

An Almost Absolute Value in History

by John T. Noonan, Jr.

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The most fundamental question involved in the long history of thought on abortion is: How do you determine the humanity of a being? To phrase the question that way is to put in comprehensive humanistic terms what the theologians either dealt with as an explicitly theological question under the heading of “ensoulment” or dealt with implicitly in their treatment of abortion. The Christian position as it originated did not depend on a narrow theological or philosophical concept. It had no relation to theories of infant baptism. It appealed to no special theory of instantaneous ensoulment. It took the world’s view on ensoulment as that view changed from Aristotle or Zacchia. There was, indeed, theological influence affecting the theory of ensoulment finally adopted, and, of course, ensoulment itself was a theological concept, so that the position was always explained in theological terms. But the theological notion of ensoulment could easily be translated into humanistic language by substituting “human” for “rational soul”; the problem of knowing when a man is a man is common to theology and humanism.

If one steps outside the specific categories used by the theologians, the answer they gave can be analyzed as a refusal to discriminate among human beings on the basis of their varying potentialities. Once conceived, the being was recognized as man because he had man’s potential. The criterion for humanity thus, was simple and all embracing: if you are conceived by human parents, you are human.

The strength of this position may be tested by a review of some of the other distinctions offered in the contemporary controversy over legalizing abortion. Perhaps the most popular distinction is in terms of viability. Before an age of so many months, the fetus is not viable, that is, it cannot be removed from the mother’s womb and live apart from her. To that extent, the life of the fetus is absolutely dependent on the life of the mother. This dependence is made the basis of denying recognition to its humanity.

There are difficulties with this distinction. One is that the perfection of artificial incubation may make the fetus viable at any time: it may be removed and artificially sustained. Experiments with animals already show that such a procedure is possible. This hypothetical extreme case relates to an actual difficulty: there is considerable elasticity to the idea of viability. Mere length of life is not an exact measure. The viability of the fetus depends on the extent of its anatomical and functional development. The weight and length of the fetus are better guides to the state of its development than age, but weight and length vary. Moreover, different racial groups have different ages at which their fetuses are viable. Some evidence, for example, suggests that Negro fetuses mature more quickly than white fetuses. If viability is the norm, the standard would vary with race and with many individual circumstances.

The most important objection to this approach is that dependence is not ended by viability. The fetus is still absolutely dependent on someone's care in order to continue existence; indeed a child of one or three or even five years of age is absolutely dependent on another's care for existence; uncared for, the older fetus or the younger child will die as surely as the early fetus detached from the mother. The unsubstantial lessening in dependence at viability does not seem to signify any special acquisition of humanity.

A second distinction has been attempted in terms of experience. A being who has had experience, has lived and suffered, who possesses memories, is more human than one who has not. Humanity depends on formation by experience. The fetus is thus "unformed" in the most basic human sense.

This distinction is not serviceable for the embryo which is already experiencing and reacting. The embryo is responsive to touch after eight weeks and at least at that point is experiencing. At an earlier stage the zygote is certainly alive and responding to its environment. The distinction may also be challenged by the rare case where aphasia has erased adult memory: has it erased humanity? More fundamentally, this distinction leaves even the older fetus or the younger child to be treated as an unformed inhuman thing. Finally, it is not clear why experience as such confers humanity. It could be argued that certain central experiences such as loving or learning are necessary to make a man human. But then human beings who have failed to love or to learn might be excluded from the class called man.

A third distinction is made by appeal to the sentiments of adults. If a fetus dies, the grief of the parents is not the grief they would have for a living child. The fetus is an unnamed "it" till birth, and is not perceived as personality until at least the fourth month of existence when movements in the womb manifest a vigorous presence demanding joyful recognition by the parents.

Yet feeling is notoriously an unsure guide to the humanity of others. Many groups of humans have had difficulty in feeling that persons of another tongue, color, religion, sex, are as human as they. Apart from reactions to alien groups, we mourn the loss of a ten-year-old boy more than the loss of his one-day-old brother or his 90-year old grandfather.

The difference felt and the grief expressed vary with the potentialities extinguished, or the experience wiped out; they do not seem to point to any substantial difference in the humanity of baby, boy, or grandfather.

Distinctions are also made in terms of sensation by the parents. The embryo is felt within the womb only after about the fourth month. The embryo is seen only at birth. What can be neither seen nor felt is different from what is tangible. If the fetus cannot be seen or touched at all, it cannot be perceived as man.

Yet experience shows that sight is even more untrustworthy than feeling in determining humanity. By sight, color became an appropriate index for saying who was a man, and the evil of racial discrimination was given foundation. Nor can touch provide the test; a being confined by sickness, "out of touch" with others, does not thereby seem to lose his humanity. To the extent that touch still has appeal as a criterion, it appears to be a survival of the old English idea of "quickenings"—a possible translation of the Latin *animatus* used in the canon law. To that extent touch as a criterion seems to be dependent on the Aristotelian notion of ensoulment, and to fall when this notion is discarded.

Finally, a distinction is sought in social visibility. The fetus is not socially perceived as human. It cannot communicate with others. Thus, both subjectively and objectively, it is not a member of society. As moral rules are rules for the behavior of members of society to each other, they cannot be made for behavior toward what is not yet a member. Excluded from the society of men, the fetus is excluded from the humanity of men.

By force of the argument from the consequences, this distinction is to be rejected. It is more subtle than that founded on an appeal to physical sensation, but it is equally dangerous in its applications. If humanity depends on social recognition, individuals or whole groups may be dehumanized by being denied any status in their society. Such a fate is fictionally portrayed in *1984* and has actually been the lot of many men in many societies. In the Roman empire, for example, condemnation to slavery meant the practical denial of most human rights; in the Chinese Communist world, landlords have been classified as enemies of the people and so treated as nonpersons by the state. Humanity does not depend on social recognition, though often the failure of society to recognize the prisoner, the alien, the heterodox as human has led to the destruction of human beings. Anyone conceived by a man and a woman is human. Recognition of this condition by society follows a real event in the objective order, however imperfect and halting the recognition. Any attempt to limit humanity to exclude some group runs the risk of furnishing authority and precedent for excluding other groups in the name of the consciousness or perception of the controlling group in the society.

A philosopher may reject the appeal to the humanity of the fetus because he views "humanity" as a secular view of the soul and because he doubts the existence of anything real and objective which can be identified as humanity. One answer to such a philosopher is to ask how he reasons about moral questions without supposing that there is a sense in which he and the others of whom he speaks are human. Whatever group is taken as the society which determines who may be killed is thereby taken as human. A second answer is to ask if he does not believe that there is a right and wrong way of deciding moral questions. If there is such a difference, experience may be appealed to: to decide who is human on the basis of the sentiment of a given society has led to consequences which rational men would characterize as monstrous.

The rejection of the attempted distinctions based on viability and visibility, experience and feeling, may be buttressed by the following considerations: Moral judgments often rest on distinctions, but if the distinctions are not to appear arbitrary fiat, they should relate to some real difference in probabilities. There is a kind of continuity in all life, but the earlier stages of the elements of human life possess tiny probabilities of development. Consider for example, the spermatozoa in any normal ejaculate: There are about 200,000,000 in any single ejaculate, of which one has a chance of developing into a zygote. Consider the oocytes which may become ova: there are 10,000 to 100,000 oocytes in a female infant, of which a maximum of 390 are ovulated. But once spermatozoon and ovum meet and the conceptus is formed, such studies as have been made show that roughly in only 20 percent of the cases will spontaneous abortion occur. In other words, the chances are about 4 out of 5 that this new being will develop. At this stage in the life of the being there is a sharp shift in probabilities, an immense jump in potentialities. To make a distinction between the rights of spermatozoa and the rights of the fertilized ovum is to respond to an enormous shift in possibilities. For about twenty days after conception the egg may split to form twins or combine with another egg to form a chimera, but the probability of either event happening is very small.

It may be asked: What does a change in biological probabilities have to do with establishing humanity? The argument from probabilities is not aimed at establishing humanity but at establishing an objective discontinuity which may be taken into account in moral discourse. As life itself is a matter of probabilities, as most moral reasoning is an estimate of probabilities, so it seems in accord with the structure of reality and the nature of moral thought to found a moral judgment on the change in probabilities at conception. The appeal to probabilities is the most commonsensical of arguments, to a greater or smaller degree all of us base our actions on probabilities, and in morals, as in law, prudence and negligence are often measured by the account one has taken of the probabilities. If the chance is 200,000,000 to 1 that the movement in the bushes into which you shoot is a man's, I doubt if many persons would hold you careless in shooting; but if the chances are 4 out of 5 that the movement is a human being's, few would acquit you of blame. Would the argument be different if only one out of ten children conceived came to term? Of course this argument would be different. This argument is an appeal to probabilities that actually exist, not to any and all states of affairs which may be imagined.

The probabilities as they do exist do not show the humanity of the embryo in the sense of a demonstration in logic any more than the probabilities of the movement in the bush being a man demonstrate beyond all doubt that the being is a man. The appeal is a "buttressing" consideration, showing the plausibility of the standard adopted. The argument focuses on the decisional factor in any moral judgment and assumes that part of the business of a moralist is drawing lines. One evidence of the nonarbitrary character of the line drawn is the difference of probabilities on either side of it. If a spermatozoon is destroyed, one destroys a being which had a chance of far less than 1 in 200 million of developing into a reasoning being, possessed of the genetic code, a heart and other organs, and capable of pain. If a fetus is destroyed, one destroys a being already possessed of the genetic code, organs, and sensitivity to pain, and one which had an 80 percent chance of developing further into a baby outside the womb who, in time, would reason.

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

This review of current controversy over the humanity of the fetus emphasizes what a fundamental question the theologians resolved in asserting the inviolability of the fetus. To regard the fetus as possessed of equal rights with other humans was not however, to decide every case where abortion might be employed. It did decide the case where the argument was that the fetus should be aborted for its own good. To say a being was human was to say it had a destiny to decide for itself which could not be taken from it by another man's decision. But human beings with equal rights often come in conflict with each other, and some decision must be made as whose claims are to prevail. Cases of conflict involving the fetus are different only in two respects: the total inability of the fetus to speak for itself and the fact that the right of the fetus regularly at stake is the right to life itself.

The approach taken by the theologians to these conflicts was articulated in terms of "direct" and "indirect." Again, to look at what they were doing from outside their categories, they may be said to have been drawing lines or "balancing values." "Direct" and "indirect" are spatial metaphors; "line-drawing" is another. "To weigh" or "to balance" values is a metaphor of a more complicated mathematical sort hinting at the process which

goes on in moral judgments. All the metaphors suggest that, in the moral judgments made, comparisons were necessary, that no value completely controlled. The principle of double effect was no doctrine fallen from heaven, but a method of analysis appropriate where two relative values were being compared. In Catholic moral theology as it developed, life even of the innocent was not taken as an absolute. Judgments on acts affecting life issued from a process of weighing. In the weighing, the fetus was always given a value greater than zero, always a value separate and independent from its parents. This valuation was crucial and fundamental in all Christian thought on the subject and marked it off from any approach which considered that only the parents' interests needed to be considered.

Even with the fetus weighed as human, one interest could be weighed as equal or superior: that of the mother in her own life. The casuists between 1450 and 1895 were willing to weigh this interest as superior. Since 1895, that interest was given decisive weight only in the two special cases of the cancerous uterus and the ectopic pregnancy. In both of these cases the fetus itself had little chance of survival even if the abortion were not performed. As the balance was once struck in favor of the mother whenever her life was endangered, it could be so struck again. The balance reached between 1895 and 1930 attempted prudentially and pastorally to forestall a multitude of exceptions for interests less than life.

The perception of the humanity of the fetus and the weighing of fetal rights against other human rights constituted the work of the moral analysts. But what spirit animated their abstract judgments? For the Christian community it was the injunction of Scripture to love your neighbor as yourself. The fetus as human was a neighbor; his life had parity with one's own. The commandment gave life to what otherwise would have been only rational calculation.

The commandment could be put in humanistic as well as theological terms: Do not injure your fellow man without reason. In these terms, once the humanity of the fetus is perceived, abortion is never right except in self-defense. When life must be taken to save life, reason alone cannot say that a mother must prefer a child's life to her own. With this exception, now of great rarity, abortion violates the rational humanist tenet of the equality of human lives.

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[Source: *The Morality of Abortion: Legal and Historical Perspectives*, ed. John T. Noonan, Jr. (Cambridge; Harvard University Press 1970) pp. 51-59.]