

Regina A. Rini (2013). “Of course the baby should live: Against ‘after-birth abortion’”. *Journal of Medical Ethics* 39(5): 353-356.

<http://jme.bmj.com/content/39/5/353.full>

Of course the baby should live: Against “after-birth abortion”

Regina A. Rini

Oxford Uehiro Centre for Practical Ethics

regina.rini@philosophy.ox.ac.uk

Abstract In a recent paper, Giubilini and Minerva argue for the moral permissibility of what they call “after-birth abortion”, or infanticide. Here I suggest that they actually employ a confusion of two distinct arguments: one relying on the purportedly identical moral status of a fetus and a newborn, and the second giving an independent argument for the denial of moral personhood to infants (independent of whatever one might say about fetuses). After distinguishing these arguments, I suggest that neither one is capable of supporting Giubilini and Minerva’s conclusion. The first argument is at best neutral between permitting infanticide and prohibiting abortion, and may in fact more strongly support the latter. The second argument, I suggest, contains an ambiguity in its key premise, and can be shown to fail on either resolution of that ambiguity. Hence, I conclude that Giubilini and Minerva have not demonstrated the permissibility of infanticide, or even great moral similarity between abortion and infanticide.

In biological terms, a late-stage fetus and a newborn infant are quite similar. What is it that makes the killing of one acceptable to many people, and the killing of the other abominable to almost everyone? In a recent *Journal of Medical Ethics* paper¹, Alberto Giubilini and Francesca Minerva (hereafter referred to as ‘G&M’) argue that a fetus and a newborn infant are in fact equally deserving of moral concern. Indeed, they argue for what they call “after-birth abortion”: the view that whatever conditions might justify abortion of a fetus will equally justify the killing of a newborn infant.

It is an uncomfortable view to defend, or even to consider, and unfortunately some responses to G&M’s paper have so far exhibited this discomfort in a dangerous way, trending toward abuse and even threats for the authors. I have no patience for such responses; G&M’s argument deserves serious, sober-minded consideration, and the authors obviously deserve basic respect and decent treatment. My intention in this paper is to maintain all of these, while nevertheless arguing that the substance of G&M’s paper is flawed. I will suggest that their central arguments are confused, and that once this confusion is unravelled, these arguments can be shown to conclusively fail. Yet it is

possible to reach even this complete rejection of the paper while firmly upholding that its authors may be people of admirable moral character, who offered their arguments in intellectual good faith. I hope all readers will bear that in mind.

A confusion of arguments

In their paper, G&M appear to argue for the following two claims:

- (1) The moral status of a fetus and a newborn infant are the same.
- (2) It is morally permissible to kill a newborn infant, at least under certain circumstances.

G&M conjoin these claims in the following sentence: "The moral status of an infant is equivalent to that of a fetus, that is, neither can be considered a 'person' in a morally relevant sense." (G&M, p.2) This generates some unclarity in understanding how these two claims are supposed to relate to one another. At times, it seems as if (1) is a premise on the way to a conclusion giving (2). That is, G&M appear to be claiming that infanticide is permissible *because* infants are similar to fetuses in all morally relevant ways. At other times, they appear to have an argument for (2) that does not require any claim like (1). That is, G&M appear to have an independent argument for the permissibility of infanticide which does not *depend* on making any claim about fetuses (although it might logically entail such a claim). Getting clear on the differences between these two arguments, and which one G&M are employing, seems like a wise first step.

Let's call one argument they might be making the Natal Equivalence Argument. It asserts that there is no morally relevant difference between a fetus and a newborn. In essence, the mere fact of being born does not confer upon a human any moral status that she did not possess in the womb. The argument then points out that we (or at least some intended dialectical audience) regard at least some abortions as morally permissible. Hence, the argument runs, if a fetus and an infant have similar moral status, and the killing of a fetus is morally permissible in certain circumstances, then the killing of an infant is morally permissible in the same circumstances.

The Natal Equivalence Argument:

- (N1) The moral status of a fetus and a newborn infant are the same.
- (N2) Abortion of a fetus is sometimes morally permissible.
- (N3) Therefore, killing of a newborn infant must also be sometimes morally permissible.

The Natal Equivalence Argument is not new – versions have been defended (with varying degrees of endorsement) by Kuhse and Singer² Warren³, and McMahan⁴. Notice that (N1), the crucial premise, might be defended on a simple "burden of proof" basis. That is, the proponent of (N1) might simply challenge opponents to explain how the mere fact of birth possibly *could* be a morally relevant difference between a fetus and a newborn. On this strategy, the defender of (N1) needn't put forward *any* positive theory about what properties entitle a human being to a right to life; the defender must only insist that, whatever properties these are, the mere occurrence of birth is not one of them.

Notice further that (N1) is capable of supporting an inversion of the Natal Equivalence Argument, generating a quite different conclusion. Call this one:

The PreNatal Equivalence Argument:

- (N1) The moral status of a fetus and a newborn infant are the same.
- (PN2) Killing of a newborn infant is never morally permissible.
- (PN3) Therefore, abortion of a fetus must also be never morally permissible.

So (N1) is a double-edged premise: it might be used to support a conclusion permitting infanticide, or one prohibiting abortion. However, that double-edged feature disappears if we introduce further considerations grounding (N1). That is, we might argue for (N1) on a basis other than what I called the "burden of proof" strategy above. We might instead propose a *positive* account of properties necessary for a right to life, and then argue that both a fetus and a newborn infant *equally* possess or fail to possess these properties. If we take that strategy, then (N1) is no longer capable of generating both the Natal and PreNatal Equivalence Arguments – only one of the two will find its second premise logically consistent with our basis for holding (N1).

G&M are clear in insisting that abortion is sometimes morally permissible, and therefore do not want to defend (N1) on the double-edged "burden of proof" grounds I discussed. They clearly pursue the latter strategy, of introducing another argument, including a positive account of properties necessary for a right to life. But notice a curious fact: (N1) does not actually figure into this argument. That is, this argument does not rely on asserting a moral equivalence between a fetus and a newborn infant. The argument might *entail* (N1), but it is not a premise. In any event, I think G&M are most plausibly understood as making a different argument, which I will call the 'Valued Personhood Argument'.

The Valued Personhood Argument:

- (VP1) A moral 'person' (which means anyone who has a "right to life") is "an individual who is capable of attributing to her own existence some (at least) basic value such that being deprived of this existence represents a loss to her." (G&M p2)
- (VP2) A newborn infant is not capable of attributing to her own existence some (at least) basic value such that being deprived of that existence represents a loss to her.
- (VP3) Therefore, a newborn infant is not a moral person, and does not have a right to life.
- (VP4) Therefore, infanticide is morally permissible.

Quickly, let me set aside one problem with this argument: the inference from (VP3) to (VP4) is questionable. There might be reasons for thinking infanticide impermissible *even if* we grant that an infant does not have a "right to live". For instance, we might think that, while an infant does not have a right to life, it has the *possibility* of acquiring that right, and therefore cannot be killed. G&M address the possibility objection, and in this paper I won't challenge them on that point. But there are other ways to block the move from (VP3) to (VP4). For instance: it might be that talk of rights here, as in the abortion debate, distracts from more nuanced considerations arising in the relationship between a newborn and its mother.^{5,6} Or we might think that a willingness to kill a human infant displays a warped character or deficient moral vision. For my part, I find these to be extremely compelling objections to the Valued Personhood Argument. But I will set them aside for the rest of this paper, and speak as if the inference from (VP3) to (VP4) is unproblematic. In the next section, I will instead discuss what appear to be flaws in premises (VP1) and (VP2), and claim that the argument ultimately fails.

How is personhood valued?

I take it that I've finished with ground-clearing. G&M are best understood to be making something like the Valued Personhood Argument. In this section, I will present objections to both of its central premises, and so suggest that its conclusion fails.

First, (VP1): A moral 'person' (which means anyone who has a "right to life") is "an individual who is capable of attributing to her own existence some (at least) basic value such that being deprived of this existence represents a loss to her." (G&M p2)

Unfortunately, (VP1) appears to admit of a central ambiguity – and, I will argue, G&M's argument depends on a failure to resolve that ambiguity. The trouble is with the locution, "capable of attributing to her own existence some (at least basic) value". There are two logically distinct ways for an individual to attribute value to her existence.

First, an individual might value her existence *directly*. To do this, she must cognize herself as the subject of a life, or a sequence of experiential states, and value the continuance of this life. In this case, the individual attributes value to her existence itself, regardless of anything else.

Second, an individual might value her existence *indirectly*. To do this, she must value *something*, and it must be the case that the continuance of her life is instrumentally necessary to her achieving that something. Notice that this does not require the individual to have *any* attitude toward her existence itself – or even to be able to conceptualize her existence.

G&M defend (VP1) on the basis of the following assertion: "a necessary condition for a subject to have a right to X is that she is harmed by a decision to deprive her of X. (G&M p2)" The idea here is fairly intuitive: it only makes sense to say that S has a right to X (that is, a moral requirement for others to respect pursuit of X) in case X actually matters to S in some way. Notice that this remark applies equally well to either of the two construals above: depriving an individual of her life matters to her whether she values that life directly, or as a necessary means to something else.

So, there are actually two distinct versions of (VP1). It will be helpful to mark these:

(VP1a) A moral person (with a right to life) is an individual capable of conceiving of herself as the subject of a life that she values.

(VP1b) A moral person (with a right to life) is an individual capable of valuing certain aims, for which the continuation of her life is instrumentally necessary.

I think that G&M can be read as employing each of these variants at different moments in their paper. (VP1a) appears when they write, "We take 'person' to mean an individual who is capable of attributing to her own existence some (at least) basic value..." (G&M, p.2) (VP1b) appears in passages such as "If the death of a newborn is not wrongful to her on the grounds that she cannot have formed any aim that she is prevented from accomplishing, then it should also be permissible to practice an after-birth abortion on a healthy newborn too, given that she has not formed any aim yet." (G&M, p.2)

It is my contention, for which I will argue in the next section, that neither of these variants of (VP1) can sustain the Valued Personhood Argument. (VP1a) is too strong to be plausible; it appears to entail that many individuals – including some adult human beings – to whom we might ascribe a right to life do not actually possess one. And while (VP1b) is plausible enough, it is too weak to support the rest of the argument. In particular, on (VP1b) the second premise – that newborn infants do not have the sort of mental events that generate a right to life – will turn out to be false, or at least inadequately supported. The argument only appears to succeed so long as it is permitted to equivocate between the two variants of (VP1): (VP1a) makes the argument cohere, but is itself implausible, and (VP1b) is plausible, but makes the argument incoherent.

Rejecting the Valued Personhood Argument

In this section I will show that (VP1a) is implausible and that (VP1b) cannot support the rest of the Valued Personhood Argument. Therefore, there is no successful version of this argument.

(VP1a) claims that an individual is a moral person (and has a right to life) only if that individual is capable of conceiving of herself as a subject of a life that is valuable. (VP1a) makes G&M's argument quite similar to one offered by Michael Tooley⁷, and causes it to inherit some of the same concerns. In effect, this version of the premise imposes rather stringent cognitive demands on moral personhood. A moral person must possess a mental life sophisticated enough to accommodate both a conception of herself as the *subject* of a life and an understanding of what it would *mean* to value that life. These are very complex concepts.

Certainly (VP1a) is strong enough to support the conclusion of the Valued Personhood Argument. It seems extremely unlikely that a newborn infant (or a fetus) possesses anything like the cognitive complexity needed to meet the conditions imposed by the premise, and so clearly the infant will not have a right to life. (Although a new born infant may possess some capacities that suggest a rudimentary form of self-aware cognition.⁸)

The trouble is that (VP1a) may be too demanding. It relies on the assumption that, to have a right, one must be able to *cognize* the object of that right, and this is a troublesome assumption.⁹ Indeed, (VP1a) draws much more than newborns and infants into its grip. Many developmentally disabled adult human beings will not meet this condition, either because they are incapable of regarding themselves as *subjects* of a life, or because they lack a sophisticated understanding of what it means to value a life. Virtually no non-human animals would meet this condition. Yet these seem like implausible entailments: we do think that developmentally disabled adult human beings, and perhaps also certain non-human animals, are moral persons, and have a right to life.¹⁰

Indeed, G&M say exactly this, immediately after introducing (VP1): "many non-human animals and mentally retarded human individuals are persons (G&M p2)." So they recognize the implausibility of (VP1a). They must, therefore, intend something weaker, something like (VP1b). On this version, the emphasis is not on the capability for ascribing value directly to one's life, but instead merely on the possession of aims which can be frustrated by one's being killed. It seems reasonable to suppose that virtually all adult human beings, including those with developmental disabilities, as well as quite a few non-human animals, will meet this condition. Even if some lack sophisticated self-conceptions,

they can at least possess aims, in the sense that they make purposive actions and experience frustration when these actions are disrupted.

But can the Valued Personhood Argument work on (VP1b)? G&M seem to think so. They write that, "hardly can a newborn be said to have aims, as the future we imagine for it is merely a projection of our minds on its potential lives. It might start having expectations and develop a minimum level of self-awareness at a very early stage, but not in the first days or few weeks after birth (G&M p2)." If this is correct, then clearly a newborn infant will fail to meet the conditions of (VP1b), and so the Valued Personhood Argument goes through: newborn infants are not moral persons, and may sometimes permissibly be killed.

But G&M merely *assert* that "hardly can a newborn be said to have aims". It does not seem to me that they provide a convincing argument for this assertion. True, a newborn infant does not have very *sophisticated* aims, nor a particularly sophisticated conception of its future. But even a newborn infant does exhibit preferences: for warmth, for food, for physical contact. It experiences pleasure and pain as *linked* to the satisfaction or frustration of these preferences. And it will do the tiny things within its power – grasping, suckling, crying – to bring about the fulfilment of these preferences.

It seems plausible to me to call all of these things "aims" in a newborn infant. Or, at least, I can't see any justification for refusing to call these things "aims", and yet insisting that many non-human animals do have "aims". G&M seem to try to resist this objection by denying that a newborn has a "minimum level of self-awareness" – but then that remark trends back toward (VP1a), which required a moral person to possess a conception of a self as the subject of a valued life. As I suggested, this condition is too demanding. At the very least, then, G&M owe us a much more detailed argument, explaining exactly what it means to say that certain non-human animals possess aims while newborns do not.

So, I have argued, (VP1) is objectionably equivocal. On one reading, it is not plausible. On another reading, it does not support the conclusion taken from it. Therefore, I suggest, the Valued Personhood Argument fails.

Rejecting the Natal Equivalence Argument

Recall that I began by distinguishing between two arguments that G&M might have been making. I've now argued that one, the Valued Personhood Argument, fails. Before concluding, it is worth asking whether G&M could default to the other argument, the Natal Equivalence Argument. In this final section, I will re-examine that argument, and suggest that it doesn't do very much to accomplish G&M's dialectical goals.

The Natal Equivalence Argument, you'll remember, simply asserts that there is no morally relevant difference between a fetus and a newborn infant, and on the further grounds that abortion of a fetus is permissible, concludes that killing a newborn infant is also permissible. As I pointed out, this argument shares its first premise, (N1), with the PreNatal Equivalence Argument: since there is no morally relevant difference between a fetus and a newborn infant, and since it is impermissible to kill a newborn infant, it is therefore impermissible to abort a fetus.

Perhaps G&M could accept everything I've said in the last section, regarding the failure of the Valued Personhood Argument, and yet press the following objection: whatever properties are necessary to achieve moral personhood (self-awareness, vulnerability to foiled aims, something else) it seems unlikely that a newborn infant possesses these properties and a fetus does not. As some have put it, at the moment of birth a human being merely changes locations: from inside the womb to outside the womb. Surely *that* can't be the basis for ascribing moral personhood?¹¹

This is, essentially, an argument for premise (N1): that the moral status of a fetus and an infant are identical. But notice that, if this argument succeeds, it offers no grounds for deciding between the Natal Equivalence Argument and the PreNatal Equivalence Argument. That is, (N1) seems to secure only that we should evaluate abortion and infanticide equivalently. It is therefore at least as compatible with rejecting abortion (and infanticide) as with accepting infanticide (and abortion).

Even more problematically – at least for those who believe in the permissibility of abortion - the trend of views espoused by G&M appears to favour the PreNatal Equivalence Argument. In the previous section, I suggested that G&M haven't given a convincing argument for distinguishing between the aims of many non-human animals and the aims of newborn infants. If we hold, along with G&M, that these non-human animals have a right to life, on the basis of the vulnerability of their aims to frustration through killing, then we should also hold that newborn infants have this right. But now, if (N1) is true and there is no morally relevant difference between a newborn infant and a fetus, we must conclude that a fetus as well has a right to life. In effect, G&M's argument has been turned from one supporting infanticide into one opposing abortion.

But I do not think that G&M are utterly forced to that conclusion. Perhaps it was too quick to say that the mere location of the fetus (inside or outside the womb) could not be relevant to its moral status.¹² I believe they may have grounds for rejecting (N1) - and therefore holding that a newborn is a moral person while a fetus is not. This, of course, is not the conclusion they wanted, but I suspect they would find it preferable to the moral impermissibility of abortion.

Here is the argument, in brief: plausibly, at the moment of birth, a human being actually does undergo a morally relevant change. Specifically, the human being becomes biologically independent of its mother, in such a way that it begins to have aims that it did not before. In the womb, a fetus is essentially passive regarding its own needs, which are provided directly by the umbilical cord and uterine environment. A newborn infant, once its umbilical cord has been severed, must suddenly begin to breathe on its own, to process its own nutrients, to digest and excrete and seek out warmth. It must almost immediately begin responding to these needs, playing the tiniest role in their accomplishment through its grasping, suckling, and crying. As I suggested in the last section, these needs, along with the means to accomplish them, are very plausibly understood as "aims", at least to a similar extent that animals and certain disabled adults have aims. Newborn infants have aims, but fetuses do not. Therefore, if the vulnerability of such aims to frustration is morally significant, then there is a morally relevant difference between a fetus and a newborn. (N1) is false, so the Natal and PreNatal Equivalence Arguments both fail.

With that, my argument is complete. I have claimed that G&M present a confused set of arguments, which I have attempted to separate into the Valued Personhood and Natal Equivalence Arguments – both of which have turned out to fail. Therefore, G&M have not provided any compelling reason to

hold that infanticide is morally permissible, nor even have they shown that the moral permissibility of infanticide is linked to the moral permissibility of abortion.

Acknowledgments

I would like to thank Alberto Giubilini and Francesca Minerva, Guy Kahane, Jeff McMahan, Simon Rippon, William Ruddick, and two anonymous referees for discussion and comments related to this paper. This research was funded by the VolkswagenStiftung's European Platform for Life Sciences, Mind Sciences, and the Humanities (grant II/85 063)."

¹ **Giubilini A and Minerva F.** After-birth abortion: why should the baby live? *J Med Ethics* 2013; 39: 261-263.

² **Kuhse H and Singer P.** *Should the baby live?: The Problem of Handicapped Infants*. Oxford: Oxford University Press, 1985.

³ **Warren MA.** On the Moral and Legal Status of Abortion – Postscript. In Feinberg, J, ed. *The Problem of Abortion* Belmont: Wadsworth, 1984. 102-119.

⁴ **McMahan J.** Infanticide. *Utilitas* 2007;19:131-159.

⁵ **Little M.** Abortion, Intimacy, and the Duty to Gestate. *Ethical Theory Moral Pract* 1999;2:295-312.

⁶ **Warren MA.** The Moral Significance of Birth. *Hypatia* 1989;4:46-65.

⁷ **Tooley M.** Abortion and Infanticide. *Philos Publ Aff* 1972;2:37-65.

⁸ **Bermudez JL.** The Moral Significance of Birth. *Ethics* 1996;106:378-403.

⁹ **Stevens JC.** Must the Bearer of a Right Have the Concept of That to Which He Has a Right? *Ethics* 1984;95:68-74.

¹⁰ **Weiss R.** The Perils of Personhood. *Ethics* 1978;89:66-75.

¹¹ **Singer P.** *Practical Ethics*. Cambridge: Cambridge University Press 1979:108.

¹² **Jaggard A.** Abortion and a Woman's Right to Decide. *Philos Forum* 1974;5:347-60.