

## RESOLVING THE DEBATE ON LIBERTARIANISM AND ABORTION

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MARK FRIEDMAN, in his generally excellent *Libertarian Philosophy in the Real World*,<sup>1</sup> classifies the abortion issue as one on which there is really no definitive, “official” libertarian view, despite the plank in the Libertarian Party platform calling for no government overseeing of the matter, leaving it to the conscience of each individual and thus enshrining what is usually called the “liberal” or “pro-choice” view. He states that “this does not mean that the position flows naturally from one or more of the basic principles that undergird libertarianism” (157). He goes on, quite correctly, to point out that everything depends on the question of just when—at what point in its development, if any—the fetus “acquires ‘moral status.’” In particular, if that point were early on in the nine months of fetal development, then it would be very plausible to argue that its right to life pre-empts whatever preferences its parents or maternal parent might have about it.

My discussion (a) resoundingly denies Friedman’s claim that no position “flows naturally from the basic principles that undergird libertarianism,” and (b) defends the choice of birth, for most contemporary societies, as the plausible point of departure for denying any basic intrinsic rights to pre-borns and possibly granting some indirect rights to post-borns. However, my argument does not try to discuss all dimensions of this issue.

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<sup>1</sup> Mark Friedman, *Libertarian Philosophy in the Real World* (London: Bloomsbury, 2015).

Friedman cites the familiar argument of Don Marquis<sup>2</sup> that murdering someone deprives him of his life—at whatever point in his life that might be. But Marquis claims that as soon as the group of cells that becomes that person is sufficiently organized to be uniquely identifiable as a certain purely biological individual-to-be, which he says is about three weeks, we have sufficient reason to say that aborting that mass of tissues deprives of life the individual whose life is in question. But this begs the question on the main issue. Fetuses have none of the interactive psychological properties we ascribe to all human persons. There is no excuse for ascribing inherent liberty rights to things that have none of those features. You can only qualify for a right to general liberty if you have a “will” that can be thwarted by others’ actions.

Of Marquis’s account, Friedman says, “Clearly, this verdict runs counter to the strong, widely held intuition that an organism *so unlike* a ‘standard’ adult human (or even a newborn) should be entitled to Full Moral Status... Quite obviously, this is a thorny issue” (159; emphasis in original). But it is not a matter of trying to decide whether some organism is too “unlike” ordinary humans to be eligible for moral standing. Neither Marquis nor anyone else has reason to attribute rights to clumps of cells. Rights are for persons, not organisms or DNA encodings. Marquis’s “argument” is not really an argument at all, but a groundless assertion: in context, it begs the question. Is X a “person” and thus entitled to moral standing? Marquis’s answer is that X is a person when it is a clump of cells that we can identify as the individual human it will grow into. Such an answer is not just “thorny”—it is dead wrong. We could never settle the question of who has rights if that was the only sort of “argument” to make. Any such answer is arbitrary if it fails to identify what it is about people that makes it plausible to extend to them the *intrinsic* rights that we (most of us) think they have.

Now, the individual that a given fetus would become, if it does become one, of course would then have the rights that we all have. But if that fetus does not have those defining properties, then if there is an abortion, no such person exists as yet, and so no person has been deprived of his life. You cannot murder a clump of cells.

Thus Friedman is wrong about this, as is Marquis. Libertarianism gives every person the right to run his or her own life. But fetuses are not able to “run” anything. They are not participants in the agreements among us that constitute morality, and not yet participants in communities. We of course

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<sup>2</sup> Don Marquis, “Why Abortion Is Immoral,” *Journal of Philosophy* 86 (April 1989), 183–202.

usually anticipate with joy the arrival of this organism into personhood—but that is not to be confused with its having rights, nor does it give it such a status. It simply does not have the status of personhood, and it is not a matter of how much we love or care about the entities in question.

There might be reasons why a given society would want to insist on carrying fetuses to term, but those reasons have no grounding in “fetal rights,” and it is difficult to think of any that would pass muster with libertarians, who (rightly) deny that “society” has any business coercing individuals for any other purpose than mutual protection. And in the case of society versus individual nonparents, that’s certainly what it would be.

We should remember that many societies have not even extended rights to newborns.<sup>3</sup> For example, they have routinely exposed to the elements newborns who were defective or even simply one too many for the limited resources available. Neither of those conditions is at all likely to apply nowadays, of course. Reasons for terminating the lives of infants are not of that sort. And there is in fact a major difference between fetuses and newborns, as any parent knows. Even very young infants begin to have some of the features that identify one as a person and not just a clump of cells.

But even so, there is no fundamental basis for attributing rights to nonminded, nonpersonal beings. Morality is for people, not for organisms. Of course, we persons have bodies—we are organisms, of a sort—but it is not our organisms that have rights, but *we*. Among those rights is the protection of that organism from damage by others. You do not need to be a metaphysical dualist to say this. Rather, you only need common sense. Wherever the “I” constituting a given person is “located” or whatever gives us that right, it is our choices and agreements, not the physical thing that presumably is our operating substructure, that create and ground rights.

Societies often feel that they need rules about such things as childbirth. (Contemporary China, e.g., long required that citizens have no more than one child. The policy was a mistaken reaction to a misperceived shortage of resources; but, given that misperception, it is easy to see why a society might impose the policy.) Philosophers and legislators, then, might press for a precise demarcation between the developing organisms about which parents may decide whether they live, and those that society will protect as valued members of the community. And a very plausible such demarcation is indeed birth—certainly too early for a being to possess actual personality, but again,

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<sup>3</sup> See, for example, Jared Diamond, *The World until Yesterday* (New York: Viking, 2012), pp. 177–79, for an insightful and highly informed discussion of primitive societies’ practices on this matter.

there might be other reasons why society would want to protect its newborns.

The great advantage of birth for such purposes is that prior to birth, the fetus is in the mother's body and one would need to invade that body if involuntary eviction, say, were proposed; whereas, once born, the infant is separate from that mother and thus, can be transported without invading her body. Forcibly parting a mother from her fetus assaults that woman's body. It is not so for newborns or infants, who can be transferred without physical harm to their mothers (psychological harm is, of course, another matter).

That forcibly taking an infant away from its mother would be an invasion of her rights, of course, is true, but is another matter—at least, once it is born, no one needs to violate her body *per se* in order to remove the infant from her. Just what if anything would justify taking an infant from its parents is an interesting question. But it is important to realize that it is not a question that necessarily concerns the issue of abortion as such. Libertarians defend property rights, but do any of them think one's right to one's car, say, is more fundamental and more important than the right to one's very body?

Newborns and infants are in great demand in contemporary societies. Do we have reason to insist on parental control over them to the exclusion of rival bidders who might well give them a better life? We may insist only that the parents brought an infant into existence, a fact creating a historical link to those particular parents—a link that the infant does not have to anyone else. But if those parents are interested in the infant's well-being, and cannot or are disinclined to provide for it, one could argue that in extreme cases involuntary adoption might be called for. Do parents have the right to deposit newborns in garbage bags? Most people think not—yet even today in places like America, the penalties meted out for such activities are far smaller than the penalties for killing more well-developed children. And this has been accepted practice in many societies. Indeed, in most—or nearly all—pre-contemporary societies, infant exposure to the elements was accepted and even routine if the child was not likely to grow up sufficiently well to sustain itself. But there would be no question of whether such parental rights were limited if the entity in question were not yet born, since then, in addition to what could be argued to be theft, there would be the much more basic problem of invasion of person.

Thus any protections of infants are not due to fetal rights or newborn rights. They are due to special interests of society (perhaps): those beings do not have rights, but we adults have rights over our precious newborns—rights that *may* come into conflict with the rights of other adults to self-defense, broadly defined. For example, adults might object to a given parent's

retaining control over her young ones if compelling evidence shows that children brought up the way the parent is bringing them up will before long become juvenile delinquents, menaces to their neighbors. And those neighbors, of course, *do* have a say in such things. No such issues can arise regarding fetuses, however.

So Friedman, I submit, is wrong. There is an intrinsic basis for liberty rights, and it does not obtain in the cases of pre-borns or newborns. How long after birth it does obtain is a reasonable question. But after all, children are valuable—indeed, essential if there is to be an ongoing society. If, like Friedman, we support a minimal state, then provisions for protections of newborns, and so on, are something we might want to consider. Whether any such protections can pass muster as libertarian is an important question, but not one I will explore further here. All I need do is emphasize that for society to invade the bodies of mothers is a far more basic and unarguable violation of individual liberty, the fight against which is the essence of libertarianism. Obviously outside parties might try to reason with potential mothers about the value of their continuing, or discontinuing, gestation. But invasion is another matter, of course. It is what libertarianism is about.

Arguably, it is the rights of, first, parents and then those who would be affected by the new persons that are to be respected in these matters. That is why the Libertarian Party's statement is basically right: it is to be left to parents, and especially the female parent, whether to raise a given infant. If a woman has a child, but does not wish to care for it, then others may volunteer to take on the unwanted child. The initial parents can make an offer to those potential caregivers, and society must allow parents to consider such offers and accept or reject them.

One might hope things would not get that far: expectant mothers who do not want their fetuses to come to term should, of course, be able to abort. They are not committing murder, as I have argued, since the fetus does not have the sort of capabilities that endow a being with rights the violation of which amounts to murder. Beyond that, we may insist that parents do reasonably well by their children; and the parents themselves normally would want to do better than that, if possible. But even here, there is little room for rational governmental intervention in those areas either, as Friedman himself would agree.

Although this discussion has defended the modern liberal view on abortion in the context of libertarianism, my argument in fact is prior to libertarianism. It is instead about the fundamental idea of (social) morality—of the rules by which we humans are to relate to each other. Those rules are human-made, not “natural” in the way that the bark growing on trees is

natural. And as such, the rules must be made by rational beings in their self-perceived interests—and not by legislators or constitutional conventions. That is what gives credence to the claim that libertarian rights are “natural” rights.

I have frequently defended the social contract as the basis of morals. We have nothing else on which to base a rational morality. And social contracts, the general “agreements” in accordance with which we all are to live with each other, can only be made by rational beings sufficiently well developed to understand the terms of that agreement. Any rights we attribute to anything else—to property, for instance—derive from the rights of the primary contractors. Fetuses and infants come under the same category. Most parents are very interested in parenthood, and very concerned for the good of their children. That is as it should be. But it does not allow us to ascribe intrinsic rights to things that simply are not capable of having them.<sup>4</sup>

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<sup>4</sup> A more extensive discussion can be found in Jan Narveson, *Moral Matters* (2nd edition, Peterborough, ON: Broadview, 1999), ch. 8, pp. 157–80. See also my entry in *Arguments for Liberty*, forthcoming from The Cato Institute.