
Rem B. Edwards

Abortion Rights

Why Conservatives Are Wrong

On July 3, 1989 the Supreme Court announced a split 5 to 4 decision upholding a Missouri law that severely limits the rights of women to have abortions and let stand its decree that "human life begins at the moment of conception." Given this emasculating and forthcoming challenges to the 1973 *Roe v. Wade* decision allowing abortions, the American people must now make an informed decision whether they will accept the conservative position on abortion.

Conservative opponents of abortion hold that from the moment of conception, developing fetuses have (or may have) full humanity or personhood that gives them a moral standing equal to that of postnatal human beings. To have moral standing is to be a recognized member of the human moral community, perhaps having moral duties to others or rights against others or at least as being the recipient of duties owed by others. Conservatives give neoconceptuses full moral standing, including a right to life that is equal to adults. They sincerely equate fetid abortions with murder. Many of them actively seek to overthrow current abortion laws and campaign to make abortion illegal from the moment of conception, with few exceptions. Ronald Reagan would allow an exception only to save the life of the mother; a more liberal George Bush would also allow abortions for rape or incest. No conservatives will allow abortions for maternal health, fetal defects, the mother's career, the youth of the mother, advanced age of the mother, family finances, or for any other reason.

Conservatives reject abortion because they believe that (1) fetuses have (or may have) full and equal humanity or personhood from the moment of conception; (2) this full humanity entitles them to full human moral standing and moral rights, including the right to life, from conception; and (3) the right to life of the fetus always outweighs any lesser rights of the mother, including her rights to privacy, to bodily self-determination, to the pursuit of happiness, etc. Under the *Roe v. Wade* Supreme Court decision of 1973, these assumptions were repudiated and still are by a majority of Americans. I wish to explain why they should be repudiated.

In a 1983 opinion, Justice Sandra Day O'Connor claimed that the trimester framework of *Roe v. Wade*, with its emphasis on the importance of viability, has "no justification in law or logic." Conservatives believe that the significance attached to the moment of conception by

today's court majority does have a foundation in law and logic; but it does not.

The conservative position fails because it is supported by bad arguments and because there are decisive objections to it. Relevant considerations fall into three groups: legal, philosophical, and religious. Because of limitations of space, my emphasis will be on the legal and philosophical, primarily the latter. Religious considerations (divine revelations) will be neglected except to say that they cannot form the basis for public policy in a free society, and that sincere religious persons do not agree among themselves about what revelation requires.

Legal Considerations. Conservatives reject the constitutional grounds on which the 1973 Supreme Court decision was based. The majority opinion in *Roe v. Wade* recognized a right to have an abortion for any reason during the first two trimesters of pregnancy and to save a pregnant woman's life or health during the third. It based women's rights to abort upon the right to privacy that was implicit in "the Fourteenth Amendment's concept of personal liberty and restrictions on state action," and it recognized the possibility of grounding abortion rights "in the Ninth Amendment's reservation of rights to the people." Conservatives gloat that no right to privacy is mentioned in the Constitution, but just how far they wish to go in undermining privacy rights is unclear. In his dissenting opinion in *Roe v. Wade*, Justice Rehnquist opined that the Court "had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment" because a majority of the states had restrictive abortion laws on their books in 1868 when this amendment was adopted. However, this objection could not be raised against the Ninth Amendment, adopted as a part of our Bill of Rights in 1791. This Amendment may prove to be the firmest constitutional basis for a right to privacy that would include abortion rights. It says in effect that we cannot infer that people do not have certain rights merely because they are not explicitly mentioned in the Constitution. Abortion was practiced but was not legally prohibited in early America. The restrictive abortion laws overthrown in 1973 were enacted mostly in the last half of the nineteenth century for the protection of the life and health of the mother, not the fetus; and modern medicine has made this rationale for them obsolete. At neither the national nor the state levels did the Founding Fathers give the fetus

full humanity and equal moral and legal standing with adults, and the abortion laws in effect when the Fourteenth Amendment was added were not enacted to protect the fetus. The Founding Fathers definitely did not ascribe to the neoconceptus an equal right to life, and they did not treat abortion as being morally or legally equivalent to murder. They did not proscribe abortion but left this right to be retained by the people, where it should remain.

Philosophical Considerations. Abortion is wrong, conservatives maintain, because the fetus is human from the moment of conception and because all humans have an equal right to life. Often "a person" appears in place of "human" in such conservative arguments, but terminology is irrelevant. Conservatives clearly want to claim that from the moment of conception, fetuses have the same metaphysical and moral status as adult human beings. The central philosophical question here is: What properties must an entity possess to have full and equal moral (and legal) standing?

If the answer is "personhood" or "humanity," the terms are meaningless until they are carefully defined. The conservative position often leaves these concepts undefined and draws its strength from their emotive rather than their cognitive impact. As Dr. Seuss suggested, "A person is a person, no matter how small"; but this does not tell us what a person is. If asked why a single cell neoconceptus has full moral standing whereas pre-conception ova and sperm cells do not, conservatives can be persuaded to identify those metaphysical properties which entitle it to equal moral standing. What the neoconceptus has that ovum and sperm cells do not is (1) the ability to reproduce itself, (2) a higher probability of live birth, and (3) a complete set of human genes. The last of these is clearly the most important, as we shall see.

The ability to reproduce is usually taken to be a defining trait of life, and the single cell neoconceptus is said to be a living person because it can reproduce. It reproduces itself immediately by cell division in gradually making the baby and ultimately through sexual reproduction. Actually, when it becomes a sexually mature organism, it reproduces only *part* of itself through sexual reproduction; for sex cells contain only *half* of the genetic potential required for sexual reproduction. Since other things besides persons can reproduce themselves, this is clearly not sufficient for personhood.

Neoconceptuses do have a higher probability of making a complete baby than do pre-conception reproductive cells. Their capability for this is not at all unconditional because spontaneous abortions are commonplace. Live birth will occur if and only if the developing embryo does not self-destruct or is not demolished by a hostile intra-uterine environment. Neither unmated sex cells nor neoconceptuses have an unconditional ability to reproduce themselves, but the latter do have a significantly higher probability of doing so. Even here we find only differences in degree, not any absolute differences of kind that would make it wrong to abort fetuses but not equally wrong to waste human ova and sperm. Most estimates of the percentage of fetuses that abort spontaneously are in the forty to forty-five percent range, though occasional estimates are somewhat lower or higher, varying from

twenty to sixty-nine percent. Neoconceptuses will not inevitably develop into babies. Indeed, there is a rather high probability that they will not.

For conservatives, the really crucial thing about a single cell neoconceptus that distinguishes it definitively from unmated reproductive cells is that it contains a complete set of human genes, whereas the latter contain only half the genetic potential required for making a baby. Thus, their view is that the metaphysical property that *defines* the kind of humanity or personhood that legitimates full and equal moral standing is *having a complete set of human genes*. As John Noonan wrote, "A being with a human genetic code is a man." Occasionally, conservatives are accused of confusing genetic humanity with the sort of personhood that truly gives moral standing, but it is clear that they intend for the two to be the same.

There are many good reasons for rejecting this conservative metaphysics of humanhood. Most decisively, by this definition almost every living cell in the human body would be a person, with the exception of a few types, such as bone, red-blood, and reproductive cells, because almost every cell in the human body carries a complete set of human genes. If conservatives are right, every human being is literally billions of persons. If it is objected that nonreproductive cells cannot reproduce themselves, the reply is that they can by cell division—which is exactly the same way that a neoconceptus reproduces itself. If it is objected that they lack the capacity to make a baby that reproductive cells have, the reply is that they can do this in principle, and will be able to in practice, as soon as cloning is as fully developed for our species as it already is for a number of plant and animal species. Granted, the probabilities will never be high, but there is no fundamental difference in capacity. If it is objected that a new conceptus will (likely) develop *naturally* into a baby since conception has occurred, the reply is that any non-reproductive cell will (likely) develop into a baby once cloning occurs. Unless we can accept the metaphysical implication that almost every human cell is fully a person, we must reject the conservative stance. We should also reject it if we cannot accept the practical implication that we commit murder every time we prick our finger, remove a mole, or otherwise destroy any cell that contains a complete set of human genes.

Another important reason for rejecting the conservative metaphysics of humanity or personhood is that there is enormous room for honest disagreement about what *minimal* metaphysical property or properties an entity must possess to qualify for full and equal moral standing. By contrast, there is massive reflective agreement about *maximal* properties that are sufficient for paradigm personhood (or whatever we wish to call those who possess full and equal moral standing). *Maximally*, all our paradigm examples of entities that belong fully to the human community and enjoy a full and equal right to life exemplify a wide variety of properties, such as:

1. Having a spontaneously beating heart, unless artificially maintained. (If we think that human life *ends* when the heart permanently stops beating spontaneously, we might want to hold that it *begins* around three weeks *after* conception when the

heart first beats spontaneously. If we reject "chest death," we might want to adopt any of two through six below, but we are no more likely to agree about when life ends than about when it begins).

2. Having a functioning brain stem, which begins at six to seven weeks after conception.
3. Having a functioning upper brain, i.e., upper brain wave activity, at eleven or twelve weeks or so after conception.
4. Having functioning lungs and other organs which permit assisted independent existence (viability), beginning at twenty weeks at the earliest for no more than ten percent of premature newborns.
5. Having consciousness, including a conscious awareness of pleasure and pain, at twenty-seven to thirty weeks after conception. Earlier reflex responses to stimuli, including pain stimuli, are not indicative of consciousness since these may be elicited from the irreversibly comatose and from anencephalics who have no upper brain at all.
6. Having conscious desires, interests, and a rich emotional life, beginning with the onset of consciousness at twenty-seven to thirty weeks.
7. Being born alive, and taking the first "breath of life," typically at forty weeks after conception.
8. Being capable of complex communication using language, beginning around eighteen months to two years after birth.
9. Being rational, capable of conceptual understanding and making rational inferences, beginning with the learning of language well after birth.
10. Having self-awareness or a concept of self, beginning around eighteen months after birth.
11. Being a moral agent capable of assuming moral duties to others, which develops gradually as children mature.
12. Being capable of forming and acting upon a long-term plan of life.

The list could go on. The important thing is that *all* of our paradigm and incontrovertible instances of full humanity exemplify all of these traits and that neoconceptuses exemplify *none* of them. The more removed from paradigm personhood we get, the more room there is for doubt. Honest and thoughtful persons may legitimately disagree about which of the foregoing properties and corresponding times of origin are *minimally* sufficient for the sort of humanity that entitles a being to full moral standing and equality. In determining minimal sufficiency, we must make a *decision of significance*, i.e., we must decide what property or properties are sufficiently important to constitute living personhood or humanity. Unfortunately, we do not all make the same decision and we are never likely to do so because we have no rational way of convincing those who have made a different decision that they are wrong. Conservatives maintain that selecting any property/time other than genetic completeness at conception as a definitive criterion for the onset of humanity is arbitrary; but to those who have not made *their* decision of significance, their choice seems equally arbitrary. Genetic completeness seems totally inconsequential to those who believe that to be a living person,

an entity must at least have a beating heart or a functioning brain stem or upper brain activity or viability or consciousness, etc. If there is no "logic" behind viability, neither is there any behind genetic completeness.

Conservatives sometimes argue that we cannot afford to be selective about recognizing the humanity of others lest we revert to the genocidal policies of the Nazis or the enslavement of Blacks practiced by our American forbears. Certainly we do not want to slide down a slippery slope into such horrors, but there is no danger of this as long as we think clearly about who is incontrovertibly human, which is just what the perpetrators of atrocities fail to do. If we try to add "is gentile" or "is white" to the foregoing list, these are trivial and irrelevant by comparison with the total set of properties of paradigm personhood. All the victims of the Holocaust and all Black slaves in America exemplified all of the foregoing traits of paradigm personhood, except for the very young who exemplified at least the first seven of them. By contrast, neoconceptuses exemplify *none* of them. No contemporary Jew or Black should feel the least threatened if we reject the conservative concept of humanity, for by the above test of paradigm personhood all would qualify incontrovertibly. However, every contemporary adult, including Jews and Blacks, should be insulted and intimidated to be informed that they are of *equal* value with, and thus *of no greater value than*, a single cell neoconceptus that consists merely of a genetic blueprint for the making of a person.

Conservatives occasionally express the more modest stance that even if we do not know that fetuses are fully human from conception, they never-the-less *may* be; and *they should be given the benefit of the doubt*. This would have the same practical consequences of the stronger claim; abortions would be generally prohibited from conception.

What is wrong with the "benefit of the doubt" argument? To begin with, any "philosophical maybe" is always readily countered by a "maybe not." More seriously, the argument is a classic case of *argumentum ad ignorantium*. From the "we do not know" admission, no positive conclusions logically follow, especially not that we should treat neoconceptuses as if they were fully human. Conservatives have maintained that the issue before us is too serious for logic, that when confronted with something that might be human, we cannot afford to treat it otherwise, i.e., to kill it. Ronald Reagan argued that "anyone who doesn't feel sure whether we are talking about a second human life should clearly give life the benefit of the doubt. If you don't know whether a body is alive or dead, you would never bury it." Similarly, one might argue that if we are uncertain whether a person is in a building about to be demolished, we should not blow it up, or if we do not know that the thing moving the bushes is not a man, we should not shoot it.

Unfortunately, in all of these analogies we are certain that the body at issue is that of a person whereas that is just what we are uncertain of and have good reasons to disbelieve with respect to a single cell neoconceptus. We should not confuse the question, "Is x a person?" with "Is a person x?" The conservative argument confuses the issue of whether something is a person with whether

something that is definitely a person is alive or is in the building or in the bushes. Since one may honestly doubt that neoconceptuses are persons, the analogies fail.

A counterargument based on knowledge rather than ignorance may be constructed to support freedom of choice. We do not know that a neoconceptus is a person with rights and have good reasons for doubting it; but we do know that the pregnant woman is a paradigm person. The rights of known persons always prevail over the rights of entities whose personhood is highly questionable. Thus, before fetuses are significantly developed, pregnant women's rights obviously have priority, including their rights to privacy, bodily self-determination, and the pursuit of happiness.

Conservatives sometimes maintain that fetuses have equal worth and moral standing simply because they have *the potential* to become paradigm persons. However, the underlying principle that "potentialities are equal to actualities" is dubious indeed and needs only to be stated to be repudiated. Potential spouses do not have equal rights or powers or privileges with actual ones; nor do potential adults, potential presidents, potential graduates, potential citizens, or potential persons. Unfortunately, the conservative principle of potentiality gives equal rights, including a right to life, to every functional human sperm and ovum as well as to all neoconceptuses. Every human reproductive cell has the potential to become a paradigm person, perhaps not a very high potential, but conservatives cannot afford to attach great significance to high degrees of probability. If they do, their principle becomes: "high potentialities are equal to actualities;" and that would rule out many neoconceptuses, would raise serious questions about how high is high enough, and would admit that not all genetic humans have equal standing.

Many relevant issues must remain untreated here because of spatial limitations, but I will discuss one more popular conservative argument against abortion. Frequently they tell us that women with unwanted pregnancies should carry their children to term because they knew what they were doing when they had sex and must now assume full responsibility for the consequences of their actions. This is a bit vague, but "being responsible" here really means that pregnant women are not entitled to call upon medicine to help them undo their past mistakes. Anyone who makes a mistake should simply suffer the consequences. This argument is on a par with, and has no greater plausibility than, the following: Drivers with unwanted mutilations suffered in automobile accidents involving excessive speed are ineligible for medical treatment because they knew what they were doing when they raced the car and now must assume full responsibility for the consequences of their actions; anyone who makes such a mistake should simply suffer the consequences.

We have seen that there is enormous room for legitimate disagreement about what property(ies)/time(s) are minimally sufficient to give the developing fetus moral standing as a member of the human community, but the conservative answer (genetic completeness) is the least plausible of all. Unfortunately, no alternative answer (brain function, viability, consciousness, etc.) can deliver

a knock out blow to all the competition. Where there is such enormous room for honest disagreement, our public policy should be one of great tolerance. We should not legislate an extremely restrictive minority metaphysics that is both genuinely uncertain and highly dubious. In the face of enormous doubt or uncertainty, conservatives usually agree that we need more freedom, not less. Indeed, we need less governmental intervention in abortion decisions, not more.

We must decide to give the fetus the benefit of the doubt and offer it protection for its own sake at some point; but how can we determine this in the face of such uncertainty? *Compromise* is the only workable answer. Compromises never make all parties completely happy, for each has to give a little to get as much as possible. A defensible compromise point for defining humanhood is the beginning of the third trimester, with exceptions to protect the life and health of the mother after that. We should retain the "trimester system," not because viability is all that fixed or significant, but because it is probably the most workable compromise our society can achieve. Even here there might be some room for negotiation concerning an earlier cut off point in light of the fact that over ninety percent of all abortions are obtained in the first trimester, assuming that exceptions would be allowed for fetal defects, teenage pregnancies, rape and incest, maternal life and health, etc.

Doubtless, those who regard the onset of consciousness as the relevant property that confers moral standing will be especially pleased with retaining the present trimester system; but almost everyone will have to give a little to get as much as possible. Liberals who want no prohibitions on abortion will get two trimesters out of three for having what they want, but they will still be dissatisfied with third trimester restrictions. Moderates who pick lower or upper brain activity will be dissatisfied, but they will get some restrictions on abortion after conception but before birth. Is there anything in the trimester system for dissatisfied conservatives? Indeed there is. They get restrictions on abortion for one trimester prior to birth, but most importantly the law leaves them alone to act on their convictions in their own lives without any interference from the state. Society does not force them to have abortions against their will or religious convictions, as China has done with its forced abortion policy for parents with one existing child. What makes conservatives unhappy is that they cannot use the police power of the state to force their metaphysical or religious convictions on others who sincerely disagree, but they will just have to learn to live with that. **NF**

REM B. EDWARDS is Lindsay Young Professor of Humanities and a senior member of the medical ethics faculty in philosophy at the University of Tennessee, Knoxville. He is the author of *Reason and Religion: An Introduction to the Philosophy of Religion* (Harcourt, 1972 and University Press of America, 1979), and of *Pleasures and Pains: A Theory of Qualitative Hedonism* (Cornell, 1979). He also edited *Psychiatry and Ethics: Insanity, Rational Autonomy and Mental Health Care* (Prometheus, 1982) and co-edited/authored (with Glenn Graber) *Bio-Ethics* (Harcourt, 1988).