, trying to bring all four to term on SLP grounds would increase the likelihood of morbidity, and maybe mortality, for each fetus and the mother. Since the number of fetuses (4) is relevant to the potential of each to become a person, as well as for the mother to remain one, we should treat this scenario in utilitarian terms.[15] Although I shall modify slightly the standard interpretation of utilitarianism to accommodate the case in question, my analysis will remain true to the spirit, if not the letter, of that theory.

According to classical utilitarianism, the rightness of an action is determined by the maximization of the nonmoral value produced by that action. The standard of right derives from the standard of good, and we ought to maximize the total quantity of whatever we specify as the good.[16] In a quadruplet pregnancy, the standard of good would be the number of lives saved, or five (i.e., four fetuses plus the mother). By contrast, the concept of average utility identifies the good with the average net sum of benefits per person, which for the case at hand can be understood in terms of quality of life. Although utilitarian or consequentialist terminology may not be congenial to those who espouse the Sanctity of Life Principle, the two main tenets of SLP are not incompatible with the classical model of utility, to the extent that both make their claims irrespective of qualitative considerations.[17]

According to SLP, the intrinsic value of life is not affected by the amount of pain and suffering there is among the living. For the classical utilitarian, the aim is to maximize the quantity of what is intrinsically good, independently of how extrinsic factors may lower its qualitative value. Curiously, defenders of each view would insist that, insofar as each embryo or developing fetus counts as one intrinsically valuable entity, we ought to bring to term as many of them as possible. SLP would say that this prescription is moti-

vated by considerations of fairness to each individual, whereas utilitarianism would say that it is motivated by the desire to produce the best outcome. Nevertheless, both views implicitly assume that goods can be summed across actual and potential lives. In other words, the presumed infinite value of one life can be modified positively by adding lives to yield an increase in overall value.

In the case at hand, we would do well to adopt the average, qualitative, model of utility, since the reason for terminating two in order to save two (plus the mother) is grounded in quality of life considerations. These considerations incline us to favor average utility because our main concern is with the consequential quality of life for the fetuses and the woman carrying them after the fetuses have been brought to term. In effect, quantity is traded off against quality. Accordingly, on the model of average utility the average net quality of life per individual brought to term decreases as the number of fetuses increases.[18] If we were motivated by SLP and attempted to bring all four to term, then the low probability of all of them surviving implies that each would suffer a loss, either by dying *in utero* or in the neonatal period, or else by having a life of very low quality. Each one experiencing pain and suffering could rationally prefer nonexistence to their present state. The justification for the recommended course of action is that, in order to save *any*, with the assurance of a reasonable quality of life, we have to terminate *some*. By adopting the model of average utility, we make it more probable that there will be at least some lives worth living. We can formulate the desired outcome of this proposed course of action as an inequality: $2 > 4 \times 0$; and including the mother yields $(2 + 1) > (4 + 1) \times 0$.

Consistent with the act-utilitarian principle applied in this particular case, selective termination in multiple pregnancies is permissible because it is performed in order to minimize harm more so than to maximize benefit. Furthermore, provided that this action follows from the mother's autonomous choice, she fulfills her negative duty of nonmaleficence by not inflicting undue burdens on the fetuses. At the same time, she fulfills her positive duty of beneficence by giving birth to two healthy neonates.[19]

With the selective termination of two fetuses in a quadruplet pregnancy, the net sum of benefits minus losses outweighs the considerable or even total loss that probably would result from adhering strictly to an SLP rationale. Not surprisingly, overall benefits turn out to be greater on the average model than if we had adopted the total model and aimed to maximize quantity from the outset. Combined maternal and fetal benefits outweigh combined maternal and fetal burdens, harms, or losses. Happily, there is no conflict between the values of fetal benefit and maternal autonomy. More significantly, given the high probability of harm and loss that I have noted, if we try to bring all of the gestations to term in a multiple pregnancy, then it may turn out that there will not be *any* lives at all to sanctify. Consequently, we see how untenable appeals to equality *per se* can be in situations of scarce resources, which in the case we have been examining would be space and nutrition in the womb.

An interesting legal implication of this problem is that, if all four fetuses were brought to term and survived with a very low quality of life, then there could be a case for wrongful life. This would involve a suit brought on behalf of an impaired infant or child on grounds of foreseeable but neglected risks. Unlike the act of selective termination, this *would* imply a conflict of values between nonmaleficence toward the fetuses and maternal autonomy. There would be a breach of the mother's duty not to harm the child, whose right to be born with reasonable prospects for a fulfilling life would be violated by having been brought into existence with an impairment. Here we could acknowledge a tort of wrongful life and accordingly award damages precisely because this right had been violated.[20]

However, torts of wrongful life may be problematic insofar as the handicapped child bases his claim against his parent or parents on a comparison between having a handicapped existence and not having any existence at all. The claim is made that never having been born is preferable to the handicapped or otherwise impaired existence he presently has. But the comparison between existence and nonexistence is not a coherent one.[21] Exist-

ence cannot be compared with nonexistence. Rather, the relevant comparison is between a healthy life and a handicapped one. And it is on the basis of this comparison that the impaired or handicapped party can make a legitimate claim for compensation.

It is with respect to the comparison between having a healthy life and having a handicapped one that wrongful life is germane to selective termination. Numbers play a crucial role in this regard. If all four fetuses are brought to term and survive, but with high morbidity and thus very low quality of life, then arguably two of the four could file a suit for compensation for wrongful life. The relevant comparison would be between the life they have with the defects, given that all four were brought to term, and the life they would have had if the other two fetuses had not been brought to term along with them. This avoids the incoherence of comparing life with nonlife. Still, there is a question of identity: *Which* two fetuses have lives that are worse than they would have been because the pregnant woman decided to bring all four to term? I do not pretend to have an answer to this question, if indeed there is one. Perhaps it is an issue for the moral or legal community as a whole to resolve.

The paradoxical upshot of these considerations is that upholding sanctity of life may lead to wrongful life (although of course the proponent of SLP would deny this, since she does not believe in the concept of wrongful life to begin with). Moreover, maternal autonomy may lead to maternal maleficence toward the fetuses. So reducing the number of gestations from four to two seems to be the most viable course of action.

We have yet to resolve the problem of rights and interests. Some might insist that fetuses have rights and interests. Hence, the interests of the two terminated fetuses would be thwarted and their rights violated if we were to follow the course of action that I have proposed. Earlier, I said that those who defend SLP, virtue theorists, and moral pluralists could invoke Kantian deontological principles to justify the absolute prohibition against using a fetus merely as a means for the sake of maximizing some general overall good. Yet, given the particular features of the case in question,

a consequentialist theory, such as average utilitarianism, appears to offer a more promising approach to the problem. Still, we remain at an impasse, unable to reconcile individual rights with the general good. Attempting to bring about the least harmful outcome by terminating some entails violating the rights of those terminated.

There is more to the Kantian story, however. In explicating his principle of beneficence, Kant maintains that it is the "universal duty of men" to promote, according to their means, the happiness of rational beings, which is to be realized by promoting the conditions necessary for the existence of these beings.[22] Broadly construed, this principle does not necessarily rule out the idea that promoting these conditions *may* entail that the rights and interests of some are sacrificed for the sake of others. At first blush, this consequentialist interpretation conflicts with the second formulation of the Categorical Imperative. Recall that it prescribes that, in acting, one always treat humanity never solely as a means but always at the same time as an end. Kant explicitly states that "humanity" includes both "your own person" and "the person of any other," which expresses an impartiality that cannot, by definition, be limited to one person. To the extent that maintaining the conditions necessary for humanity is Kant's primary concern, it would not be inconsistent with the second formulation to say that the rights of some persons may be infringed, although not violated, in certain situations. This claim is consistent with the two limitations on the principle of beneficence: permissible means; and proportionate inconvenience.[23] These limitations, in turn, entail the concept of imperfect duty.

Unlike a perfect duty, which "admits of no exception in favor of inclination,"[24] an imperfect duty allows some latitude for free choice in observing the moral law. That is, in situations of moral conflict or scarce resources, where persons' lives (and the potential lives of potential persons) are at stake, we are obliged only to help those whom we reasonably can help. The rights of some may be infringed, or justifiably transgressed, in

the circumstances. But the rights of none are violated, or unjustifiably transgressed. Joel Feinberg makes the point succinctly:

> When a person in a situation of scarce resources discharges his duty of imperfect obligation by saving some rather than others from among those equally eligible for aid, he violates no one's rights, no matter how arbitrary his selection procedure.[25]

Kantians might have qualms about the use of "arbitrary" in the last clause of the passage cited. Nevertheless, in our quadruplet pregnancy the concept of imperfect duty allows us to say that the rights of neither of the two terminated fetuses are violated. This is consistent with the principle of nonmaleficence. Again, the scarce resources in question are nutrition and space in the pregnant woman's womb. Since an imperfect duty is a duty to no one in particular, it does not matter *which* two of the four fetuses are aborted.

This provides us with a justification (perhaps even a Kantian consequentialist one) for selective termination. Fetuses may very well have *prima facie* rights to become persons. But the mere having of these rights does not imply that they would be violated if some fetuses were terminated. The risks entailed by a multiple pregnancy allow us to make this claim.

Conclusion

The arguments that I have advanced in this chapter for the permissibility of selective termination in multiple pregnancies show that there is no conflict in the maternal–fetal relationship in such cases. More generally, they demonstrate that deontological prohibitions against certain courses of action may be indefensible insofar as they lead to states of affairs that are worse than what probably would result from acting according to a consequentialist line of reasoning. Consequences may trump rights, and quality of life concerns may supersede sanctity of life concerns. If we

acknowledge that numerical considerations can affect our choices and actions, as I have proposed they should regarding selective termination, then we may rule out absolute prohibitions against the loss of potential and actual lives. Numbers may not always count in matters of moral import; but sometimes they do. To the extent that they count, they should influence our choices and actions that have morally significant consequences.[26]

Notes and References

[1]*See* Brahams, Diana (1987) Assisted reproduction and selective reduction of pregnancy, *Lancet*, 1409; (1988) Selective fetal reduction (review article), *Lancet*, 773; Evans, Mark I., et al. (1988) Selective first-trimester termination in octuplet and quadruplet pregnancies: clinical and ethical issues, *Obst. Gynecol.* **71,** 3, 289–296; Berkowitz, Richard, et al. (1988) Selective reduction of multifetal pregnancies in the first trimester, *N. Engl. J. Med.* **118(16),** 1043–1047. Cf. Hobbins, John (1988) Selective termination—a perinatal necessity? *N. Engl. J. Med.* **318(16),** 1063.

[2]Indeed, the risks of transferring multiple embryos that implant in the uterine wall have been significant enough to cause discontinuation of the practice in Australia of transferring more than three embryos. I thank Peter Singer and Nancy Davis for bringing this to my attention.

[3]My concern with numbers of lives in situations of moral conflict owes much to three papers: Taurek, John M. (1977) Should the numbers count?, *Philos. Public Affairs* **6,** 293–316; Parfit, Derek (1978) Innumerate ethics, *Philos. Public Affairs* **7,** 285–310; and Sanders, John T. (1988) Why the numbers should sometimes count, *Philos. Public Affairs* **17,** 3–14.

[4]This figure indicates an increase in the rate of success from that of the 10% given by Singer, Peter and Dawson, Karen (1988) IVF technology and the argument from potential, *Philos. Public Affairs* **17,** 87–104.

[5]Implantation can occur only when the embryo is at the blastocyst stage. *See* Wolf, Don P. (ed.) *In Vitro Fertilization and Embryo Transfer: A Manual of Basic Techniques,* Plenum, New York, Chs. 1, 9, 11, 19. Also, Singer and Dawson.

[6]Noted by Benson, Ralph (1983) in *Handbook of Obstetrics and Gynecology*, 8th ed., Lange Medical Publications, Los Altos, CA, p. 281. Berkowitz et al. offer a rationale for saving two fetuses in these cases, p. 1045.

[7]Cited in Benson, pp. 255–258. Also, Kempke, C. Henry, et al. (1984) *Current Pediatric Diagnosis and Treatment,* 7th ed., Lange Medical Publications, Los Altos, CA, p. 65.

[8]Dan Brock offers a very helpful overview of all relevant aspects of this issue in (1993) Quality of life measures in health care and medical ethics, in *The Quality of Life,* (Nussbaum, Martha C. and Sen, Amartya, eds.), Clarendon, Oxford, pp. 95–132.

[9]For an account of virtue theory and its pertinence to biomedical ethics, *see* Hursthouse, Rosalind (1991) Virtue theory and abortion, *Philos. Public Affairs* **20,** 223–246. The sanctity of life principle is formulated and defended by Ramsey, Paul (1978) in *Ethics at the Edges of Life,* Yale University Press, New Haven, pp. 191 ff., and by the Sacred Congregation for the Doctrine of the Faith (1980) *Declaration on Euthanasia,* Vatican City, p. 7. *See also* Keyserlingk, Edward W. (1979) *Sanctity of Life or Quality of Life in the Context of Ethics, Medicine and Law.* Study written for the Law Reform Commission of Canada, Law Reform Commission, Ottawa, pp. 9–47. Kuhse, Helga (1987) offers a critique of SLP in *The Sanctity of Life Doctrine in Medicine,* Clarendon, Oxford. Also germane to the issue under discussion in this chapter is Kuhse and Singer's (1985) *Should the Baby Live?: The Problem of Handicapped Infants,* Oxford University Press, Oxford.

[10]Kant, Immanuel (1990) *Groundwork of the Metaphysics of Morals* (1785) (Beck, L. W., trans.) 2nd ed., Macmillan, New York, p. 429. References are to standard Prussian Academy pagination. See also *Critique of Practical Reason* (1788) (Beck, L. W., trans.) (1965), Bobbs-Merrill, Indianapolis, pp. 87, 131.

[11]*See* Warren, Mary Anne (1978) Do potential people have moral rights? in *Obligations to Future Generations* (Sikora, R. I. and Barry, Brian eds.), Temple University Press, Philadelphia, pp. 14–30; and (1973) On the moral and legal status of abortion, *The Monist* **57,** 43–60. Also, Sumner, L. W. (1981) *Abortion and Moral Theory,* Princeton University Press, Princeton, NJ, pp. 143–154; Feinberg, Joel (1984) (on birth and prenatal harm), *Harm*

to Others, Oxford University Press, Oxford, pp. 95–104; and Thomson, Judith Jarvis (1986) A defense of abortion; rights and deaths, in *Rights, Restitution, and Risk,* Harvard University Press, Cambridge, MA, pp. 1–32.

[12]Death and the value of life, (1988) *Ethics* **99,** 54.

[13]*See* Carter, W. R. (1980) Once and future people. *Am. Philos. Quart.* **17,** 61–66, and (1982) Do zygotes become people? *Mind* **91,** 77–95. Also, Quinn, Warren (1984) Abortion: identity and loss. *Philos. Public Affairs* **13,** 24–54.

[14]Narveson, Jan discusses the problem of trying to make such comparisons in "Future people and us," in Sikora and Barry, p. 48. Parfit elaborates the problem further (1986) in *Reasons and Persons,* Clarendon, Oxford, pp. 487–490.

[15]I take utilitarianism to be a species of the theory of consequentialism, according to which the rightness or wrongness of actions are determined solely on the basis of their consequences.

[16]The classical concept of utilitarianism is formulated by Mill, John Stuart (1979) in *Utilitarianism* (Sher, George, ed.), Hackett, Indianapolis, Ch. II. *See also* Sidgwick, Henry (1907) *The Methods of Ethics*, Macmillan, London. For discussion of the average concept of utilitarianism, *see* Parfit, *Reasons and Persons,* Part Four; Sumner, Ch. 5; and Rawls, John (1971) *A Theory of Justice,* Harvard Belknap Press, Cambridge, MA, pp. 161–175.

[17]Of course, there is at least one important difference. Whereas the main concern of SLP is not consequences but the intrinsic value of life, on the total and average versions of utilitarianism it is *only* consequences that matter. SLP rests on deontological rather than consequentialist principles and therefore takes the right to be prior to the good.

[18]Berkowitz et al. "In pregnancies with multiple gestations, adverse outcome is directly proportional to the number of fetuses in the uterus, primarily because of an increased disposition to premature delivery." p. 1043.

[19]For discussion of the principles of nonmaleficence, beneficence, and autonomy, *see* Beauchamp, Tom L. and Childress, James F. (1989) *Principles of Biomedical Ethics*, 3rd ed., Oxford University Press, Oxford, Chs. 3–5. The extent to which these principles figure in the mother's choices in a single pregnancy is examined by Mattingly,

Susan S. (1992) The maternal-fetal dyad: exploring the two-patient obstetric model. *Hastings Ctr. Rep.* **22,** 13–18.

[20]*See* Feinberg, Joel (1987) Wrongful life and the counterfactual element in harming, in *Philosophy and the Law* (Coleman, Jules and Paul, Ellen Frankel, eds.), Blackwell, Oxford, pp. 145–178. *Also,* Steinbock, Bonnie (1986) Wrongful life. *Hastings Cent. Rep.* **15,** 17.

[21]Heyd, David (1992) makes this same point in *Genethics: Moral Issues in the Creation of People,* University of California Press, Berkeley, pp. 21–38. Here Heyd critiques Feinberg's views on wrongful life. John Harris offers further insightful analysis of this problem in (1992) *Wonderwoman and Superman: The Ethics of Human Biotechnology,* Oxford University Press, Oxford, pp. 79–97.

[22]*Groundwork of the Metaphysics of Morals*, pp. 417, 428, 431. *Also* (1964) *The Doctrine of Virtue* (1797) (Gregor, Mary, trans.), University of Pennsylvania Press, Philadelphia, p. 452.

[23]*The Doctrine of Virtue*, p. 451, and *Critique of Practical Reason*, pp. 110,111. *See also* Donagan, Alan (1977) *The Theory of Morality,* University of Chicago Press, Chicago, pp 85,86; and Cummiskey, David (1990) Kantian consequentialism. *Ethics* **100,** pp. 586–615.

[24]*Groundwork of the Metaphysics of Morals*, p. 421; *The Doctrine of Virtue*, p. 389; and Cummiskey, p. 607.

[25]*Harm to Others*, pp. 147,148.

[26]An ancestor of this chapter was presented at a conference on applied ethics at the University of British Columbia in June 1990, where I benefited from comments by Peter Singer. I am also grateful to Nancy Davis and, especially, Lainie Friedman Ross, for many helpful criticisms and suggestions on earlier drafts.

Part III

Introduction

Bambi Robinson argues that when a woman learns she is pregnant with a fetus that has a serious problem, such as Tay-Sachs disease, which will result in a child that will know little other than pain and suffering until its death, she has an obligation to abort it. Her argument consists of two parts: first, that it is wrong to deliberately inflict protracted suffering on a sentient being. In the case of a seriously impaired fetus, the judgment is made that life, itself, will be a harm to the child and thus not in its best interest. Second, the emotional and physical costs to the parents are less in the case of a second trimester abortion than in bringing such a seriously impaired child into the world. Robinson considers, but rejects, the justification that obligatory abortions in such cases serve the public good.

On a Woman's Obligation to Have an Abortion

Bambi E. S. Robinson

Introduction

Suppose you were born with Tay-Sachs disease. Imagine what your life would be like. For the first few months of life, you develop normally. However, by $8^1/_2$ months, when a doctor has diagnosed your problem (a few months after your parents knew you had one), your quality of life begins to go downhill. You become lethargic and your motor development declines. By $1^1/_2$ years, you have become blind. You have been experiencing seizures for a few months. By the end of your second year of life, you are paralyzed, deaf, and retarded. Breathing and eating become increasingly difficult, generally necessitating the use of a feeding tube or gastrostomy. It becomes increasingly difficult for you to have a bowel movement. By age three, you are not able to cough up mucus (a year ago, you were able to do it for 40 minutes straight!) so you must be suctioned. By about 40 months, you are dead of broncho-pneumonia.[1] Because your mental development was arrested in a precognitive stage, you do not understand any of what is happening to you: All you know is pain and suffering until you die.

This need not have happened, however. Tay-Sachs disease occurs mainly in Ashkenazi Jews, to a lesser extent in French Canadians, and is also found in some groups of Louisiana Cajuns.[2] There is a blood test that can determine whether or not a person is a carrier for the disease.[3] Many who test positive as carriers choose not to reproduce, which has led to a decline in the number of Tay-Sachs births.[4] Tay-Sachs is also detectable through prenatal testing, such as amniocentesis or chorionic-villus sampling,[5] which has led many parents to choose abortion instead of birth.

Philosophers are nearly unanimous in their support of the permissibility of abortion—especially in cases such as this. (Two notable exceptions are Don Marquis and John Noonan.) I, however, take a stronger stand: I believe that in cases such as this, where a baby will know little other than pain or suffering until its death, that abortion is obligatory. Not to abort in these cases is morally wrong. My argument will consist of two parts: first, that it is wrong to deliberately inflict protracted suffering on a sentient being. Second, the emotional and physical costs to the parents are less in the case of a second trimester abortion than in bringing such a seriously impaired child into the world.

I leave the question of whether the fetus lacks rights entirely or possesses some sort of moral status an open one. I am inclined to think it possesses some moral status once it has achieved sentience, but not the full moral status conferred by personhood. By this I mean that although it would generally be wrong to torture it, because torturing creatures that can experience pain is generally wrong, the fetus does not possess the rights, including the right to life, that is part and parcel of possessing the full moral status of personhood. The fetus is merely a potential person. However, I shall not take up the point here because it does not affect my overall argument. I do not justify an obligation to have an abortion based on the moral status, or lack thereof, of the fetus, but instead on the harm that would befall the child if it was permitted to be born. It is in virtue of this—the harm that would befall the child—that I ascribe a right not to be born to the fetus.

The literature on abortion is remarkably quiet concerning such an obligation. (Perhaps it is because philosophers are so concerned with protecting a woman's autonomy and hence her right to choose that we forget that sometimes autonomy must be limited to prevent harm to others.) David H. Smith hints at such an obligation in a 1977 paper, but ultimately only claims that abortion might be *permissible* if done for the sake of the fetus.[6]

The legal literature is a bit richer. In the past 15 years, a new type of lawsuit has arisen: the wrongful life or wrongful birth suit. In such cases, the child's representatives or parents argue that because the physician neglected to tell them about their risk or certainty of having an impaired child, the parents were deprived of the knowledge that would have permitted them an informed choice concerning ending the pregnancy. It is argued that the child was wronged by being born and thus seeks to win monetary damages. The courts have been reluctant to side for the child in part because wrongful life suits claim that the child had a right not to be born. This, initially, seems to be a strange sort of right. It seems to require that we compare the benefits of existence—a discussion involving an actual being—to the benefits of nonexistence, that may require us to examine the ontological status of beings who have never existed. Courts, not surprisingly, are reluctant to ascribe rights to such a being or even to examine such metaphysical views. This is what Feinberg refers to as "the problem of the subject": To what nonexistent being are we to say that nonexistence is the best alternative?[7] The New Jersey Supreme Court, in Gleitman v. Cosgrove, states:

> The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.[8]

Most courts avoid dealing with this claim by interpreting wrongful life suits not as concerning the right not to be born, but, rather, as the right to recover damages for pain and suffering during the child's short life. This is believed to be a much easier issue to examine than issues such as whether nonexistence is preferable to existence or who the subject of the discussion is.

Furthermore, many courts appear to hold a sanctity of life view and believe that any life, no matter how painful, is preferable to no life at all. According to the New Jersey Supreme Court, in Berman v. Allan:

> One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than nonlife... To rule otherwise would require us to disavow the basic assumption on which our society is based. This we cannot do.[9]

One court that has broken ranks with the rest and concluded that a severely impaired child can collect damages from medical personnel is in California. In Curlender v. Bio-Science Laboratories,[10] Bio-Science Laboratories were found to be negligent in performing genetic tests on the parents of a child with Tay-Sachs disease. The parents were erroneously told they were not carriers for the disease. However, the court made its ruling based on the right of the child to recover damages for pain and suffering that resulted from the lab's negligence, not because of any right the child had not to be born.

The court also stated, but did not discuss thoroughly, the view that any parents who knowingly bring a severely impaired child into the world were themselves legitimate targets of a wrongful life suit. "[T]here is no sound policy which should protect these parents from being answerable for the pain, suffering and misery which they have wrought on their offspring."[11] This hint at a parent's obligation not to bring a severely impaired child into the world was overturned by the California legislature that, in 1982, prohibited this sort of lawsuit.[12]

However, as I have already indicated, courts, for the most part, seem reluctant to discuss the question of whether no life is preferable to any sort of life at all. An oft repeated quote is:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.[13]

We, however, are philosophers, and it is not unreasonable for us to attempt to resolve this question.

An obligation to have an abortion implies that the fetus has a right not to be born. As I indicated earlier, this seems to be an odd sort of right: It requires us to make a determination that a particular life is not worth living. It may seem difficult to argue that nonexistence is preferable to existence, no matter how pitiful and painful that life might be. After all, it could be argued, if someone has known nothing but pain and suffering, he has no standard of comparison and hence may be satisfied with his lot in life. Certainly the courts have generally declined to make such a judgment.

The claim that an obligation to have an abortion implies that the fetus has a right not to be born should not be taken to imply that I believe that all obligations have correlative rights. However, in cases, such as I am discussing, the fetus has a claim against its mother and the medical profession (in the form of some medical practitioner or other) that it should die, by virtue of the suffering that would occur if the child was allowed to be born. By claiming that a fetus has a right not to be born, I mean that we have determined that life would not be in the best interest of the resulting child; that we have made a determination that the child's life is not worth living.

This sort of judgment is made in hospitals across the country. It is made not concerning fetuses, but concerning seriously impaired newborns.[14] Sometimes, it is argued, it is better to allow

a severely impaired newborn to die than to force it to live a painful or pitiful life. An example of such a severely impaired neonate is one born with severe spina bifida, hydrocephaly, no arms, and incompletely developed legs. Some people, such as Michael Tooley,[15] Mary Anne Warren,[16] and Peter Singer[17] argue that we have no obligation to keep such a neonate alive because it is not and never will be a person. Therefore, it does not have a right to life, so we do not violate its rights when we allow it to die.

Other people, such as John Fletcher[18] and Tristram Englehardt[19] make the judgment to let such a neonate die based on quality of life or best interest of the child considerations. Even Paul Ramsey[20] would argue that quality of life considerations permit one to allow an infant with Lesch-Nyhan syndrome to die.[21] On this line of reasoning, the infant's quality of life would be so bad that death, rather than life, is judged to be in his best interest. Although these two rationales—quality of life and best interest of the child—for letting a newborn die are usually portrayed as different rationales, for all practical purposes, they become indistinguishable when we consider a child with a negative quality of life. It is in the child's best interest not to live when the child's quality of life would be constantly negative. In other words, in such cases, life is a fate worse than death.

Some people, of course, object to this whole approach because they believe in the sanctity of human life. According to this doctrine, every human life is sacred just because it is human and hence it is wrong to undertake actions that will result in the death of that human. Every life, no matter how pitiful, is worth living.

However, apart from religious convictions, grounded in faith, it is difficult to see how someone could hold this doctrine in cases such as I am discussing. The doctrine of the sanctity of life implies that life is always a blessing. However, that is not true. In rare cases, the quality of life of the individual is so bad, so full of pain and suffering, that it is difficult to support the claim that life is good. It is not the occasional pain of a toothache or a broken heart that these people experience: Life is uniformly negative. In these cases, the individual's basic interests will never be satisfied.

It is possible to make judgments that life may be a burden even although we have never experienced, first hand, things like Lesch-Nyhan syndrome. All that is necessary is to imagine a particularly painful episode in our lives and imagine that is all we will ever know from now on. For example, as a migraine sufferer, I know that my quality of life while I am experiencing a migraine is quite negative. If a migraine were to continue for the rest of my life, I would no longer consider life to be a blessing and would desire to end it. Women in the throes of childbirth suffer tremendous pain. We endure it because we know it will end and we will have the joy of having a baby at the end. Yet while in labor, the pain seems to be interminable: If such pain were to be all a woman would know for the rest of her life, her quality of life would be negative indeed. It is doubtful that many women would choose to continue living under such circumstances. Once we see that in some cases life is a burden and not in the best interest of those possessing it, the sanctity of life doctrine begins to crumble.

Some might argue that this is an inappropriate comparison. After all, since none of us have yet experienced death, we are unable to judge whether death is preferable to life. Suppose, for example, that after death we faced eternal hellfire and damnation. In that case, living with Lesch-Nyan syndrome or being perpetually in labor might be a better alternative; death would not, then, be preferable to life.

However, ethics does not require us to be omniscient in order to determine our obligations. If it did, then attempting to determine our moral obligations would be a pointless activity: It is a given that mere mortals are all too often fallible. Thus we are forced to determine our obligations in the face of incomplete information. As to the suggestion given earlier—that we face eternal hell after death—it seems rather improbable. Those who are atheists are likely to deny there is a hell, whereas those who believe in an afterlife would have to look long and hard to find a religion that promised us all eternal damnation. (Besides, hell could not be worse than a migraine.) So it is possible to make the judgment that death is preferable to life in certain circumstances.

For seriously impaired newborns, the decision frequently is made to let them die. Arguments from Rachels notwithstanding, most people faced with such a decision choose to let the baby die slowly of starvation and dehydration rather than ending its life quickly and painlessly by means of a lethal injection. Thus a baby for whom life is a burden is forced to shoulder that burden for a few days. Although it may be in a child's best interest to die, medical personnel do not generally deem it in the child's best interest to die quickly and mercifully.

The point of the last section was to show that it is possible to judge that nonexistence may be preferable to existence. This judgment is made all too often concerning neonates. Now it is time to return to the discussion of fetuses that will become such severely impaired neonates if they are not aborted.

Many of the conditions that would cause people to let a newborn die are detectable *in utero* through several different tests. Two of the most common are CVS (chorionic villus sampling) and amniocentesis. CVS is usually performed between 9 and 12 weeks of gestation and results are available in 10 to 14 days. Amniocentesis is usually done at 16 weeks of gestation, with results available in 10 to 14 days. Thus, many of the severe problems from which a baby might suffer are detectable before the fetus is five months old.

At this point, many parents, when faced with the news that their fetus suffers from Tay-Sachs disease or spina bifida, choose a second trimester abortion over birth for their fetuses. Others, however, continue with pregnancy only to give birth to a child who will suffer or who may be allowed to die slowly of starvation and dehydration. In cases of Tay-Sachs, there is no question of the possible long-term survival of the child. With Lesch-Nyhan syndrome, there is no question but that the child will suffer. A diagnosis of spina bifida is more problematic because it comes in various degrees of severity and prenatal testing only shows that the fetus has the condition, but not its severity. However, many parents, when faced with a baby with spina bifida, choose to allow the baby to die regardless of the severity of the condition.

A basic principle of ethics is that it is wrong to cause harm to another, and when harm is unavoidable, there is an obligation to see that it is minimized. Nonmalficence is also one of the basic principles of medicine: Above all, do no harm. Another basic principle of medicine is beneficence. In cases of seriously impaired or dying newborns, for whom life is a burden, not a benefit, where those conditions are detectable *in utero*, it is impossible to avoid harm altogether. However, the minimum amount of harm will occur if the fetus is aborted, rather than being permitted to be born only to suffer until its death. Therefore, such fetuses should be aborted.

It might seem that in such cases, if doctors are obligated to help, not harm, that a physician must stand by and do nothing. However, in today's world of medicine, it is frequently the case that in order to help a patient, it is necessary to harm him. Take, for example, the use of chemotherapy (poison) in order to cure a greater harm (cancer). In treating cancer, a physician must poison her patient. For a fetus with Tay-Sachs disease, the only way to help it is to kill it.

This objection, however, raises a more serious issue: That although physicians have an obligation to refrain from acting in harmful ways, it may be that they should not do actions that cause harm. So, although it may be permissible to stand by and let a severely impaired newborn die of whatever dreadful condition ails him, physicians are not obligated, indeed, may not be permitted to kill the child. Killing a fetus is worse than letting an infant die because killing is, in general, a more serious moral matter than letting die.

However, although I agree that killing is, in general, a more serious moral matter than letting die, I follow Rachels and believe that in cases where the decision has been made that it is permissible to allow a person to die, it is also permissible to kill her.[22] Killing is generally considered to be a more serious moral matter because most cases of killing are unjustified deaths; are murder. In such cases, the death of the person violates her rights. We typically view cases of letting die as cases where death is justified;

where death is considered to be a benefit. However, since we psychologically associate killing with murder, it is psychologically difficult for many to acknowledge that killing is not murder, but instead is justified in cases where the decision has been made to let the person die. In these cases, we do not violate the person's rights by killing her. As Rachels has so persuasively argued, in cases where the decision has been made, justifiably, to let a person die, there is no moral difference between killing her and letting her die.

However, there are reasons for sometimes preferring killing over letting the person die of whatever affliction she has. In cases where the individual is not competent to decide whether to die quickly and mercifully, or slowly and painfully, when letting die causes more pain and suffering than would killing, then considerations of minimizing pain and suffering (nonmalficence and beneficence) obligate us to kill the person instead of letting her die. In cases where the woman or couple have learned that the fetus carries a genetic flaw of the sort I have been discussing, then the fetus should be killed. If a fetus is killed before it can feel pain, that is less harmful than letting it die later, after birth.

I am not arguing that fetuses have interests or rights that are harmed by abortion. However, the fetus has a condition that will result in the interests of its future self being harmed, or, as Feinberg puts it, in such cases, "the condition of the infant at birth amounts to a *dooming* of his future interests to total defeat."[23] The fetus is not harmed by having Tay-Sachs, but the resulting child will be. The fetus, however, may be able to feel pain. Even if the fetus lacks rights and has no special moral status, if it is able to feel pain, it is harmed by that pain. Although inflicting pain on someone may be justified (as in a visit to the dentist) or suffering pain may be a blessing in disguise (pain initiates a sequence of events that results in an appendectomy), the fact that pain hurts is enough to show that pain is a harm. Abortion may cause pain to the fetus. However, the harm of that pain needs to be weighed against other harms, in this case, a life that is uniformly negative in quality where basic interests can never be fulfilled. Thus, the

conjecture that abortion may cause pain to the fetus is not enough to show that abortion is wrong in these cases.[24]

In the case of a baby born with Tay-Sachs disease, there are three alternatives. First, the fetus can be aborted. Although a four- or five-month fetus is probably able to experience some pain, the pain of abortion can be reduced or eliminated by the use of an anesthetic. Even if the fetus possesses no special moral status, it seems kinder to reduce pain if it can feel pain; this is true of all creatures that can feel pain. Second, the fetus can be brought to term and the resulting child be allowed to live out its pitiful and painful existence, unable to understand why it must experience pain. Third, the fetus can be brought to term and the baby be allowed to die after birth, usually slowly of starvation and dehydration. Of the three alternatives, the first, abortion, produces the least amount of harm. Thus, a woman who discovers by prenatal testing that she is carrying a fetus with Tay-Sachs disease has an obligation to the fetus to abort it and thus minimize harm.

In the case of a fetus with such problems as a severe form of spina bifida with other complicating factors, such as hydrocephaly, the parents also have some choices. First, the fetus can be aborted. Second, the baby can be born and the parents decide that the baby should die. If the parents would decide their baby should die, then to minimize harm, that death should occur as an abortion for the reasons discussed earlier.

Spina bifida presents a more complicated case than does Tay-Sachs disease. Spina bifida is a condition that comes in varying degrees of severity and is usually accompanied by other impairments, such as hydrocephalus, whereas Tay-Sachs disease has but one fatal form. Many babies with spina bifida are kept alive and have an existence that, whereas not that of a "normal" person, is not usually one of torture. Although nearly all children with this condition have bladder and bowel problems, the presence and extent of paralysis is determined by the location of the spinal cord lesion as well as the presence of hydrocephalus. A child with a sacral lesion, without hydrocephalus, will be able to walk with minimal or no braces, whereas a child with a thoracic

lesion and hydrocephalus is unlikely to walk even with extensive braces and crutches.[25] Approximately 37% of children with spina bifida and myelomeningocele are severely disabled.[26] For some of these, who have other impairments as well, the severity of the impairments are such that life is a burden rather than a blessing. Unfortunately, medicine is currently unable to determine accurately the severity of spina bifida *in utero,* which makes the parents' decision a much harder one than in the clear cut case of Tay-Sachs disease.

However, regardless of the severity of the impairment, if a woman believes that any child of hers born with spina bifida should die, then abortion should be performed. It is the alternative that causes the least amount of harm. If a woman plans to let any child who is born with spina bifida die slowly of dehydration, then she has chosen a course of action that will cause the newborn to suffer, if only for a few days. She should either abort it or request that it be killed quickly and mercifully after birth. However, this is not a real choice because she cannot choose one of the alternatives: killing the child immediately after birth. This is not because it is morally worse to kill the child than to allow it to languish and die, but because such a course of action is currently against the law. Should the laws change, then the woman could decide to bring the fetus with spina bifida to term and then have it killed, which would minimize the harm to the child. However, so long as euthanasia remains illegal, in order to minimize harm, the woman should abort the fetus.

At this point, some might argue that my argument is flawed because there is too much murky ground where we do not know what to do. If it is impossible to draw the line and state which conditions will justify an obligation to abort, then, it is argued, we cannot say that possessing any disease yields an obligation to abort.

The problem with this objection is a problem shared by all line drawing arguments: It is possible to establish clear cases on either end of a continuous line, even if it is not possible to decisively draw conclusions about cases in the middle. Severity of impairments and diseases occur on a continuous line, from the

exceedingly hopeless to the exceedingly minor. Distinguishing between clear cases on either end of the spectrum of impairments is a matter of examining the effect the child's impairments would have on the possibility that her basic interests, such as welfare interests, will be fulfilled. If the impairment is so severe that the child's basic interests are all thwarted, then this is a clear case for an obligation to abort. Thus, in cases such as Tay-Sachs disease, the severity of the problem and the ease and certainty of diagnosis make it clear that life would not be in the best interest of the child. Her interests are doomed to defeat from the very start. If the impairment is not severe, then the child will be able to have her basic interests fulfilled, even if she will never be able to develop some further interests, such as pursuing a graduate education. In cases such as this, abortion is not obligatory.[27] Thus, life is clearly a benefit, not a burden, for a child with Down syndrome and duodenal atresia, because although the surgery necessary to open the duodenum will cause pain, overall, the quality of life for such a child is positive. In still other cases, we cannot say with any degree of certainty whether death is in the child's best interest.

However, the mere existence of a murky middle ground does not preclude the establishment of clear cases on either side of that murky middle. When faced with a clear case, the obligation is easy to establish. As the case becomes increasingly difficult, determining the obligation becomes correspondingly difficult. In some cases, we may not be able to make a clear determination. But one need not have answers to every single case before one can have answers for the clear cases. This chapter focuses on the clear cases because I am concerned only with demonstrating the existence of an obligation to abort. I leave questions of determining our obligations in that murky middle ground to future research.

Another, although weaker, justification for an obligation to abort concerns the physical and emotional costs to the parent or parents. A normal pregnancy is an uncertain time: Parents worry that their babies will not be perfect. The advent of prenatal testing meant that some of this worry could be alleviated. However,

it also meant that parents received the news they had been dreading: that their babies were not perfect. Parents who receive the news that their fetus suffers from some sort of severe impairment are likely to be devastated. Parents who have learned that their long awaited child has Tay-Sachs disease, for example, have been described as feeling "depressed, confused, angry, ashamed, guilty, desperate, or lethargic."[28]

Such parents have two choices: Abort the fetus in the second trimester or continue the pregnancy, knowing of the problem, ultimately only to watch helplessly as the baby dies. Both ways cause suffering to the parents—suffering so horrific that no person wants to contemplate it. However, if the fetus is aborted, the parent or parents are spared the emotional agony of continuing a doomed pregnancy and the horror of watching a child die. Thus, in order to minimize harm to the parent or parents, the fetus should be aborted.

This justification is weaker than the justification that relies solely on preventing harm to the fetus because it is generally permissible to take on yourself pain and suffering should you so choose. However, there is another party to the suffering: the child. The argument that a woman sometimes has an obligation to abort a fetus relies primarily on the claim that there is an obligation to minimize harm to the fetus. This argument is strengthened by noting that this abortion will also reduce the amount of harm experienced by the parent or parents.

There is another alternative to consider: Why not permit the baby to be born and then kill him when the disease progresses to a point where life has become a burden? In the case of a child with Tay-Sachs disease, this would permit the parents to enjoy him before his death. Killing the child after birth might appear to be more morally problematic than killing the fetus before birth, but in cases such as I am discussing, that may not be so. Even though abortion is permissible because the fetus lacks a right to life, killing a baby who may possess a right to life may also be permissible. Killing and letting die are morally on a par, at least in cases where the death is justifiable. In cases where a child will

know little other than pain or suffering until his death, death is justifiable, and we typically believe it is permissible to let such a baby die. But then it would also be permissible to kill him. So why not let the baby live for a while and kill him when life is deemed to be no longer in his best interest?

Although some parents may believe that they would prefer to let the child be born only to be killed later, this option is not preferable to aborting the fetus. First, parents might prefer to kill the child as a baby rather than as a fetus because they do not approve of abortion. However, if parents believe that abortion is wrong, it is unlikely (assuming a reasonably consistent set of beliefs) that they will believe that killing the child sometime after birth is permissible. It is even more unlikely that they would believe that killing such a child is obligatory.

Second, for those who claim not to object to killing the child, it is not at all certain that when the time comes to kill him, that they will be able to do it. The longer we care for someone and love him, especially babies and small children, the harder it is to kill him. Furthermore, there is also the problem with a progressive disease like Tay-Sachs (or Alzheimer's disease) of determining when life is no longer a benefit. Because of this uncertainty, it is likely that parents will naturally continue to put off the day of reckoning, and thus the child, for whom life has become a burden, is made to suffer. To avoid this, it is better to abort the fetus than to wait and kill the child some time after birth.

There is also the small practical problem, mentioned earlier, that killing a child (or anyone) who has a progressively worsening condition is currently against the law. A medical practitioner who kills such a child may face criminal charges. This is a practical consequence that must be taken into consideration. I am not arguing that the law must triumph over the concerns of morality, or that the law must determine the dictates of morality. However, the threat of criminal prosecution is a consequence that must be factored into the equation, at least for as long as euthanasia remains against the law.

Some might object to this whole line of reasoning because it rests on future predictions of psychological states. Although humans are able to make reasonably accurate predictions about psychological reactions to various situations, such predictions are not foolproof. Thus, it may be that there are parents who can cheerfully bring a doomed child into the world, care for him, and then kill him when his quality of life becomes negative. It is possible...but unlikely. When determining our moral obligations, we have to rely on the best information available. In any consequentialist argument, especially one of this sort that rests on predictions of human behavior, we have to determine obligations based on the knowledge available to us. We are not omniscient, nor does morality require us to be. Since it seems unlikely that parents would actually be able to kill their children or have them killed by someone else, even if we knew just when to kill them, in order to minimize harm to the parents and the child, the fetus should be aborted.

Another justification that could be offered for obligatory abortion in the case of severely impaired fetuses is that aborting these fetuses promotes the social good.[29] According to this line of reasoning, aborting such fetuses would remove them from the gene pool before they have a chance to reproduce. Obviously, a child with Tay-Sachs disease would not live long enough to reproduce, but other children with other problems may. Abortion also means that parents or society will not have to allocate money and scarce medical resources to keep these children alive. This argument does not entail that we should place a finite limit on the amount of money spent on all persons and just let them die when they exceed that amount. It does, however, claim that when there are only a finite number of dollars and resources available, it makes sense to spend it on those who can benefit from it. When life is, and always will be, a burden for an individual, it will not benefit that individual to spend large amounts of money on her. The only benefit that would come is a false one: Those who must care for the child may feel more comfortable with the false belief they are helping her. But if she cannot be helped, they are merely fooling themselves.

This justification for an obligation to abort is more problematic than the previous two. Obligations requiring pregnant women to do or refrain from doing certain actions have a nasty way of finding their way into the court system and into law. It is increasingly common, for example, for pregnant drug abusers to be incarcerated until they give birth. Proponents of these actions typically justify them by an appeal to the well-being of the fetus or resulting child. Other, well meaning individuals promote social, not legal coercion to see that fetuses are not harmed. Total strangers have been known to approach pregnant women who are smoking or drinking and harangue them on their obligations to their unborn. Thus, based on current trends in society's treatment of pregnant women, it is not out of the question that society will act to safeguard the right of a fetus with Tay-Sachs disease not to be born.[30]

If we believe that aborting severely impaired fetuses is justified by appeals to the social good, then we need to see that such an obligation be generally enforced. Killing one such being does little to help the social good. We need to kill most severely impaired fetuses in order to affect the social good. Should this obligation be fully enforced, society would have to intrude too much into the lives of women. If we are serious about removing severely impaired individuals from the gene pool by aborting them, then we have to know which individuals are severely impaired. This entails that every pregnant woman—even those not currently listed as "high risk" pregnancies—would have to undergo genetic testing. This is not an entirely pleasant experience. Furthermore, it is an invasion of a woman's right to privacy. Although overriding an individual's right to privacy is justified when we are reasonably certain that doing so will prevent harm to identifiable others, this line of reasoning would have us invade the privacy of millions of women in the hopes of detecting relatively few cases of impairments such as Tay-Sachs disease. Such widespread harm to privacy, bodily integrity, and autonomy caused by obligatory genetic testing is unjustified.

It is not clear that doing prenatal testing on all women will be a cost saving measure, and hence an efficient use of our health

dollars. The number of babies born with such problems as Tay-Sachs disease and Lesch-Nyhan syndrome is small, whereas the number of woman who get pregnant each year is quite large.[31] Although it is more cost effective to pay for prenatal testing and subsequent abortion for one woman than to pay for the costs of her severely impaired child over its lifetime, it is not cost effective to pay for the costs of prenatal testing for all women in the hopes of catching the relatively few that ought to be aborted.

Furthermore, if we seriously believe that such individuals must die to promote the social good, that can be done by requiring that every baby who is severely impaired die. There is no need to force abortions on women. Of course this solution has problems of its own; problems that are beyond the scope of this chapter, although I have given hints as to the approach I would take.

An obligation to abort those for whom life will only be a burden is one that should be only a moral obligation, and not a legal one. This is an obligation that would make for very bad law. If this were a legal obligation, then society would intrude very heavily into the lives of women, perhaps reducing women to the status of fetal containers of worthwhile fetuses. If this were made into law, women would not be free to decide whether they will uphold their obligations as they are with purely moral obligations. For this to succeed as a law, obstetricians would be required to perform CVS or amniocentesis even on unwilling women. Women who are pregnant would be required to visit a doctor and report their pregnancies. Such a legal obligation would violate the basic rights of women. Furthermore, a law such as this would only be able to do the job of forcing abortions if significant penalties were attached to those women who refused to have abortions. Physicians who knew of the fetus' condition, yet did not force abortions on the unwilling women, or call in some sort of forced abortion squad, might be charged as accomplices.

Such is the case in China, where there is a policy of mandatory abortions after a first child. Women are observed at work for signs of pregnancy and harassed until they give in and have an abortion. Parents who refuse to abort a second child are punished

through higher taxes, poorer living quarters, and so on. In societies that take seriously the notion of individual liberties and rights, such a scenario is intolerable. Thus, although a woman has an obligation to abort any fetus for whom life is not in its best interest, societies should not enact this obligation into law.

I have argued that a woman has an obligation to abort her fetus when prenatal testing reveals that her fetus suffers from a condition that would make its quality of life after birth negative. In such cases, life is not in the best interests of the resulting child. Thus, in order to minimize harm to all concerned, including the potential child, the woman has an obligation to abort. I do not pretend that this will be an easy obligation to carry out. I suspect that all who uphold this obligation would do it out of motives that would satisfy Kant: purely for the sake of duty and not for personal pleasure or satisfaction. However, no one ever said it had to be easy or fun to be faithful to the dictates of morality.

Notes and References

[1]Paritzky, Jane F. (1985) Tay-Sachs: the dreaded inheritance. *Am. J. Nursing* 260–264.

[2]D'Alton, Mary E. and DeCherney, Alan H. (1993) Prenatal diagnosis. *N. Engl. J. Med.* **328,** 115.

[3]Both parents must be carriers in order for the child to have Tay-Sachs disease. Even so, there is only a 25% chance that any child of two carriers will have the disease. Fifty percent of children born to two carriers are themselves carriers and the remaining 25% will be normal.

[4] Paritzky, "Tay-Sachs: the Dreaded Inheritance," p. 261.

[5] D'Alton and DeCherney, "Prenatal Diagnosis," pp. 114–120.

[6]Smith, David H. (ed.) (1978) The abortion of defective fetuses: some moral considerations, in *No Rush to Judgment: Essays on Medical Ethics,* The Poynter Center, Bloomington, IN, p. 33.

[7]Feinberg, Joel (1984) *Harm to Others,* vol. 1 of *The Moral Limits of the Criminal Law,* Oxford University Press, Oxford, pp. 99,100.

[8]Gleitman v. Cosgrove 49 NJ 22, 227 A.2d 689,692 (1967).

[9]Berman v. Allan 80 NJ 421,404 A.2d 8, 12,13 (1979).

[10]Curlender v. Bio-Science Laboratories 106 Cal.App.3d 811, 165 Cal.Rptr.477 (1980).

[11]Curlender 106 Cal.App.3d at 811–814.

[12]Fleisher, Lynn D. (1987) Wrongful births: when is there liability for prenatal injury? *Am. J. Dis. Child.* **141,** p. 1263.

[13]Becker v. Schwartz (1978) 46 NY at 411, 413 NYS 2d at 900, 386 NE 2d at 812.

[14]The phrase "seriously impaired newborn" has come to refer to a whole host of conditions ranging from any baby born with some sort of disability, e.g., Down syndrome with duodenal atresia, to those for whom life cannot be said to be in the child's best interest. In this chapter, I use words such as "severely impaired newborn" to refer solely to this latter type of child.

[15]Tooley, Michael (1972) Abortion and infanticide. *Philos. Pub. Affairs* **2,** 37–65.

[16]Warren, Mary Anne (1973) On the moral and legal status of abortion. *The Monist* **57,** 43–61.

[17]Kuhse, Helga and Singer, Peter (1985) *Should the Baby Die? The Problem of Handicapped Newborns,* Oxford University Press, Oxford.

[18]Fletcher, John C. (1975) Choices of life or death in the care of defective newborns, in *Social Responsibility: Journalism, Law and Medicine* (Louis W. Hodges, ed.), Washington and Lee University Press, Lexington, VA, p. 77.

[19]Engelhardt, H. Tristram (1975) Ethical issues in aiding the death of young children, in *Beneficial Euthanasia* (Kohl, Marvin, ed.), Prometheus Books, Buffalo, NY, p. 185.

[20]Ramsey, Paul (1978) *Ethics at the Edges of Life,* Yale University Press, New Haven, CT.

[21] Children with Lesch-Nyhan syndrome are mentally retarded, suffer from uncontrollable spasms, and engage in self-mutilative behavior. This condition cannot be cured. It causes considerable and untreatable pain to the child.

[22]Rachels, James (1986) *The End of Life.* Oxford University Press, Oxford, chapters 7 and 8; Active and passive euthanasia, (1975) *N. Engl. J. Med.* **292,** 78–80.

[23]Feinberg, Joel, *Harm to Others*, p. 98.

[24]The claim that abortion causes pain to the fetus is not enough to show that abortion is wrong generally. However, it may mean that the doctor should offer the woman a strong pain reliever and thus

ensure that the fetus receives it through the placenta. Then the fetus will not suffer before its death. This is similar to arguments that animals that will be killed as food ought not to suffer before their deaths.

[25]Batshaw, Mark and Perret, Yvonne (1992) *Children with Disabilities: A Medical Primer* 3rd ed., Brooks, Baltimore, MD, pp. 478,479.

[26]Bradshaw and Perret, pp. 486,487.

[27]In such cases, abortion is, of course, still permissible.

[28] Paritzky, "Tay-Sachs: the Dreaded Inheritance," p. 261.

[29]Such a justification for the permissibility of abortion has been discussed by many different people. *See*, for example, Kass, Leon R. (1973) Implications of prenatal diagnosis for the human right to life, in *Ethical Issues in Human Genetic Counseling and the Use of Genetic Knowledge* (Hilton, Callahan, Harris, Condliffe, and Berkeley, eds.), Plenum, New York, pp. 185–199; Pueschel, Siegfried M. (19XX) Ethical considerations relating to prenatal diagnosis of fetuses with down syndrome. *Mental Retardation* **29(4),** 185–190.

[30]This may sound implausible given the large numbers of people who are "pro-life," but those who argue for life regardless of its quality generally have no idea how bad life can be for some. The people who are willing to allow victims of rape or incest to have an abortion after discovering how terrible life would be for the woman may also come to realize that abortion is justified in cases where the life of the child would be uniformly negative once they learn what such a life would really be like.

[31]In the United States, in 1989, out of 45 reporting states and the District of Columbia, there were 3,577,803 births. Of these, 1875 (.05%) were chromosomal anomalies other than Down syndrome and 1087 (.03%) were unclassified central nervous system abnormalities. (1993) *Vital Statistics of the United States* 1989, vol. I, *Natality* US Dept. of Health and Human Services, Hyattsville, MD, Section 1, p. 351.

Introduction

Enthusiasm for reproductive technologies, ranging from those dealing with infertility to those dealing with diseases having genetic components, risks losing sight of the problems of already existing individuals whose circumstances and handicaps cannot be technologically avoided. Successful treatment of infertile couples reduces the "natural" pool of adoptive parents, consigning ever more abandoned and orphaned children to despair, and is particularly disquieting when such treatment involves creation of children to be abandoned by their natural parents.

The development of gene therapy at the somatic or germ-cell level may condition our attitudes toward those unfortunate enough to have escaped such therapies; the very possibility of avoiding inborn imperfections makes them less tolerable when they occur, and we may expect a rise in instiutional intolerance of expensive disabilities as it becomes technologically possible to avoid handicaps.

This chapter offers a set of suggestions for what realistically will be the great residue of cases of individuals with unavoided handicaps, by focusing on the needs of one group of handicapped children and showing how their claims may be effectively argued by parents who must come to terms with such institutionalized resistance to the longer-term, more expensive, and more difficult means of dealing with human problems than through technological fixes.

The Just Claims of Dyslexic Children

Richard T. Hull

Several philosophical treatises have explored how the theory of justice applies to individuals who are retarded,[1] vulnerable,[2] or subjugated.[3] These treatises are abstract, and they treat a far wider range of issues and conditions than those faced by dyslexics. Nonetheless, the social plight of the dyslexic child is in important ways analogous to the retarded; dyslexic children are rendered specially vulnerable by falling outside the range of normal perceptual functioning, and dyslexic children are commonly confronted with the judgment of others prevailing over them without adequate justification, simply because those others hold power. So, one may anticipate that a survey of the arguments provided in these books for their respective special populations will prove useful in constructing the case for the educational needs of dyslexic children.

The major source of the disputability and complexity of claims on behalf of dyslexic children, as with other special populations, is that their claims are for a disproportionate amount of the goods available to support education. And, it is not at all clear what proportion would be just, what the aim of such educational benefits should be, or even why handicapped individuals' claims should be acknowledged.

Just treatment is often taken to mean equal treatment, and in the context of education it may be thought to mean equal distribution of resources, i.e., spending roughly equal amounts on the education of each child. But, as Robert Veatch notes, in the case of a retarded child with impairments of both hearing and speech, "equal distribution of...health and educational resources...would surely make outcomes very unequal."[4] Most children with educationally handicapping conditions require, at least in the earlier stages of dealing with them, substantial one-on-one intervention by specialists specifically trained to deal with the condition, special and expensive equipment, or special and expensive architectural accommodations.

On the other hand, if we aim at equality of outcome, we must ask, outcome in terms of what measure? An aim of equality of happiness might force us to cater to the expensive tastes of the rich and famous, and might overlook other more important human experiences of satisfaction at successful achievement. Aiming at equality of opportunity for all, translated in terms of "important skills" when resources are limited, may well result in the typical erosion of programs developing artistic talents or physical education budgets.

The obvious solution to the problem of insufficient available resources is to increase them to meet the just demands of the needy; in the case of dyslexic and other "special education" students, to increase school budgets through increased taxation (or lotteries, or whatever other sources of funds for education a district has). This quickly encounters resistance in the form of other justice claims, namely, the claims of persons to ownership and control of their private property. So, the case for disproportionate resources is a case for an increase in resources to be devoted to the handicapped over that portion typically sufficient for meeting the needs of the normal individual, not a case for shortchanging the normal to provide for those with special conditions. And, that becomes a case for increasing appropriations of private property for the common good. Because we typically regard private property as rightfully owned when legiti-

mately acquired, property rights quickly come into conflict with the rights-claims of handicapped individuals. We are thus forced into dealing with this conflict as advocates for the handicapped.

I set the stage for the philosophical discussion in this way because one of the most common types of objections encountered by individuals seeking special educational services from public school districts is that to provide them would require shifting resources from other important programs. "Budgetary constraints" is the shibboleth that often frustrates concerned parents' first efforts to obtain special help for their child. The school administrator quite correctly perceives that to aim at satisfying the needs of the one can, given limited resources, short-change the needs of the many, so that producing a satisfactory educational experience for as many as possible can be perceived to be incompatible with meeting the needs of the handicapped individual. Hence, parents seeking such services may well spend their time better pursuing either legislation to increase resources earmarked for assistance to handicapped individuals or, in states where such legislation is in place, legal action to force tax increases to secure designated appropriations.

Making the legislative case for special appropriations is making the case for appropriation of privately held resources. Veatch makes the case that the Judeo-Christian tradition provides the historically most compelling cases for this redistribution of private property. The idea is simple enough. The notion of all humans as creatures of a divine being, and of the world as a gift to humanity with strings attached, generates the view of private property as property held by individuals in trust under the concept of commonwealth. Private ownership is thus a fiduciary relationship, not one of absolute right of possession. Individuals are permitted the benefits of accumulated wealth and relatively exclusive use of property, but always under the obligation of providing for the well-being of those not similarly privileged. Hence, ownership of property is reconceived as a kind of lease "to certain users provided the users pay rent in the form of honoring the welfare claims of the needy."[5]

Thus, the Judeo-Christian view of justice requires of those able to provide for the needs of others a duty of compassion and charity, whereby they are obligated to return to the common weal that proportion of their collective property necessary to raise the welfare of the handicapped to a level comparable to their own. Equality thus means equality of welfare, so far as that is attainable; a state of justice, then, is a state in which the welfare of all is an effective end of each.

Veatch acknowledges that the religious presumptions of the case as couched in the terms of the Judeo-Christian tradition will not prevail against secularists, and although he himself endorses arguments from that tradition, he explores the resources of secular positions as well. I shall recapitulate my own understanding of one such position, that of John Rawls.[6]

Rawls approaches questions of justice from the perspective of one who endorses the importance of enabling individuals to achieve, or have a reasonable and fair chance at achieving, their own particular vision of what is good. That is, he recognizes a major personal, idiosyncratic component in each person's version of the good life. The first aim of a well-ordered society, then, is to so structure economic matters as to secure opportunity for effective realization of the good life for each citizen. But Rawls also recognizes that the "natural lottery" (which we may understand as including genetics, race, social class, and other accidents of one's birth and situation) allocates talents and burdens, advantages and disadvantages, quite unequally, and that those of us who are better enabled to compete for the world's goods than others have not earned that competitive advantage by our merits, but by forces in no way in our control. (This is not to deny that, through dint of hard work and discipline, individuals may not gain competitive advantage justly. It is to say that there is a large component of something like good or bad luck in our fortunes and misfortunes.) So, the second factor relevant to structuring the policies of a well-ordered society, then, is a recognition of the unequal effects of the natural lottery.

But how are we to determine what is just in light of good and bad fortune? Rawls suggests that, in order to overcome the

natural tendency to favor one's own particular circumstances in designing policies that are fair, we perform a thought experiment. Suppose a veil of ignorance were to descend over each of us as we seek to negotiate social and economic policies. Under that veil, none of us would have particular knowledge of our circumstances—our place in society, our class position, social status, natural abilities and disabilities—but would each have the general knowledge of the laws of psychology and economics and that we will live in some sort of socioeconomic relationship with others. Rawls then challenges us to ask and answer the question, What rules and principles would we regard as fair, not knowing what advantages or disadvantages we will each have when the veil of ignorance is lifted, such that we would be willing to endorse those policies as giving each of us, as rational, self-interested persons, a fair shake?

Rawls' speculative answer is this: We would choose two rules: Equal maximum liberty, consistent with a similar measure for others, will be assured to individuals; and economic goods are to be distributed equally except when unequal distributions work to the benefit of the least well off. The first of these is called the principle of equal liberty, and the second is called the difference principle, or sometimes the "maximin" principle (short for the notion of *maxi*mizing the welfare of those *mini*mally advantaged). The basic idea of fairness here is equal distribution of liberties and of economic goods; but Rawls recognizes that equality may sometimes not serve the interests of all equally well, and that those whose needs are greater than average may be better served by unequal distributions. Nor does the difference principle imply that the least well off would be entitled to a proportionately greater share of goods. It may be the case, for example, that an unequal distribution to others with special skills of particular use to the least well-off will maximize their interests more than direct distributions to them, as when superb teachers are induced to teach in inner-city schools by higher salaries, or physicians to train for primary care by being provided with free tuition.

Applied to the educational needs of dyslexic children, Rawls's principles might operate as follows. We accept that equal

maximal liberty is to be guaranteed to all, as part of our assurance of equal opportunity for meaningful work and access to the full range of human activities to which one is naturally disposed. But dyslexia is a liberty-limiting principle, particularly in a society in which the abilities to read, to write, to tell directions, and so on, are essential to successful functioning in most roles. Hence, dyslexics are less well-off than their otherwise equal, nondyslexic counterparts. The difference principle holds that if a distribution of economic goods disproportionate to that naturally occuring in the competitive give-and-take of economic activity would tend to bring the dyslexic up to a level playing field in terms of equality of liberty, that unequal distribution would be just. And, particularly if such a difference in distribution brings the individual to effective equality of liberty, one might well view it as an investment to be recouped in increased adult productivity of the one who is enabled to overcome a serious handicap. But even if the disproportionate distribution will not be temporary, dyslexic individuals (as with other individuals who are handicapped) are entitled to that continued disproportionate distribution necessary to maintain equality of their welfare. The subtleties of disagreement between religious and secular egalitarians, and of criticisms of Rawls' position, need not occupy us here, because our task is to provide those advancing justice claims on behalf of dyslexic children with a sampling of the possible lines of argument that can be given to support those claims. Two other lines of argument are suggested in the philosophical literature on justice.

Jeffrey Reiman organizes his social contract theory along somewhat different lines than did Rawls. Reiman holds that "justice is the set of principles regulating behavior that it would be reasonable for all human beings to accept to best protect themselves against the threat of subjugation each poses to the others."[7] The simple idea here is that when individuals disagree about an action to be taken that is such that, given either option, one will have his or her preferred action blocked, it is reasonable for either to ask the other for a justification of his or her preference. A true justification, one that establishes more than the fact that

the two parties disagree, "will *require* the loser to accept the resolution of the conflict..." Hence, a true justification for a claim on behalf of a dyslexic child has the logical force of morally compelling the assent and cooperation of the school administrator, against the option the administrator would prefer **and** against the fact that the administrator has the power to enforce her preferred choice. For the administrator to offer as justification of denial of special educational benefits "no more than that she has judged that she should act the way she did," and that she has the power to enforce her judgment, is for the administrator to subjugate the dyslexic child to her power without a rational case being made for doing so.

What are the principles of justice for Reiman? They are similar to those of Rawls. People "owe each other noninterference, easy rescue, respect for natural ownership, trustworthiness, intergenerational solicitude, and punishment no greater than *lex talionis* (the punishment fitting the crime) and deterrence require—and these are owed to everyone equally."[8] This is Reiman's version of the liberty principle, somewhat broader in its impositions of responsibilities than Rawls's. The second principle is the difference principle, expressed in terms of the source of benefits arising from cooperation: "Where people do cooperate to produce benefits, they owe each other distribution of the benefits and efforts that went into producing them according to the difference principle—inequalities must work to maximize the share of everyone in society starting from the worst-off individual."[9]

The reason that nonsubjugation of others is a requirement of reason, a requirement that every reasonable individual ought to accept, is that reason dictates that one's actions be directed toward the world as it is, not as we imagine it to be. And other humans are a part of that world. Because other humans, as we do, have lives that are uniquely subjective in that they have goals and ends that are of their own choosing, reason requires that we recognize the importance of their liberty, their freedom from the arbitrary interference of others in the pursuit of those subjectively chosen ends. Thus, reason requires the liberty principle. Reason requires

"that one identify with the human subjects who may be affected by one's action"[10] so that one considers the effects of one's action on others' pursuit of their own ends and not impose one's own ends on others without justification—that is, that one not subjugate others.

Where individuals are by design involved in cooperative ventures, such as public education, the difference principle requires that school administrators do more by way of not subjugating than simply avoid interference with parents who are attempting to obtain help for their dyslexic children. To leave nonsubjugation at the level of noninterference would only require an administrator, say, to permit a parent to employ a volunteer to provide one-on-one tutoring of a dyslexic child during the school day; noninterference and easy rescue does not impose the additional duties of hiring specialists, or providing areas and equipment in the school adequate for the dyslexic child's developmental needs. It is, rather, in the difference principle that such justice claims find their justification. It is the cooperative effort at producing educated children, undertaken by a society to secure the benefits of an educated citizenry, that justifies the unequal distribution of educational benefits so as to maximize the future share of the dyslexic child in the society's social and economic institutions.

Parents who confront recalcitrant school administrators, be they principals or superintendents or school board members, often find subjugating attitudes that arise from the power of such individuals to enforce their views granted by the authority vested in them. Such power can subjugate precisely because it can enforce the provision of educational services that are inadequate to the dyslexic child's needs, and with pseudojustifications that are rooted in a failure to appreciate just how desperately pressing those needs are in the lives and ends subjectively important to those children and their parents. The moral claim of parents of dyslexic children for special educational measures that aim effectively at overcoming their children's handicaps is thus rooted, on Reiman's account, in the necessity for those involved in the cooperative enterprise of education—specifically, teachers and admin-

istrators, but also legislators who exercise the powers of taxation and allocation—to identify with the disabling impact of dyslexia and to allocate differentially so as to minimize or eliminate that impact. To attend only to the commonly shared needs of children and ignore the special needs of the handicapped is to fail in appreciation of the uniqueness of the subjective experiences of individuals—in short, to fail fundamentally to understand the requirements of justice as applied to individual humans who are essentially subjects of unique lives.

Robert Goodin emphasizes similarly the duty of the just person not to capitalize on the special vulnerabilities of persons. Dyslexia, like its frequently accompanying feature of higher-than-average intelligence, knows no socioeconomic class. Were it a disability that typically affects only the children of the well-to-do, we might regard their needs as not requiring redistribution of our common wealth but as burdens appropriately borne only by their families. However, dyslexia afflicts the children of parents of very modest means as well as the children of the Rockefellers. (Governor Nelson Rockefeller was so dyslexic that he had to commit his speeches to memory rather than rely on reading them aloud.) Hence, to take the attitude that dyslexia is an unfortunate burden, but a burden that is properly borne solely by the families of dyslexic children and anyone else they are able to enlist in voluntary contributions, is to capitalize on the vulnerabilities of those families caused by their position on the socioeconomic ladder.

Goodin argues that provision of ameliorating and compensating benefits to otherwise vulnerable persons is a requirement of justice in two ways. First, justice requires that we not take unfair advantage of others. An unfair advantage occurs when the natural distribution of biologically determined qualities gives one individual a significant advantage over an another without it being merited by that individual's personal effort. Thus, we take unfair advantage of the dyslexic child when we put that child into competition with children of normal perception without providing the special training necessary to overcome the naturally occur-

ring perceptual handicaps that constitute dyslexia. The dyslexic child's performance is rated lower than that of the normal child on standardized examinations under standard conditions, and to the extent that such ratings determine access to college and careers or occupations that are differentially preferred in our economy, the unfair advantage is exploited throughout the dyslexic individual's life. Justice does not necessarily require welfare payments; but it does require, where special training techniques and technologies can offset or eliminate such naturally occurring disabilities, that such ameliorations be provided. And, where full parity of ability cannot be achieved for severely handicapped individuals, justice requires both that we provide standard welfare benefits to insure for them lives that are not bereft of dignity because of their handicaps and that we commit resources to research aiming at development of ameliorative training and technologies and means of preventing handicapping conditions in future individuals.

Second, Goodin recognizes that there is a ground in self-interest for not exploiting unfair advantages. History shows that, if large classes of people experience such exploitation, they will tend to rise up in violent protest against what they perceive to be unfair treatment. Whether such protests are individual, as in the high rate of violent crime in impoverished social classes, or collective, as in the revolutions that have marked the histories of countries like Russia and France, those naturally endowed with competitive advantages not of their own making have an interest in achieving social institutions that do not fuel perceptions of exploitation. Thus, prudence dictates that access to the good life not be denied to the handicapped in ways and through policies that exploit their handicaps.

We thus have a common interest in addressing the disabling conditions of individuals. That interest lies in not creating for them lives full of desperation, taunted by the accretion to the naturally endowed of unmerited quality of life. Discrimination and exploitation of vulnerabilities occur whenever we fail to provide social institutions that are tuned to the particular needs of individuals. Institutions with cracks through which individuals fall,

which in turn produce a lack of access to meaningful employment, are breeding grounds for the alienation that produces the kinds of sociopaths that violent criminals are. Even if the supportive efforts of families create qualities of character that offset sociopathy, the quality of life of an individual whose disabilities have not been fairly addressed is a kind of suffering that is universally abhorred.

Parents and others seeking educational benefits for dyslexic children often encounter pseudojustice claims in opposition to their own. Typically, these claims rest on the view that to devote more than an equal share of educational resources to a given child is unfair to other children. To deal effectively with such counterclaims, one must understand their logic and its limitations. Certainly we would hesitate to commit extraordinary resources to a relatively few handicapped individuals if (a) such commitment would markedly decrease our ability to attend to the needs of a large number of other individuals, and (b) such commitment would not markedly improve the condition and lot of the handicapped ones. So, the logic is that of the utilitarian: We ought to seek to maximize the greatest good of the greatest number; extensive expenditures on behalf of the relatively small minority of handicapped individuals will not markedly improve their good, and will markedly harm the interests of the vast majority of normal individuals. Their due is no more and no less than that of anyone else; and providing that is treating them equally. Hence, extensive expenditures on behalf of the handicapped beyond the proportionate amounts that are their due are not warranted.

We have seen how philosophical theories of justice can be used to counter this line of argument by showing that it is founded in a false equation of justice with equal expenditure. First, theories of justice provide a basis in the Judeo-Christian tradition of regarding private property as legitimately appropriated for the needs of the less well-off, by regarding it as not absolutely owned but held in trust, with strings attached. Second, theories of justice establish that justice requires both impartiality—seeing as equally legitimate the claims of the less well-off—and compassion—

identification with the experiences of the naturally burdened as a way of adjusting one's approach to the world to the peculiar facts constituted by human subjectivity. Third, theories of justice require that we not subjugate others, and that we not take unfair advantage of their vulnerabilities. Finally, theories of justice require that we affirm others' liberty and that, where liberty is limited by unmerited, naturally occurring handicaps, we undertake cooperatively to remove such handicaps. When the requirements of justice have been met, it is appropriate to award individuals for their achievements based on merit, so that inequalities resulting from superior and inferior striving are appropriate. But their appropriateness comes only after assuring equality of opportunity and not unfairly taking advantage of naturally occurring disadvantaging conditions.

Dyslexia is a real condition of perceptual deficiency for which labor-intensive ameliorative approaches exist. It is a condition of which scientific research is beginning to provide understanding. The Human Genome Project promises to develop technologies that may some day allow us to treat this and other genetic or partially genetic conditions medically, and perhaps even to avoid their occurrence as expressions of an underlying genetic substrate. Under those conditions, justice requires that we approach dyslexia as we have begun to approach other disabling conditions, with compassion, commitment, and in a manner that fosters the self-worth of individuals suffering from them. Failure to honor the claims of the dyslexic child is unjust.

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