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Philosophy and Theology: Pre-Birth and Post-Birth Abortion

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PHILOSOPHY AND THEOLOGY

In his article “Infanticide and Moral Consistency,” Jeff McMahan writes, “Almost everyone believes that infanticide is wrong. What could possibly justify the intentional killing of an innocent, unthreatening and wholly defenceless human being? Yet many who believe that infanticide is nearly always impermissible also accept that abortion can sometimes be permissible, even in the second and third trimesters of pregnancy.”¹

McMahan argues that it is not consistent to defend late-term abortion but universally condemn infanticide. One cannot make a morally significant distinction between a postnatal human being and a prenatal human being at the same stage of psychological and physical development. We could call this the pre-birth/post-birth consistency problem.

Those who believe that abortion can sometimes be justified after the point of fetal viability but that infanticide is never permissible face a problem of consistency, for there is no intrinsic difference between a premature infant and a viable fetus of the same age and level of development. The only difference is extrinsic, a matter of location. If, as virtually all moral theorists agree, moral *status* is a function of intrinsic properties only, there can be no difference in moral status between a viable fetus and a premature infant of the same age. If all infants have a status that brings them within the scope of stringent moral constraints, the same must be true of all viable fetuses. For any viable fetus could be an infant with a slight change of location that involves swapping a natural for an artificial system of life support.²

The conventional pro-choice view advanced by NARAL and Planned Parenthood is that abortion is ethically permissible and should be legal after viability, but infanticide

1. Jeff McMahan, “Infanticide and Moral Consistency,” *Journal of Medical Ethics* 39.5 (May 2013): 273, doi: 10.1136/medethics-2012-100988.

2. *Ibid.*, original emphasis.

is ethically impermissible and should be illegal. As McMahan notes, this conventional view “meant that killing a viable fetus during the second trimester was constitutionally protected, yet if the pregnant woman carrying it suddenly went into labour, killing that same individual after it had emerged from her body would have been murder. This was arbitrary and irrational.”³

Defenders of abortion sometimes invoke birth itself as the ethically decisive event that distinguishes human beings without a right to life from human beings with a right to life. Even if we accepted that birth is the dividing line, which I believe we should not, the consistent defender of abortion who criticizes infanticide faces the challenge of determining when exactly a child is born.⁴ If we hold that a postnatal child deserves equal protection under the law but a prenatal human being does not, how do we handle partial-birth abortion? The question, what exactly counts as birth, is as practical as any in ethics, for the law must draw the line between legal and illegal killing. Despite using the dehumanizing language of “it” to describe a “her” or a “him,” McMahan sees the arbitrariness of drawing the line in partial-birth abortion:

Does the morality of killing it depend on what percentage of its body protrudes from the woman’s? The absurdity of the statute is proclaimed by its exactitude on these matters. What [the legislation] prohibits is the killing of a fetus if “the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” If the navel is exposed when a non-viable fetus is killed, a criminal act has occurred. But if an 8th of an inch less of the abdomen is exposed, the act of killing is constitutionally protected. Yet it would be silly to suppose that anything of moral significance could depend on whether the fetus’s navel is showing. Nor could it make any moral difference, in itself, whether the whole of the body is exposed rather than just the part above the chin or below the navel.⁵

It is hard to believe that having one’s navel exposed is the ethically significant difference granting an inalienable and equal right to life.

McMahan would seem to resolve the pre-birth/post-birth consistency problem by expanding the permissible scope of intentional killing to include infants. He considers reasons for questioning the presumption against infanticide and notes that we allow infants to die for reasons that we would not allow older children to die. It is also true, however, that we allow ninety-year-olds to die for reasons that we would not allow older children to die. McMahan’s analysis makes the questionable assumption that the intentional killing of a baby or a ninety-year-old is ethically equivalent to not providing life-saving aid. If we do not save the baby or elderly person, then we may also intentionally kill them.

3. Ibid.

4. For a critique of the view that birth grants the right to live, see Christopher Kaczor, *The Ethics of Abortion: Women’s Rights, Human Life, and the Question of Justice*, 2nd ed. (New York: Routledge, 2015), 41–58.

5. McMahan, “Infanticide and Moral Consistency,” 273.

An alternative analysis holds that all innocent human beings have a right to life, that is, all agents have a duty not to intentionally kill innocent human beings, but duties to aid vary widely depending on innumerable concrete circumstances. We can hold that all human lives are worth living, because all human beings have intrinsic value, but also hold that not all treatments are worth providing, because the burdens of a treatment may outweigh its benefits.

Can arguments, such as the violinist analogy, free the defender of abortion from the pre-birth/post-birth consistency problem? McMahan does not think so: “All that the appeal to a woman’s right to control the use of her body can justify is the removal of the fetus from her body. After the point of viability, this can usually be accomplished without killing the fetus or allowing it to die. After this point, therefore, the appeal to the pregnant woman’s right cannot normally justify an abortion, which by definition involves killing the fetus.”⁶ Indeed, a similar position is explicitly stated by Judith Jarvis Thomson: “You may detach yourself [from the violinist or person in utero] even if this costs him his life; you have no right to be guaranteed his death, by some other means, if unplugging yourself does not kill him.”⁷ After viability, extraction without killing is possible. Since an alternative is available, which both frees the woman from pregnancy and preserves the life of the child, it is not permissible to abort in the sense of intentionally killing the viable human being in utero.

In his article “The Viable Violinist,” Michael Hawking comes to the same conclusion as McMahan, namely, that the defenses of abortion, such as the violinist analogy, do not resolve the pre-birth/post-birth consistency problem. In order to pump our intuitions about the violinist analogy, Hawking mentions “a real legal case involving a man (McFall) in need of a bone marrow transplant whose cousin (Shimp) was a match. McFall filed a suit to force Shimp to donate his marrow but the court ruled that he could not be forced to do so against his will.”⁸ Is bone marrow donation ethically analogous to abortion?

The cases are dis-analogous in at least two ways. Shimp does not have a serious moral and legal responsibility to support his cousin McFall that is the same as the duty of a mother or father to support her or his dependent child. Moreover, this analogy lends support to a defense of the unborn person rather than a defense of abortion. If a person should not be forced to give up her bone marrow in order to save someone else’s life, then *a fortiori* a person should not be forced to give up her marrow, bones, organs, entire bodily integrity, and life itself in order to support someone else’s decision to no longer live as a mother. Recall that the violinist analogy grants the supposition that two persons are involved in abortion. If a lesser harm (surgery to remove bone marrow) cannot be imposed on one person in order to secure a greater good (life itself) for another person, then surely a greater harm (loss of life) cannot be imposed on one person in order to secure a lesser good (being free

6. *Ibid.*, 274.

7. Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy and Public Affairs* 1.1 (Fall 1971): 66.

8. Michael Hawking, “The Viable Violinist,” *Bioethics* 30.5 (June 2016): 313, doi:10.1111/bioe.12206.

of motherhood) for another person. The bone marrow donation case is an analogy against abortion, not in defense of it.

Hawking puts a new twist on Thomson's argument by introducing the viable violinist: "By including the viability of the violinist (late-term fetus) along with the fact that the woman will have some degree of responsibility for the violinist after he is detached, this modified version of Thomson's analogy better accounts for the morally relevant features of late-term pregnancy."⁹ The violinist could survive being detached, but this would involve a cost to the woman, specifically she would have some responsibility for him until a suitable guardian could be found. Abortion after viability differs, claims Hawking, from abortion prior to viability. Prior to viability, detaching or extracting the embryo from the woman to end her pregnancy necessarily involves fetal demise. After viability, detaching or evacuating the fetal person does not necessarily involve his or her demise, since the young human being could still survive after detachment.

Hawking's argument hinges on the premise that "termination of pregnancy post-viability requires a deliberate and distinct act of feticide, accomplished by means that could equally be used for infanticide."¹⁰ If we can separate ourselves from the violinist without killing him, we are not justified in killing him to separate ourselves. Hawking writes, "Rather than showing us that late-term abortion and infanticide are morally distinct, Thomson's analogy, if refined to bring it closer to the clinical realities of post-viability termination of pregnancy, very clearly illustrates their moral similarity."¹¹ In other words, if infanticide is wrong, then the violinist analogy does not justify post-viability abortion. If the analogy does justify post-viability abortion, then it also justifies infanticide.

In the article "Pro-Life Arguments against Infanticide and Why They Are Not Convincing," Joonas Räsänen reconciles the pre-birth/post-birth consistency problem by defending Alberto Giubilini and Francesca Minerva's controversial article, "After-Birth Abortion: Why Should the Baby Live?"¹² Räsänen defends infanticide, in part, by attacking the substance view, namely, that we are human organisms whose basic rights begin at conception. Räsänen writes, "If you or I came to be at conception (as supporters of SV claim), one might ask why we celebrate birthdays instead of conception days? After all, what is morally relevant, according to the supporters of SV, is the conception. But it would be ludicrous to celebrate the day you were conceived or count the years and days how old you are from the date of the conception (at least as ludicrous than say that you or I were never born)."¹³ The substance view leads to absurdities, according to Räsänen.

9. Ibid., 314.

10. Ibid., 316.

11. Ibid., 315–316.

12. Alberto Giubilini and Francesca Minerva, "After-birth Abortion: Why Should the Baby Live?," *Journal of Medical Ethics* 39.5 (May 2013): 261–263, doi: 10.1136/medethics-2011-100411.

13. Joonas Räsänen, "Pro-Life Arguments against Infanticide and Why They Are Not Convincing," *Bioethics* 30.9 (November 2016): 658, doi: 10.1111/bioe.12281.

However, some traditional cultures in East Mongolia and Japan calculate age from conception. Multicultural sensitivity suggests that we not dismiss other cultural practices as ludicrous. Nevertheless, it makes more sense to count age from birth for two reasons. First, the day of conception is often hard to determine. Say a baby is born on July 19. If the child is not premature, we can know that she was conceived sometime in October. However, even if her parents had kept careful track of the days they were having sex, in many cases it would still not be clear on which day conception took place. You can easily imagine disputes and contrary bits of evidence arising about which days a couple made love months and months ago. Even if a couple knew that they had sex only on one day during the time in which the child was conceived, sperm can fertilize an egg up to five days after intercourse. A birth on July 19 is compatible with a wide range of dates, any of which is possible and none of which can be determined. It also makes sense to mark age from birth because it is typically more memorable, dramatic, and public than conception.

Räsänen also rejects various critiques of Giubilini and Minerva's defense of infanticide. In *Ethics of Abortion*, I suggested that it is problematic in debate to appeal to premises or intuitions that are deeply controversial in order to come to conclusions about an even more contentious issue.¹⁴ By claiming that post-birth abortion is permissible because pre-birth abortion, lethal embryo research, and capital punishment are permissible, Giubilini and Minerva move from the uncertain and disputed to the even more uncertain and disputed. It is like arguing from the premise of affirmative action in favor of having mandatory allotments by race for all legislative and judicial seats. It is like arguing from the supposition that all Republicans are better presidents than all Democrats, to the conclusion that Richard Nixon was the best president of all time.

Räsänen responds to this critique by saying that abortion, embryo research, and capital punishment are just examples, which simply “show that the fact that one belongs to the human species is not sufficient reason to claim that it is impermissible to kill one (or it).”¹⁵ In other words, if we accept abortion, embryo research, and capital punishment, then we at least implicitly embrace the principle that not all human beings have a right to live. Therefore, we cannot argue that infanticide is wrong on the grounds that it violates the right to live of the baby as a human being.

Do these examples show the fact that being human does not grant individual human beings a right to live? If she is appealing to intuition, then the fact remains not shown, at least to everyone who rejects the lethal use of human embryos, abortion, and capital punishment. Perhaps Räsänen is claiming that the principle, not all human beings enjoy basic rights, is already accepted, and these examples merely illustrate an already-accepted principle that not all human beings enjoy basic rights.

Surely this ethics of exclusion is itself deeply controversial. Räsänen, Giubilini, and Minerva do not give any arguments for their claim that only some human beings have basic rights. Indeed, the assertion seems radically at odds with the very first line of the United Nations Declaration of Human Rights, “Recognition of the inherent

14. See Kaczor, *Ethics of Abortion*, 1–12.

15. Räsänen, “Pro-Life Arguments against Infanticide,” 657.

dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

Räsänen argues, “Giubilini and Minerva think that some members of the human species do not have a right to life, but the reason for that is not the fact that capital punishment, abortion and embryo research are legal somewhere and that some people see those as morally acceptable practices but rather that not all human beings are persons who are capable of valuing their own existence.”¹⁶ This explanation fails to account for Giubilini and Minerva’s inclusion of the death penalty on their list. Surely most human beings on death row value their own existence, so if the list of controversial practices is meant to illustrate the principle that persons are individuals who value their own existence, why include capital punishment?

Moreover, all the cases cited by Giubilini and Minerva may be justified in ways consistent with universal basic human rights. Thomson argues that abortion may be justified, even if the human fetus has a right to life. John Finnis has justified the death penalty as an instance of retributive justice that is compatible with each human being’s right to live.¹⁷ Death row inmates retain basic rights, which is why cruel and unusual punishment, such as torture, is condemned even for those subject to capital punishment. If the right to live is understood as the right of innocent human beings not to be intentionally killed, then capital punishment, killing in self-defense, and killing enemy combatants in just war do not violate human rights. Even embryonic stem cell research could be understood as consistent with the principle of universal human rights. As Jeff McMahan argues, if the pre-implantation embryo is not sufficiently unified to be an organism, then the pre-implantation embryo cannot be a human organism.¹⁸

Of course, none of these considerations justify intentionally killing a newborn baby. An infant is not supported by the body of her mother, so the violinist analogy is inapplicable. Neither is she a convicted criminal subject to the death penalty, nor an aggressive threat that may be killed in self-defense or in a just war. Moreover, it would be difficult to deny that a newborn human being is a human organism. If killing a baby is wrong and if we have not overcome the pre-birth/post-birth consistency problem, then we have reason to question the permissibility of pre-birth abortion.

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16. Ibid.

17. John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: Catholic University of America Press, 1991): 78–81.

18. Jeff McMahan, “Killing Embryos for Stem Cell Research,” *Metaphilosophy* 38.2–3 (April 2007): 177–181, doi: 10.1111/j.1467-9973.2007.00488.x.