

ABORTION AND THE MARGINS OF PERSONHOOD

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I. INTRODUCTION

When a woman is pregnant, how should we understand the moral status of the life within her? How should we understand its status as conceptus, as embryo, when an early or again matured fetus? According to some, human life in all of these forms is inviolable: early human life has a moral status equivalent to a person from the moment of conception.¹ According to others, such life has no intrinsic status, even late in pregnancy.² According to still others, moral status emerges when sentience does. Until the fetus is conscious—a point somewhere at the end of the second trimester,³ it has no moral status at all; after it is conscious, it does.⁴

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1. BARUCH BRODY, *ABORTION AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW* 116-22 (1975); John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 *PHIL. & PUB. AFF.* 117, 144-45 (1973); Patrick Lee & Robert P. George, *The Wrong of Abortion*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 13 (Andrew I. Cohen & Christopher Health Wellman eds., 2005).

2. PETER SINGER, *PRACTICAL ETHICS* 96-99, 186-88 (2d ed. 1993); Michael Tooley, *A Defense of Abortion and Infanticide*, in *THE PROBLEM OF ABORTION* 51, 51-52 (Joel Feinberg ed., 1973); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *MONIST* 43, 57-59 (1973).

3. *Brain activity* arises much earlier, but *sentience* emerges with the development of organized brain activity of the form EEGs capture. One review of the science puts this development at somewhere between twenty-four and twenty-eight weeks gestational age. See DAVID BOONIN, *A DEFENSE OF ABORTION* 107-09 (2003).

4. BOONIN, *supra* note 3, at 115-27; JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 267-80 (2002); *see generally* BONNIE STEINBOCK, *LIFE*

But for a great many people, none of these views suffice. It is something rather more moderate that marks their intuitions. For many people, the human life at stake in early stages of pregnancy is not the moral equivalent of a paradigmatic person: if one somehow had to extinguish the life of an embryo in vitro to save a five-year old child, the choice would be clear. On the other hand, even early abortion involves a morally sober loss: contraception is preferable to abortion on grounds of morality, not just public health. Most clearly, the fully-matured fetus has the same level of moral considerability as does a newborn: birth does not mark a change in intrinsic moral status. In short, what a great many people believe is a *graduated* view of embryonic and fetal status: even at early stages of pregnancy, developing human life has an important value worthy of respect; its status grows as it does, increasing gradually until, at some point late in pregnancy, the fetus is deserving of the very strong moral protection due newborns.

I think this is exactly right; and in the present Article, I sketch the outlines of such a view. I begin by considering why it has been difficult for philosophical theories to give more nuanced views of embryonic and fetal status. Discussion of abortion and the status of early human life has been dominated by two traditions, natural law on the conservative side, Enlightenment models on the liberal.⁵ I believe that each has important insights to offer, but that those insights are better understood when we start not with an all-or-nothing conception of moral status, but with a genuinely developmental picture of it. Part anticipatory and part achieved, moral status is comprised of a number of interweaving stages each leading to and giving way to the next.

I then consider the implications such a view has for our public understanding of legal regulations around abortion. As many have noted, the legal status of abortion cannot be settled by determination of fetal status alone: so long as such life resides in a woman's body, living in and off of her resources, abortion laws implicate women's fundamental rights of bodily dominion. Added to this is the question of fetal viability—not because the emergence of viability changes the fetus's intrinsic status, but because it implicates what opportunities the fetus has independent of the woman, and hence what restrictions we may place on efforts of hers that would interfere with those changes. Considered together, I'll argue, these factors underwrite

BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (1992); Elizabeth Harman, *The Potentiality Problem*, 114 PHIL. STUD. 173 (2003).

5. See *supra* notes 1, 2, 4 and accompanying text; *infra* notes 7, 10 and accompanying text.

a liberal but shifting view of abortion. Early in pregnancy, abortion should be unrestricted, not because the embryo and early fetus have no value, but because pregnancy asks an enormous amount of a woman, and she is in the best position to judge whether it is a price that can be paid. As pregnancy continues, it takes more justification decently to abort, but the pregnant woman is still the proper authority for making decisions about whether that justification is reached. Late in pregnancy, the fetus's status and viability solidify; abortion—an act that aims at the death of the fetus rather than just bringing about an early end to gestation—is a grave affair that should be reserved for unusual cases involving the health or life of the mother.

This is a view of abortion that many, at least, will find reasonable. It is also a view that explicitly acknowledges a genuine, if growing, moral status to early human life. Sometimes, those concerned to emphasize the importance of women's bodily dominion—and to balance what may legitimately be seen as a tendency on the part of some to highlight the fetus over the woman—have tended to downplay the issue of fetal status altogether. Hoping to remain neutralist, they are silent or vague about the status of developing human life. As one who is deeply committed to protecting legal access to abortion, I find this a profoundly flawed strategy. It ends up doing a deep disservice both to the maturing fetus and to the experiences of pregnant women and abortion providers; more than that, I'll be arguing, it threatens to undermine the very real arguments that exist for minimizing detailed state regulation of even late pregnancy and birth.

II.

According to one tradition, early human life is inviolable from the moment of conception. Sometimes described as the sanctity of human life doctrine, the position states that moral status is independent of developmental stage, accomplishments, or exercisable capacities. There are two main avenues to this view.

One is found in the natural law tradition. Grounded in Aristotelian metaphysics as it was taken up and inflected by Aquinas,⁶ the view is, of course, committed to a theological worldview; it is also committed, though, to the idea that Aquinas's work revealed a "natural law" that is accessible to

6. See generally SAINT THOMAS AQUINAS, *SUMMA THEOLOGIAE* (Timothy McDermott ed., 1989). For a recent and excellent defense of natural law, see ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (2001).

reason without reliance on religious premises.⁷ According to advocates of this position, inviolability attaches not to specific accomplishments or stages, such as rationality, any more than it attaches only to adolescents or adults rather than infants. Instead, moral status attaches to the substance sort of human being, and early human life is already that. To end the life of the embryo is thus to deprive one of us of the good of life—a profound and fundamental wrong.

Of course, one cannot simply assert that a given substance has full moral status as such; what is it, then, in virtue of which this one does? Most agree that species membership does not suffice: the fact that a creature has a particular genome seems neither necessary nor sufficient for moral status.⁸ The answer, according to some, is that full moral status belongs to life that carries the biological potential for rationality.⁹ It is not just that the human embryo *could* become rational—the fact that a special elixir could change a cat into a rational creature does not now give it moral status.¹⁰ The claim, instead, is that having the potential for rationality in one's *nature* confers a status such that the good for such a creature presses always and already on us with the force of a creature who now is rational.

The question many will ask, though, is why. Having now the potential for a capacity is not usually thought to provide one with the benefits that possession of the capacity would bring. Having the potential for moral status is not itself immediately prescriptive; one may wonder why the whole is granted a status by virtue of its peak achievement. At its most powerful, the view traces instead to the fundamental conviction that inviolability is an *essential* rather than accidental feature.¹¹ Other moral statuses may come and go, but inviolability is the sort of moral status that attaches, if it does at all, to the identity of the creature, and hence must come into and go out of existence as the creature does: if ever inviolable, then always inviolable. Added to a view that we are essentially human organisms, it follows that even the earliest moments of the human organism carry an inviolability equal to its matured stage.

The view is certainly a coherent one. It is also, of course, precisely what the gradualist denies. To the gradualist, it is just as fundamentally intuitive

7. See generally Lee & George, *supra* note 1.

8. See, e.g., David DeGrazia, *Moral Status, Human Identity, and Early Embryos: A Critique of the President's Approach*, 34 J.L. MED. & ETHICS 49 (2006).

9. Burleigh T. Wilkins, *Does the Fetus Have a Right to Life?*, 24 J. SOC. PHIL. 123, 123-27 (1993).

10. The example of the cat is Tooley's. Tooley, *supra* note 2, at 86-88.

11. Lee & George, *supra* note 1, at 16-19.

that moral status is a *stage* sortal; it is just as fundamentally intuitive that status is precisely the sort of thing that can emerge and shift over the life of a biological organism. The question, then, is whether the essentiality claims key to the conservative position retain their plausibility independently of controversial commitments to a soul or to the broader metaphysical commitments of the natural law tradition.

A second avenue to the conservative conclusion is one based on the value of the goods held in anticipation for the creature. Don Marquis gives the argument its most famous expression.¹² In an argument meant to bypass controversial metaphysical commitments, he argues that the wrongness of ending embryonic life can be based on reflection about what is wrong with killing someone.¹³ One important piece, at least, of why it is wrong to kill someone is that doing so deprives him of a future that we ourselves are committed to thinking of as valuable—namely, a “future like ours.”¹⁴ But human embryos and fetuses also have such futures stretching out before them, whatever their current lack of capacities. To end the embryo’s life is to rob it of this future. Just so long as we agree that a future like ours is a good worth protection, so, too, we must be committed to the view that ending embryonic life is a serious wrong.

The first indication that there is a problem with the view is that, according to its logic, it is worse to end the life of a one-week embryo than that of a five-year-old child. The badness of death is judged by the extent of future lost, after all; and the loss of future is greater the earlier life is ended.¹⁵ For many, though, such an outcome is highly implausible, raising the question of whether Marquis’s argument puts the cart before the horse. Certainly part of what is wrong with killing a paradigmatic person is the loss of future life inflicted on her, but that loss may constitute the basis for a prohibition in part because she is a creature that already counts, by independent criteria, as having moral status.

A second problem presses on the idea that the embryo “has” a future in the sense required by the argument. Claiming independence from the idea of an embryo’s potential or nature, Marquis instead relies on the idea of the future it would have enjoyed but for the interference of the aborting

12. Don Marquis, *Why Abortion is Immoral*, 86 J. PHIL. 183, 189-90 (1989).

13. *Id.*

14. *Id.*

15. See RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 86-87 (1993); MCMAHAN, *supra* note 4, at 165-74; DeGrazia, *supra* note 8, at 54.

woman.¹⁶ As Frances Kamm points out, however, at least for early pregnancy, that comparison is a misleading one.¹⁷ Until viability, the fetus *has* no trajectory independent of the gestational assistance the woman provides. Abortion ends the life of the embryo or fetus, to be sure, and often by active means; but some killings, as she puts it, share the formal features of a letting die, which is that they leave the creature no worse off than they would have been absent the woman's help to begin with.¹⁸ At least early in pregnancy, we might say, it is not clear that one should describe ending gestation as depriving the embryo of its future rather than continuing gestation as helping to provide it with one.

Those who resist the idea of inviolability from the moment of conception most often look to a very different tradition—the tools and categories of the Enlightenment. Purposefully distanced from specific religious traditions and skeptical of “human” as a parochial category, these views tend to eschew the idea of reasoning from membership in any natural kind, biological or metaphysical: what matters for moral status is an *achievement* the individual has reached, and the achievements at issue are achievements of the *mind*.

On the most restrictive view, the achievement in question is that of rationality.¹⁹ If natural law looks to Aquinas, here the historical anchor is Kant: our value is located in our possession of a will, in our status as self-legislators.²⁰ This approach looks to a different element of why killing is wrong—namely, it is a violation of our *autonomy*, the dominion we have as beings capable of self-governance.

While rationality is clearly a deeply important grounding of moral status, though, the limitations of claiming it as a necessary condition for strong moral protection are also clear. If cats are out on this view, so, too, are our young children and failing elders. A theory that grants status to non-autonomous humans only by polite extension is a limited theory, indeed.

More common, then, is the idea of locating the relevant capacity in a broader psychological achievement, namely, sentience.²¹ The badness of death is located in the radical way in which it sets back a creature's interests,

16. See Marquis, *supra* note 12, at 192.

17. F.M. KAMM, CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY 22-27, 84-87, 130-32 (1992).

18. *Id.* at 22-27.

19. Joel Feinberg, *Abortion*, in MATTERS OF LIFE AND DEATH 183, 190 (Tom Regan ed., 1980).

20. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 52-54 (Mary McGregor ed. & trans., Cambridge Univ. Press 1997) (1785).

21. Many are in this camp. See *supra* note 3.

and interests are understood as something one can *take* an interest in—hence the core importance of consciousness. The claim is not that one has moral standing only while sentient, of course: our interests, once underway, can extend to what happens to us while asleep or even after death. The claim, instead, is that creatures that have never *been* sentient cannot be harmed, for harm is found in a setback of interests, and no interests have gotten underway until sentience arrives on the scene.

This view has its own challenges. First, having insisted that interests are tied at core to the notion of a point of view, one may wonder why bare sentience suffices for status. Why are the first flickers of consciousness robust enough to ground the form of moral status that issues protection in continued life, rather than just introducing a possible evil, namely, experiential suffering, that one should not inflict? Faced with this concern, some *idealize* the contents of interests: David Boonin, for instance, argues for an idealized desire account of interests, according to which one can have an interest in matters about which one has no knowledge, appreciation, or, indeed concept.²² If idealization can be this ambitious, though, it begins to put pressure on the claim that sentience is necessary for status: if things so far outside our ken can count as factors in our interest, one might wonder why we need any “ken” to begin with.

Others, agreeing that genuine interests require more than mere sentience but skeptical of such thorough-going idealizing moves, respond instead by raising the bar on the form of subjectivity that creatures must have in order to earn strong moral protection against killing. Several argue, for instance, that *self-awareness* is needed: one must have attitudes toward the world and self to count as having interests in attaining goods, such as continued life, rather than interests in avoiding immediate experiential evils such as pain.²³

The concern for these theories is that, having raised the bar this high, it does not look like one that newborns surmount. And indeed, some of these theorists bite the bullet: infanticide may be problematic for contingent reasons, but that is all.²⁴ If we feel distress at the prospect of ending a newborn’s life, there is nothing intrinsic to that life in virtue of which distress is warranted. Once again, such a view is logically possible, but it will seem to many to have gone wrong: if self-awareness does not ground full protection for infants, it is a very good reason to think that such

22. See, e.g., BOONIN, *supra* note 3, at 64-84.

23. See generally TOOLEY, *supra* note 2.

24. See, e.g., MCMAHAN, *supra* note 4, at 170-71, 338-43.

considerations do not exhaust the bases we look to in determining moral status.

Jeff McMahan has recently given a particularly sophisticated, and particularly strongly psychologically-based view of moral status.²⁵ McMahan has a very strong allegiance to sentience: according to his view, we are essentially embodied minds; hence we never existed as embryos or pre-sentient fetuses.²⁶ Once sentience is on the scene but before the threshold of autonomy is reached, moral protection for continued life is only as strong as are the organism's "time-relative interests" – that is, the value of the organism's future interests, judged in both quantity and quality (how much and how good a life it would have), discounted by the degree to which those future goods now matter to the creature.²⁷ They are discounted, more specifically, as a function of how psychologically unified and connected the creature is with that future.²⁸

Applied to embryos and fetuses, the view ends up with a rather startlingly minimal status for early human life. Until the fetus is sentient, it has no status; more than that, concern for it is something akin to a category mistake, like mistaking the clay for the statue. Once sentience emerges, one of us exists; but because fetuses have so little psychological connection with their potential future, they are owed very little in the way of moral protection. Given that change is not appreciable until quite some time after birth, even newborns merit little.

III.

On the above options, we face a stark choice. On the first view, early human life is, from the very first, inviolable; early miscarriage is, in intrinsic terms, as profound as the loss of a child. On the second view, early human life has no status until sentience: from the perspective of intrinsic status, abortion is the moral equivalent of contraception until consciousness emerges—likely not until after the midway point of gestation. And for those, like McMahan, who extend status by only modest increments to the matured fetus and newborn, protection is minimal all along.

Such starkness is a reflection of the bifurcating starting points of the options. Roughly speaking, the conservative tradition states that anticipatory

25. *Id.* at 232-40, 275-76.

26. *Id.* at 66-69.

27. *Id.* at 165-74.

28. *Id.*

factors are sufficient for full moral status. Ensnocing them in a metaphysical normative essence, status is found in features appreciable from a whole life perspective, with no indexing to what the life has thus far become. Roughly speaking, the liberal tradition states that status is a matter of achievement. Emphasizing the importance of mindedness, it finds the factors relevant to status (and sometimes identity) in reflection on the form of life the creature has when its death is considered.

But many of us, struck by the gradual development from fertilized egg to growing fetus to newborn, have something more like binocular vision when it comes to contemplating moral status. Part anticipatory and part achieved, status is something that emerges and increases as the balance between potential and actualization shifts. The early stages of human life are not equivalent in moral import—in the pulls and tugs, the mandates and constraints—that later life presents to us; it is not yet one of us. On the other hand, the human embryo or early fetus is not just any living organism, properly characterized in full abstraction from what it could become: it is, as it were, on its way to becoming one of us. What it is and what it would become if nurtured sit side by side; neither alone offers the full story.

Warren Quinn offers a view that takes seriously this approach to thinking about early human life.²⁹ Like a house under construction, he argues, the embryo and early fetus are best understood as not yet a full human person, but as already developing into one.

He sets forth two different ways this thought can be unpacked. The first is a variant on distinguishing stages relevant to status.³⁰ As he points out, there is a sense in which “human being” can itself be considered a stage in the life of the human organism. A modest enough stage, it is nonetheless subsequent to our very earliest months. Just as a house is not present, though a pile of bricks is, until a certain level of function has been reached, so too the human being emerges when the most fundamental systems of the fetus – the basic capacities both metabolic and minded—are in place. But this does not have to mean, he points out, that considerability is utterly lacking until

29. Warren Quinn, *Abortion: Identity and Loss*, in *MORALITY AND ACTION* 20 (Warren Quinn ed., 1993). For a discussion of human beings as “emergent beings” see Joan C. Callahan, *The Fetus and Fundamental Rights*, *COMMONWEAL*, Apr. 11, 1986, at 203, 205. Influenced by McMahan’s time-relative interests view, but freed from the assumption that entities must be sentient in order to have interests, David DeGrazia defends a view that is consonant with the idea that organismic good strengthens in prescriptivity as it develops. See generally David DeGrazia, *The Harm of Death, Time-Relative Interests, and Abortion*, 38 *PHIL. F.* 57 (2007).

30. Quinn, *supra* note 29, at 26-27.

this stage has been reached—as though early abortion represents nothing of moral import. There is already an organism extant with a good. The prescriptivity of this good increases as its status does, explaining why, if all abortions represent loss, later ones involve the death of an entity with more significant claims on us.³¹

The second view, which Quinn calls the “process” view, takes the gradualist suggestion more literally. Here, “human being” returns to the familiar category of a substance rather than stage sortal—it is the kind of thing we most fundamentally are; but it is a substance that comes into being only gradually.³² On this view, that is, the human being is always and already there from the start, but only in partial existence. The embryo and early fetus already exist as an organism in empirically determinate form, of course, just as a house in the process of being built already exists in fully determinate form as a “construction.” In both cases, though, the entity is more fundamentally understood by reference to another substance—human being and house, respectively—that it is coming to be. “Organism,” like “construction,” is what Quinn calls a “mock generic”³³—a sortal we use to mark a determinate reality that, in a further sense, is best understood as a different substance—human being and house—that is gradually coming on the scene.

On either view, the good of the early human life has a claim on us, but not a full one. On the first view, it is there in a mitigated way because it is there only as the good of the organism as such, rather than the good of a human being: given that the life, if it developed, would be such a valuable one, its continued life carries a prescriptive force, but not yet at the level of prescriptivity that would be issued by the good of a human being. On the second view, the good is partially prescriptive because the being to which the good belongs, namely, one of us, is only partially present. On both views, the importance of sustaining the life is in part determined by what it has the potential to become, and in part by what it has already managed to be.

While Quinn’s central concern is to make room for the gradualist enterprise rather than to defend a specific point at which full status emerges, he notes that, on both versions, a key point of being more fully one of us is plausibly the point at which the matured fetus’s capacities to learn are on board.³⁴ More than mere consciousness but nothing as ambitious as self-

31. *Id.* at 45, 51.

32. *Id.* at 30-35.

33. *Id.* at 34, 36.

34. *See id.* at 37.

awareness, such a stage marks the point at which the life can take in and respond to the world.³⁵ An element of mindedness, then, has some importance for Quinn, but for a different reason than for Enlightenment-based thinkers: it is not because prenatal life has no status until it is significantly minded, since its value is present even before, nor again because the emergence of this capacity brings in some complete set of human interests, fully present and idealized, since many of these are yet to be developed. Such mindedness is relevant, rather, because it marks the point at which a human being in general is more robustly on the scene.

Details aside, Quinn's fundamental insight is that moral status need not be a one-size-fits-all concept: some aspects of status may be present even as other aspects arrive later. At some point, a key common denominator emerges, when the human organism has the fundamental protections of a "right to life." Even before this point, though, the life has value; and its status continues to shift after that point is reached.

Indeed, the variegated nature of moral status (variegations that again can ride atop the fundamental, strong form of protection signaled by a right to life) is familiar enough when we think of the developmental story that continues after birth. As the infant emerges into the world, its psychological connections emerge as more coherent and, if all goes well, a subject emerges—viewing, wanting, representing, exerting and manipulating, taking in, querying. Here we see the process of moving from a human being to a *subject*, and a subject to a *self*, with attendant changes in how we must treat the being. One's stewardship for the future interests that the infant cannot yet glimpse must gradually give way to appreciation of, and growing constraint by, the contemporaneous interests and preferences of the child.

Continuing further, if all goes well, the young child starts to respond to reasons: initial forays are made into structuring the world by what is and is not done. This, too, is a gradual process; the apparatus of normative engagement is tested and tried on; the toehold of accountability and of normative powers—the ability to bind oneself, to be held responsible, to demand, forgive, and claim one's due—emerges. Here is the beginning and gradual emergence of an *agent*, a creature with the ability to will, a creature in possession of values and commitments, not just interests. These are changes that, once again, alter how we may treat the entity, as paternalistic concern for its welfare must increasingly defer to its own autonomous

35. As a friend of mine who is an obstetrician noted to me, this stands in stark contrast to the radically premature infants, twenty-four weeks or so, in the Neonatal Intensive Care Unit, for whom touch itself can so overwhelm the systems that it leads to cardiac arrhythmias.

choices of will. Nor is all of this a mere progression or sequence in which one stage simply replaces another. It is, instead, quite literally a developmental picture, with prior stages maturing into the next stage. And often in cantilevered fashion: it is in meeting the needs of one stage that we introduce the next need—meeting the need for the breast in order to satiate and calm over time introduces oneself as an object the infant now wants and needs to ground its sense of continued existence. It is also one often marked by what we might call “proleptic engagement”: it is by treating the young as if they already were in the next stage that we help usher them into it. It is by treating the infant as a creature capable of learning that we help it become more robustly a creature that can learn; it is by treating a young child as a fledgling agent that we help it turn into one.³⁶

On this approach, the gradual coming to be of a *human organism*, with a biological good that can be aided or thwarted, gives way to the gradual coming to be of a *human being*, with its far more significant considerability, which gradually becomes a *self*, with its interests and preferences, which gives way in turn to the gradual coming to be of an *agent*, with will and commitments. Four different economies of considerations, the prescriptivity of which each emerges gradually, largely supplanting the prior, in a partial replacement of each. The interests that come with self, the exercises of normative authority that come with agency, each have nascent forms and themselves increase in strength, inflecting how we value and reason about one another in early stages of life.

IV.

This approach offers a very different picture of the moral status afforded for life inside the womb, one that increases in strength as the life develops more fully. Even at early stages, human life has a value worthy of respect. Miscarriage or abortion represents *loss*. Not just a loss for those with hopes of a child, but the loss of a distinct life that had a good in at least the organismic sense and that was, as it were, on its way to becoming one of us. Contraception is preferable to abortion: if life is not to be developed into a person, better that it not be created. Love for such a life may not be required; but nor, if it does emerge, need it be some sort of category mistake. It can be

36. My thanks to Mark Lance for this last point. For a discussion of speech acts that institute normative status in anticipatory form see REBECCA KUKLA & MARK LANCE, “YO!” AND “LO!”: THE PRAGMATIC TOPOGRAPHY OF THE SPACE OF REASONS ch. 8, § 1 (forthcoming 2008).

love of this creature now (an organism that, if the pregnancy continues, will turn out to have been the beginning stages of one's child), and proleptic love for the child it would become.

On this view, later abortion is more serious than earlier abortion, even before sentience has emerged. As the fetus's status increases, it has stronger claims for protection and assistance. If women and abortion providers regard abortion at twenty-two weeks as far different from early abortion, that is, it is understandable: by twenty-two weeks, the fetus is far more developed as a human being along many dimensions, even if not in minded terms. The further one goes into a pregnancy, the more justification it takes to decently end a pregnancy. And finally, at some point within the third trimester, the matured fetus becomes equivalent in intrinsic moral status to a newborn. Its claims for protection and assistance, stated as such, are the same as those of a newborn.

Superimposed on this graduated view of intrinsic moral status is determination of fetal viability—of the point at which others can reasonably and meaningfully sustain the fetus's life if only it can be safely delivered from the pregnancy woman. "Viability," of course, is a bright-line idea masking a continuum of probabilities and complexities—how good the chances of survival, how brutal the interventions, how sober the risks of catastrophic impairment, how enormous the resources to assist to relative independence.³⁷ But when the fetus is robustly viable, this has important implications for the status of aborting. Not because it has anything to do with the fetus's intrinsic status: the two are conceptually and materially independent. (If I become uniquely dependent on your blood supply after a strange illness, that does not change my status as a full rights bearer.) But viability is highly relevant to the status of abortion, and for the reason we saw earlier when talking about Marquis and Kamm.³⁸ The act of aborting is conceptually liminal, as we might put it, between killing and letting die. Whether it is more like the latter is a function in part of whether the fetus has a hopeful trajectory independent of the woman's gestation. When the fetus has no opportunities that the act of aborting would forestall, abortion is properly viewed less as interference and more akin to a letting die, to a removing of life-sustaining assistance. The woman may of course face responsibilities (from modest to strong, depending again on how much status

37. See Norman Fost, David Chudwin & David Wikler, *The Limited Moral Significance of "Fetal Viability,"* HASTINGS CENTER REP., Dec. 1980, at 10 (describing the ways in which viability is itself a grey concept).

38. See *supra* notes 12, 17 and accompanying text.

the life has accrued) to continue providing the assistance; the point is that questions about the legitimacy of abortion of preivable embryos and fetuses can be contained to more local issues of balancing potential responsibilities to help with the burdens and invasions of doing so. But when the fetus has opportunities independent of the pregnant woman, then the act of aborting (as opposed to, say, early delivery) forestalls realization of those opportunities, and must be justified, if it can be, in light of that more demanding metric.

When considering the moral and legal status of abortion, then, we must consider the status of the fetus as well as its outside opportunities. What we must also, and crucially, consider, whatever the stage of the pregnancy, is what its continuation means for the woman. This, of course, is the other variable fundamental to assessing the moral and legal status of abortion. Whatever the status of early human life, it does not develop on its own. It develops by way of enormous infusion of resources of the woman, living in and off of her body, transforming its every physical system in the process. Put bluntly, it takes a great deal of work to turn early human life *into* something of full moral status. Gestation, to state the obvious, is not just any form of help: it involves the use of one's very body; its continuation can implicate every corner of a girl or woman's life. That such life has a value worthy of respect means there are reasons—of increasing strength across the pregnancy—to offer that infusion; but its costs, judged both as burdens and intimacies, can be substantial, and deeply context dependent, grounded in what the pregnancy means in the narrative context of the woman's life.

Together, these variables yield a shifting picture of abortion. In the first trimester, the intrinsic moral status of early human life is modest, the burden of continuing deep, and the fetus has no trajectory independent of the woman's gestational assistance. The profound and on-going nature of the assistance implicate rights of bodily dominion; further, given that the life is not yet a child, abortion rights at this stage have a leg in the rights of reproductive decisional privacy. What continued pregnancy asks prospectively of the woman, in short, is enormous; to legally require a woman to continue gestating when these three conditions are met would arguably be to require more than we require of any other citizen. A constitutionally-protected right of access to abortion, then, is a core protection for women's status as citizens; and early abortion, while regretful, can be regarded as a decent and, indeed, potentially honorable action.

If the pregnancy continues and the fetus develops into the second trimester, increasing fetal status means that it takes greater justification decently to abort. But good reasons there well may be. While earlier abortion is clearly preferable, there are nonetheless considerations that may lead

women decently to abort in this trimester. If the fetus's status evolves, so too may the woman's circumstances: a smooth first trimester may turn into a second trimester with overwhelming nausea and waves of fatigue; a rocky marriage ends and the woman's partner leaves her. Or again, women living in chaotic households or impoverished circumstances find they can only in the second trimester confront, decide, and make arrangements for an abortion they would have chosen earlier under better circumstances. Or again, news of significant disability comes to light only after the first trimester. Whatever we might say about the care of premature infants born with such conditions, the finding of profound abnormality in the middle stages of pregnancy brings its own issues, both because the fetus's status, while substantial, is not yet equivalent to a newborn, and because of what it means to have one's body carrying, attached to, and sustaining a fetus with a profound impairment.³⁹

As viability approaches, all these considerations become more freighted. Given that others now can help this life, decisions about its disposition are no longer fully contiguous with the woman's decisions about her body and life. Especially when robust viability precedes full moral status (a gap that will only increase with further technology), a gray zone emerges in which decisions over the life of the fetus hover between the private and the public.

In the third trimester, matters change significantly. Status and viability solidify. Others can help; the fetus has opportunities independent of the gestating woman. And they are interests of a creature with full moral status. Our interest in the fetus emerges as substantive, both because its intrinsic status solidifies and because we now can help to do the work of sustaining and developing it if it can be delivered safely from the woman. In particular, the distinction between *aborting*—a medical procedure that involves killing the embryo or fetus—and *ending gestation*—procedures that include early induction or delivery—emerges as central: restrictions on killing may be justified even where requirements that the woman provide continued use of her body are not.

But this is not to say that issues of bodily dominion evaporate—even in the third trimester, even when the fetus has full moral status. So long as a woman remains pregnant, with deeply intertwined physiologies, the fetus's presence in her body implicates her health, life, and bodily integrity in ways that can be profound. More than that, getting the fetus *out* implicates the same. Birth is not just a matter of opening a door; quite literally entwined,

39. The documentary *Severina's Story* follows the case of a Brazilian woman carrying an anencephalic fetus denied access to abortion by the legislature until her third trimester. DVD: SEVERINA'S STORY (Debra Diniz & Elaine Brum 2004) (on file with author).

the fetus's placenta is burrowed into the walls of the uterus (as anyone who has witnessed a woman bleed out during delivery can attest). Further, whatever the responsibilities of pregnant woman to the matured fetus, and they are surely profound, there are specific elements of bodily dominion that the fact of pregnancy ought not compromise, such as the right of a citizen not to be compelled to undergo surgery for another's benefit.⁴⁰ If women should not have an unrestricted right to kill their matured fetuses, decisions about whether and how to end a pregnancy and deliver a baby are ones that may still be appropriately regarded as up to her.

In short, there are still profoundly important issues around the legal regulation of abortion even in the third trimester, not because the status of the matured fetus is insignificant, but because of the very significant policy-based concerns with state regulation of conduct during pregnancy and birth. Law is perforce crude; abortion legislation that goes beyond broad statements of the sorts of reasons we regard as legitimate for abortion, such as protecting the health and life of the woman, risk intrusion into details best left to the woman and her medical team. Whether, when, and how to regulate abortion in the third trimester depends on many factors: how often we think that individuals, in the absence of detailed state regulation, will act egregiously; whether softer forms of social management, such as medical professional codes, substantially obviate the need for state action; how much a given state entity can be trusted to understand and respond to the real world difficulties and nuances that hard cases are going to involve.

If women's advocates resist detailed regulation of abortion in the third trimester, such as those limiting abortion methods, it is not because they think the fetus's residence inside the woman gives her absolute dominion over its fate, but because they are mindful of the crudeness of regulation. Because the rather singular event of getting one person out of another's body, when the former is quite literally entwined with the latter, implicates a broad range of medical and bodily integrity issues that the state may be ill-posed to second-guess or enforce. Because medical decisions at the very beginning of life, like those at its very end, are the subject of judgments and emergencies that the courts and legislatures may be ill-placed to regulate by algorithm. Because life has tragedies, and those living in and with those

40. See *In re A.C.*, 573 A.2d 1235, 1249-51 (D.C. 1990) (en banc) (holding that an individual has the right to accept or reject medical treatment, and that the court may have to act as a surrogate and substitute its judgment when an individual is unable to make an informed decision).

tragedies may be better placed than the courts in to decide what to do in their face.

To be clear, then, *no one* thinks that in the third trimester, women have a positively-protected indiscriminate interest in ending the fetus's life, as though we should defend a *de jure* right to feticide for whatever reason at any time. Instead, concerns about abortion regulation late in pregnancy are concerns about the difficulties of specifying and balancing those issues, given the realities of pregnancy, in the real world. Women need not be granted a right to elective abortion—that is, abortion independent of considerations of the woman's health and life—in the third trimester, but details of medical need or method may not be ones best demarcated by legislative bodies.

Attending to considerations such as these also helps to explain why one might reasonably resist or worry about laws that categorize fetuses as persons. It is sometimes argued that, if a matured fetus has a moral status equivalent to newborns, as we should agree, then we should subsume them under the legal concept of "personhood" or again "unborn child." But this would be to go badly wrong. Kinds are not just names; they are summary concepts that bring with them wholesale patterns of reasoning, precedent, and the like. The matured fetus is the same as a newborn in intrinsic status, but regulating the body is different from regulating the custody of a child. The category of "person," like the category of "child," was made with physically individuated and separated persons in mind; these are sortals animated by the enterprise of regulating human social interactions.⁴¹ They are, in a phrase, not designed with fetuses in mind. This doesn't mean that fetal status does not matter; it means that it needs to be developed in a theory that is adequate to the, shall we say, unique conditions under which it lives. Fetuses are not natural persons, not because they have no moral status, but because the fetus deserves a theory of its own.⁴² Not because the fetus has a lesser intrinsic moral status than the newborn, as though its location inside and attachment to the pregnant woman dilutes its import, but because legal personhood is a concept that has a pragmatic life of its own, and one which,

41. Elizabeth Anderson emphasizes issues about moral status as a marker of inclusion in society in the context of the animal rights debate. See Elizabeth Anderson, *Animal Rights and the Value of Nonhuman Life*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 277 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

42. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1314 (1991) ("As it is, the fetus has no concept of its own, but must be like something men have or are: a body part to the Left, a person to the Right. Nowhere in law is the fetus a fetus.").

developed to deal with other scenarios, may not extend well to those who reside in another's body.

Notice now that, if all of this is a key reason why regulation of even third trimester abortion must be done with care, it is also a key reason why silence or vague gestures about the status of early human life is so dangerous. Late in pregnancy, when full moral status and viability converge, a key premise in arguing for minimal state regulation of abortion is that women are in fact unlikely to seek, or physicians to provide, abortions at this stage. But this premise is hard to maintain if those relying on it never speak of or endorse the consideration that accounts for that reticence: the belief that matured fetuses have lives that should not be taken except in extreme circumstances. If women's advocates cannot acknowledge the moral status of a matured fetus, it will be difficult indeed to appreciate why pregnant women can be trusted to do so.

Rationales around rights and restrictions to abortion really are different across pregnancy. In early pregnancy, the embryo and early fetus have more modest status; ending pregnancy is more about ending assistance than about interference; the bodily integrity issues involved in continuing gestation and birth compared to early abortion are profound. The rights at stake for the pregnant woman are rights of reproductive decisional privacy, equality, and protection against the state compelling continued bodily assistance and birth. By the third trimester, robust fetal status and robust fetal viability converge: others could sustain this life; the woman's actions affect its substantive chances. Critical issues of bodily dominion remain, but they shift to the difficult and complex issues of balancing the needs of the fetus with its location. In between the first and third trimesters, abortion is, well, just that—in between.⁴³ As women and abortion providers alike attest, decisions here are decisions full of ambivalence and difficulty, burdens and grief—just what we might expect on a gradualist picture.

43. My thanks to Elizabeth Anderson, in email correspondence, for this way of putting the point.