

# **Abortion and Infanticide: a Radical Libertarian Defence**

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## **Abstract**

*This essay's main argument is in two parts. First, even on the assumption of personhood, there need be no overall inflicted harm with abortion and infanticide including when there is direct killing. Second, it is paradoxical to suppose that there is a moral obligation to do more than avoid inflicting overall harm. However, there is also a defence of the thesis that unborn and infant humans are not persons in the intellectual sense that has special moral value. Various relevant criticisms are responded to throughout and at the end, with reference to property rights and contracts where appropriate.*

## **1. Introduction**

This essay takes one radical interpretation of a libertarian approach (it appears to differ significantly from the others<sup>1</sup>). However, non-libertarians could accept the specific arguments used here without thereby committing themselves to that ideology. Libertarianism is about not infringing the liberty of persons. In practice, this means not initiating trespass, damage, assault, bodily harm, theft, fraud, contract-breaking, etc. (collectively, not proactively imposing) with respect to other people's bodies and possessions (where these are acquired without proactively imposing).<sup>2</sup> A libertarian approach appears to explain how abortion and infanticide can be compatible with the liberty of persons and not be immoral. This is primarily because they need involve no overall inflicted harm (a type of proactive imposition); and because it is paradoxical to suppose a moral obligation to do more than that. But it is also, separately and sufficiently, because it is not dealing with persons in the intellectual and the moral sense. In both cases some popular criticisms can be shown to be mistaken, with property and contracts often shown to be unavoidably relevant.

## **2. No overall inflicted harm and no proactive killing**

First consider a position relevantly similar to that taken in the classic article Thomson 1971. But that article assumes rights, which we will see it is not necessary to do. Rights often make for a more complicated and disputable approach: they are all-too-promiscuously assertable and often without clear explanations, origins, and implications. Also, that article does not fully and consistently draw out and accept its own relevant logical implications.

On the assumption that the unborn human is a person, or has equivalent status, pregnancy appears to be analogous with your becoming physically attached to an unconscious adult person—whether by choice, chance, carelessness, or coercion—where no one else could or would have supported that particular adult and he requires your bodily support for nine months.

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<sup>1</sup> Notably, for instance, Rothbard [1973] 1978 and Block 2011.

<sup>2</sup> The philosophical arguments concerning what abstract theory of liberty this entails (the eleutherology) and how this relates to property need not detain us here. A common-sense understanding is sufficient. But for a brief explanation see Lester 2020a and in more detail Lester 2019.

If you decide that you do not wish to continue the benefit of your support, then there is *no overall inflicted harm* on the unconscious adult by unplugging yourself and stopping: he is no worse off than if you had not started to support him in the first place. The idea of no overall inflicted harm is crucial. We might be said to ‘cause harm’ in the sense that the act of unplugging is the proximate cause of the adult’s death, and causing death here is to cause a harm. But clearly there is no overall harm inflicted on the adult, even if we first plugged in by choice. This appears to be not too controversial a claim when it comes to a simple unplugging and walking away. That might not even appear to most people to constitute direct killing: it looks more like letting die.

But what if the only way to stop your support is by directly killing the unconscious adult? For instance, because you are so intricately connected to him that you have to pull him to pieces in order to free yourself. And here we need to see that confusion is often caused by conflating two completely different types of even direct killing. One is proactively, or aggressively, killing someone who would not have died but for you (such as is usual with murder): this is clearly inflicting overall harm on the killed person. The other is reactively, or defensively, killing someone as the only way to escape from the undesired burden that they are to you; as we have here. And, as we also have here, the person is still no worse off than if you had never been connected to him (“no one else could or would have supported that particular adult”). It might sound gruesome, but with this reactive killing you have still inflicted no overall harm.

There seem to be two necessary and sufficient aspects for moral permissibility here: (1) you have defended your chosen use of your own body; and (2) the unconscious adult is not worse off than if you had never started to support him in the first place. One far-too-hasty criticism might be that such an argument could seem to imply that killing your adult offspring is permissible, as they are thereby not overall 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 merely defending your chosen use of your own body.

Another objection is that we do not normally allow people to engage in excessive harm to others even in self-defence. Are you in this situation with the intricately-connected adult? No. It is necessary to do this much bodily harm in order to free yourself, and the supported adult would not have lived anyway without you: therefore, he is not worse off overall as a result of your harm to his body. But when we use excessive force against, would-be, criminals or other aggressors (say, by shooting someone who is repeatedly poking his finger in your chest) then the harm done is probably not necessary to defend ourselves and we do leave them overall worse off as a result of our behaviour. (We can leave aside here how we ought to balance potential proactive harm to ourselves against the reactive harm we need to inflict to stop it.)

‘But you put him in that situation!’ is a popular criticism (when applied to abortion after voluntary sex, at least: the responsibility argument). This criticism might be sound if it were to refer to a person that someone else would, or might, otherwise have saved (or brought into existence). For then our behaviour would, or might, have worsened the overall condition of the person compared to what he would, or might, otherwise have had. As it is, however, that is not the case. To start to support some unconscious (or unborn) person and then stop is not in itself to inflict any overall harm on him even if we ‘put him in that situation’.

Another criticism, at least if it is a person or has equivalent status, is that there is some sort of consent (the tacit consent argument) or even a quasi-contract between the mother and the unborn human to bring him to term, etc. It is true that 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. Or as Mahon 2016 has it—but in terms of rights—“no one has the right to use my body without my permission; it is also true that I may revoke this permission at any time” (p.73). Strictly, a valid contract to the contrary with another person would seem to override this revocation; but we don’t need to discuss specific-performance contracts here. Between an unborn human and its mother there is certainly no kind of—even implied—offer, or acceptance of that offer, or any quid pro quo; which contracts require. Neither are there either of these once the infant is born.

When people object to the killing of foetuses they often fail to distinguish both inflicted harm from overall inflicted harm and proactive from reactive killing. For instance, Marquis 2007 concludes that “Deprivation of an FLO [future like ours] explains why killing adults and children is wrong. Abortion deprives fetuses of FLOs. Therefore, abortion is wrong” (p.764). For the sake of argument, assume that an “FLO” is what makes life valuable. However, the “deprivation of an FLO” by the killing of adults and children would, we may suppose, be proactive (or aggressive) and also inflict an overall harm on them. The latter two reasons are what make the killing wrong; not merely causing a “deprivation of an FLO”. And with a foetus it is not a proactive but a defensive “deprivation”, and it leaves the foetus with no overall inflicted harm.

Consequently, if we do now fully return to rights and allow that the foetus has a ‘right to life’, and is a person, then we can now see what this must imply if it is to be coherent. It does *not* imply that it has an absolute right not to be killed. What it means is only that it has a right not to be aggressively or proactively killed. But the foetus is not aggressively killed. It is killed in self-defence of the woman’s ‘right to control her own body’, to put it in equivalent rights terms. And no overall harm has been inflicted on it. But what of an infant: surely that is not killed in self-defence? True. But given that we have no wish to support it or to give it away, then it would otherwise die in any case. Therefore, it may—even must—be euthanised to alleviate any suffering. There is no inherent obligation to give an infant to other people to care for him. And other people would be proactively imposing if they trespassed in order to ‘rescue’—i.e., engage in the theft of—an infant.

### **3. The paradox of assuming a duty to benefit**

However, perhaps we can avoid the plethora of contingent complications surrounding abortion (such as elaborated in Johnson 2019) and the disputable relevance of the analogy of being attached to another adult person (the stranger-versus-offspring criticism). It is possible to make a more fundamental and abstract moral argument that should be clearer and more cogent. To bestow a benefit on others, for their own sakes, is *prima facie* morally good. To proactively impose—inflict overall harms—on others, for whatever reason, is *prima facie* morally bad. To do neither is *prima facie* morally neutral (or innocent). It cannot proactively impose on other people to deny them, or to stop, a bestowal of a benefit (to genuinely contract to help someone in some way and then break one’s contractual obligations is a proactive imposition and not the denial of a bestowable benefit).

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 in itself 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 overall inflicted harm—even if we assume personhood. If they do not inflict pain or suffering, abortion and infanticide are morally neutral.

What about Singer 1971's well-known example of a drowning child in a shallow pond? Isn't there a moral obligation to save him? And if there is, isn't a foetus or infant—at least with the status of a person—in a sufficiently similar moral situation? If there is a moral obligation to save a drowning child, then it is not because it is immoral not to be positively moral (at least, when this costs us little). As we have seen, that creates a paradox. If it is immoral—and it seems that it usually is—then that is because there are common contracts, implicit or explicit, concerning behaviour when we choose to enter any area. And one of those contracts is usually that in the event of temporary and extreme emergencies (serious fires, crimes, accidents, etc.) we are obliged to help directly or seek appropriate assistance (in more detail see Lester 2020b). Therefore, abortion and infanticide are allowable unless we have a contract to the contrary. And even then, breaking the contract will proactively impose on the person with whom we have the contract and not on the unborn or infant human.

#### **4. Personhood and its moral relevance**

It would be an omission to say nothing about personhood. Liberty is for persons and so there ought to be some idea of what persons are. Such a theory can help to alleviate criticisms of the previous arguments if we see that they do not even involve persons. And it seems that it is enough in itself for a defence. Property and contracts also have some relevance here.

Unborn or infant humans are potential persons, as Tooley 1972 famously argues. However, that article also elects to “treat the concept of a person as a purely moral concept, free of all descriptive content” (p.40). Here, rather, a person is assumed to be a purely descriptive concept. It is a logically separate matter whether persons have moral status or rights and what they might be. The various theories of positive, rather than normative, personhood need not be compared and contrasted. But they tend to agree that some degree of reflective consciousness has to be obtained, and that is—or creates—a sophisticated mind that non-persons lack. And if it is sometimes acceptable to kill animals that are not persons, then it is sometimes acceptable to kill humans that are not persons. Consequently, accounts of personhood have been used to argue in defence of abortion, such as, seminally, Warren 1973; but that article does not fully and consistently draw out and accept its relevant logical implications with respect to infanticide.

To what extent is it a problem if we cannot agree when a person exists? We can try to determine more precisely the theory and criteria that fit our intuitions as to when a human has sufficiently become a person. If we find that the age is higher than we feel morally comfortable with as

regards infanticide, then there is no reason that we are obliged to practice it at that age or contract into living in a private-property area that draws the line higher than we can accept. Just as with abortion and age-of-consent laws, there is likely to be variation from place to place. However, exactly what constitutes a person is a separate matter from the thesis that sufficient intellectual sophistication does seem to be what gives persons their greater moral value.

A critic might even ask: ‘Why is actual possession of a sophisticated mind necessary for greater moral value?’ This seems somewhat like asking, ‘why are unhappiness or pain bad and happiness or pleasure good?’ We might be inclined to wonder whether the questioner understood the meanings of the words or the experiences they represent. However, some explanation is possible. Suppose three apparently identical human adults: the first is brain dead; the second has the permanent mental capacity of an infant; the third is normal. Which one is it the most moral for you to save if you could only save the life of one of them? Surely the third. If we have to explain our choice, then we might say that a greater consciousness is more valuable for anyone to possess than a lesser consciousness and that we simply feel that to make it of more inherent moral value (this is not to imply that normal people can be morally ranked by intelligence or that being a person is the only morally valuable thing). If someone were to insist that all three humans are of equal moral value, then we might suspect that this person is morally confused.

One important attempt at a *reductio ad absurdum* is that by this theory of personhood a temporarily unconscious adult human would seem to be only a potential person, and so morally on a par with an unborn or infant human as regards the alleged permissibility of killing him. But then it seems that one would also have to say that someone in a dreamless phase of sleep is not a person either. Or maybe even someone who is not currently thinking at a sufficiently sophisticated level. And one might use the same type of argument to claim that a surgeon is only a surgeon when he is engaging in surgery and otherwise he is only a potential surgeon. Such considerations appear to violate our intuitions as to what being a person, or surgeon, amounts to. Consequently, it looks far more cogent and realistic to see this as an existing person: personhood is not merely potential but has already been achieved; a life as a conscious person has been experienced before and will be experienced again. It is simply that this person’s consciousness is temporarily interrupted, and that is why the moral standing relating to personhood remains.

## **5. Some further criticisms and responses**

What of “the concrete ethical fact that giving a fetus fetal alcohol syndrome is immoral” and therefore abortion, because it is worse, is also immoral (Hendricks 2019, p.2)? Assume that any ensuing child would still have a life worth living. Contrary to the popular intuition, a woman carrying a foetus does not overall inflict harm (proactively impose) by drinking alcohol that impairs its development. This is really only failing to give the foetus the benefit of optimal developmental circumstances. Possibly even the majority of pregnant women do this: how many women choose the best-balanced diet, most pollution-free area, stress-free circumstances, healthiest bodies, etc.? Hence the benefit given, or withheld, is usually a matter of degree and can never amount to an overall harm inflicted because it is all a gift. As we have seen, it is paradoxical to assert that a failure to benefit—enough—can be immoral. Hence “giving a fetus fetal alcohol syndrome” is not in itself immoral. But this is so more obviously, and less controversially, when the foetus is to be aborted or the damaged infant is to be euthanised; which appear to be separate sufficient reasons that causing foetal alcohol syndrome

need not be immoral. Consequently, this argument against abortion fails.<sup>3</sup> Thus, it does seem that abortion (or “pro-choice”) is morally acceptable. And as a consideration of “The Axiology of Abortion” rightly argues, “it would be better if the pro-choice position is right” (but we will not evaluate those arguments here) despite the fact that it wrongly argues, as we have now seen, that “there is no good reason to think the pro-choice position is correct” (Hendricks forthcoming, p.1).

There are also the following claims: “our overall *reductio* succeeds. That is, psychological accounts of personhood do at present suggest the permissibility of infanticide, even for healthy infants. These accounts also imply the permissibility of pre-personal acts such as forced organ donation, use of infants for medical research, use of infants for sexual gratification, and discrimination against infants” (Rodger, Blackshaw, & Miller 2018, p.119). As we see, this is intended to be aimed at “psychological accounts of personhood” in particular. However, the same arguments can also be regarded as applying to the no-overall-inflicted-harm argument. Therefore, let us briefly consider all of these in turn leaving the sexual one for last.

If a parent or guardian does not wish to support a healthy infant or give it away, and there is no contract to the contrary, then they cannot be coerced into doing so without infringing their liberty. If they opt for painless infanticide, for whatever reason, then no person loses a life and no suffering is inflicted. If this is not allowed, then it seems that abortion of a healthy foetus—or even a healthy embryo—might be coercively disallowed for analogous reasons. The infanticide of healthy infants is likely to be relatively rare and not done lightly.

Why “*forced* organ donation”? In theory, at least, that might superficially seem to be implied only if consequentialism is assumed. However, long-term good consequences usually seem to fit liberty better (with its diverse alternatives, including commercial ones) than coerced behaviour (with all its procrustean authoritarianism and moral hazards). If interpersonal liberty is to be respected, then no person can be “forced” to donate their infant’s organs (unless, again, some contract is thereby to be upheld). However, the organs of a non-person—with the permission of the parent, guardian, or other title-holder—could be used for the considerable benefit of people in general, only most obviously those people in need of an organ transplant. This appears to be entirely desirable. Medical research on non-suffering, non-persons also seems entirely moral—and, again, compatible with both interpersonal liberty and consequentialism. Research on humans is often more useful than research on similar animals.

What is wrong with “discrimination against infants”? By this the article means to refer to race, sex, sexual orientation, etc. This appears to be based on the politically-correct authoritarianism that flouts freedom of association, etc., because it ‘discriminates’. Consequently, it is possibly not even a popular opinion except within the minority of politically-correct authoritarians who are keen to proactively impose their personal preferences on everyone else. Parents or guardians should not be obliged to keep alive, or hand over to other people, an infant when they do not wish to do so for whatever reasons—including those that ignore political correctness. There is also the epistemological problem of determining whether they hold the ‘wrong’ reasons for their behaviour rather than ‘acceptable’ ones.

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<sup>3</sup> That said, if a foetus is going to become a child then foetal alcohol syndrome is certainly not desirable. There must be a variety of ways of discouraging it that need not interfere with anyone’s liberty, and which are probably more efficient as a result.

“Sexual gratification”, however, is materially different. The article might have added cannibalism, as that is in principle possible too (at least for non-vegetarians), and so it is added here. Both of these possibilities appear to be cases where any hypothetically minuscule ‘gains’ from allowing them (even ignoring the possibility of unintended bad side-effects, such as undermining the taboo on such things in other cases) appear to be utterly overwhelmed by the utter horror and revulsion that virtually everyone would feel and could never be persuaded to tolerate—not even a tiny minority of fanatical libertarian philosophers. Moreover, literally no one is advocating that either of these things should be allowed and arguing that there is a significant welfare loss if they are not. Therefore, this example is in principle valid but in practice vacuous.

Consequently, apart from the final vacuous example, far from being *reductiones ad absurdum* (“against psychological accounts of persons” and the no-overall-inflicted-harm argument) each of these objections amounts to versions of the logical fallacy of *argumentum ad populum*. It may be true that “most people will feel the force of these intuitions and not give them up lightly” (p.118). However, intellectually, popular intuitions cannot trump a sound philosophical argument. Rather, the reverse is true. How practical it is, at least in the short-run, to go against strong popular moral intuitions is an entirely separate matter.

## 6. Conclusion

This appears to be a more radical approach to abortion and infanticide than is normal, or even anywhere else, in the literature. Consequently, there is probably plenty of scope for criticism.

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