

LIBERTARIANISM AND ABORTION: A REPLY TO PROFESSOR NARVESON

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PROFESSOR JAN NARVESON objects to my claim that abortion on demand up to the moment of birth is not a policy prescription that follows naturally from the basic principles that undergird libertarianism. For the reasons set forth below, I continue to hold this view, even in the face of Narveson's thoughtful criticism. However, before going further, I wish to thank him for the attention he has paid to my book, and his praise for the rest of it.

I will proceed by briefly summarizing the key points of my original argument regarding the ethics of abortion. I will then describe the basis for Narveson's disagreement and explain my grounds for adhering to my original view. My argument is threefold: (i) Narveson's version of contractarianism can be interpreted in a way consistent with the pro-life perspective; (ii) Narveson's own understanding of his social contract produces a result that is implausible and even repellent; and (iii) even if his contractarianism did imply a unique, aggressively pro-choice stance on abortion, there are competing libertarian theories that are receptive to pro-life views.

The crux of my original analysis (Friedman 2015: 157–58) is that the rights-based approach to resolving this issue must focus on the relative

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strengths of the mother's claim to bodily integrity and the fetus's putative right to life. Central to this inquiry is the question of when, if ever, the latter obtains full moral status (FMS) or near-FMS. I review and reject the polar extremes, starting with the pro-life argument formulated by Don Marquis (1989), who assigns FMS to the fetus at about three weeks after conception, when the embryo has developed to the point where it is uniquely identifiable biologically as the *same* entity that will be born, grow into adulthood, and die. It is wrong, says Marquis, to abort a healthy fetus beyond the third week for the same reason it is wrong to murder the adult it will become: you are robbing it of the future value of its life. I hold this line of reasoning to be flawed because while a three-week-old embryo may be the same biological organism as the adult it becomes, it is a qualitatively different being: "it is not the *same* individual, in the morally relevant sense, as the person it develops into" (Friedman 2015: 239n25). Or as Narveson puts it (2016: 279), we cannot attribute rights to a "clump of cells."

I also consider and reject the pro-choice arguments, purportedly grounded in libertarian principles, advanced by Ayn Rand and Murray Rothbard (Friedman 2015: 160–61, and related endnotes). The latter's commitment to self-ownership leads him (like Narveson) to reject the existence of FMS for both fetuses and infants. However, even if we accept that the mother's self-ownership confers certain moral rights, Rothbard never provides an argument establishing that they are sufficiently weighty to override the claims of the late-term fetus.¹ Nor does he explain why birth transforms a fetus from a being completely lacking self-ownership to one with at least partial status, and why, if so, an infant may rightfully be starved to death by its parents.

My conclusion was that libertarian theory provides no decisive reason to reject the majority opinion that "*at some point* in its development (perhaps at the point of consciousness), the fetus enjoys or nearly enjoys FMS, and that good cause must then exist to justify an abortion" (Friedman 2015: 159;

¹ The fact that property has been justly acquired and retained does not convey to its owner the absolute right to do whatever she likes to any human being who wanders, even uninvited, onto it. For example, it would be manifestly unjust for the owner of a remote vacation cabin to booby-trap it to release deadly poison gas on any trespasser who walks through the unlocked front door. Thus, at the minimum, it is not obvious that the third-trimester fetus's location within the mother licenses her decision to kill it merely in order to avoid the inconvenience of giving birth. For a fuller defense of this argument, see Feser (2004: 100–102); Friedman (2015: 240n32), and Block (1978).

emphasis in original).² As it happens, I share this perspective, but it is worth emphasizing that I was not arguing the merits of this position, but merely asserting that it is not inconsistent with generally accepted libertarian norms.

Narveson (2016: 278) agrees with me that “everything depends on the question of just when—at what point in its development, if any—the fetus acquires ‘moral status.’” However, he differs with me (2016: 279) in holding that late-stage fetuses cannot possess rights because they lack the “defining properties” of personhood, and intrinsic rights belong only to persons. For him (2016: 279), this means “interactive psychological properties... a ‘will’ that can be thwarted by others’ actions,” “participa[tion] in the agreements that constitute morality, and participa[tion] in communities.”

According to Narveson (2016: 278, 280), the moral status of newborns is somewhat different than fetuses because “even very young infants begin to have some of the features that identify one as a person.” Nevertheless, they are “nonminded, nonpersonal beings,” and therefore have at most only “indirect rights.” He does not define this term, nor have I found it in the literature.³ Nevertheless, from the context I infer that he means the sort of claims that parents might assert to defend *their* property rights in their children (2016: 281) or such rights that society decides to bestow upon the very young for the common good. I will start with Narveson’s discussion of abortion rights, and then turn to his position on newborns and infants.

One empirical consideration that might reasonably be thought to bear on the ethics of abortion is the existence or not of fetal pain. There is widespread disagreement on this question, but virtual unanimity that research in this field is greatly impeded by the obvious fact that fetuses are incapable of self-reporting their experience, and that their pain cannot be directly observed or measured. We are thus required to proceed by inference.

Another obstacle to reaching consensus on this question is the challenge of deciding what qualifies as “pain,” since the phenomenology of

² According to a July 2016 Harvard–STAT national poll (2016: 10), 61 percent of Americans believe that abortion after twenty-four weeks of pregnancy should be illegal, while 23 percent think it should be available, with 15 percent giving equivocal answers. Moreover, as reported by the National Conference of State Legislatures (2015), thirty-eight of our states have enacted “fetal homicide” laws that expressly include the unborn as potential homicide victims, and at least twenty-three have laws that do so at any stage of pregnancy.

³ For example, it does not appear in the *Stanford Encyclopedia of Philosophy* entry on “Children’s Rights.” See Archard (2016).

this experience may differ qualitatively for an organism possessing a conceptual apparatus that includes language and self-awareness, and one that does not. As one expert has put it (Derbyshire 2010: 6), we may be required to distinguish between “apprehending” pain and “comprehending” it.

There are well-qualified scientists in this field who believe that pain, as we commonly understand it, is mediated through the cerebral cortex, which is not fully developed until after birth (Mellor 2005). Others, such as Christof Koch (2009), believe that “the fetus is actively sedated” in utero, including by “a range of neuroinhibitory and sleep-inducing substances produced by the placenta and the fetus itself.” Thus, he asserts, even a very late-term fetus “experiences nothing in utero... [I]t feels the way we do when we are in a deep, dreamless sleep.”

However, these theories are hotly disputed. Lowery et al. (2007) and Anand (2007) contend that fetuses can feel pain as early as twenty weeks after fertilization through noncortical pathways, and deny that the experience of noxious stimuli in this way is materially different than the perception of pain by adults. This perspective is bolstered by compelling observational evidence (Merker 2007: 78–80) that children (ten months to five years old) born with hydrocephaly (a condition in which all or virtually all of the cortex is missing) exhibit consciousness, including purposeful behavior and emotional reactions. There is also good reason to question (Derbyshire 2010: 5–6) the thesis that the fetus is never sufficiently wakeful to experience pain. It is fair to say that there exists no scientific consensus for or against the hypothesis that third-trimester fetuses can feel pain in some morally relevant manner.⁴

Apart from the existence or not of fetal pain, there are other things about the fetus that may have normative significance. According to Koch (2009), “Exposure to maternal speech sounds in the muffled confines of the womb enables the fetus to pick up statistical regularities so that the newborn can distinguish its mother’s voice and even her language from others.” More than this, newborns recognize music they were exposed to in utero, and even respond differently when wrong notes are introduced into the original song (Partanen et al. 2013). Now, even if we elect to characterize this capacity as “primitive,” “automatic,” “unconscious,” or the like, it still demonstrates some form of memory and learning.

Moreover, the nervous system and other key organs of the fetus are well-enough developed at the start of the third trimester that with appropriate

⁴ A useful overview of the conceptual and empirical obstacles that prevent firm conclusions about the question of fetal pain is found in Derbyshire (2010).

medical intervention it can survive outside the womb, with an excellent medical prognosis.⁵ This fact at least invites the question why, if it is forbidden to kill a slightly premature baby once born, it is permissible to kill the same being while in the womb.

Accordingly, by any reasonable measure, a third-trimester fetus is no longer a mere “clump of cells.” At this point, it is a radically more evolved, sophisticated, “purposeful,” and recognizably human organism. I do not claim to have produced a fully worked-out theory regarding the moral status of the fetus at various stages of development, but I do contend that it is highly plausible that any physiological differences between the late third-trimester fetus and the newborn are morally irrelevant.

Against such considerations, Narveson makes the following three-step argument: (a) the answer to the question of who has rights depends on identifying “what it is about people that makes it plausible to extend to them the *intrinsic* rights that we (most of us) think they have”; (b) the correct response to the question just posed is only “rational beings sufficiently well developed to understand the terms of [Narveson’s social contract]”; and (c) the fetus is utterly without this capacity. Therefore, as he puts it, abortion cannot be murder, because “no such person exists as yet, and so no person has been deprived of his life” (2016: 279, 283; emphasis in original).

Before analyzing this argument further I pause to observe that Narveson must hold a copyright on the term “intrinsic rights,” as it appears not a single time in the *Stanford Encyclopedia of Philosophy*. I infer that his use of “intrinsic” is intended to convey the idea that there are certain facts or features about the contractors that warrant the attribution of “intrinsic” rights to them. As far as I can ascertain, Narveson presents no reason why we should accept this claim. But, in any case, there are competing ethical principles.

For example, utilitarians might assert that people, and not inanimate objects, have certain rights because the former can experience pain, while the latter cannot. This view holds that the wanton infliction of pain on unwilling persons does, under most circumstances, violate an objectively valid moral rule and thus may justly be coercively deterred and punished. For natural-

⁵ Neil Marlow, a neonatologist at University College-London Hospital and one of the authors of the EPICure studies (large-scale, longitudinal investigations of survival rates and health outcomes for extremely premature neonates), states that “we found that babies born at 27, 28, 29 weeks, which had really high mortality rates when I was doing the first study [1995], are now doing well and living normal lives” (quoted in Salter 2014).

rights theorists, personal autonomy (or the like) has intrinsic value and therefore imposes constraints on how individuals may be treated.

Narveson, it seems, would deny that he assumes any ethical principle. Like the alchemists of yore, he attempts to transform the lead of self-interest into the gold of moral value: “the most important thing to emphasize about the contractarian approach is that it hopes to *generate moral principles for societies out of nonmoral values of individuals*” (1988: 166, emphasis in original). Accordingly, for Narveson, apparently it is not the intrinsic properties of the social contractors that ground their intrinsic rights. Rather, they receive robust (negative) rights because this ensures them the widest scope of permissible conduct. We should, Narveson says (1988: 181), be willing to “sign up for a social contract allowing each to be whatever she may wish to become, provided only that she respect the right of all others to do likewise.”

I will not here pause to consider whether this attempt at deriving “ought” from “is” is successful. Instead, I note that as Narveson acknowledges (2016: 280), if it should unexpectedly turn out that granting even what he terms indirect rights to third-trimester fetuses would be in the self-interest of the contractors, this should be legislated by them. And, indeed, pro-life advocates have made just such a claim, arguing that abortion on demand diminishes respect for all human life, leading to a higher frequency of child abuse, more violence, and other serious social problems (Life Resources Charitable Trust 2011). I find such utilitarian arguments highly suspect, but it remains true that if abortion on demand does have a net negative impact on the contractors, they should enact restrictions.

If they do, I think the pro-life movement would scarcely care whether they march in under the banner of “intrinsic” or “indirect” rights—and neither should we. The question at hand is whether basic libertarian principles dictate an abortion-up-until-the-moment-of-birth stance. If there is a plausible argument against this position within Narveson’s scheme, even on the basis of what he calls indirect rights, then his claim has been falsified.

In any case, as discussed more fully below, it is perfectly natural for Narveson to assume his contractors would not wish to be inconvenienced by the moral demands of nonpersons: fetuses and newborns alike. The implication of this stance is that parents are seemingly incapable of criminally wronging their infants, regardless of how prolonged or horrific this abuse may be. Narveson (1988: 269) keenly appreciates the need to address this concern: “Among our strongest duties, surely are our duties to help distressed kids, and indeed to be willing to go to a considerable amount of trouble to do so. It would, as I say, be an embarrassment to the theory were it unable to underwrite these feelings.”

Thus he attempts to draw a line between the about-to-be-delivered fetus on the one hand, and newborns/infants, on the other: “There is, in fact, a major difference between fetuses and newborns, as every parent knows. Even young infants begin to have some of the features that identify one as a person and not just a clump of cells” (Narveson 2016: 280). However, I do not see why, within the confines of his theory, having “some of the features” should matter at all, as the third-trimester fetus and infant are exactly alike in utterly lacking the capacity for social bargaining.⁶ Therefore, it seems undeniable that if the fetus is entirely without intrinsic rights, the newborn and infant must be as well. In fact, unless they happen to be little Saul Kripkes, even children at the end of their elementary school education have so little knowledge of world history, psychology, economics, social science, and political theory as to be completely unfit social contractors.

Perhaps to fend off this repugnant conclusion, Narveson hopefully observes (2016: 281–82) that a concerned public “might” opt to legislate protection of some sort to young children as a means of “self-defense, broadly construed,” since neglected kids “will before long become juvenile delinquents, menaces to their neighbors.” However, this comment occurs against the backdrop of his prior remark (2016: 280) that “libertarians... (rightly) deny that ‘society’ has any business coercing individuals for any purpose than mutual protection.” In the end, Narveson (2016: 282) takes no stand on whether a libertarian society would adopt laws safeguarding young children.

Nevertheless, I believe it is clear that Narveson’s theory cannot support government intervention to shield newborns, infants, and young children from even the most dreadful abuse by their parents. First, societal “self-defense, broadly construed” does not apply to an entire range of cases where children are simply murdered before reaching the age that qualifies them for contractor status, or are terribly mistreated but then isolated by their parents from the rest of society during their adult lifetimes. In such circumstances it appears that the state is impotent in the face of monstrous evil.

Second, even in those cases where society’s right of self-defense might reasonably apply, Narveson would need an argument showing that the state’s interest in this matter would override the property rights that parents hold in their offspring. And this intervention would be inherently speculative since there can be no certainty that an abused infant will grow up to harm others in adulthood. If Narveson holds that a community’s right of self-defense

⁶ Narveson acknowledges (1988: 270), as he must, that “infants are not rational creatures eligible for participation in the social contract.”

justifies legal action in such circumstances, then it must be said that the state has comparable concerns regarding a great many other matters that libertarians rightly believe are not justly subject to collective action. If I were inclined to play the “libertarian purity” card, I would lay it on the table now.

Third, we should remain unsatisfied even if Narveson could somehow persuade us that his system would protect newborns. Surely, we do not object to parents’ torturing their infants out of our fear of what the victims may become, but because torture is a monstrous injustice. We are, after all, outraged even at the thought of animals suffering such cruelty. Admittedly, this is not a formal argument, but perhaps there are some truths that are self-evident.

Most people, and I daresay even libertarians, will rightly find the sanction of parental infanticide and abuse to be deeply disturbing, and sufficient to undercut the credibility of Narveson’s contractarianism. Apparently to soften the instinctive horror we might feel, Narveson asserts without citation that “even today in places like America, the penalties meted out for such activities [killing newborns] are far smaller than penalties for killing more well-developed children” (Narveson 2016: 281).

However, assuming this claim is accurate, it is almost certainly explained by the fact that a significant percentage of the defendants charged with murdering newborns suffer from postpartum depression, a serious medical condition that is implicated in a substantial portion of maternal infanticides (Spinelli 2004). Persons suffering from this illness would more likely be charged with lesser degrees of homicide or be able to strike more favorable plea-bargains than “typical” murder defendants, and would therefore tend to receive lighter sentences. Accordingly, Narveson’s observation simply has no bearing on the moral status of infants.

If our moral intuitions are insufficient to establish at least a weak and fallible presumption of FMS for newborns,⁷ Marquis’s future-value-of-life analysis may fit the bill. A healthy newborn is, barring some catastrophe, a future rational agent with an entire lifetime of joy and sorrow in front of it. While it is true that infants cannot appreciate or assert their right to life, neither can persons asleep or in a reversible coma. Nevertheless, homicide laws are routinely applied in such cases as we rightly impute to such individuals the desire to live. I see no reason why a similar attribution should not be made on behalf of newborns.

⁷ For probably the most fully developed argument for ethical intuitionism, see Huemer (2005). For a trenchant critique of this idea, see Frederick (2016).

The critical point here is that Narveson's stance on infants also impugns his position on third-trimester abortion in that he has no credible way of distinguishing the two types of cases. The same three-step argument he makes with respect to the impossibility of murdering a fetus also shows that it is impossible to murder a newborn, since it also plainly lacks the "defining properties" of personhood. And because, as argued above, Narveson cannot consistently hold that unwanted newborns, but not late-stage fetuses, enjoy indirect rights, he is put to the hard choice of either permitting parental infanticide or allowing that third-trimester fetuses may also have moral status (based on the features they share with newborns).

This is the rock on which most extreme pro-choice theories run aground. It is impossible, it seems, to formulate an argument that permits third-trimester abortion on demand without also excusing infanticide (see Friedman 2015: 158, 238n23). Thus, Narveson's contractarianism is either implausible for most libertarians or does not exclude pro-life arguments.

I turn now to the ethics of abortion from the perspective of noncontractarian libertarian theories. In his review of Loren Lomasky's *Rights Angles*, Matt Zwolinski observes that libertarian philosophers have "long been divided into two main camps." In his taxonomy, these consist of natural-rights proponents and consequentialists. He notes that "among academic philosophers, the uncontested champion of this [natural rights] camp is Robert Nozick, though Ayn Rand and Murray Rothbard have remained popular 'outsider' favorites." With respect to the consequentialists, he writes that "Richard Epstein and David Friedman head up the moderate and more radical factions, respectively."

I will devote most of my analysis in this section to the natural-rights perspective, which I endorse and with which I am more familiar and comfortable. I will simply note here the provocative consequentialist argument against abortion made by libertarian economist and social theorist Bryan Caplan.⁸ He claims that "the utilitarian case against abortion seems very strong" because of the asymmetry that exists between the temporary distress experienced by an unwilling mother and "the *lifetime's* worth of utility the unwanted child gets to enjoy if he's carried to term" (Caplan 2015; emphasis in original).

⁸ Caplan is not a utilitarian, and offers this analysis to illustrate the implications of what he regards as an implausible moral theory. However, as he observes, many utilitarians would be willing to bite this bullet.

Caplan cites empirical data to support this stance, including the fact that most people are glad to be alive; that the reluctant mother will most probably not have to actually raise her child since there are waiting lists for adoption; that “unwanted children often *become* wanted by their birth mother once they’re born”; and that “women who just miss the legal cutoff for abortion seem to quickly recover emotionally” (Caplan 2015; emphasis in original). This proposal obviously has unexplored complications such as whether it might promote aggregate utility at the expense of average well-being, and what to make of the results if it does. Nevertheless, especially if restricted to third-trimester abortions, which would limit the disutility experienced by the mother, it seems Caplan has identified a perfectly plausible pro-life argument grounded in consequentialist principles.

With respect to natural-rights libertarians, it is to be expected that those who believe that the fetus (or even zygote) has FMS should take a pro-life stance. Indeed, a number of libertarian philosophers, journalists, bioethicists, public intellectuals, and politicians hold that, absent a grave threat to the mother’s life, abortion is indistinguishable from any other unexcused killing of a human being and thus a violation of the nonaggression principle or the fetus’s right of self-ownership.⁹ These include the philosophers and bioethicists associated with the group Libertarians for Life (e.g., Gordon 1999 and Irving 1999), Edward Feser (2004),¹⁰ Nat Hentoff (1986), Judge Andrew Napolitano (2012), and Ron Paul (2008: 59).

Walter Block, an economist and libertarian theorist, has staked out an intermediate position known as evictionism. He argues that from conception onward the zygote/fetus has FMS but becomes a trespasser, and thus subject to removal, at such time as the mother decides she no longer wishes to continue the pregnancy. However, he holds that “if and when medical science allows us to devise a method of abortion that does not kill the fetus (this has already come to pass in some limited cases) then, all other things being equal, it *would be murder* to abort in any other way” (Block 1978; emphases in original).¹¹

⁹ Ayn Rand was staunchly pro-choice, but her reasoning on this subject can best be described as flimsy (see Friedman 2015: 159–60).

¹⁰ Feser (2004: 103) argues that since young children and the mentally disabled are rightly regarded as self-owners, “an eight-month-old fetus cannot plausibly be denied self-ownership status; self-ownership cannot plausibly depend on whether one is two inches this side of the womb.”

¹¹ Block holds that the mother need not make any financial sacrifice to preserve the life of the fetus. But provided that others are willing to bear such costs, Block’s proposal

Nozick's theory of natural rights is noncommittal on the abortion controversy. His *Anarchy, State, and Utopia* identifies rational agency as the quintessential attribute that requires the ascription of libertarian rights to persons. Briefly, rational agents are entitled to a special dignity because they alone (so far as we know) are able to understand and conform their conduct to the moral law and to guide their lives according to values of their own selection (1974: 48–49). The existence of this attribute provides the best explanation of why it is wrong, by objective moral standards, to harm innocent persons.¹²

If rational agency is the source of our distinctive value, the appropriate moral response by others is noninterference, which Nozick famously expresses in his notion of “side constraints” (1974: 28–30). It is true that for Nozick, like Narveson, only competent adults have the life experience and cognitive capacity for rational agency. However, unlike Narveson, Nozick's libertarianism is not derived from the nonmoral self-interest of imaginary social contractors, but from what he takes to be moral facts.

In this regard, it should be understood that Nozick's theory of justice is a self-consciously political doctrine delineating the legitimate boundaries of state action and not a comprehensive schematic of human virtue and vice. This is made quite clear in the first two sentences of *Anarchy, State, and Utopia* (1974: ix): “Individuals have rights, and there are things no person may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do.” Thus, for Nozickians, normative considerations other than those giving rise to libertarian rights may require legal protections for potential persons: late-term fetuses, newborns, infants, and so on.

Arguments along these lines, including that the features of the third-trimester fetus, coupled with potentiality, warrant FMS, must therefore be assessed on their own merits. Nozick himself, in *Philosophical Explanations*, appears open to the potentiality argument for fetal rights when he offers an account of how ethical truths are possible in a world comprised exclusively of material things. He posits the existence of a “value-seeking I,” and explains that this characteristic is a “capacity or potentiality—infants and unconscious

would at this time prevent the killing of any fetus roughly twenty-three weeks or more after fertilization. Block's characterization of the unwanted fetus as a “trespasser” has been challenged by Jakub Wiśniewski and defended by Block in a series of papers. See Wiśniewski (2010a); Block (2010); Wiśniewski (2010b); Block (2011a); Wiśniewski (2011); Block (2011b); and Wiśniewski (2013).

¹² For a much fuller exposition of Nozick's argument, see Friedman (2011: 16–29).

people have it” (Nozick 1981: 457–58). He expressly declines to address “all the delicate questions about when the capacity first is present (in fetuses?), when it is destroyed... and so forth.”

It is perhaps worth stressing again that my purpose is not to take sides in the abortion controversy. Rather, it is simply to show that no particular policy prescription follows ineluctably from libertarian first principles. Essentially, in my judgment, natural-rights libertarianism—as a political theory—has nothing useful to say about the key question, fetal moral status.

In conclusion, there is conceptual space within Narveson’s contractarianism for a prohibition of late-term abortions based on what he calls indirect rights. If he accepts this as a plausible policy position, it refutes his claim that there exists an orthodox libertarian abortion ethics. I expect he will reject this possibility.

However, a policy of abortion on demand until birth urgently invites the question: what about newborns? Within his framework Narveson cannot credibly distinguish the morality of third-trimester abortions and parental infanticide, leaving him with no intellectual resources with which to condemn the latter. This renders his theory implausible for most of those libertarians holding competing moral theories. On the other hand, were he to favor a prohibition on parental infanticide, this would open the door to pro-life arguments based on the evident similarities between the late-stage fetus and newborn child.

In any case, there are alternatives to Narveson’s contractarianism that not only uphold libertarian rights but do not endorse parental infanticide and do not imply unconditional abortion rights. Sadly, libertarianism appeals to only a small slice of the electorate. Thankfully, there is no good reason to shrink its influence further by repelling those holding pro-life views.

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