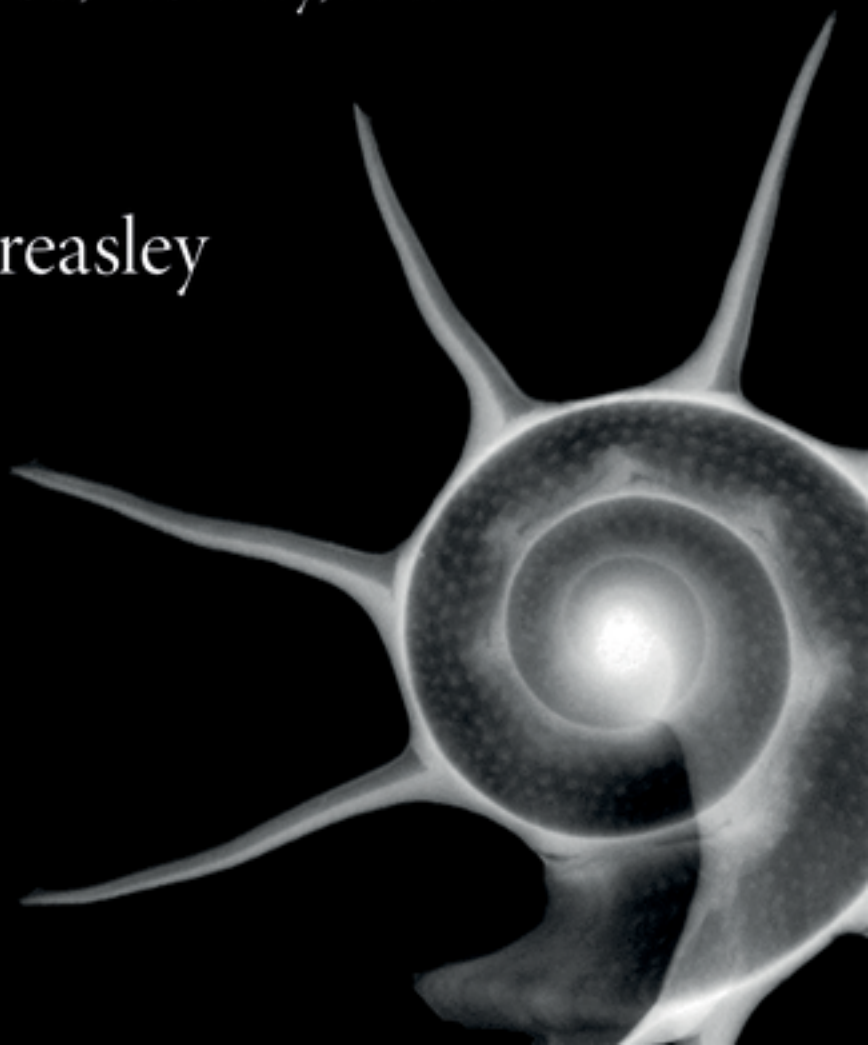


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Arguments about Abortion

Personhood, Morality, and Law

Kate Greasley



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KATE GREASLEY

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Introduction

This book is about abortion, but it is about a good deal more besides. Part of what makes abortion such a rich and rewarding topic of study is its entwinement with a plethora of other absorbing legal and philosophical problems. Among other things, thinking through the abortion problem forces us to confront questions such as: When is an early human being worthy of strong moral protection? When, if ever, is it justifiable to end the life of another human being? And do we possess the fundamental right to life merely in virtue of being members of the human species, or in virtue of something else?

Given its entanglement with problems such as these, it is hardly surprising that moral disagreement about abortion has been so protracted. Abortion is a hard topic, not just, or even primarily, because it is taboo, emotive, and political. Abortion is hard, first and foremost, because it invites questions that are genuinely complex. The philosopher Margaret Little puts it well when she says that the abortion problem is ‘plain old hard’.¹ As she writes:

It touches on an enormous number of complex and recondite subjects, requiring us to juggle bundles of distinctions which are themselves points of contention in morality and law.²

As Little incisively notes, the problems of abortion are not just hard the same way that a ‘complex math or public policy question is hard’.³ They are hard in part because when reflecting on the nature of pregnancy and the fetus, the general principles and distinctions of moral and legal analysis with which we are most familiar often seem to come up short. There is, Little sees, ‘something about abortion that is not captured however carefully we parse counterexamples or track down the implications of traditional classifications’.⁴ Thus, she writes, the ‘clear-headed’ application of the ‘usual tools’ of morality and law often fails to construct a wholly satisfactory account of what happens in abortion.

This troubling doubt that abortion could ever be properly analysed using our conventional principles and categories (the ‘usual tools’) is a worry that pervades the topic, rearing its head at a number of sticking points. At its most sceptical,

¹ Margaret Olivia Little, ‘Abortion, Intimacy and the Duty to Gestate’ (1999) 2 *Ethical Theory and Moral Practice* 295, 295.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

the challenge to which Little refers simply denies that we can argue about abortion *at all* the way we argue about other issues in morality and law—although, when it gets this far, the threat can begin to look a little *too* ominous. Pregnancy may be like nothing else, but then again, no subject of philosophical study is exactly like anything else. The distinctness of a practice or of a situation does not preclude it from also being an instance of a more general kind of phenomenon. Indeed, the entire usefulness of arguing from principles is their ability to capture what is salient and universal about a discrete problem, and thereby gain some insight into how it ought to be appraised, given the more general commitments that we have.

Even with relevant principles to hand, though, navigating a way through all of the pertinent considerations in abortion and assigning them logical order is a significant challenge in its own right, and one with which the first part of this book is exclusively concerned. As will become apparent, deciding what is really at the heart of the abortion controversy is one preliminary inquiry that in fact constitutes a significant proportion of all argument about abortion.

There is a lot that abortion is concerned with which this book is not. Abortion is very often about religious affiliations and beliefs. It is about attitudes to sex—who should be having it, with whom, and how. It is tied up with women's interests in sexual liberation, and men's interests in women's sexual availability. Abortion is often about control: control of a medical procedure, of reproduction, of women as a class, and, from some perspectives, population control. In politics, abortion is about winning elections and judicial appointments, and, in the United States, about the autonomy of states to set their own policies on reproductive choice. Whilst being about all these things sociologically and politically, a main thesis of this book is that at its philosophical heart, abortion is about whether the human fetus is rightly considered a person, in the moral, rights-holding sense. It goes without saying that the answer to this question will probably have implications for a number of problems outside of the abortion dispute, most notably, embryo experimentation and assisted reproduction techniques that typically involve embryo wastage, such as *in vitro fertilization*. I will not be making specific claims about these related topics, but will leave it to the reader to infer what bearing my arguments might have on them, if any.

Abortion is hardly in need of a definition, but in the interests of complete clarity, let me define it as the deliberate ending of a pregnancy with the known or desired result that the embryo or fetus will die. This book is predominantly concerned with how claims about the moral and legal permissibility of abortion intersect with claims about fetal, or 'prenatal', personhood—in other words, claims about whether the fetus is a person in the philosophical sense. In different places, I refer to this issue interchangeably as the question about what constitutes 'personhood', or 'moral status' or 'full moral standing' or full 'moral considerability'. Exactly what is meant by that question, and how the designation 'person' differs from that of 'human being', will be clarified in chapter 1.

Preliminaries

Before we get properly into the discussion, a small handful of issues need to be addressed. Terminology is a common cause of friction in the abortion debate, often for good reason. When still in the midst of argument, it is imperative to avoid stating things in ways that are tendentious. Therefore, I will be using the term ‘pregnant woman’ rather than the more prejudicial ‘mother’ to refer to bearers of pregnancies, and ‘fetus’, not ‘baby’ or ‘unborn child’, to refer to all forms of unborn human life, including embryos. (There are notable exceptions when dealing with arguments that explicitly assume, as part of their premises, that the fetus is a person.) My terms are meant not to convey any commitments about the nature of unborn human life but to convey only neutrality about that nature before the relevant arguments have been made.

The designations ‘pro-life’ and ‘pro-choice’ are widely disliked for the reason that they imply false leanings on behalf of the opposing camp: opponents of abortion do not view their cause as one that abjures choice for women, and defenders of abortion rights do not see themselves as set against life. I will therefore mostly be employing the less provocative (if slightly more cumbersome) propositions of being in opposition to or in defence of abortion rights. I make an exception in chapter 1, where I refer to the ‘pro-life’ and ‘pro-choice’ political movements as they are colloquially labelled.

The extent to which discussants in the abortion debate are entitled to rely on their own, or on common, settled judgements in constructing their arguments is another persistent issue in this topic. I will be following the approach of most discussants by according some presumptive epistemic force to moral judgements that are firmly held by most of us—for instance, the judgement that it is seriously wrong to terminate the lives of healthy human infants. It is not my view that an entrenched judgement such as this should never be reconsidered; to some extent, all relevant moral judgements are held in abeyance at the outset of my inquiry. However, reflecting on what does seem inescapably clear to us, including which practices are plainly morally impermissible, can be an essential step towards gaining understanding about what is less clear. In this discussion, the nature of abortion and the human fetus are the contentious matters. If every other commitment surrounding them were treated as equally contentious, we might struggle to make progress with the subject matter at all. Quite apart from holding the moral prohibition on infanticide very loosely, then, one could instead think that the consensus of judgement there is capable of giving some direction to our deliberations about abortion, and of helping us to see what, in particular, *needs* to be explained.

Some thinkers will no doubt be suspicious of this methodological inclination, and will view any degree of closed-mindedness about ancillary questions (such as the moral permissibility of infanticide) as an impediment to truth-finding, not a partial map. But no theorist can entirely avoid relying at points on propositions

that seem to her, and to most people, to be obviously correct. The judgements that human sex cells are not morally considerable beings, and that contraception cannot possibly be murder, are also grounding premises in the abortion debate which, rather than being equally open to dispute, are used by proponents on both sides to shape their arguments about the nature of abortion. This is not to say that our starting presumptions about the moral status of sex cells, or infants, ought to remain immovable in our thinking about abortion, no matter what. But holding everything as equally up for debate at the outset of discussion might only steer us away from the most useful questions there are for understanding the special case of the fetus.

Next, it is important to keep in mind throughout that the questions concerning the moral character of abortion and the appropriate legal response to the practice are distinct. There may well be much that separates the reproductive choices people ought to make and those which the law is justified in enforcing. In regulating abortion, lawmakers must attend to considerations that the moralist need not—considerations like administrability, compliance, the aptness of legal coercion, and its collateral harms. All of these things should alert us to a possible, or even probable, gap between our moral conclusions about abortion practice and the best system of regulation. At the same time, one should expect the two matters—abortion morality and abortion law—to intersect in at least some meaningful ways, even if it is only that our conclusions about the moral nature of abortion practice form the starting point for ascertaining the optimal regulatory regime. The overlap between the correct moral and legal responses to abortion will be greater or lesser depending on what is believed about the nature of the human fetus. What follows about the proper legal status of abortion *if it is the unjustified killing of a person* is different from what might follow if abortion is morally unacceptable but does *not* equal the killing of a person. In particular, the law may have the elbow-room to frame its permissions more loosely than those of morality if the moral cost of abortion does not entail murder, but involves some less grave kind of wrong.

Still, in parts of the book the questions about abortion's moral and legal permissibility will track one another quite closely. This is especially true of chapters 2 and 3, where I consider whether much abortion could be understood as justified homicide or the justified refusal to sustain the life of another person. With regard to the conditions for justified homicide in particular, there is no generally recognized gap between what morality requires and what the law can justifiably enforce. Consequently, much of that discussion will consider the moral and legal landscape in tandem.

It is worth saying one or two more words about the kind of discussion I will be conducting. This book is a work in normative legal and moral philosophy. As such, its primary focus is on the argumentative sustainability of broad propositions about the nature of abortion, about morally and legally permissible conduct, and about the logical consistency of certain sets of claims. It is not primarily concerned with sociological or doctrinal legal questions about abortion, such as how women respond to having abortions and why they have them, or how the law of abortion is and can be applied and interpreted. Though questions of these kinds

may prove relevant to the main inquiry at points, they are not approached as independent subjects of investigation. This is not because I regard them as unimportant, but only because their answers do not bear on the particular puzzles central to my discussion.

Like other books about abortion ethics and moral status, I employ the argumentative device of thought-experiments at points. I do this with some awareness of the scepticism harboured by some about the usefulness of abstract hypotheticals for enhancing moral understanding of problems like this. The source of that scepticism is well expressed by Stephen Mulhall when he writes:

... thought experiments in ethics presuppose that we can get clearer about what we think concerning a single, specific moral issue by abstracting it from the complex web of inter-related matters of fact and of valuation within which we usually encounter and respond to it. But what if the issue means what it does to us, has the moral significance it has for us, precisely because of its place in that complex web? If so, to abstract it from that context is to ask us to think about something else altogether – something other than the issue that interested us in the first place; it is, in effect, to change the subject.⁵

With respect to abortion, the concern might be that the use of thought-experiments which are far removed from pregnancy will, in all likelihood, fail to account for many of the morally salient aspects of pregnancy and abortion which are bound up with the real-life context in which it is embedded. Perhaps not everything that is important about pregnancy and abortion can be captured by hypotheticals about violinists with kidney ailments or conjoined twins or intelligent Martians. This issue will be explored in greater detail in chapter 4. As a brief opening apologetic, I will say only that it is extremely difficult to bring more general moral and legal principles to bear on the abortion question *without* looking at how those principles operate outside of the abortion context, and that it is not entirely clear to me how argument about abortion is meant to proceed without marshalling and applying any of our more general moral commitments. I will not, therefore, avoid the thought-experiment method in my discussion. However, mindful of Mulhall's caution, I will try to use them judiciously and to remain alert to important aspects of pregnancy and abortion which they might obscure.

The main stakeholders in abortion rights are of course women. Some readers might therefore be dismayed by the relative sparseness of discussion here about women's interests in accessing abortion and the realities of unwanted pregnancy and abortion prohibitions on women's lives. Philosophical accounts of abortion in which the fetus appears to be central and the pregnant woman somewhat marginalized can be antagonizing to some, and for understandable reasons. The only reason why women's interests in abortion access do not occupy more space in my own analysis is because I take it completely as granted that a considerable amount is on the line for women in securing reproductive control, and that denying them that control is inexorably damaging—damaging to their health, life, happiness,

⁵ Stephen Mulhall, *The Wounded Animal: J M Coetzee & the Difficulty of Reality in Literature and Philosophy* (Princeton University Press 2009) 27.

and equality. This much is, in my view, beyond serious contention, and it is for this reason that I do not devote more space to expounding the profound negative implications of abortion prohibitions for women.

Neither do I apportion any space to examining the contrary claim that safe abortion provision actually *harms* women, for the simple reason that I do not think it can be taken seriously. This is not to say that no woman could be or has ever been harmed by an abortion, emotionally or physically. That is surely untrue. But almost any medical procedure is potentially harmful to anyone—physically or emotionally—in the right conditions. The prevalent claim by philosophical opponents of abortion that “abortion harms women” can therefore only be understood as the more particular claim that abortion has such a propensity to harm those choosing it, and inflicts a degree of harm which, overall, so far outweighs its benefits, that it is best understood as a bad thing for womankind. This is the claim which I regard as so palpably false as to not warrant any engagement.

The Argument to Come

Does the morality of abortion depend on the moral status of the human fetus? Must the law of abortion presume an answer to the question of when personhood begins? Can a law which permits late abortion but not infanticide be morally justified? These are just some of the questions this book sets out to address.

The book is divided into three parts. Part I is solely concerned with the relevance of prenatal personhood for the moral and legal evaluation of abortion. Contrary to some accounts of the abortion problem, it defends the basic proposition that the argument for abortion rights does indeed critically depend upon whether the human fetus is rightly regarded as a ‘person’ in the philosophical sense. I examine a few long-standing philosophical accounts of abortion that are alike in concluding that we do not need to decide whether or not the fetus has full personhood status in order to draw the correct conclusion about the morality or legality of abortion.

Those accounts include, most notably, Ronald Dworkin’s view that abortion argument is, at root, not about whether the fetus is a person in the philosophical sense, but rather about different interpretations of the intrinsic value of human life, and Judith Jarvis Thomson’s argument that even if the fetus is a person, abortion can be considered as the mere failure by a pregnant woman to proffer it non-obligatory life-sustaining assistance. Chapter 3 considers the somewhat different claim that even if the fetus is a person, abortion could be subsumed under moral and legal categories of justified homicide, and chapter 4 examines the view that considerations of sex equality relegate the personhood question to irrelevancy in the abortion debate. Against all such propositions, I argue that deciding what the human fetus is, morally speaking, is of pre-eminent importance in legal and ethical reasoning about abortion.

In Part II, I turn to the substantive debate about the nature of personhood. Disappointingly, no doubt, I do not advance any novel theory about the conditions

for personhood or about when persons begin. Instead, I trace the key features of the conventional debate about when persons begin to exist and ask what further beliefs and commitments are seemingly implied by certain familiar strains of argument. In particular, I suggest that arguments in favour of the conception threshold of personhood which point to the putative ‘arbitrariness’ of all *post*-conception thresholds (viability, consciousness, birth, and so on) seem to presuppose a view about how persons begin, which I term ‘punctualism’. Punctualism is the belief that personhood status is acquired completely and instantaneously, and that there can be no vague period in which human beings gradually become persons. In chapter 5, I claim that there is good reason to reject the punctualist thesis and to accept the antithetical ‘gradualist’ view, which holds that, whatever its constitutive features, the advent of personhood is a process which admits of no non-arbitrarily distinguishable points. In chapter 6, I consider and reject some further arguments for embracing the punctualist thesis and for the view that complete persons must have come into being by the completion of conception. These include arguments which seek to move from claims about the conditions of continuing personal identity to the conclusion that all zygotes are persons.

Chapter 7 is something of a fresh start. I restate the compelling arguments for believing that our concept of a person has chiefly to do with a cluster of sophisticated cognitive and emotional capacities, as well as the perennial problem that not all human beings *post*-birth possess all of those capacities. I argue that some rejections of the so-called ‘developmental’ (capacities-based) view of personhood’s conditions use the wrong test for conceptual salience—that is, they wrongly hold that every constitutive feature of personhood must also be an *essential* feature of all persons. Still, the ostensible absence of *any* sophisticated cognitive or emotional capacities in human beings before birth is also a challenge for so-called ‘graduated’ accounts of pre-birth moral status, which hold that fetuses become more morally considerable as gestation progresses. Drawing on recent work about the moral status of animals, I suggest instead that the basic (and popular) intuition that later abortion is more morally serious than early abortion can be vindicated by thinking about the moral respect we have reason to demonstrate for human embodiment.

Chapter 8 turns to address two of the most prominent issues in the abortion ethics literature: the human equality problem and the moral difference between abortion and infanticide. The problem from human equality asserts that any account which takes personhood status to supervene on developmentally acquired attributes, such as self-consciousness or rationality, is inconsistent with a commitment to basic human equality, since those attributes can be possessed in greater and lesser degrees by human beings post-birth. The implication, it is argued, is that only a conception of personhood as being constituted by human genetic completeness (a test met by zygotes) can account for human equality. I try to adduce reasons of a moral nature for treating personhood status as a ‘range property’, meaning that it is fully and equally borne out by all human beings past a minimum threshold. I go on to suggest that there are good reasons for the law in particular to set that minimum threshold at live birth, notwithstanding the close resemblances of late fetuses and neonates. I do, however, partly call into question the popular philosophical view

that there are no 'intrinsic' differences between human beings immediately prior to and subsequent to birth.

Finally, Part III turns to some specific issues of abortion law and regulation. Chapter 9 considers what implications my conclusions in Parts I and II have when it comes to framing a good law of abortion, as well as the question of what the serious commitment to a 'right' to abortion (even if only up to a certain gestational point) would require. I also examine some problems arising out of gaps between the morality of reproductive decision-making and the justifications for legal interference, including the well-rehearsed 'back-street abortion argument' based on counterproductiveness of regulation. Chapter 10 considers the special case of selective abortion on the ground of fetal sex or disability of the future child, focussing on the ways in which attitudes towards these special kinds of abortion have been harnessed in the wider moral debate. The final chapter offers some comments on the current controversy surrounding the scope of the right to conscientiously object to participation in abortion provision.

PART I

ORDERING THE ARGUMENT

1

What Should Abortion Argument Be About?

When we argue about abortion, what should we argue about? When a topic is so mired in moral complexity, it can be difficult to gain clarity on just where one's starting point ought to be. Nevertheless, precisely where the locus of debate should reside is not just an interesting question in its own right, but an essential first piece of the puzzle when it comes to thinking through the rights and wrongs of abortion. For many discussants, the argumentative priority of establishing what we are dealing with ontologically or morally in a human fetus—that is to say, whether a fetus is what we understand to be a 'person' or not—is self-evident. Conversely, some serious and influential contributions to the abortion debate have sought to establish that the moral status of the fetus is not decisive either for the morality or legality of abortion, or is even rendered redundant by other philosophical considerations.

Speaking plainly, there is more than one way of telling someone that she is asking the wrong question about a contentious subject matter. On the one hand, one could say that her question misfires because the answer to that question will not, in the end, determine anything critical in the discussion, and then go on to illustrate why this is so. Alternatively, one might claim that there is something inherently defective about the question itself—that it asks something that cannot be answered; that it is irrational or unintelligible; that it is not pertinent to the topic under consideration, or that it is not what disputants are truly arguing about. Challenges of both kinds are captured by certain arguments in academic discussion about abortion. Such arguments seek, in one way or another, to bypass the 'personhood' question in moral and legal reasoning about abortion.

As an example of challenges of the first kind, take the following claim, which we will call the 'Good Samaritan Thesis' (GST):

The Good Samaritan Thesis: Abortion is morally permissible in all (or almost all) cases, *whether or not the fetus is a person*, because gestation is a form of Good Samaritanism—that is, it is a form of supererogatory assistance that no one person could be morally obligated to perform in order to preserve the life of another. Consequently, abortion only discontinues non-obligatory, life-preserving assistance.

The GST claims that abortion is always or almost always permissible, whether the human fetus is a person or not. In effect, it sidelines the personhood question by stating that it is never, or hardly ever, morally obligatory for a woman to carry a pregnancy to term, even to save the life of another person. The most well-known iteration of the GST comes in the way of an analogy drawn by Judith Thomson

between pregnancy and a hypothetical situation in which a person is kidnapped and forcibly connected to a famous, ailing violinist, whose unique kidney condition means that he needs to be connected to the other person's body for the next nine months in order to survive.¹ Thomson's argument is that just as the unfortunate person is surely permitted to unplug the violinist and terminate the bodily support, even with the result that the violinist will die, so a woman is permitted to discontinue her bodily support of a fetus by having it removed from her body.

Another personhood-bypassing challenge of the first kind is what we might call the Justified Homicide Thesis (JHT), which claims the following:

The Justified Homicide Thesis: Abortion is morally permissible in all (or almost all) cases, *whether or not the fetus is a person*, because it is a recognizable instance of justifiably killing another person.

The JHT begins by pointing out that our moral and legal principles make exceptions to the general prohibition on killing other persons. This includes, for instance, situations of self-defence, or just war, or in situations of what criminal lawyers have called 'necessity', where by killing one person is the only way of avoiding an even greater loss of life.² It then claims that if the fetus *were* a person, abortion would often or always fit those exceptions. JHT differs substantially from GST by analysing abortion as an act of killing, not just the refusal to save. Hence, the two theses construct abortion's permissibility in different ways. On JHT, abortion is an example of justified killing, and on GST, of a justified refusal to save life.

Let me put the merits of the GST and JHT to one side for now. My concern here is instead with personhood-bypassing challenges of the second kind. As I said, challenges of that kind do not proceed by claiming that, in the final analysis, the permissibility of abortion does not depend upon whether the fetus is a person or not. They have an altogether different character, asserting that the personhood question is a misguided starting point for philosophical discussion and/or legal reasoning about abortion. In what follows I want to examine some such challenges and ask whether they are at all convincing. In short, is there reason to throw out the personhood question in the very early stages of our thinking about abortion?

1.1 Persons and Human Beings

But we may be getting ahead of ourselves already. It might be asked what the category 'person' even means in the context of this discussion, especially in relation to the separate category 'human being'. Most moral philosophers distinguish these two classifications.

¹ See Judith Jarvis Thomson, 'A Defense of Abortion' (1971) *Philosophy and Public Affairs* 1, 47–66.

² Both exceptions are, naturally, subject to proportionality requirements. Actions taken in self-defence must be not only necessary to resist the harm threatened by another person but also proportionate to that harm (e.g. one may not kill in self-defence to avoid sustaining only a minor injury). Homicides performed out of necessity are also subject to the proportionality requirement that more of value—namely, human life—is preserved by the killing than is lost by it (and even then, philosophers heavily dispute which side-constraints on necessity killing still apply). These issues are the subject matter of chapter 3.

The ascription 'human being' is taken to be a biological category, encompassing any living creature that is genetically a member of the human species. Any human fetus, or, for that matter, newly formed zygote, is at least a human being in the bare sense that it is an individually identifiable human life. It is definitely not a frog, or a cat.

The ascription 'person', on the other hand, denotes a category of beings which possess a certain kind of moral status, typically elaborated in terms of interests or rights, and yielding a cluster of normative implications concerning how it is morally acceptable to treat such beings. Precisely what all of these normative implications are is a matter of some dispute. At the very least, however, personhood status is taken to entail strict rules about the permissibility of killing the bearers of that status. It is never permissible to kill persons, no matter how painlessly, for reasons of convenience or (on most views) even to promote an appreciable level of welfare among other creatures or persons. The same kind of strict prohibitions on killing are not generally believed to apply to non-persons. The normative classification captured by the term 'person' has, in different places, been expressed in terms of 'moral status', 'metaphysical status', or, in Mary Anne Warren's description, humanity 'in the moral sense'.³ As I see it, all these terms grasp at more or less the same notion. To ask whether a fetus is any of these things is simply to ask whether it is something that, by virtue of its essence or attributes, is akin to fully matured human beings in the thing that endows *them* with their special status, interests, and rights.

The analytical distinctness of human beings and persons is apparent from the fact that we can at least conceive of non-human persons. Intelligent aliens, angels, and perhaps even some non-human animals could all fit our concept of a person without being biologically human. So 'human being' and 'person' do not *mean* the same thing. It may be true, nevertheless, that all human beings are, necessarily, persons. This would be so if all members of the human species also happened to meet the conditions for personhood, making overlap between the categories 100 per cent. The analytical separateness of the two just means that it is an open, and, hence, an intelligible question whether or not this is so.

Having noted this important distinction, let us turn to the *prima facie* case for placing the question of prenatal personhood at the forefront of our ethical and legal investigations about abortion. For many, that case is clear and simple. Our moral norms prohibit the intentional killing of other persons in all but the most exceptional circumstances. Without adequate justification or excuse, such killing is legally classified as murder. If a fetus *is* a person, then, abortion is, on the face of it, in the same moral category. At best, defensible homicide. At worst, murder. This sets the stakes high when it comes to the moral status of the fetus. Perhaps even the real *possibility* that a fetus is a person, morally on a par with you and me, is enough to alter the whole structure of the abortion debate. That possibility might prompt us to ask whether abortion could perhaps be subsumed into a moral or legal category of justified homicide, or to think about whether abortion is correctly analysed as an instance of intentional killing.

It should be acknowledged at this point that not everyone engaged in discussion about abortion concedes that the embryo or fetus *is* a human being, where

³ Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57(1) *The Monist* 43–61.

'human being' is taken to mean 'full member of the human species' rather than a form of human life, or human biological material. As can also be true of other animal species, one might argue that there is a difference between what counts as human biological material and what counts as an individual *member* of the human species. A cow fetus is certainly a cow in one sense, that is, it is bovine, but perhaps it is not yet an identifiable instance of *a cow*.

Some philosophers have appealed to the consensus among embryologists when asserting that a new, individual human being is present by the end of conception, when a zygote possessing a complete set of human DNA comes to exist.⁴ However, the degree of developmental completeness that is required before a life form may count as a new member of the human species is an evaluative question, not a scientific one. No embryological facts can tell us whether a single-celled zygote properly counts as a whole member of the human species (albeit an immature one), rather than as biological material that is the precursor to a new member, since the idea of a full and complete member of a species is not itself strictly scientific. Returning to the cow example above, a group of zoologists might agree about every biological fact concerning cows and yet disagree about whether a cow embryo should be considered a complete species member.

So the fact that human *beings* begin to exist at conception is by no means a given, depending on what precisely is meant by that designation. I will say nothing further about this issue, however. The distinction between human beings, a biological category, and persons, a moral and evaluative one, is a sufficient primer for my arguments throughout this book without any need to challenge the claim that embryos and fetuses are human beings. In everything that follows, therefore, I am willing to concede that human beings begin to exist at conception.

1.2 Dworkin and the Red Herring

Is it possible, though, that the questions whether, when, and to what degree unborn humans are persons fall far from the true, philosophical heart of the abortion problem? In his book *Life's Dominion*, Ronald Dworkin set out a compelling argument

⁴ See Robert P George and Christopher Tollefsen, *Embryo: A Defense of Human Life* (Doubleday 2008) chapter 5, citing Bruce Carlson, *Human Embryology and Developmental Embryology* (CV Mosby 2004) 58 and Keith L Moore and TVN Persaud, *The Developing Human* (7th edn, WB Saunders 2003) 40; Patrick Lee, *Abortion and Unborn Human Life* (1st edn, The Catholic University of America Press 1996) chapter 3; Christopher Kaczor, *The Ethics of Abortion* (1st edn, Routledge 2011) 127–9. Others have attacked the proposition that all zygotes and embryos count as individual human beings on the ground that an entirely *individualized* human being doesn't emerge until some days or weeks after conception, either because some parts of the early embryo (or 'blastocyst') eventually become the placenta, or because monozygotic twinning is still possible before the 'primitive streak' (the earliest precursor of the spinal cord) is formed at fourteen days (see: Mary Warnock, *An Intelligent Person's Guide to Ethics* (Overlook 2004) 65–6; Ronald Green, *The Human Embryo Research Debates: Bioethics in the Vortex of Controversy* (Oxford University Press 2001) 31; and Joseph Donceel, 'Immediate Animation and Delayed Hominization' (1970) 31 *Theological Studies* 76, 98–9).

for believing the personhood question to be, in the main, a red herring in the abortion debate.⁵ Rather, he argued, that debate is in truth only a proxy for the genuine disagreement at the root of abortion conflict, grounded in the sanctity of human life, or, more precisely, differing *interpretations* of the sanctity of life and what is required to show that value appropriate respect.

Dworkin's account begins with certain observations about the nature of the public abortion debate. Drawing attention to the fiercely adversarial nature of that debate which, he rightly observed, outdoes practically all other public conflicts in the United States in its upper limits of intensity, Dworkin observed that when conducted in the traditional terms of argument about prenatal personhood (meaning, whether or not the fetus is a person), the abortion conflict appears to be intractable. This owes substantially to the fact that, as Dworkin claimed, 'neither side can offer any argument that the other must accept', since different conclusions about the personhood of the fetus are only, ultimately, a matter of 'primitive conviction'.⁶ He wrote:

[T]here is no biological fact waiting to be discovered or crushing moral analogy waiting to be invented that can dispose of the matter. It is a question of primitive conviction, and the most we can ask of each side is not understanding of the other, or even respect, but just a pale civility, the kind of civility one might show an incomprehensible but dangerous Martian.⁷

Fundamentally, either we see a fetus as a person or we do not. This, in Dworkin's eyes, makes debate about fetal personhood interminable, for there will be no trump cards, so to speak. Those who view the fetus from conception onward as equivalent to an unborn child and those who view it as no more than a cluster of cells cannot hope to persuade each other otherwise by recourse to reason, for their beliefs are not grounded in reasoned argument to begin with, only in gut intuition.

Next, so long as abortion disagreement is directed at the moral status of the fetus, that debate will not only be interminable, but also, Dworkin argued, resistant to compromise. Such compromise is 'unrealistic', he claimed, for those who view the fetus as morally analogous to a born human being will not be moved by women's rights arguments which, on their view, are blind to the fact that if a fetus is a helpless unborn child 'then permitting abortion is permitting murder, and having an abortion is worse than abandoning an inconvenient infant to die'.⁸ Conversely, those who conceive of a fetus as something hardly different from a body part probably cannot help viewing the opponents of legal abortion as 'either acting in deep error' or out of bigotry, unreflective religiosity, or vindictiveness towards those whom they regard as fallen women. Dworkin concludes:

Self-respecting people who give opposite answers to whether the fetus is a person can no more compromise, or agree to live together allowing others to make their own decisions, than people can compromise about slavery or apartheid or rape . . .

⁵ Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins 1993).

⁶ *ibid* 10.

⁷ *ibid*.

⁸ *ibid* 9–10.

If the disagreement really is that stark, there can be no principled compromise but at best only a sullen and fragile standoff, defined by brute political power.⁹

But he did not believe we should resign ourselves to this gloomy prognosis. This is because the entire personhood-centred picture of the abortion conflict was, to his mind, based on a serious ‘intellectual confusion’.¹⁰ A good indication that the real nub of that disagreement is something other than as first appears comes in the way of what Dworkin called ‘signal inconsistencies’ in public attitudes to abortion on both sides of the divide. Opponents of abortion rights, for instance, commonly make concessions where abortion is necessary to save the life of the pregnant woman, or where pregnancy is the result of incest or rape. Furthermore, many are willing to agree that, although abortion is immoral, it should nevertheless be legally permitted, that it ought not to invoke the same penalties as murder, or that despite their moral objection, they would support their own wife, daughter, or friend if she decided to obtain one.

Some ‘signal inconsistencies’ echo on the ‘pro-choice’ side too. While supporters of abortion rights clearly do not regard abortion as murder, they do frequently characterize it as a kind of ‘cosmic shame’ and a ‘grave moral decision’,¹¹ not to be undertaken lightly or for trivial reasons, for example because the pregnancy will interfere with a booked holiday. Consequently, supporters of abortion rights often support some legal restrictions on abortion choice, notwithstanding their professed belief that the fetus is not a person in the philosophical sense.

Dworkin pointed out that on the personhood-centred picture of abortion argument, these results seem ‘baffling’.¹² How could someone who truly believes that abortion kills a person consign the abortion decision to the realm of personal morality or make concessions where pregnancy is brought about through rape? And why would someone who, say, thinks that abortion is not very different from a tonsillectomy, view it as something obviously to be regretted, or the appropriate target of any legal restrictions? The concessions and exceptions commonly made on both sides seem flatly inconsistent with the traditional account of the abortion conflict as hinging on the personhood issue. In particular, Dworkin claimed:

No one can consistently hold that a fetus has a right not to be killed and at the same time hold it wrong for the government to protect that right by the criminal law. The most basic responsibility of government, after all, is to protect the interests of everyone in the community, particularly the interests of those who cannot protect themselves.¹³

However, Dworkin thought that these signal inconsistencies *are* explicable once the conflict is recast in a different light. Central to a better understanding of abortion disagreement, he claimed, is a distinction between two very different grounds of objection to abortion captured by the interest in ‘protecting fetal life’. That interest can, in the one place, refer to what he called the *derivative* objection to abortion. The derivative objection says that abortion violates the fetus’s right not to be

⁹ *ibid* 10.

¹⁰ *ibid*.

¹¹ *ibid* 32.

¹² *ibid* 14.

¹³ *ibid*.

killed, a right which all persons possess. But 'protecting fetal life' can implicate a very different ground of abortion opposition. Dworkin labelled this the *detached* objection to abortion. The detached objection does not depend on ascribing the moral status of persons to any individual fetus. Rather, it claims that all human life has a sacred or, in secular terms, 'intrinsic', value, like the value we might ascribe to a brilliant work of art or a place of natural beauty. The objection holds that abortion is wrong not because it violates a fetus's right to life but because it 'disregards or insults' that intrinsic value.¹⁴

Dworkin argued that someone who does not regard the fetus as a person may still 'object to abortion just as strenuously as someone who insists it is' if his objection is rooted in detached grounds.¹⁵ Just as someone might object to turning off the life-support of a patient with an incurable and intolerable illness not because of the belief that death is against her interests but because the act of killing insults the intrinsic value of human life, so too might a person object to abortion not because she regards the fetus as having an interest in continued life but because she views the deliberate extinguishing of any human life as an insult to life's intrinsic value, analogous to destroying valuable works of art.

Dworkin believed that almost everyone who objects to abortion practice truly objects to it, 'as they might realise after reflection', on the detached rather than the derivative ground.¹⁶ Once we understand this, he thought, we can make far better sense of why some people believe that abortion is wrong but ought to remain legal, while others think it acceptable, but legitimately regulated. It is perfectly 'consistent', he said, for someone who objects to abortion on detached (sanctity of life) grounds to hold that it is 'intrinsically wrong' to end a human life, but that the decision whether or not to end that life *in utero* must be left to the pregnant woman.¹⁷

Moreover, on the detached picture of abortion disagreement, supporters of abortion rights actually *share* this appreciation of human life's intrinsic value. They too believe that all human life is extremely valuable, and that its destruction is always regrettable—always a 'cosmic shame'. Thus we should not be surprised that defenders of abortion rights are still sobered by the need for abortion and, frequently, support some restrictions.

This all raises a question, however. If disputants on both sides of the debate share a commitment to the intrinsic value of human life, what are they arguing about? Dworkin's answer was that people *interpret* this value in very different ways. Later in the book, he offered an account of how different interpretations of life's intrinsic value might sponsor radically different conclusions on the abortion question. More fully, he distinguished between two different sources of human life's intrinsic value: *natural* creation and *human* creative investment. Those who place more stock in natural or biological creation are more likely to conclude that the intrinsic value of human life is always insulted when abortion is carried out. But not everyone will agree that premature death in the womb is the most serious frustration of human

¹⁴ *ibid* 11–13.¹⁵ *ibid* 12.¹⁶ *ibid* 13.¹⁷ *ibid* 15.

life.¹⁸ Others may believe that performing an abortion is consistent with respecting human life's intrinsic value if it prevents significant human creative investment in the life of the pregnant woman from being squandered. Disagreement about abortion is, in short, disagreement about which 'mode' of life's intrinsic value has the greater moral importance. Conservatives in the abortion debate are likely to think that natural investment in the form of biological human life is pre-eminent. Liberals, on the other hand, more frequently believe that it is a greater frustration of life's miracle when an adult human being's expectations are disappointed and talents wasted than when a fetus dies before any comparable investment in its life is made.¹⁹

From all of this, Dworkin drew an important conclusion about political resolution of the abortion problem. Crucially, he argued that disagreement about the meaning and nature of life's intrinsic value has a 'quasi-religious' quality. Our personal interpretations of that value are, he said, 'essentially religious beliefs', relating, as they do, to questions about the meaning of life and death. The end picture is therefore of a conflict which is 'at bottom spiritual'.²⁰ And recognizing the religious nature of abortion argument has implications for the possibility of principled compromise. For, when the conflict is translated into these terms—into a matter of *religious-like* difference—a pathway to principled resolution is laid out by the doctrine of religious toleration. 'We think that it is a terrible form of tyranny', he wrote, 'destructive of moral responsibility, for the community to impose tenets of spiritual faith or conviction on individuals.'²¹ In liberal democracies, the protection of free exercise of religion therefore underwrites a permissive answer to the question of abortion's legality. Since everyone must be free to express her religious beliefs for or against abortion the state must not coercively remove the abortion option. This is a resolution which, Dworkin suggested, those who are morally opposed to abortion have reason to accept if they *are* committed to religious toleration.

Dworkin went on to spell out the ramifications of his argument for the constitutional legality of abortion in the United States in particular. If, as he claimed, beliefs about reproductive freedom are 'essentially religious', then the right to make one's own decisions in such matters can be construed out of the First Amendment, which guarantees the free exercise of religion. Consequently, state prohibitions on abortion are an unconstitutional restriction of US citizens' First Amendment rights. The religious nature of the disagreement settles the constitutional question permissively.

1.3 Personhood v the Intrinsic Value of Human Life

1.3.1 'Signal inconsistencies'

As we have seen, a key aspect of Dworkin's account was the descriptive claim that prenatal personhood is not, in actual fact, at the root of public controversy over abortion—that *it is not what people are arguing about*—and that the features of

¹⁸ *ibid* 90.

²¹ *ibid* 20.

¹⁹ *ibid*. See Dworkin chapter 3 generally, especially 91.

²⁰ *ibid* 101.