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Presumptive Personhood

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A common premise in conservative arguments on the morality of abortion is that the nonviable fetus has a right to life — and a common reaction to such arguments is puzzlement. Much of the puzzlement is over what is meant by saying that the nonviable fetus “has a right to life.” Moreover, attempts at explaining the meaning of this phrase have generally failed to bring its intuitive sense to the surface. I think that this situation can be improved somewhat. I will suggest an explication of “the fetus has a right to life” which I think is both adequate to the conservative’s usage of the phrase and useful to his cause, although the premise so construed will not do all of the work in moral arguments he wishes it to. Before presenting this explication I will mention several previously offered and, I think, unsatisfactory analyses.

Some individuals contend that “The fetus has a right to life” means “The fetus ought never to be killed.” But if this is what is meant by “having a right to life,” then not even every adult human being has such a right. I think that there are conceivable cases of legitimate killing, the clearest being killing in defense of one’s own life or the killing involved in waging a just war. However, if having a right to life means that one ought never to be killed, and if person x may sometimes be killed justly, then it follows that person x does not have a right to life. But surely any explication must be inadequate which,

together with true premises, supports the conclusion that not all persons have a "right to life." It seems that if there are any fundamental rights at all, which all individuals who are persons must have simply because they are persons, then a "right to life" must be one such right.

Perhaps the initial suggestion ought to be broadened; perhaps what is meant by saying "The fetus has a right to life" is "The fetus ought never to be killed except in defense of some person's life." This I consider unsatisfactory because of my convictions on the following case. Suppose nation A is determined to conquer nation B and to enslave B's population for economic purposes. If the citizens of B do not resist, there will be no bloodshed; A wants to enslave B, not annihilate B. I think that the citizens of B have a right to resist; further, if deaths of members of A's armed forces result from B's resistance, I do not think that any "right to life" has been violated. But if such deaths are justified, it is not because they were caused in defense of any persons' lives, but rather in defense of property, of the right of self-governance, and so forth. The proposed analysis of "having a right to life" is inadequate because it makes B's resistance with force a violation of the right to life of some of the citizens of A.

Perhaps, then, we ought further to broaden the notion of "self-defense" to include a host of instances in which killing is justified. Roughly, to say "The fetus has a right to life" would then be to say "The fetus ought not to be killed except in 'self-defense'—where 'self-defense' is construed so broadly as to include 'defense of one's own manner of living.'" There would be several objections to such an explication. First, conservatives are surely to reject it as opening the way to dangerous decisions concerning "justified" killing of persons. But a more pointed objection for our purpose is that such an explication is not at all helpful for the sort of job conservatives want the concept of "having a right to life" to do. Under this explication, one would need a somewhat detailed listing of the conditions under which killing is justified. But the current debate on the morality of abortion is precisely a debate over the contents of this list! Obviously one could not, without circularity, appeal to such a right to life *in order to* justify the setting of those conditions. But this is how conservatives are wont to argue: "Killing a nonviable human fetus is immoral (unjustified) *because* that fetus has a right to life."

Finally, some have suggested that what is meant by "The fetus has a right to life" is "The fetus has the right to be given at least the bare minimum that it needs for continued life."¹ But do even adult human beings have such a right? We certainly have a right to refuse some claims of others on our goods or services, even though the claims are made on the basis of actual need. If not, the demands upon our personal resources, in the name of someone else's "right to life," would be endless. I know of no one who does not weigh his or her

own *manner* of living against the continued *bare* existence of others and who does not sometimes choose (morally, I think) to maintain the former at the loss of the latter.

This is not to say that claims to the bare minimum are *never* justified, but merely to say that they are not *automatically* justified due to the claimant's possession of a "right to life." And if we were to broaden the explication to "The fetus has the right to be given at least the bare minimum that it needs *and deserves* for continued life," we have an account that is objectionable on a basis similar to that for which the third proposal above was found to be wanting: we still lack an account of the conditions under which the bare minimum is *deserved* and claims about fetal right to life, so construed, are not going to be helpful in setting the contents of that account. Any appeal to fetal right to life in the process of setting those conditions will be a logically otious move, for nothing that is not vacuously true will thereby be established. And premises about fetal right to life will not be able to ground substantive conclusions about the morality of abortion without begging important moral issues.

Conditions of Adequacy

None of these proposed explications, now familiar to all of us, adequately captures the sense of "The fetus has a right to life." However, the discussion has been useful in that two conditions of adequacy can be formulated. The first is: a "right to life" would seem to be a right that every person has as person, and no explication can be acceptable which does not do justice to this universality. Given any explication of "having a right to life," if I cannot agree that every person, as person, has such a right, I must conclude that no person, as person, has such a right. Therefore, if there is meaning to "having a right to life," the given explication has failed to capture it.

The second condition of adequacy is the following: any proffered explication ought to be rejected which makes central conservative arguments containing it obviously circular or vacuous. This is simply a heuristic canon of good criticism: it is better to attest to the lack of an explication than first to assume that one understands the meaning of a key phrase and then to urge that the argument containing the phrase is faulty due to the meaning assigned. Obviously this canon does not apply in the case of a phrase whose meaning is clear or noncontroversial. But were the meaning clear or noncontroversial, we would not be as concerned with explication as we are. If our research is generated by genuine desire to understand, then lack of success at explication should not convince us that this is the best we can do.

However, it is true that the persistent rejection of proposed analyses does not provide an account of what *is* being claimed when the fetus is said to have a "right to life." We must try to say what is meant more clearly.

I suggest that the claim "The fetus has a right to life" may be usefully analyzed into (at least) two quite different sorts of claims. The first sort of claim is about membership in the set of persons, while the second sort is about the treatment of members of the set of persons.

The key claim of the first sort is that "The fetus is presumptively a person." By this I mean that there is reason to believe that the fetus has a right to be presumed a person unless or until proved otherwise. Or, alternatively, it is the claim that there is some reason for thinking that the fetus has a *prima facie* right to be classified as a person. It is a claim about a *prima facie* right of fetuses to be considered members of the set of persons for basic moral considerations. With this explanation in mind I will suggest that "The fetus has a right to life" be taken to entail "The fetus is presumptively a person."

This is a useful analysis in that it enables us to make sense of some otherwise troublesome arguments brought in favor of a conservative position on abortion-arguments whose intelligibility is often questioned.

For example, some conservatives profess to understand the suggestion that the fetus *might be* a person although we *might never know* for certain. They appear to treat the question of assessing personhood as a matter of recognizing some brute fact and they seem to think that classification is a process totally independent of conceptual frameworks and societal decisions. Thus construed, the intelligibility of the conservative position rests heavily on the intelligibility of an epistemological realism. Their opponents contend that it is nonsense to think that there is a hard line drawn "in nature" between persons and non-persons, any more than there is a line drawn "in nature" between living and non-living. (Indeed, we find the same metaphysical debate behind the issue of whether death is "an event or a process."²) What is unfortunate about this approach to the question of fetal personhood is that a barrier of intelligibility is erected between the differing parties. It is not merely that they disagree, but rather that each finds the position of the other unintelligible.³

It seems unacceptable that we should leave the fate of human fetuses adrift on such open metaphysical waters. What is more, this direction is the result of a needless tack in the abortion debate. The conservative claim that the fetus *might be* a person becomes more intelligible when it is construed as the claim that the fetus is *presumptively* a person, that the fetus has a right to be classified and treated as a person until good reason is brought forward for treating the fetus otherwise. I believe that this is essentially the claim that the conservative is trying to make good; but in making such a claim there is no need for dependence upon epistemological realism. If a certain conservative is also an advocate of such an epistemological theory and wishes to remain one, that is another matter. But the mere suspicion that the

fetus "might be" a person may well be an expression of the concern, not that the fetus's "nature" is not being "perceived correctly," but that a *prima facie* fetal right is being violated without due justification.

On the proposed entailment, we can also make better sense of conservative arguments that run roughly as follows: if we begin to decide questions about personhood merely on the basis of an individual's actual (as opposed to potential) characteristics and abilities, then the way is opened for declaring individuals not to be persons whenever their behavior or capability falls below an acceptable level. How, the conservative argues, will this line of "acceptability" be drawn? How will the liberal proceed when, considering an individual in the final stages of life, there seems to be both diminishing activity and a closing off of the potential for ever regaining lost capabilities? But when this fear is framed as an argument, the result (when viewed as a preview of societal practice) strikes liberals as assuming that the slope is more slippery than it really is and the argument (when viewed from the standpoint of logic) earns from liberals the rebuttal that an acorn simply is not an oak tree and therefore need not be treated as such.

Interpretative Difficulties

Again, difficulties arise due to a given interpretation of the conservative position and some (but not all) of the heat generated in the resulting debate is avoidable. I believe that the conservative is contending that while the fetus is clearly not an adult human person, it does have certain characteristics that justify treating it as a person with respect to certain basic rights (a point which we will discuss in a moment). Some conservatives conceptualize this situation by appealing to the distinction between "actuality" and "potentiality," contending that of the generally accepted characteristics of adult human persons the fetus "actually" has some and possesses the others "potentially." Many liberals find this a hopelessly useless intrusion of metaphysics and consider characteristics that are "had potentially" by the fetus as simply *not had* at all.⁴

What is germane here is to contend that conservative arguments about "potential" need not be framed within a metaphysics of act and potency. The conservative position may be construed as the claim that the fetus (and, presumably, the individual in the final stages of life) has a *prima facie* right to be included in the class of persons, with all the rights such membership involves.

What reason is there to think that the fetus really *has* such a *prima facie* right? The reasoning seems to be that the fetus has certain characteristics, and that anything so characterized must be presumed to be a person unless good reason is brought forward for classifying it otherwise. These characteristics are purely biological: the fetus is an embodied member of the human species, the product of a sexual union

of two (clear) members of that species, and possessed of the genetic requirements both for individuality and for species membership. The conservative believes that this is surely a sufficient condition for claiming a *prima facie* right to personhood.

I think it unfortunate that conservatives have ever thought that such arguments from "embodiment" adequately support the claim that the fetus *is* a person. This is, at best, a weak argument and their claim to be able to *prove fetal personhood* has been quite legitimately challenged. (That this is a tactical error is evidenced by the reception such an approach has received in the courts in recent years.) But "arguments from embodiment" provide far better support for a weaker conclusion: the fetus has a right to be presumed a person until good reason is brought to classify the fetus otherwise. One extremely important advantage of this latter conclusion over the former is that it is compatible with the claim that the concept of "person" is *not* definable (either at present or in principle) by means of a set of necessary and jointly sufficient conditions. Indeed, the proponent of the weaker conclusion need not even claim to have a set of *sufficient* conditions for personhood. What he does claim to be able to do is recognize cases wherein sufficient conditions are met for establishing a peculiar sort of *prima facie* right: a right to be classed as a person in a provisional way. No strong claims of any sort are being advanced concerning the "actual membership" of the class of persons "in nature."

A second characteristic of the weaker, better supported conclusion (and a characteristic that ought to make it acceptable to conservatives) is that it is a *sufficiently strong* conclusion for the conservative's purposes. It may prove difficult to establish that fetuses are not persons, or to establish that the *prima facie* right of fetuses to person status ought to be overridden; in any case, the burden of proof, it seems to me, lies with those who would wish to classify fetuses *otherwise* and not with those who advocate fetal rights.

It is time to return to the analysis begun somewhat earlier when it was proposed that an entailment of the first sort (concerning membership in the set of persons) is "The fetus is presumptively a person." I will now suggest an example of the other sort of entailment — the sort of entailment which deals with what is meant by "being a person" and with how persons ought to be treated. I do not intend to survey here the extensive literature on this topic. However, an entailment important in the context of the debate about "having a right to life" is "Any person has a *prima facie* right not to be killed." This *prima facie* right is one shared by all things classified as persons precisely because they are classified as persons. Such a right can be overridden (that is why it is only a *prima facie* right), but the *exception* ("This person may be killed") is in need of justification, not the *rule* ("Persons ought not to

be killed"). That persons have the *prima facie* right not to be killed is, conservatives think, a self-evident matter following on the very notion of personhood. What cases of justified killing of persons have in common is that the *burden of proof* of the legitimacy of the killing lies with the individual who takes life and not with the victim.

Conservatives' Claim

This then is what some conservatives may be claiming when they premise that the fetus has a right to life: there is reason to presume the fetus a person until good reason is brought forward for classifying the fetus otherwise and until and unless such good reasons are forthcoming the fetus ought to be presumed to have a *prima facie* right not to be killed. It can be seen that this analysis meets the conditions of adequacy mentioned earlier: clearly every person has a "right to life" (so construed) and the statement "X ought not to be killed *because* x has a right to life" is not analytically true.

If this expresses what the conservative is claiming, then I find the premise understandable and reasonable. However, it may be questioned whether conservatives have always made proper *use* of such a premise in argumentation over abortion. Many uses of the premise systematically elicit a residual puzzlement that remains even after puzzlement over the meaning of the claim is dispelled. This is understandable when it is seen that, given the above meaning analysis, such a premise seldom supports all that some conservatives wish it to support. Making good the claim that the fetus has a right to life does not *directly* settle the morality of any abortion, any more than claims about the right to life of combatants can settle the morality of the killing that occurred in the course of World War II. In particular, the claim that "All persons have a *prima facie* right not to be killed" is not itself any more useful in directly settling a particular case than is the claim that "No person ought to be killed except in 'self-defense' (construed broadly)." We still lack clear knowledge of the conditions under which the *prima facie* right may be morally overridden.

But I would argue that the conservative is, on the whole, making a *more* useful and *more* pointed claim than merely that "fetuses ought not to be killed *unjustly*," even though he is not properly claiming so much as will enable him to deal directly with all the questions he wishes to address. On my account, the additional, useful claims concern the initial or *presumptive classification* of fetuses as persons and address the question of *where the burden of argument rests* regarding (1) possible reclassification of the fetus and (2) treatment of those classified as persons. As such, claims about fetal right to life are important assertions about the *rules* under which some basic and fundamental moral questions about the treatment of fetuses should be settled. So construed, however, claims about fetal right to life do not

in themselves make direct logical contact with the question of whether abortion is ever moral: they rather perform the important task of assigning moral responsibilities to those participating in the debate.

REFERENCES

1. This explication and a discussion of it are found in Judith Jarvis Thomson's "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. 1, No. 1, Fall 1971, pp. 47-66.
 2. See, for example, Robert Morison and Leon Kass, "Death — Process or Event?," *Science*, Vol. 173, 20 August 1971, pp. 694-702.
 3. This theme is strong in Roger Wertheimer's "Understanding the Abortion Argument," *Philosophy and Public Affairs*, Vol. 1, No. 1, Fall 1971, pp. 67-95.
 4. This debate has been further fueled by the attempt to formulate a set of necessary and jointly sufficient conditions for personhood, an enterprise which may be misguided, if not dangerous. See Joseph Fletcher's "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report*, Vol. 2, November 1972, pp. 1-4, and "Four Indicators of Humanhood — The Enquiry Matures," *Hastings Center Report*, Vol. 4, December 1974, pp. 4-7.
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