



## Separation-survivability – the elusive moral cut-off point?

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Act 92 of 1996, the Choice on Termination of Pregnancy Act, seeks to promote female autonomy. The Act makes no reference to the nature of the abortus – implying its moral insignificance. Utilitarian arguments on the value of life strongly support this position. Utilitarians argue that neither belonging to the human species, nor possession of the potential to develop into a person, is a significant intrinsic characteristic in determining the value of life. For them the entrance requirement to any conception of moral significance is sentience – the ability to suffer. Full moral significance is only accorded to ‘persons’. A person is someone who has attained a sufficient level of self-awareness to have an interest in the continuance of its existence. This develops some time after birth.

‘Conservatives’ argue for conception as the moral cut-off point after which termination is morally unacceptable; ‘liberals’ hold that there is no such prenatal point. Both of these notions

are problematic, as is the notion of sentience.

We argue that separation-survivability is the only morally acceptable cut-off point, based on four premises, viz. (i) a particular notion of potentiality; (ii) the inextricable, mutual relationship between human beings and their world (without either, the other cannot exist); (iii) the moral correspondence of the viable fetus and the neonate; and (iv) the moral unacceptability of infanticide.

We support a graded position on the value of prenatal human life, and a ‘moderate’ stance on termination – that notwithstanding possessing *some* moral significance, other arguments may trump this up to the point of separation-survivability. This seriously problematises ‘partial birth’ abortion, and the utilitarian argument on the value of life.

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Act 92 of 1996, the Choice on Termination of Pregnancy Act,<sup>1</sup> seems to be justified mainly by recourse to the promotion of female reproductive rights and personal autonomy, the woman’s ‘right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs’. The legislator argues that the State has a consequent duty to provide ‘safe conditions under which the right of choice can be exercised without fear or harm’, and states that the ‘decision to have children is fundamental’ to global female health.

The promotion of female autonomy is laudable in a society where women’s rights and freedoms are not always duly recognised and respected, and where, according to many, patriarchy and paternalism often persist.<sup>2</sup> However, the Act is problematic in denying the responsibility and complicity of the male in reproduction. This might be understandable since the promotion of autonomy aims to liberate women from male domination. The Act does not make any reference to the moral stature of the abortus. The view that the moral status of the fetus is insignificant is powerfully supported by the utilitarian view on the moral value of prenatal life. Utilitarianism is a form of consequentialism, an influential moral theory which advocates that moral acts should be judged only on results. Utilitarians seek the promotion of happiness,

or in a contemporary reading, that which produces the best results, and argue that the moral significance of *all* beings resides in non-potential *acquired* characteristics. Membership of the human species by itself presents no particular significance; speciesism is an unwarranted and unfounded prejudicial theory and practice, in terms of which membership of ‘my’ species accords us with special moral rights and privileges, primarily because we have the *power* to do so.<sup>3</sup> Nor does the *potential* to develop these acquired characteristics warrant moral significance.

The utilitarian characteristics are, firstly, sentientism (the ability to suffer, or awareness), based on the supposition that the *moral domain is demarcated by the capacity for suffering*: ‘... the question is not, Can they reason? Nor, Can they talk? But, Can they suffer?’<sup>4</sup> But most animals, certainly most vertebrates, are also sentient, and all sentient beings are entitled to equal treatment. Utilitarians deny that sentience justifies a ‘right to life’, but the *ability to suffer is the entrance requirement for any conception of moral significance*; until such time as sentience is present in prenatal life, ‘abortion ... terminates an existence that is of no intrinsic value at all’.<sup>5</sup> The only moral demand a sentient being can make is that it not be subjected to suffering.

The second, and for the utilitarian, more significant acquired characteristic is that of rationally defined *personhood*. Life, for utilitarians like Peter Singer,<sup>5</sup> John Harris<sup>6</sup> and Michael Tooley,<sup>7</sup> has value only because it is the life of a person. A person is someone who has attained a sufficient level of self-awareness to have developed an interest in the continuance of his or her own existence.<sup>6</sup> Psychological characteristics like self-awareness

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and the ability to project oneself into the future, or at least *some form of the concept of a 'continuing mental substance'*, are required before an interest in continued existence (a future) can develop, and a living being can 'value her own life' – some time *after birth*.<sup>7</sup> The fetus clearly does not have this ability yet. Killing it does not remove a capacity it has ever experienced; it is unaware of what has occurred. Significantly, 'birth does not mark a morally significant dividing line. I cannot see how ... fetuses may be "replaced" before birth, but newborn infants may not be.'<sup>5</sup> 'Replacement' is the substitution of a present being by a later sibling, morally acceptable in classical utilitarianism, as long as net happiness is not diminished. Thus, Peter Singer distinguishes between persons who have a personal preference in their future, and non-persons, who cannot have such capacity. *Persons* are 'non-replaceable'.

The utilitarian therefore argues that the prenatal human being, the neonate and the infant have negligible moral value and do not warrant meaningful consideration *for their own sake*. They may warrant indirect consideration *only inasmuch as they contribute to or detract from the utility (net benefit, advantage, good or bad) of others*. It is clear how this position supports Act 92. The question is whether this position is morally defensible. We think not.

### Moral cut-off points

A difficulty that both liberal ('pro-choice') and conservative ('pro-life') positions share in the abortion debate is that of moral cut-off points – clearly recognisable, generally accepted developmental phases or stages, beyond which the killing of a fetus is morally unjustifiable. 'Conservatives' often regard conception as the moral cut-off point. Of course conception is a significant event. The problem here is divisibility.<sup>8-10</sup> Some pre-embryos may subdivide to bring about the existence of two or more identical new beings.<sup>9</sup> All cells resulting from the earliest divisions are pluri-potential – each has the ability to individuate into a unique individual, should it split off. Some subdivisions may subsequently reunite to form a single new being (a chimera). If the conservative ascribes full moral significance to the fertilised egg, the problem is to conceptualise the moral significance of these 'interim' beings, and the moral nature of the chimera. According full moral significance to 'biological' human life precludes termination for whatever indication and problematises the treatment of terminal and non-salvageable patients. Conception cannot be the moral cut-off point.

Much is made of sentience as a moral cut-off point, since this indicates the beginning of 'awareness'. But the advent of sentience is notoriously difficult to quantify. The range of suggestions – often little less than thumb suck – vary from 7 to 30 weeks or more.<sup>8,11-13</sup> Recent work has highlighted the difficulty of trying to ascertain the psychological (and moral) meaning of sentience for the fetus.<sup>11-13</sup> Even if there are apparently 'sophisticated and localized behavioural response

to noxious stimuli',<sup>11,12</sup> it remains impossible to determine the nature of the experiential world of the fetus. How might its apparent experience of pain – if that is what it experiences – affect its future, especially as we have no understanding of its memory? We can argue, surmise and infer – with little certainty. We are on shaky ground if we rest our case on sentience.<sup>14</sup>

If the conservative does not accept conception as the moral cut-off point, she justifies early termination, and takes a step onto an irresistible slope, since fetal development progresses on a continuum without halts or breaks, or obvious morally significant demarcation. The conservative is obliged to take the 'safest' option, i.e. conception as cut-off point, notwithstanding its inconsistencies, and the attending difficulty in justifying any indication for termination. The utilitarian 'liberal', on the other hand, wants free access to abortion, and chooses a cut-off point that allows that, and is, in a sense, irrelevant to the debate – personhood appears only some time (utilitarians present no time frame) after birth. But the price for this position is the difficulty of denying the legitimacy of infanticide, as conceded for instance by Peter Singer and Michael Tooley.<sup>5,7</sup>

### The relevance of species membership and potential

The inherent potential of the fetus to become a person cannot be denied as readily as the utilitarian suggests. We hold strong intuitions about the value of (particularly flourishing) human life, or at least life that has the potential to flourish later when adequate development has taken place, as is the case with immature beings. Given a favourable maternal environment, the normal embryo may have the full potential to develop into a person with a flourishing life, a person with moral attributes, and it should not lightly be denied the opportunity to do so when both of these requirements are fully present.

Contrary to utilitarians, existential phenomenologists argue that human life has particular significance in a way that seriously undermines the utilitarian critique of speciesism. The supporting argument is not specifically moral, but also philosophical. According to phenomenologists, the world as we know it is by definition a human world since it is the correlate of the act of making sense by humans. (Wo)man and world is a unity of mutual implication. *There is a world only because there are humans for whom that world has meaning; similarly, there are humans only in as much as there is a world that constitutes the necessary environment in which they reside*. All meaning that we can be aware of is of necessity human; we know no other world than the world that makes sense to humans. Speciesism is therefore not a sign of moral arrogance; it is a necessary characteristic of our existence. 'Man is the sole creator of meaning and value in the world'.<sup>15,16</sup> Conceptions of *value* can therefore only make sense with reference to humankind and therefore presuppose human existence, and consequently any prospect of eventual morality as well. There is no alternative



way of constituting the world, as we know it; human speciesism is not only justifiable and desirable, it is *inevitable*.

These are but two arguments one can develop against the utilitarian proposal that pre-sentient human life has no inherent significance.<sup>15-17</sup> Many authors extol the theoretical incoherence of utilitarianism (its insistence on utility and denial of the moral significance of individual rights, promises and obligations), and the societal risks if its arguments are fully deployed (e.g. to legitimise infanticide).<sup>18</sup> Unlike the utilitarian, based on arguments such as these we hold that the humanity of the normal embryo has *some* moral significance from individuation onwards – if it has the inherent potential to become a person and that potential is accompanied by a definite decision to carry it to term. Moral significance increases on a sliding scale as development progresses, as more potential is actuated and less remains in doubt. Unlike the conservative, our notion is not absolute; although abortion is *prima facie* wrong, it is not absolutely or always wrong. Arguments in favour of termination may trump the initial limited moral value of the embryo/fetus. As development progresses these arguments become more persuasive. The question is whether we reach a point where termination becomes morally unjustifiable.

### Separation-survivability as a moral cut-off point

We propose that the advent of separation-survivability, or viability, is a realistic moral cut-off point.<sup>17</sup> We accept current clinical consensus that suggests a cut-off point for aggressive neonatal intervention at 25 weeks, provided birth mass exceeds 500 g and in the absence of unmanageable birth defects, although the exact gestational age is immaterial to a discussion of its philosophical-ethical implications. At about 25 weeks' gestation development reaches the stage where the pre-person can survive separation from its mother, should it be born alive at that point. This crucial milestone radically alters pre-personal moral significance and confirms pre-personal potentiality. It is a unique characteristic; the pre-person is now comparable to the neonate or an infant – it can survive separation from its mother and *become* an infant (and eventually, a person). We perceive the viable fetus as an *individual*, separate from and independent of its mother, capable of attaining legal status and of confirming its moral status – the advent of its unique human individuality. A human being that can survive on its own has every right *not* to be killed. As with all infants and neonates, further growth and development has to, and normally will take place; its immaturity alone cannot deny its moral significance. We might formerly have conceived of mother and fetus as an integrated unit, of the fetus as an anatomical extension of the maternal body, like an arm or a leg, 'flesh of her flesh, part of her' (approximating the *legal* conception of a pre-person).<sup>19</sup> Or that the association between female and fetus is relational, a relation that the female is entitled to stop at any time since that fetus can have no relation with any other body.

But now no more; we are obliged to accept that the fetus is not dependent on, or locked into this particular physical or emotional relation. It has acquired the potential to enter into other relations, as it gradually becomes more of a subject.<sup>20</sup> It need not remain bound to this maternal figure. It remains vulnerable and dependent on human care and protection. Since *all* neonates, infants and toddlers are vulnerable and dependent, this should not exclusively negate the moral significance of the viable fetus.

The moral correspondence between the normal neonate and the normal viable fetus in the last weeks of pregnancy justifies equal treatment. We argue that the process of birth, though the final episode in the pre-natal development of the fetus, is of limited and secondary philosophical and moral importance.<sup>18,21-25</sup> We do not kill neonates; neither should we kill the viable fetus. Of course, we assume that infanticide is morally unjustifiable and incompatible with responsible societal life. Our most basic moral intuitions abhor infanticide and direct us to protect (normal) neonates and infants because of their humanity, potentiality and vulnerability. If infanticide is morally unacceptable, so too is feticide (the killing of normal, viable fetuses), unless, of course they are killed because of termination for which there are compelling reasons, such as a threat to the life or health of the pregnant woman. But we are not obliged to act in defence of the fetus against the wishes of the mother (enforcing caesarean section, incarceration to quell substance abuse, postmortem caesarean section, etc.).

Therefore, *separation-viability may be the elusive moral cut-off point* to justify a claim to a 'right to life'. It is the only realistic and justifiable moral cut-off point; conception, or individuation, and sentience are insufficient, and psychological personhood appears too late to be useful. Viability as a moral cut-off point provides firm argumentative ground in the abortion standoff. Since infanticide is *prima facie* wrong, and there is no moral difference between the viable fetus and the neonate, we have a moral obligation to treat them equally; both should be accorded the opportunity to actuate their inherent potential. They should not be terminated. These reasoned grounds should change our approach to the termination of pregnancy beyond the advent of viability. Viable pre-persons have a 'right to (the continuation of their) life' *claim* (or should at least be conferred the *benefit* of societal protection, if a 'right to life' is too presumptuous a claim). Reasons to allow termination beyond this point should be very persuasive since they are set up against a powerful argument.

Should this right or benefit be trumped by the autonomy of the woman as the only legitimate spokesperson for the viable fetus? Not necessarily. One reason is the consequence of the utilitarian argument. If there is little difference between the viable fetus and the baby it has the imminent potential to become, as the utilitarians and we agree, and we may kill the fetus, what moral reason stops us from killing the baby, as



Singer suggests,<sup>5</sup> if the mother so wants? There is no direct, or even indirect, moral reason that does not also apply to the viable fetus.

This discussion underlines the relation between scientific knowledge and philosophical discussion; scientific knowledge is a particular prerequisite to sensible biomedical reflection. Technological advances increasingly factor in the survival of premature neonates. We should not confuse moral significance with the availability of sophisticated treatment. This is not a plea for the aggressive treatment of 25-week neonates, only that since they are (at least theoretically) viable, this precludes their termination while still *in utero*.

We conclude with three final comments. If our argument is correct, 'partial birth' abortion (killing of the fetus just before it is born, usually at the crowning of the head), legal in Israel and only recently totally outlawed in all of the USA, is seriously problematised.

The utilitarian linkage of fetal and neonatal moral significance problematises *their* personhood argument. Utilitarians who hold a liberal view on abortion are obliged to accommodate infanticide, without which their argument is inconsistent.

Our position supports a moderate stand on abortion and gives moral support to the protection of third-term fetuses, as such also supporting generally held moral intuitions. 'Moderate' here means a position that is neither absolutely pro-choice, nor absolutely pro-life, but somewhere in between.<sup>17</sup> The moderate position argues that even if there might be moral significance at conception, or individuation, this can be overridden by other contextual considerations and arguments. Moral value develops in line with fetal development throughout pregnancy, and a critical moral cut-off point may even be reached

sometime during pregnancy, beyond which the termination of pregnancy is precluded. We argue that this point is separation-survivability.

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