

Explaining the Psychological Appeal of Viability as a Cutoff Point

Introduction

My aim is to explain, or perhaps it is better to say “explain away” the appeal of the principle of viability that plays such a prominent role in the *Roe v. Wade* decision and the ensuing debate. My contention is that many defenders of the principle are not actually deeply committed to it. I am not implying that they are in bad faith, knowingly defending a principle that they do not believe in because they want abortion to be legal, just that they are not fully aware of what is really making the principle of viability appealing to them. My suspicion is that it is the *timing* at which the fetus *currently* becomes viable and not the actual philosophical merits of the viability principle that makes it so attractive. The basis for my claim is that certain thought experiments - in particular, two that change the timing of the onset of viability – regularly elicit from abortion proponents the admission that the viability principle is without much philosophical merit. Since the earlier adherence to viability was not grounded in any moral principles that pro-choicers feel strongly about, this suggests that other factors were motivating its initial (and superficial) appeal. So after familiarizing readers with the thought experiments, I will offer some brief psychological speculations about why the current timing of the onset of viability makes the principle of viability seem to so many people to be an attractive cutoff point for distinguishing morally justified from unjustified abortions.

Three Thought Experiments

What I call the “Stagnation Thought Experiment” will often convince abortion proponents that none of the familiar cutoff points for permissible abortion – the loss of the capacity to twin, quickening, humanoid shape, viability, development of the brain and central nervous system, sentience and even birth - are of much, if any, *intrinsic* value and moral significance. This thought experiment involves imagining that the fetus stagnates, that is, stays

alive but never develops any further.¹ In other words, the stagnation means that the human being loses its potential and stays for the rest of its life physically and mentally as it was at the time of its stagnation. Stagnating the fetus at different times of development will usually reveal that any stage abortion proponents thought to be a morally significant cutoff point for permissible abortions was only of importance because of the presence of the potential to develop further and acquire other traits like self-consciousness, rationality and moral agency that normal children and adults possess and which are obviously of considerable intrinsic value. If the fetus stagnated at the time it reaches viability, i.e., it could live for years outside the womb in an expensive high-tech incubator, most abortion proponents would admit that there is not much reason to spend hundreds of thousands of dollars keeping the fetus alive if it would never surpass a pet dog or backyard squirrel in cognitive and affective capacities.² They may be reluctant to treat such stagnated human beings with the same degree of disregard that they would the squirrel, but this is not because of the intrinsic value of the stagnated human being but merely due to a respect for the feelings of the parents or fears of a slippery slope. The abortion proponent typically responds that to insist that such a stagnated fetus has more *intrinsic* value than the neighborhood animals would render one guilty of speciesism.

What this suggests is that a reason abortion proponents are valuing and protecting the normal, viable fetus is that it possesses the *potential* to develop further. But this is not the

¹ I am using “fetus” as the name for the entity in the woman’s womb from fertilization to birth. So it covers the period that others might describe as the gestation of the zygote, blastocyst, morula, and embryo.

² For such a typical response, see Jeff McMahan’s discussion of congenitally retarded human beings without potential to develop in his *The Ethics of Killing: Problems at the Margins of Life*. (Oxford: Oxford University Press, 2002).

whole story because it does not explain why of all the fetal stages in which such potentiality is present, viability was picked. However, if viability cannot be justified, then the only reason abortion proponents will have to protect third trimester fetuses is that they have the potential to develop minds like ours. But that potential is there from fertilization, so consistency seems to demand that fetuses be protected from the first day of their existence. Well, actually consistency can also be obtained if abortion proponents decide not to protect human beings from termination at any time during a nine month pregnancy, or even afterwards, until they have sufficient intrinsic value to distinguish them from animals with lesser minds. Peter Singer and Michael Tooley notoriously take the latter approach.³

Some abortion proponents might try to avoid this conclusion, the logic of which entails either prohibiting abortion at any stage there is potential to later develop minds like ours or abandoning the significance of potential and accepting abortion at any time during a pregnancy and even infanticide. These abortion proponents might instead insist that it is the *combination of potential and viability* that makes abortion wrong after the second trimester and permissible before. They will maintain that my stagnation thought experiment fails to show that they are not committed to viability as a morally significant cutoff point, it only reveals that they are committed to protecting fetuses that are viable and have not stagnated, i.e., can not only live independently of the mother's body but have the potential to develop further into normal children and adults.

I doubt this represents a view most abortion proponents, upon reflection, will defend. My contention again is that abortion proponents, deep down, are not committed to the principle

³ Singer, Peter. *Rethinking Life and Death*. (New York: St. Martin's Griffin Press, 1994); Tooley, Michael.

"Abortion and Infanticide." *Philosophy and Public Affairs*. 2, 1972, pp. 37-65.

of viability even when its onset is combined with the fetus's potential. This can be shown by their typical reactions to two other thought experiments which involve changing the timing of the onset of viability while leaving potential unaffected. If we imagine that fetuses do not become viable until the last week in the ninth month of a pregnancy, it is unlikely that the typical abortion proponent would admit that abortions earlier in the ninth month would then be acceptable. But if viability were really a morally significant principle and its onset a necessary condition for abortion to become impermissible, then if the fetus has not reached that stage, aborting it should not be wrong.⁴ Readers should also consider moving the onset of viability to the other end of the pregnancy. Imagine that medical technology develops to where fetuses can become viable just one week after fertilization but in some cases are not deliverable until much later. That is, assume there are some pregnant women who will remain too frail for almost eight months to deliver without themselves being harmed, though their premature babies' health would not be threatened by such earlier deliveries. I doubt that many abortion proponents allegedly committed to viability as a cut off point are going to insist that women cannot abort after the first week of their pregnancy but must carry the viable child for nine months until it is safe to induce labor. In such a scenario, most women would not even know they were pregnant until it became too late for them to have a permissible abortion. So we can see from these two hypothetical scenarios that even combining viability with potential does not produce a pair of principles to which the average abortion proponent is committed.

⁴ There are pro-lifers, Judith Thomson is the best known, who will maintain that it is just to have an abortion at any time during the pregnancy. But they are, fortunately, the minority. See her "A Defense of Abortion", *Philosophy and Public Affairs*. Vol. 1 1972. See my critique in ____ (information withheld for purpose of blind reviewing).

The three thought experiments reveal the fetus's possession of viability not to be of much, if any, intrinsic moral significance. But it should not be thought that the last two thought experiments show that viability is suspect because of the possibility that technological advances could change the date of its onset. This is a common misunderstanding of the problem with viability. There is nothing wrong with technology affecting the time at which a morally significant trait is instantiated. This is evident if we imagine that mental lives comparable to that of normal adults emerged in one month old fetuses or even in unfertilized eggs. Readers should imagine such fetuses or eggs capable of thoughts and feelings like their own. These small creatures have hopes for their future, they want to fall in love, have children, find meaningful work, they contemplate the origins of the universe and the existence of God, they worry about the environment and international affairs etc. Most abortion proponents would find it nearly impossible to abort such a one month old thinking and feeling fetus. (And abortion proponents would think allowing such highly intelligent unfertilized eggs to perish would also be terribly wrong while before they thought there was not anything objectionable about allowing an unfertilized egg to *naturally* perish.) This shows that changes in the timing of the onset of properties that are genuinely intrinsically valuable can justifiably alter people's beliefs about when an entity's life deserves protection. So viability is not suspect because its timing can change with technological developments; rather, changes in attitudes to different possible onsets of viability suggest it is not truly a morally significant threshold. If viability was really believed by abortion proponents to be a morally legitimate cutoff point, it would be so treated regardless of the timing of its onset. But since typical abortion proponents would be reluctant to push back the cutoff point for abortion in the hypothetical case in which mindless fetuses are viable but undeliverable just one week after fertilization or to allow abortions early in the first

week of the ninth month of a pregnancy in the other hypothetical scenario, that reveals they are not really committed to the moral significance of viability.

The Real Psychological Appeal of Viability

If the thought experiments reveal that abortion proponents do not believe viability is really morally significant and that they have only a superficial adherence to it, then what made it so appealing to them in the first place? Before I offer an answer, I want to reiterate that I am not suggesting that abortion proponents are in bad faith and endorsing a principle that they know to be false. Rather, I am engaged in armchair speculation about why a principle with very little philosophical punch could have appeared initially so attractive and become so popular. My hunch is that it had to do with the timing of the onset of the principle of viability given the technology of the age.

Present day medical technology means viability typically emerges approximately six months weeks after fertilization. There really has not been much change since Justice Blackmun stated in his 1973 decision in *Roe v. Wade* that “Physicians and their scientific colleagues ...have tended to focus...upon the interim point at which the fetus becomes ‘viable’, that is potentially able to live outside the mother’s womb, albeit with artificial aid. Viability may occur...even at 24 weeks.”⁵ My hypothesis is that this makes possible just the timing

⁵ There has been very little change in the onset of viability because: “Until the air sacs are mature enough to permit gases to pass into and out of the bloodstream, which is extremely unlikely until at least 23 weeks gestation (from last menstrual period), a fetus cannot be sustained even with a respirator, which can force air into the lungs but cannot pass gas from the lungs into the bloodstream.” Amicus Brief of the American Medical Association, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American Fertility Society, American Medical Women's Association, American

compromise the typical pro-choicer wants. This allows the “moderate” abortion proponent to bestow upon the pregnant woman a grace period in which to make such a serious decision but without seeming to completely devalue the fetus as an abortion on demand policy would.⁶ Most abortion proponents are opposed to late abortion because it seems too much like infanticide. The fetus is so similar in appearance and age to an infant that since abortion proponents standardly want to protect infants, it is psychologically difficult for them not to extend the same protection to advanced fetuses.

While appearance and age are not morally significant features, I think they are psychologically efficacious and account for why later fetuses are treated by many abortion proponents like infants and offered the same protection. It is easy to see why appearance and age are not morally significant. Just a moment’s thought should show that bodily shape and other physical features are not morally significant. Alien creatures that did not look like us but have our affective and cognitive abilities should be awarded similar protections. And age is merely a place holder for some other developments. But the stagnation thought experiment

Psychiatric Association, and American Society of Human Genetics, for WEBSTER V. REPRODUCTIVE HEALTH SERVICES, No. 88-605, October Term, 1988. According to a 2005 *British Medical Journal* report there is a 7% chance of survival at 22 weeks, 15% at 23 weeks, 27% at 24 weeks, 49% at 25 weeks, 65% at 27 weeks. See the website posting at <http://bmj.bmjournals.com/cgi/content/full/319/7217/1093/DC1>

⁶ The slight change in the timing of the onset of fetal viability since *Roe v. Wade* doesn’t affect my thesis that the viability is attractive because of its timing rather than its intrinsic significance. And it is worth noting that the fetuses born before 24 weeks are likely to have mental and physical handicaps according to research published in *New England Journal of Medicine* 2005; 352: 9-19.

shows that pro-choicers cannot find at any time during a pregnancy an *actualized* property that is intrinsically valuable and deserves moral protection according to the tenets of their own world view. Those of us who believe the fetus's value lies in it being made in God's image, that it is designed by God to be a person, will not find our judgments about the fetus's moral status to be affected by age, appearance or stagnation thought experiments. But abortion proponents typically do not hold such views.

Most abortion proponents want to ascribe to the fetus *some* value and offer it *some* protection. They may not always have worked out what principle makes this so, but it is the intuition of most. My suspicion is that it is the potential of the fetus that is really doing "all the genuine (i.e., defensible) moral work" in the abortion proponents' position but they cannot acknowledge that because the potential is there from day one - except in the rare case of severe congenital retardation. Since they do not insist that the fetus is devoid of value, they want to balance its value with their concern for the woman's autonomy and control of her body. What they desire is a grace period of sorts where woman have considerable time to reflect upon such momentous, life altering decisions. Hence the appeal of viability. Or more accurately, hence the appeal of the current *timing* of the onset of viability. Whatever the merits of the grace period, and I do not think they override the value of the fetus's life, they are not logically or conceptually connected to the principle of viability.⁷ That is why I have speculated that the real

⁷ To convince abortion proponents that the grace period is not weighty enough to justify abortion, they should be asked to imagine themselves geographically and socially isolated somewhere with a newborn that they did not earlier have a chance to abort nor presently an opportunity to put up for adoption. That is, they did not have a grace period in which to choose not to be a parent with all the physical burdens that entails. If such a grace period was really so morally important, then infanticide, or the neglect that would amount to almost the same, would be

appeal of viability is not the philosophical principle of the fetus's independence from the mother, but that the timing of its onset provides the proper balance, in the eyes of the abortion proponent, between the value of the fetus and the autonomy of the pregnant woman.⁸

morally acceptable in such circumstances. But if infanticide is wrong even in the isolated scenario, and since the stagnation thought experiment shows that the infant does not have any more intrinsic value than the fetus, then aborting normal fetuses is also wrong, and as evil as infanticide.

⁸ I would like to thank an anonymous reviewer and Ted Furton for helpful comments on an earlier draft of this paper.