

Abortion and Infanticide: a Triple Libertarian and Critical-Rationalist Defence

J. C. Lester

(Revised June 2020)

Abstract

From libertarian and critical-rationalist assumptions, the moral permissibility of abortion and infanticide can be explained and defended in three principal ways; although non-libertarians and justificationists could also accept these arguments. These include new theories of personhood (in critical-rationalist terms) and harm-infliction (in libertarian terms). The three defences are independent of each other but collectively consistent. 1) The unborn and infant human is not a person in the relevant intellectual and moral sense, because incapable of critically appraising abstract conjectures. 2) There is no overall proactive imposition (harm-infliction), as the unborn or infant human is only denied the benefit of support (and to suppose otherwise is paradoxical). 3) The better overall welfare consequences. Two closely related property and contract issues are briefly addressed. It is concluded that the three complementary arguments may be hard to refute, and that—as is often asserted—accepting abortion but rejecting infanticide is inconsistent.

0. Introduction

In my first year at university the “Introduction to Moral Philosophy” course included various texts on world poverty, killing versus letting die, abortion, and infanticide. My responses to all of these issues led me to develop one type of libertarian position on morals (briefly, that moral neutrality must always be logically possible); although I did not fully appreciate the libertarian connection at the time. At the end of that academic year I submitted an essay to a scholarly journal applying the argument to abortion and infanticide. It was not accepted and it didn't occur to me to submit it elsewhere. It seems to me that this argument is still highly relevant, and so I finally apply it again here (section 2), but along with two other arguments also first developed then.¹

The moral permissibility of abortion and infanticide can be explained and defended in three principal ways: 1) the unborn and infant human is not a person, because incapable of critically appraising abstract conjectures,² 2) the unborn and infant human is not proactively imposed on as no overall harm is inflicted (and to suppose otherwise is paradoxical), and 3) the better overall welfare consequences. Although all three ways can be characterised as libertarian and critical rationalist,³ they stand or fall to the same degree were any explicit references to libertarianism or critical rationalism to be removed. There will also be some

¹ A separate essay forthcoming in *Studia Humana* also applies the same argument, plus others, to Singer 1972.

² This is conjectured to be necessary and sufficient for personhood, and thereby to supersede all competing theories and their various criteria.

³ For an introductory discussion on critical rationalism plus a list of further reading see Wetterson undated. For detailed explanations of critical rationalism see, for instance, Popper [1963] 1978 and 1972; also Miller 1994 and [2006] 2016.

brief discussion of two closely related property and contract issues that cannot be avoided without leaving some obvious questions unanswered.

1. The unborn and infant human is not a person

An unborn *Homo sapiens* is human, although perhaps not yet a particular human if before the stage at which twins, etc., can occur and not be reversed. It is human at whatever stage of development: zygote, morula, blastocyst, embryo, foetus, and preterm baby. But is it a person in the intellectual-development sense? For there appears to be a real distinction between a person and a non-person that can be discovered, rather than merely conventionally or stipulatively defined.⁴ Adapting the epistemology of critical rationalism can allow a theory of what constitutes personhood. Thus, a person is here tentatively theorised to be a consciousness capable of abstract conjectures (i.e., beyond immediate theory-laden perceptions) and critical theorising (i.e., having theories about theories beyond merely noticing their functionality); and it seems that possession of a language may well be a practical necessity to achieve both of these. This theory is not in itself a definition or a criterion of personhood, although it can also be used as either of these as well. Therefore, an unborn human is not a person because it has at most, and mainly in the later stages, perceptions and instincts. This brief essay will not go into a detailed explanation and defence of this epistemological theory of personhood. It suffices that this theory, or something relevantly like it, appears to capture a real and important intellectual aspect of sufficiently developed humans.

What it is to be a person is a logically separate matter from a moral evaluation of personhood. But there are obvious connections. For it appears that being a person is necessary to give human beings their greater moral value: more or less because they have sophisticated minds, or consciousnesses, that are created by abstract conjectures and critical theorising. Biologically, humans are animals. Animals that are not persons (let us here call them ‘beasts’: this is a stipulative definition) have moral value too, and it is certainly possible to have moral duties towards them (although this is outside libertarian theory); in particular, but still imprecisely, that of not causing them indefensible pain or suffering.⁵ And some beasts—chimpanzees, elephants, and dolphins, for instance—approach being persons; so moral duties towards them may exceed that of unambiguous beasts.⁶ But being a person is what makes it immoral to proactively-impose costs (this being a libertarian theory of ‘inflicted harms’) that flout self-ownership and libertarian property (these being the practical applications of the abstract theory of interpersonal liberty as ‘people not proactively imposing costs on each other’⁷).

⁴ This is thus the reverse of the approach stated in Tooley 1972, p. 40: “I shall treat the concept of a person as a purely moral concept, free of all descriptive content.” For here a person is a purely descriptive concept, and it is a logically separate matter whether persons have rights and what they might be.

⁵ To say there is a moral duty not to inflict indefensible pain or suffering on a beast, is not to imply that a beast can have rights or duties: comprehension and reciprocity seem required for those to exist. Similarly, to assert that one has a moral duty not to destroy some historic buildings or great works of art is not to imply that they have rights or duties.

⁶ At the other end of the scale there are simple beasts that approach, or even reach, the usually far lower moral value of plants.

⁷ See Lester [2000] 2012, [2011] 2016, 2014.

As has widely been asserted,⁸ the unborn human is usually only a potential person. But then so are any sperm and ovum that could in principle be conjoined; or even any food, or other substances, that could eventually be converted into a person. Therefore, it would be absurd to hold that a potential person already has the moral status of an actual person, or even of anything approaching that. It would be equally absurd to reverse this and hold that a potential non-person (as anyone might be considered to be; by death or sufficient brain damage, for instance) already has the moral status of an actual non-person, or even of anything approaching that. If it is not inherently immoral to kill a non-person, as beasts are, then it is not inherently immoral to kill an unborn human.⁹

It follows that neither is it inherently immoral to kill an infant not yet a person (although there might be bad social side-effects of one kind or another; such as greatly upsetting some people who also might resort to violence). It is probably best to draw a line for permissible infanticide, erring on the side of non-personhood, maybe at some time in the first year or so after birth and always well before sufficiently sophisticated speech—or other communication—indicates that personhood has been achieved (the word ‘infant’ has its origins in the Latin ‘infans’, meaning ‘without speech’). The agreement of any parents or guardians may be necessary: they usually have a property claim in the human non-person.

It might immediately be suggested, as an attempted *reductio ad absurdum*, that by this standard an unconscious or comatose adult human is not a person but only a potential person, and so morally on a par with an unborn or infant human as regards the permissibility of killing him.¹⁰ However, as long as full consciousness can be recovered, it looks far more cogent to see this as an existing person: personhood is not merely potential but has already been achieved. It is simply that this person’s consciousness is temporarily interrupted, and so full rights relating to personhood remain.

This, then, appears to be one sufficient explanation of the way in which abortions and infanticides of humans are not intrinsically immoral. It is libertarian in the sense that this ideology holds that only persons have a right¹¹ not to have their liberty infringed; of which being killed is clearly an extreme example. Other accounts of personhood have been used to argue in approximately the same way on abortion, such as Warren 1973 (but that article does not fully and consistently draw out and accept its relevant logical implications with respect to infanticide). However, they will not be compared and contrasted here.

2. The unborn and infant human is not proactively imposed on

Now ignore all of the preceding argument. On the assumption that the unborn human *is* a person, pregnancy is like becoming physically attached to an unconscious adult person—whether intentionally, by chance, by carelessness, or by coercion—where no one else could or would have supported that particular adult and he requires your bodily support for nine months. If you decide that you do not wish to continue the support, then there is no overall proactive imposition—inflicted harm—on the unconscious adult by stopping. And there is no

⁸ Notably in Tooley 1972.

⁹ Some vegetarianism and veganism for the sake of the beasts might conflict with this argument. But this is not the right place to criticise those ideologies.

¹⁰ Gene Callahan produced this criticism (personal communication), but it is well known in the philosophical literature.

¹¹ At least, as far as is practical to maximise overall liberty in inevitable clashes of liberty.

inherent moral difference, in these terms, between a simple ‘unplugging’ and an active killing of the unconscious adult; if that is necessary, or even merely more convenient, for you to exercise your right¹² to use your own body as you wish. There seem to be two necessary and sufficient aspects for moral permissibility here: (1) you have exercised your right to use your own body as you wish; and (2) the unconscious adult is not worse off than if you had never started to support him in the first place (ex hypothesi: “no one else could or would have supported that particular adult”). One far-too-hasty criticism might be that such an argument could seem to imply that killing one’s adult offspring is permissible, as they are thereby not worse off than they would have been had you never benefitted them—by conception, etc.—in the first place. But that would be to overlook (1): killing your adult offspring is not exercising your right to use your own body, or any of your other property (or liberty-entailed possessions), as you wish. This is, of course, close to the position taken in Thomson 1971 (but that article does not fully and consistently draw out and accept its relevant logical implications with respect to infanticide). However, by removing the contingent complications surrounding both abortion and being attached to another person it is possible to make a more fundamental and abstract argument that should be clearer and more cogent.

Here is that argument. To bestow a benefit on others, for their own sakes, is *prima facie* morally good. To proactively impose—inflict harms—on others, for whatever reason, is *prima facie* morally bad. To do neither is *prima facie* morally neutral. It cannot proactively impose on other people to deny them, or to stop, a bestowal of a benefit (to contract to help someone in some way and then fail to observe one’s contractual obligations is a proactive imposition and not the denial of a bestowable benefit¹³). Libertarianism, in particular, appears to require and make these three moral distinctions. But, in any case, logical analysis also appears to imply them. For if we want to classify mere failure to benefit people as immoral, then—conversely—we seem bound to classify mere failure to proactively impose on people as positively moral. However, proactive impositions are usually far easier to bring about than equivalent bestowable benefits (e.g., destroying someone’s house by arson versus providing someone with a free house). Consequently, we omit to proactively impose on people to a far greater extent than we omit to bestow benefits on them. This implies a paradox: merely by doing nothing, we are usually both moral and immoral at the same time or—on balance—positively extremely moral. There is no conceptual room for moral neutrality (unless, perhaps, when we are contingently not in a position to do either or they are by sheer chance in perfect balance). To avoid this paradox, it seems only coherent to distinguish good, bad, and neutral (or innocent) moral behaviour.

From this more fundamental argument we can see that the unborn and infant human is only benefitted by conception and support (or, at least, there is no inherent proactive imposition in that process). Therefore, removal of that continuing bestowed benefit cannot in itself be a proactive imposition—or inflicted harm—even if we assume personhood. If they do not inflict pain or suffering (or conflict with any other libertarian property rights; see section

¹² One can, and typically will, mention rights here; but normative matters do not need to be mentioned if one is discussing only what abstract interpersonal liberty implies in practice.

¹³ It might be suggested that, at least if it is a person, there is some sort of contract between the mother and the unborn human to bring him to term, etc. But there is no kind of—even implied—offer, or acceptance of that offer, or any *quid pro quo*; which contracts require. A pregnant woman usually did tacitly consent to, at least risk, creating the unborn human. However, that is not thereby tacitly to consent to continue support of it.

four), abortion and infanticide are morally neutral.¹⁴ There is, of course, no inherent libertarian obligation to give the infant to other people. And other people would be proactively imposing if they trespassed in order to “rescue”—i.e., engage in the theft of—the infant.

3. The better consequences

Now ignore both of the two preceding arguments. Assume that the unborn or infant human both is a person and is proactively imposed on by abortion or infanticide. Proactively coercing women to carry to term their unwanted unborn humans, or to support their infants, or to give them to others to support, cannot plausibly increase overall human welfare compared to allowing the women to bear and raise children, or put them up for adoption, when they wish to do so.¹⁵ First, there is the significant welfare-reduction to women, or parents, that are either prevented from opting for abortion or infanticide or obliged to resort to criminalised and, consequently, possibly dangerous means (with punishment if they are caught and convicted). Then there is the fact that preventing abortions or infanticides of *unwanted* humans must thereby be to reduce the numbers of *wanted* unborn and infant humans that would have otherwise had use of, more or less, the same resources; and wanted offspring are, on average, more likely to have better lives than unwanted offspring.¹⁶

This position is libertarian only in the sense that some libertarians think that abortion and infanticide are both compatible with liberty and also with the best welfare outcomes: either because they are consequentialist libertarians¹⁷ or because they are critical-rationalist libertarians who defend the libertarian conjecture from all criticisms, including consequentialist ones.

4. Two closely related property and contract issues

Now assume that all three preceding arguments are independently sound. If people nevertheless strongly object to abortion or infanticide, for whatever reasons, then they can still choose to live in unified property areas or join private organisations where these things are contractually proscribed on pain of whatever penalties they wish. To go into, or remain in, those areas or to join these private organisations would be to contract to accept those proscriptions and those penalties. But even then, the breaking of the contract would still not conflict with any rights or liberties of the unborn or infant human. It would conflict only with the rights or liberties of the parties with whom one has contracted.

¹⁴ Active infanticide might even be morally required if the alternative is a passive death that involves pain or suffering.

¹⁵ This comparison can be by thought-experiment or by comparing actual different countries or regions with different rules.

¹⁶ Utilitarian paradoxes or problems concerning total-versus-average utility are ignored here. However, it is worth mentioning that even if proactively imposing the prevention of abortions and infanticides really does increase total utility because more humans consequently live, then the same number of humans—or more—could probably be produced with even more utility by paying or otherwise rewarding women to voluntarily have more offspring.

¹⁷ Notable consequentialist libertarians (or at least classical liberals, if a distinction is made) include Milton Friedman, David D. Friedman, Ludwig von Mises, and Friedrich Hayek.

Current state-legislation concerning child-support does not approximate to what is libertarian. Where a man passes his sperm during sexual intercourse with a woman, he cannot merely thereby have any libertarian rights concerning the resultant unborn or infant human. In the same way, a woman who freely chooses to risk unprotected or imperfectly protected sex with a man does not merely thereby have any rightful claims against the man if she becomes pregnant or gives birth. To gain any such rights on either side a contract is required, such as an appropriately-worded marriage contract. Once again, though, property rules can override this default position. Some people might want to live in unified property areas where there is an implied contract for men and women to have certain duties and rights with respect to their unborn or infant humans. But without allowing people to choose such real property solutions it seems unlikely that the state can sufficiently approximate to what they would have been. Therefore, the intrinsic position should prevail: no rights or duties on either side without a contract.

5. Conclusion

On its own, each of the three principal arguments may be sufficient to explain the moral permissibility of the abortion and infanticide of unwanted humans—depending on the types of objections being addressed. Taking them together, they appear to amount to a consistent and fairly comprehensive account that it is hard to see could easily be refuted.¹⁸ It is common, however, for people to accept some versions of these arguments as applied to abortion but to reject them as regards infanticide. And that, as philosophers on either side of the debate have often observed, is simply to be inconsistent.

References

- Lester, J. C. [2000] 2012. *Escape from Leviathan: Libertarianism Without Justificationism*. Buckingham: The University of Buckingham Press.
- Lester, J. C. [2011] 2016. *Arguments for Liberty: a Libertarian Miscellany*. Buckingham: The University of Buckingham Press.
- Lester, J. C. 2014. *Explaining Libertarianism: Some Philosophical Arguments*. Buckingham: The University of Buckingham Press.
- Miller, David W. 1994. *Critical Rationalism: A Restatement and Defence*. Chicago and La Salle, Ill.: Open Court.
- Miller, David W. [2006] 2016. *Out of Error: Further Essays on Critical Rationalism*. London and New York: Routledge.
- Popper, Karl R. [1963] 1978. *Conjectures and Refutations*. London: Routledge and Kegan Paul.
- Popper, Karl, R. 1972. *Objective Knowledge*. Oxford: The Clarendon Press.
- Singer, Peter. 1972. "Famine, Affluence, and Morality." *Philosophy and Public Affairs*, Vol. 1, No. 3, pp. 229-243.
- Thomson, J. J. 1971. "A Defense of Abortion." *Philosophy and Public Affairs*, 1:1, pp. 47-66.
- Tooley, Michael. 1972. "Abortion and Infanticide." *Philosophy & Public Affairs*, 2:1, pp. 37-65.

¹⁸ There are many criticisms in the philosophical literature that have not been dealt with here, but they cannot be given due consideration without turning this brief account into something far too voluminous to be an outline of a particular libertarian and critical-rationalist approach to the topic in hand.

Warren, M. A. 1973. "On the Moral and Legal Status of Abortion." *Monist* 57:1, pp. 43-61.
Wettersten, John R. Undated. "Karl Popper: Critical Rationalism." *Internet Encyclopedia of Philosophy*. <https://www.iep.utm.edu/cr-ratio/#H14> (accessed 28/3/18).