

Viability

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I

Most people believe that while any abortion is regrettable, an abortion in the late stages of pregnancy is more so than one in the earlier stages. Many who are not seriously troubled by the thought of an abortion performed during the first weeks of pregnancy are very uncomfortable with the idea of an abortion performed in the last week. Nevertheless, it is difficult to feel wholly comfortable with any of the suggestions that have been made as to how far into a pregnancy a line should be drawn between when an abortion is easily justifiable, and when strong reasons are necessary to justify it.

For the purpose of this discussion, I will define an abortion as a procedure which intentionally brings about the premature termination of a pregnancy, except when that termination is intended to protect the health of the fetus. In keeping with the way in which the term 'abort' is used in other contexts (i.e. an aborted project, or mission), I will say that what is aborted is the pregnancy; thus, 'abortion' as used in this paper is short for 'abortion of a pregnancy'.

Perhaps the most often cited criterion for drawing the line between permissible and impermissible abortions is the viability of the fetus. However, many of us are uncomfortable with this criterion for the permissibility of abortion. Two main objections are usually given against using viability as such a criterion. First, it is far from clear why one's moral status should change as one develops the ability to survive on one's own — or, more accurately, as one develops the ability to survive independent of any *particular* person. It is objected that one's ability to survive on one's own has nothing to do with one's right to life; this appears to be a morally irrelevant factor. The second main objection is that the developmental stage at which a fetus becomes viable depends on the current state of medical technology, and it is unintuitive to claim that the current state of medical technology can have a bearing on the moral status of a being. How can it be that today a six-month old fetus has a right to life, while a fetus of the same age and developmental stage did not have this right twenty years ago? Surely a being's moral status should not depend on outside factors in this way.

Nevertheless, a careful consideration of the real moral significance of viability can be used to shed new light on the abortion discussion. In this paper I will present a new objection to using viability as a criterion for determining the permissibility of abortion. One of its advantages over the above-mentioned objections is that, whereas they bring us nowhere nearer to solving the problem that viability was proposed to solve, the objection that I will present does just that. There are, however, many other ethical and philosophical problems associated with abortion that this paper will not touch upon.

Before we go on, let us consider in more detail the two commonly cited objections to viability mentioned above. In pressing the first objection — that viability is not a morally relevant factor — it is common to cite cases in which fully developed persons are not viable, in the sense of being able to survive on their own, but in which we would not allow them to be killed. Thus, for instance, no one who has undergone major surgery is viable, in this sense, for a considerable time after the operation, nor are persons with many sorts of serious handicaps. But we are not prepared to say that such persons may be killed. On the contrary, we may well feel that we have a special obligation to protect and assist them. To take a specific example: Who would say that a brilliant researcher should be killed because she has become a quadriplegic as the result of an accident? (In fact, given the way we have all been spoiled by life in modern society, most of us may not be viable!)

Unfortunately, this objection appears to rest on an illegitimate interpretation of 'viability'. 'Viability,' at least as it is used in respect to fetuses, is not correctly understood as the ability to survive on one's own. If this is how the term were intended there would be absolutely no sense at all in talking about a fetus achieving viability: but, of course, there is. A fetus is viable when it has reached a stage in its development such that it can survive without its gestational mother; as a fetus it never reaches a stage at which it can survive without anyone to care for it.¹

Nevertheless, while the recognition that this is what is meant by 'viable' shows us that examples such as the ones used above are illegitimate, one might still argue that being viable, even in this more restricted sense of being able to survive without the assistance of another particular individual, does not add to one's moral worth. Surely, a being is no more or less worthy of a right to life in virtue of being viable in this narrower sense either.

The second objection — that the stage at which the fetus reaches viability changes with advances in medical technology — is related to the first in the following way: If viability itself were morally relevant, it would make no difference that the age at which viability is achieved changes. So for instance, if we believe that the ability to feel pain is a morally relevant feature, then if we discovered that fetuses were developing this ability earlier and earlier, the age at which they developed the ability would not be an issue, we would simply be concerned to know when today's fetuses are able to feel pain.

What this objection adds to the first, however, is a clearer appeal to our intuition that the moral status of a being should not be determined by factors outside of itself. When we use viability as a criterion for determining when abortions are permissible we are using a fact about the current state of medical technology to pick out a fetus at a certain stage of development. We might have thought that this criterion happened to pick out fetuses which had reached a special morally significant stage in their own development, but because technology picks out fetuses at different stages as it advances, it cannot be doing this. Thus, this second objection can be used to strengthen the first: viability does not affect the moral status of the fetus, nor does it direct us to a morally relevant stage in its development.²

Despite these objections, however, there is something to the idea that the viability of the fetus is relevant to a woman's decision to abort her pregnancy. After having considered the following objection we will be able to see what, after all, is right about caring about viability.

II

As we saw in the previous section, there is a spectrum of senses in which the term 'viable' is used. As it is most often used in discussions of abortion, a fetus is said to be viable if it is able to survive outside its gestational mother's womb. More precisely, the term 'viable' is often used as shorthand for 'at the age of viability': the age of viability being the earliest age at which any fetus has been known to survive outside its gestational mother's womb. Needless to say, a fetus which has just reached the age of viability (and thus is viable in this shorthand sense) will not usually be viable in the sense of being able to survive outside its mother. In what follows I will depart somewhat from this usual practice, and will take the age of viability to be the age at which a fetus is reasonably likely to be able to survive outside its mother.

How likely must it be that a fetus will survive outside its mother before we can say that it is reasonably likely to survive? This is a question that will have to be answered in much the same way that we answer other questions about the likelihood of death resulting from other policies and procedures. Governments create policies about speed limits, hazardous waste disposal, workplace safety, aid to poor families, and so on, knowing that these policies will result in a certain percentage of deaths. Presumably there will be a similar way to determine a standard in the case of viability.

It will no doubt be objected that it is not simply a matter of whether or not the fetus will survive the removal from its mother's womb. There is also the question of how severely the surviving fetus may be handicapped — physically, mentally, or both — by that removal. Again, governments legislate as to the 'acceptable risk' of

disability resulting from all types of hazards. This last objection suggests that we should further refine our definition. Finally, therefore, let us say that a fetus is viable when it is reasonably likely that it will survive outside its mother's womb without suffering a serious handicap as a result of its removal.

Now let us consider what we are really saying when we say that having an abortion after the fetus becomes viable is a more serious matter than having an abortion before it has reached viability. We seem to be saying that a woman is free to withdraw support from a fetus as long as this fetus is wholly dependent on her, but that as soon as it gains the ability to survive on its own (more accurately, as soon as it gains the ability to survive without her), she is no longer permitted to withdraw that support. Isn't it odd to give as a justification for requiring a pregnant woman to support a fetus the fact that it could be supported by others?³

Looking at the idea that the permissibility of aborting a pregnancy depends on the viability of the fetus in this way allows us to see that the suggestion seems almost backwards. (As long as it needs you, you are not responsible to it; when it doesn't need you any more, you are.) Does this mean that I intend to suggest that abortions should be more restricted in the early stages, and less restricted in the later? Should a woman be required to carry the fetus until it achieves viability, and then be permitted to have an abortion?

Before I explain my answer, let us step back for a moment and consider the moral distinction between abortion and infanticide. While some who argue for the permissibility of abortion find that regrettably, but for the sake of consistency, they must be willing to permit infanticide,⁴ most of those who argue for the importance of allowing a woman the freedom to have an abortion are not willing to allow infanticide. Those who argue for the permissibility of abortion while denying the permissibility of infanticide point out that once the child is born, and is therefore physically separated from the woman, the woman is able to avoid its needs and demands without killing it. This, they say, is the explanation for the fact that she is not permitted to kill the newborn child. In fact, even those who feel that they must allow infanticide often seem to find solace in the knowledge that most women would be content to give the child away rather than kill it.

Here, then, is my response to the earlier questions. A pregnant woman, just as any other woman, has the right to control her own body.⁵ Prima facie, that a woman has the right to control her own body means that she has the right to have a fetus taken from her body. In the early stages of pregnancy this necessarily means that the fetus will die, and so if the fetus has rights against the woman, it may be that her right is overridden and she cannot remove it. I have nothing philosophically interesting to say about this one way or the other. But, in the later stages of pregnancy, when the fetus is viable in the sense explained above, the woman has the right to have the fetus removed. That is, if there is no possibility that the fetus's possible right to life conflicts with the woman's rights, she should be free to exercise those rights and abort her pregnancy.

Thus, whether or not abortions ought to be permitted before viability, a woman should be permitted to abort her pregnancy once the fetus is viable. On the other hand, barring a significantly increased risk to her own welfare, in the latter stages of pregnancy a woman seeking to have her pregnancy aborted should consent to allowing the fetus to be removed in such a way as to preserve its life. By saying that a woman should consent to allowing the fetus to live I am not committing myself to the claim that once viability is achieved the fetus must be kept alive; that is a further question, the answer to which will depend on what is said about the justification of abortions in general.⁶ All I am saying here is that others should be permitted to care for the fetus, if they choose to do so. For instance, a biological father might choose to raise his child, or society might decide to allocate resources to caring for these children. Once a fetus has been removed from the body of a woman, her rights and responsibilities in regards to that fetus are no different from the rights and responsibilities of the biological father.' Nor, it seems to me, do these rights extend to demanding the death of the fetus.

Let us look at how this policy would apply to one of the most imaginative examples that has been presented in an article on abortion: Judith Jarvis Thomson's example of the famous violinist.⁸ Briefly: Thomson tells a story in which we are encouraged to imagine ourselves to have been kidnapped and hooked up to an ailing but famous violinist, in such a way that if we detach ourselves he will die. According to Thomson, our intuitions tell

us that while it may be admirable to consent to remain hooked up to the violinist until he is well and able to survive on his own, we are not obligated to do so.

So far, my intuitions agree with Thomson's. But let us make a change in her story. Let us say that there is one procedure to unhook ourselves from the violinist that will kill him, and another procedure that will allow him to live if someone else can be found to take care of him. Clearly, if one procedure is as easy as the other we have an obligation to choose the procedure that will allow him to live. (Notice that I have not claimed that we must remain hooked up to the violinist unless someone else will take care of him. I have only claimed that if there are others who are willing to care for him we should allow them to do so.)

What if the procedure that would allow him to remain alive is more difficult or painful than the other? It seems to me that unless there is a significant difference in the amounts of difficulty and/or pain involved, and provided that someone else is willing to be hooked up to him, we have an obligation to choose that procedure which allows the violinist to survive. Thus, I find that my intuitions in this case support the above suggestion.

III

With our discussion of viability in mind, let us look at the reasoning used by the United States Supreme Court in arriving at its decision in *Roe v. Wade*.

In arriving at its decision, the Court asserts that the State has certain interests in restricting a woman's access to abortion. The first interest cited is that of the physical welfare of the woman. However, as the Court acknowledges, as medical technology has advanced having an abortion has become less and less risky:

Consequently, an interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.⁹

Thus, while the State's interest in the health of the woman means that it retains an interest in ensuring that abortions are performed by qualified physicians using adequate facilities, it does not mean that the State can prohibit a woman from having an abortion on the grounds that the procedure places her at risk.

The second State interest cited is that of protecting the life of the fetus, insofar as it is a potential person (and citizen). On this issue the Court's opinion is that the State has an interest in preserving the life of the fetus, and that this interest becomes compelling when the fetus achieves viability:

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.¹⁰

But if the Court's argument for allowing restrictions on abortion rests on the State's interest in protecting the potential person, this can only mean that the State may use its power to protect the fetus. It need not follow from this that the State may impose responsibility for a fetus on any particular person. (Notice that the Court does not claim that the woman has a special obligation to the fetus, or even that the fetus itself has a right to life; the conflict is between the rights of the woman and those of the State.) Thus, according to the Court's reasoning, it does not follow that the State can prohibit a woman from having a fetus removed from her body after that fetus has achieved viability and the State can pursue its interest in other ways. To grant the State the right to protect a viable fetus is not the same as granting the State the right to require a pregnant woman to carry or subsequently care for that fetus. It never follows from the fact that the State has a certain interest that there are no restrictions on the ways in which it may protect that interest.¹¹

While the decision in *Roe v. Wade* talks about the State's interest in the life of the fetus, those who oppose abortion often talk in terms of the State's duty to protect this life. Unfortunately there is at least one passage in the decision that encourages the impression that talk of interests is translatable into talk of duties.¹² This is an erroneous impression. There has never been any question that the Court's decision allows the State to place

restrictions on abortions; it does not require such restrictions. From this it is clear that the Court does not hold that the State (or the woman) has a duty to protect the life of the fetus; legally, the fetus does not have any rights at all.¹³ On the other hand, the State presumably does have a duty to protect a woman's constitutional rights. Thus, it seems most consistent with the US Supreme Court's reasoning to conclude that while the State may require a woman to allow it to take care of her fetus, it cannot prohibit her from aborting her pregnancy once the fetus has achieved viability.

It might be argued that whether or not the State has, in fact, claimed that a woman has a responsibility to the fetus that she carries, she does, and that, moreover, it is a unique responsibility. But even if we grant that a woman has some sort of responsibility to a fetus, it would be extremely difficult to argue that her responsibility is unique. Even if it were argued that by engaging in sexual intercourse a woman knowingly risks becoming pregnant, and that in choosing to take this risk she must be responsible for the life she creates, this very argument shows that the man with whom she has had sexual intercourse is in precisely the same position. Thus, such a claim may provide the basis for an argument to the effect that the couple is jointly responsible for protecting that life, and so, perhaps, that they must pay for the facilities to keep the fetus alive if the woman is unwilling to carry it; it will not provide a basis for claiming that the woman must carry the child to term.

In fact, however, even if a couple is thought to have a special responsibility for a fetus, this responsibility cannot be so strong as to preclude the possibility of transferring that responsibility to other agents. Hardly anyone, as far as I know, has advocated the position that if a woman becomes pregnant she must not only bring the child to term, but must also keep the child after it has been born. Once the child is born, and is no longer essentially dependent on its mother, a prohibition on giving the child up for adoption is clearly undesirable. (Isn't the main alternative to abortion, suggested by right-to-life groups, giving the child up for adoption?) On what grounds, then, can it be argued that a viable fetus is the non-transferable responsibility of its biological parents?

In saying that the parents do not have a non-transferable responsibility, I have not ruled out the possibility that they have a transferable one. Certainly, parents have a transferable responsibility for their children. This responsibility is temporarily transferred when they hire a babysitter, or permanently transferred if they give their children up for adoption.¹⁴ In either case the parents are responsible for seeing to it that their responsibility is properly transferred. If this is the correct analogy, then it would seem that a couple must make certain that the fetus which the woman plans to have removed will be cared for.¹⁵ But another analogy can be made with our attitudes about one's moral responsibility towards unwanted kittens. While hardly anyone would consider it morally permissible to drown a kitten someone else has volunteered to care for, many consider it morally permissible to drown kittens when no one can be found to take responsibility for them. Which, if either of these, provides a proper analogy for our moral responsibilities towards viable fetuses can only be answered once we've taken a stand on what does, or does not, justify abortion in general. As noted above, I have not done this.

IV

Here is the final position advocated by this paper: Perhaps abortions should be permitted up until the fetus achieves viability. We have not touched on this. After that point a woman is definitely free to choose to abort her pregnancy when others are willing to care for the fetus which will be removed. It may also be that it is permissible for a woman to abort her pregnancy even if no one will care for the removed fetus. Whether or not this is permissible depends on the ultimate justification for permitting or forbidding pre-viability abortions. Again, pre-viability abortions have not been the topic of this paper.

Surprisingly, we have arrived at a conclusion that can give both those who hold the pro-choice position and those who hold the pro-life position more of what each claimed to want. It's interesting to note that each side defines itself in positive terms, in terms of what it values, and that neither claims to want the opposite of what the other wants. That is, the pro-choice side insists on the right of a woman to control her own body, and usually admits regretting that this will sometimes mean that the fetus is killed; while the pro-life side insists on the fetus's right to life, but regrets that upholding this right infringes on some of the woman's rights. Thus, each side

thinks of itself as insisting on the upholding of a value (or right) that is, unfortunately, in conflict with the value or right insisted upon by the other side. But what we have just seen is that this need not be true; at least, it need not be true once viability is achieved.

Moreover, we can now see medical technology as part of the solution, rather than as adding to the problem, at least theoretical ly.¹⁶ In the past, advances in medical technology have often widened the gulf between those who declared themselves to be pro-choice, and those who declared themselves to be pro-life. When abortion was a dangerous option it was not a choice to be actively sought, and in making abortions safer the medical community has seemed to some to have created a demand for something that should not be demanded. On the other hand, those with a moderate view on abortion, those who felt that abortion should be permissible until the fetus became viable, have been pushed closer to the pro-life position, as medical technology has brought viability closer to conception. On the position I have been suggesting, advocates of both positions should welcome all of these medical advances. When (and if) it becomes possible to safely remove a fetus any time after conception there will be no argument against allowing a woman the freedom to do this.

Notes

- 1 Joel Feinberg has pointed out to me that there is a whole spectrum of senses in which the term `viable' is used. These range from the definition that is used in the argument just discussed, unable to survive without assistance; to the definition according to which a fetus is said to be viable when it can survive outside its gestational mother's womb. Two intermediate senses are: (a) a fetus is viable when it can survive outside any natural womb, and (b) a fetus is viable when it can survive outside any natural or artificial womb. I believe that in discussions of abortion a fetus is generally considered to be viable as soon as it can survive outside its gestational mother's womb.
- 2 It might be argued that our responsibilities are determined, in part, by our abilities, and thus that our responsibilities to fetuses increase as our technology develops. Notice, however, that it is an impossibly circuitous route from here to the claim that viability is the proper cutoff point for abortions. *If* abortion is impermissible as long as we have the ability to preserve the life of the fetus, then *all* abortions will be impermissible since, by hypothesis, the fetus will survive as long as we simply refrain from performing the abortion. In this case, our level of technology is irrelevant.
- 3 Francis Kamm makes a very similar point in her book *Creation and Abortion* (New York: Oxford University Press, 1992).
- 4 For example: Michael Tooley, 'A Defense of Abortion and Infanticide', in Joel Feinberg (ed.), *The Problem of Abortion* (Belmont, CA: Wadsworth Publishing Co., 1973), pp. 51-91, and Mary Anne Warren, 'On the Moral and Legal Status of Abortion', including postscript, in Richard Wasserstrom (ed.) *Today's Moral Problems*, 2nd edn (New York: Macmillan, 1979), pp. 35-51.
- 5 Just as with any other woman, it may sometimes be the case that a pregnant woman's right to control her own body comes into conflict with the rights of others. I will leave it open whether or not the fetus has rights that might come into conflict with its mother's.
- 6 If, for instance, abortions are justified on the grounds that fetuses do not have a conscious desire for a future, then the fetus's removal is permissible even if it is certain that this removal will result in its death. On the other hand, if abortions are unjustified on the grounds that a fetus has a future like ours, then the permissibility of removing a fetus may be contingent on seeing to it that other means are provided for ensuring its survival.
- 7 This is true in the normal case, but not in every one. For instance, men who donate sperm to a sperm bank do not have the responsibilities that the typical biological father does. Also, one might well argue that a woman who becomes pregnant as the result of rape has fewer responsibilities towards her child than does its father.
- 8 Judith Jarvis Thomson, 'A Defense of Abortion', *Philosophy and Public Affairs*, 1(1) (1971), pp. 47-66.
- 9 United States Supreme Court, 410 U.S. 151. On January 22, 1973, the US Supreme Court declared unconstitutional a Texas statute that restricted legal abortions to those deemed necessary to save a woman's life. The Court found that the right of privacy implied in the Fourteenth Amendment encompassed a woman's right to terminate her pregnancy, although they did not find this to be an absolute right. The Court ruled that in the later stages of pregnancy a state's legitimate interest in protecting the life of the mother and in preserving the potential life of the fetus might override the woman's right to make her own decision regarding an abortion. According to the Court's final ruling, in the first trimester of a pregnancy the abortion decision must be left to the woman and her doctor. In the second trimester the state may restrict abortions, but only so as to protect the woman's health. In the third trimester the state may restrict abortions, but only so as to protect the woman's health. In the third trimester the state may regulate and even proscribe abortions both in order to promote the state's interest in the life of the fetus, as well as to protect the woman's health.
- 10 *Ibid.*, 163.
- 11 Sometimes this may even mean, in effect, that the State cannot pursue an acknowledged interest. For instance, the financial cost of pursuing that interest may be prohibitive. Thus, even if the State does not have the resources to support unwanted fetuses, it will not necessarily follow that it can require a pregnant woman to carry her child to term.
- 12 'The third reason is the State's interest — *some phrase it in terms of duty* — in protecting prenatal life. ... The State's interest and *general obligation* to protect life then extends, it is argued, to prenatal life' (*ibid.*, 151, my emphasis).
- 13 'All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth

Amendment, does not include the unborn' (*ibid.*, 159).

14 I owe this example to an anonymous referee.

15 Note that there is at least a legal disanalogy here. The Court recognizes that children have rights, and has assigned responsibilities to parents in regards to their children. On the other hand, as noted above, it does not recognize any rights of a fetus.

16 While I would like to be able to say that the prospects look good for continuing advances in reducing the age of viability, many in the medical profession doubt that technology will advance so as to allow fetuses to become viable at an earlier age than they now are.