

A Dilemma for Appeals to the Moral Significance of Birth

ABSTRACT: Giubilini and Minerva argue that the permissibility of abortion entails the permissibility of infanticide. Proponents of what we refer to as the Birth Strategy claim that there is a morally significant difference brought about at birth that accounts for our strong intuition that killing newborns is morally impermissible. We argue that strategy does not account for the moral intuition that late-term, nontherapeutic abortions are morally impermissible. Advocates of the Birth Strategy must either judge nontherapeutic abortions as impermissible in the later stages of pregnancy or conclude that they are permissible on the basis of premises that are far less intuitively plausible than the opposite conclusion and its supporting premises.

Giubilini and Minerva in their article “After-birth abortion: why should the baby live?”^[1] argue that “killing a newborn could be ethically permissible in all the circumstances where abortion would be” (p. 262). This is because, they argue, newborns and fetuses share the same moral status. We shall call this the “if abortion, then infanticide” inference, an inference many scholars in favor of abortion reject. Bertha Alvarez Manninen,^[2] for instance, says that, despite being pro-choice, she finds Giubilini and Minerva’s position “deeply troubling” (p. 330). Neil Levy^[3] observes that “very many people think that the killing of newborns is every bit as wrong as killing older children or adults” (p. 326). A strategy used to block the “if abortion, then infanticide” inference is to argue that there is a morally significant change that birth makes possible, which accounts for our strong intuition that killing newborns is morally impermissible. We call this the Birth Strategy. We argue that there is a largely overlooked cost for proponents of this strategy: none of them account for the equally strong moral intuition that late-term, nontherapeutic abortions are morally impermissible. By “late-term” we mean abortions that occur near the end of the third trimester, which for the sake of

argument, we will stipulate at 36 weeks.ⁱ By “nontherapeutic abortions” we mean abortions that are not medically indicated and that a “normal birth” would follow if no abortion were to occur. By “normal birth” we mean roughly what the World Health Organization^[4] means: a healthy neonate is born in the vertex position between 37 and 42 completed weeks of pregnancy after spontaneously induced labor, low-risk at the start, and remaining so up until delivery.ⁱⁱ Consequently, a dilemma for advocates of the Birth Strategy remains: either judge nontherapeutic abortions as impermissible in the later stages of pregnancy, or conclude that they are permissible on the basis of premises that are far less intuitively plausible than the opposite conclusion (and its supporting principle). In either case, the moral significance marked by or correlated with birth is undermined. This paper proceeds as follows. In section 1 we explain the birth strategy and in section 2 explain the dilemma the strategy faces. In section 3 we respond to objections.

1. The Birth Strategy

Giubilini and Minerva pose a challenge: since neonates and fetuses lack rationality, self-consciousness, moral responsibility and other morally-relevant intrinsic properties that ground personhood and the right to life, their moral status should be the same. Thus, if it is morally permissible to kill a fetus, then it is morally permissible to kill a neonate. A series of responses to this argument have focused on moral changes

ⁱ We realize this timing does not capture what is usually meant by “late” in “late-term abortion” which can be marked earlier, but this timing is clearly late and therefore bolsters the conclusion of our argument.

ⁱⁱ We realize the line between “therapeutic” and “nontherapeutic” activities is blurry and cause for debate, but it is not so blurry as to be meaningless. Reliable judgments about whether abortion of a healthy pregnancy at 36 weeks is medically indicated or not can be made without recourse to controversial health concepts that sometimes complicate the abortion debate.

made possible by birth, which are thought to justify a higher degree of protection against killing enjoyed by neonates but not fetuses.ⁱⁱⁱ Here we highlight representative examples of this type of response to Giubilini and Minerva.

Manninen, following the work of Judith Jarvis Thomson and David Boonin, distinguishes the right to life from the right to bodily autonomy, and argues that no one's right to life entails a right to use any part of anyone else's body in order to receive life-sustaining aid.^[5-8] So, just as your sister's right to life does not entail the right to use one of your kidneys, the fetus's (purported) right to life does not entail the right to use the woman's uterus. The right to an abortion, then, is the right to withdraw gestational aid from the fetus. Despite the fatal consequences for the fetus, Manninen argues that a "woman's interest in her bodily autonomy supersedes the fetus' interest in continued existence" (p. 335) for the same reason that your interest in bodily autonomy supersedes your sister's interest in one of your kidneys. The situation changes, however, at birth because the neonate's "continued existence is no longer at odds with anyone's right to bodily autonomy", and so, "the infant may not be killed because its existence infringes on no one's bodily rights" (p. 335). According to Manninen, then, birth makes possible a significant change in the moral standing of the child in virtue of terminating the fetus's dependence on the mother's body.

ⁱⁱⁱ As one reviewer observes, we can imagine fanciful scenarios in which some of the accounts discussed in this section are satisfied independently of normal birth (e.g., a fetus is removed from and put back into the mother or it is placed in an artificial womb). We set these scenarios aside for two reasons. First, they do not necessarily show that there is no moral change brought about by birth, and second, they do not affect our argument that these accounts permit the moral permissibility of late-term nontherapeutic abortion.

Another Birth Strategy response is to argue that birth allows for morally significant cognitive development. Neil Levy, for example, argues that birth makes possible the advancement of neonates' cognitive development by virtue of engaging in “scaffolded interactions with carers” (p. 326), something not enjoyed by fetuses.^{iv} A fetus simply cannot engage in the kinds of interactions with carers in a way that a newborn does. Thus, he concludes, “birth is a necessary condition for the acquisition of important psychological properties (together, perhaps, with the fact that birth correlates reasonably well with age) that explains why people think it is morally significant” (p. 327). Similarly, Regina Rini,^[9] argues that neonates have morally significant “aims” that fetuses lack. She explains that, in virtue of becoming biologically independent of the mother, the neonate “must suddenly begin to breathe on its own, to process its own nutrients, to digest and excrete and seek out warmth” (p. 356). These aims, the frustration of which is morally significant, can only emerge “once its umbilical cord has been severed” (p. 356). On these accounts, then, birth enables the neonate to develop morally relevant capacities in ways that are unavailable to the fetus.

Still another response is to argue that birth creates a new, morally significant relationship. Prabhpal Singh^[10] argues that parents acquire “special moral responsibilities” (p. 188) for neonates they did not previously have for fetuses in virtue of a new relation brought about by birth. Parents, *qua* parents, acquire roles and responsibilities in virtue of accepting a child, either through biological processes or

^{iv} Levy sets aside the extent to which the increase of moral status one receives at birth would make a difference to the ethics of killing; his focus is limited to whether there is a positive change in moral status *solely* in virtue of birth. While the utility of his discussion for the ethics of killing is limited, we include it for the sake of argument: it inherits the same problem of the other views if one assumes it makes a difference to the ethics of killing.

adoption, and among the responsibilities is the responsibility to care for the child. Obviously, this morally significant relationship requires the existence of a child, but, according to the argument, a fetus is not a “child” and therefore is “not the proper object of parental responsibility” since it cannot stand in the “parent-child relation” (p. 190). On this account, birth marks the beginning of a morally significant relationship.

2. Late-Term Nontherapeutic Abortion

We offer the preceding accounts as illustrative of the Birth Strategy, which enables one to deny that pro-choice advocates must be pro-infanticide as well. Criticisms and defenses have been offered against each position highlighted above, and it is not our aim to engage them here.^v Our aim is to show that the strategy has a cost that has been neglected in the literature. Specifically, if birth correlates to or marks the point in moral status in which the protections against killing change between neonates and fetuses, then nontherapeutic late-term abortion is permissible, which is hard to believe. Consequently, a dilemma threatens: either judge nontherapeutic abortions as impermissible in the later stages of pregnancy, or conclude that they are permissible on the basis of premises that are far less intuitively plausible than the opposite conclusion, which is further supported by a basic moral principle (discussed below). In either case, the moral significance made possible by or correlated with birth is undermined insofar as it used to safeguard the moral permissibility of abortion and secure the impermissibility of infanticide.

^v For general defenses, see Warren^[11] and Bermúdez;^[12] for a general critique, see Kaczor.^[13]

To see why, it is instructive to revisit Giubilini and Minerva's position. On their view, the reasons that justify early-term abortion (e.g., non-therapeutic reasons) justify late-term abortion and "after-birth" abortion. Consider the following scenarios:

- (A) Mary wants to get pregnant and is successful. Six weeks into her pregnancy, however, she decides that she no longer wants to have a child and that she is done being pregnant. She feels miserable and regrets her decision to have a child. She decides to get an abortion.
- (B) Mary is 36 weeks pregnant and due to give birth any day now. She decides, however, that she no longer wants to have a child and that she is done being pregnant. She feels miserable and regrets her decision to have a child. She decides to get an abortion.
- (C) Mary is 36 weeks pregnant and due to give birth any day now. She gives birth to a healthy baby. She quickly decides, however, that she no longer wants to have this child and that she is done being a mom. She feels miserable and regrets her decision to have a child. She decides to get an "after-birth" abortion.

All pro-choice advocates accept the moral permissibility of Mary's decision to get an abortion at six weeks. Giubilini and Minerva argue that Mary is just as permitted to seek out an abortion at 36 weeks and even an after-birth abortion: The reasons that justify an abortion in A also justify an abortion in B and after-birth abortion in C, regardless of fetal development from A to B and the changes brought about by birth in C. The responses to Giubilini and Minerva canvassed above are supposed to show that Mary is forbidden from intending the death of the neonate. In other words, these authors are attempting to block the "If early-term abortion, then infanticide" inference.

Surprisingly, then, it is consistent with those accounts that Mary is permitted to intend the death of a fetus at 36 weeks for nontherapeutic reasons. According to Manninen, "every person has a right to decide if they wish to use their body to sustain the life of another" (p. 330), and so, Mary would seem to be morally permitted to intend the death of the fetus at 36 weeks if she wishes. According to Levy and Rini, birth allows for

morally significant cognitive development, and if this significance makes the difference between having a right to life or not, Mary would be morally permitted to intend the death of the fetus at 36 weeks if she wishes. According to Sing, birth creates a morally significant relationship, and so, “it is only the born child that is the object of moral consideration” (p. 191).

Nevertheless, blocking the “If abortion, then infanticide” inference by appealing to the moral significance made possible by birth overlooks another inference entailed by Giubilini and Minerva’s position, namely, the “If early-term abortion, then late-term abortion” inference even if the late-term abortion is done for nontherapeutic reasons. Recall, Giubilini and Minerva argue that the reasons that justify an abortion in A (e.g., personal reasons unrelated to the physical condition of her body or fetus) justify an abortion in B. Yet, abortion advocates tend to agree that the fetus becomes increasingly morally considerable as it develops mental capacity,^[14,15] and some would agree that late-term nontherapeutic abortions are morally impermissible altogether.^[16–18] Mary Anne Warren writes that “the moral standing of the late term fetus” is “substantial” (p. 63). Judith Jarvis Thomson explains that, even though a woman has the right to abort, it would be “indecent” of her to request an abortion in the seventh month so she can go on a trip abroad (pp. 65-66). Manninen explains that because there are no significant cognitive differences between a late-term fetus and a neonate, she is inclined “against approving later-term abortions rather than toward approving ‘after-birth abortion’” (p. 335). Indeed, society’s interest in protecting human life in the later stages of pregnancy is recognized in the US Supreme Court’s landmark decision of *Roe v. Wade*, and this interest has endured. In a recent study^[19] of how Americans understand abortion, 51%

of respondents said abortion should be legal “only under certain circumstances” as opposed to legal “under any circumstance” (35%) and that, “Timing during the pregnancy is, by far, the most common limitation mentioned among interviewees who wish to constrain legality to certain circumstances” (p. 25).^{vi} How to adjudicate timing may be complex, but if “late-term” designates a time between 36 and 41 weeks, it is not surprising that even a strong “under any circumstance” advocate like Katie Watson^[20] would say “No wonder ‘late-term abortion’ triggers revulsion!” (p. 94). For obstetricians, getting past this revulsion is further complicated by what Watson calls “moral coherence” (“the desire to see like cases treated alike,” p. 164) the satisfaction of which only decreases insofar as they are dedicated to helping the parents of these small patients survive and thrive in a pre-natal context; profound cognitive dissonance arises when confronted with the proposal to kill them, which probably explains why finding a clinic to procure such an abortion is next to impossible.^{vii}

The basis for the broad consensus that late-term nontherapeutic abortions are, at least, morally disturbing results from the observation that there is little to no intrinsic difference between a fully developed, viable fetus at 36 weeks and a neonate. A fetus at 36 weeks is capable of living outside the womb, feels pain, responds to stimulus, and stands in some morally important relationship to the woman.^{viii} There is evidence that twins in utero can imitate one another, are aware of one another, and respond to one

^{vi} The study also found that timing compels moral judgment against abortion even for those in the “legal under any circumstances” category.

^{vii} Watson appeals to this dissonance in her defense of the viability criterion (p. 169).

^{viii} Whatever this relationship amounts to, it is recognized by laws that count the fetus as a victim in the homicide of a pregnant woman and by ethical norms relevant to gestational surrogacy practices.

another in special ways.^[21,22] Hershenov and Hershenov^[23] explain the apparent symmetry between fetuses and neonates:

there is no way to distinguish an infant from a [late-term] fetus in terms of an intrinsic morally relevant feature that the former has and the latter lacks—neither one is rational, morally responsible, self-conscious, concerned about the future, etc. They both lack the cognitive abilities of most household pets (p. 388).^{ix}

Late-term abortions, while rare, are typically performed for therapeutic (life-saving or health-preserving) reasons, not for Mary's reasons in B. The weightiness of these reasons are deeply relevant when we consider what late-term abortion involves.^x Lisa Harris^[25] describes performing a non-intact dilation and evacuation abortion at 18 weeks as “visually and viscerally... different from doing an eight-week abortion. Removing a microscopic fetus and gestational sac is visually and viscerally different from removing what looks like a fully formed but small baby” (p. 76). Presumably, aborting a 36-week baby is all the more visually and viscerally different. Given the viability of a healthy fetus at 36 weeks, to abort it for nontherapeutic reasons strongly seems morally impermissible. Yet, according to the accounts of the moral significance of birth canvassed above, such an abortion is morally permissible.

3. Objections and Replies

We argue that blocking the “If abortion, then infanticide” inference by appeal to the Birth Strategy is deeply objectionable because it morally permits late-term

^{ix} We, of course, disagree with the idea that the lack of these properties supports the permissibility of killing the fetus or the neonate.

^x Indeed, the weightiness of these reasons explains why Roman Catholic ethicists have debated the permissibility of craniotomy procedures for decades with little resolution.^[24]

nontherapeutic abortions. In this section we respond to three objections that might be raised to our argument.

The first objection would be to argue that there are other grounds of moral status that late-term fetuses enjoy (e.g., sentience, viability) that early-term fetuses lack that could morally rule out the kind of abortion we have in mind if not legally. Proponents of this objection could take the view that the increasing moral status of the fetus (say from when they are sentient) makes late-term abortions more difficult to justify (say impermissible for non-therapeutic reasons), but still permissible in certain circumstances (such as for therapeutic reasons). They could also claim that the additional moral significance marked by birth means infanticide is impermissible for any reason. So while birth marks additional moral status, there are other grounds of moral status for late-term fetuses.

Although this strikes us as the most promising objection, we remain unconvinced. More needs to be said about what grounds the moral impermissibility of late-term nontherapeutic abortion. It is not enough to say that such abortions would be “indecent” or that there are other grounds for ruling them out. We want to know why birth remains morally significant in light of the fact that these other grounds are just as capable of ruling out infanticide. It would seem that symmetry of the intrinsic features between late-term fetuses and newborns is greater than or equal to the moral significance of the changes made possible by birth. In other words, if there are properties of late-term fetuses that make late-term nontherapeutic abortions morally impermissible, then *these* properties ground the wrongness of killing newborns as well. The implication, of course, is that Giubilini and Minerva’s argument fails *independently*

of the strategies explained above, all of which were offered in response to their argument. It is wrong for Mary to pursue an abortion in scenarios B *and* C because the child has morally significant properties, properties that are distinct from those identified by proponents of the Birth Strategy. Dialectically, this is a cost for the accounts discussed above: they are not necessary to respond to Guibilini and Minerva, contrary to what they claim, and they do not fully account for what is wrong with infanticide.

Second, it might be objected that our dilemma posed by late-term nontherapeutic abortion is a problem only for those who share our intuition that such abortions are morally impermissible, and that our intuitions are unreliable or biased, and that the principles deployed by proponents of the Birth Strategy should help correct our judgment. To this we reply that the plausibility of the judgment that late-term nontherapeutic abortions are impermissible is simply greater than any of the proposed principles that could be used as premises in an argument to the contrary. In other words, none of them make the changes made possible by birth a bright enough line to justify killing a late-term fetus for nontherapeutic reasons. If proponents of the Birth Strategy think late-term nontherapeutic abortions are permissible, then they need to better explain why we are mistaken to think that killing a neonate right after birth for nontherapeutic reasons is just as wrong as killing a fetus right before birth for nontherapeutic reasons.^{xi} More needs to be said about why we are mistaken in thinking that late-term nontherapeutic abortions are morally impermissible.

^{xi}The most they can show is that it is slightly more objectionable to kill a neonate than a 36 week old fetus, but we see this as a distinction without difference, since it would be wrong in both cases to do so.

Another possible response to our argument would be that we rely too heavily upon untutored intuition, that is, intuition insufficiently supported by a moral principle. We disagree. While we think that one would not lack justification for simply believing that killing a 36-week-old fetus is just as serious as killing a neonate, we think the principle that explains why this is true is far stronger than any of the principles asserted by purveyors of the Birth Strategy. The principle we have in mind is that it is morally impermissible to deprive a non-threatening human being of a foundational human good like life, a good upon which all other human goods are based, without sufficient reason. Since the desire to not be a mom is not strong enough to justify an act that would deprive a 36-week-old fetus of its life, giving birth to the child and placing it for adoption should be pursued instead. To be clear, our project is not to offer an account of when a fetus becomes morally significant enough to be afforded strong protections. Our project is to show that a certain kind of response to Giubilini and Minerva's argument is saddled with a troublesome dilemma.

Conclusion

Giubilini and Minerva's "If abortion, then infanticide" inference entails the "If early-term abortion, then late-term abortion" inference. Responses that appeal to the Birth Strategy to block former fail to block the latter. Because many people have the intuition that it is not morally permissible for Mary at 36 weeks pregnant to abort the fully developed fetus for nontherapeutic reasons, and, as Levy notes, "there are good reasons to take intuitions seriously" (p. 326), then proponents of moral significance of birth strategy are saddled with an unacceptable cost. They can either bite the bullet and accept the moral permissibility of nontherapeutic late-term abortions or they can argue

that there is a moral difference between viable fetuses and non-viable fetuses.

Consequently, a dilemma for advocates of the Birth Strategy remains: embrace a highly implausible position or conclude that the moral significance marked by or correlated with birth is not that significant in response to Giubilini and Minerva.

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