

DOES THE FOETUS HAVE A RIGHT TO LIFE?

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Introduction

Here, I sketch the outline of a formal argument for the conclusion that foetuses have a serious right to life. This is part of a fuller paper defending various assumptions in greater detail, but for reasons of space I will have to defer (via endnotes) defences of these assumptions. Unique aspects of my argument include the technical formalisation using the probability calculus, and an important discussion of how to deal with uncertainty regarding relevant philosophical debates – in particular, debates regarding diachronic identity and what confers a serious right to life.

What confers a serious right to life?

The first question that arises is: what confers on a substance the serious right to life?¹ I take it that this property is not primitive or inexplicable: substances do not just *have* a serious right to life. It is most plausible that they have it in virtue of possessing some other property. Various candidates for such an explanatory property have been proposed. For example: being a human being, being a person, being an independent organism, having sufficiently complex conscious experiences, having a particular relation between conscious experiences, and so on. It is perfectly possible that the fact that these properties confer rights is itself explained by another, more fundamental property. It is also possible that our serious right to life is explained by a further property currently unknown to us. Call the hypothesis that being a human being confers a serious right to life H_H . Call the hypothesis that it is some other known and advocated property which confers a serious right to life H_K . Finally, call the hypothesis that it is an unknown property which confers a serious right to life H_U . The probability of the disjunction of these theories, given our evidence (E_1) that at least some humans have a serious right to life and that there is a property they have which accounts for this, is 1.² In an assumption generous to the pro-abortion advocate, I will assume also that there is only one such property which confers a serious right to life.³ This means that H_H , H_K and H_U form a partition under E_1 : it follows that that $P(H_H \vee H_U \vee H_K|E) = 1$ and that $P(H_H \vee H_U|E) = 1 - P(H_K|E)$. We would like to know the relative probability of each of these theories.⁴

Now consider some more evidence, viz. that all humans on which we are generally agreed – postpartum humans – have a serious right to life. This is not dependent on race, gender, or anything else. Newborns have a serious right to life, as do fully grown adults. Or, if even that is too controversial, one could adopt the premise that blind people have just as serious a right to life as people with sight (my argument will be stronger or weaker depending on which premise one adopts, but it will work even with such a weak premise as this). We also have the evidence of many of the foremost humanitarian movements – the abolition of infanticide, the slave trade, and apartheid – and the premises they were built on. Call this evidence E_2 . This is exactly what

we would expect to find given H_H . So H_H is significantly confirmed by this evidence. What about the hypothesis H_K ? Here, we need to consider whether this evidence would be predicted by the subhypotheses in the probability space under H_K . It is difficult to see how any of these subhypotheses could do a good job of explaining the data.

Let me briefly consider some examples. Suppose independence conferred a serious right to life. Then not only would all sorts of strange inanimate objects have serious rights to life, but many dependent humans would no longer have serious rights to life – the very young, the very ill, and the very poor, for example. But these are people we normally think of as giving us an obligation to provide extra support, let alone people whom it is permissible to kill for reasons of convenience. So this subhypothesis does a poor job of explaining E_2 .

Suppose instead that the serious right to life is dependent on a sufficiently complex conscious experience. What forms could this kind of hypothesis take? One could say that a right to life is globally gradable according to mental opulence: that is, that there is a simple, linear relationship between mental opulence and the right to life. But our evidence is that blind people, drowsy people, and cultural Philistines have just as much of a right to life as those with sight, the alert, and the enlightened. So this seems implausible.

Perhaps the right to life is gradable according to the extent to which conscious life is present pre-term, but normalised postpartum (or at some other point). But this would be an irremediably complex and ad hoc theory, and so has no great antecedent probability.⁵ There seems to be no great motivation for it other than to preserve the moral permissibility of abortion and to preserve the fundamental beliefs about universal, inclusive human rights which we have. And if there were to be an explanation for why the right to life was normalised after birth (or some other point), then it would seem to depend on some other criterion about what confers the right to life, and it would seem that conscious experience is no longer the property we are really interested in.

Perhaps the right to life is not gradable at all: rather, a particular kind of conscious experience is sufficient and necessary for a serious right to life. But it is hard to see what this could be. If it were a very simple kind of conscious experience, then presumably it would have to be a very simple sort of quale, like the percept of a red pixel. But not only would this demonstrate that most foetuses (even at a relatively early age) have a serious right to life; it also seems prima facie implausible that having a percept of a red pixel, for example, could have the power to confer a serious right to life on something.

Perhaps, instead, a particular kind of very complex conscious experience is necessary. But this is also implausible: firstly, there is no reason to think it has any great antecedent probability. Why should a particular kind of consciousness be that which confers value? Secondly, any sufficiently complex criterion would presumably rule out the severely mentally ill, and perhaps even those who are asleep or under anaesthetic. Thirdly, the problem of traversing the boundary, where a substance goes from having absolutely no kind of right to life to having a serious right to life in the same way as you and I, renders this view improbable. Fourthly, there is a problem

understanding what it is about consciousness that confers value, particularly when we think about the timing of conscious experiences. It is incredibly implausible that *having had* a conscious experience is the rights-conferring property. Consider two substances, both of which have an exactly similar future, but one of which has had a quale previously, and the other of which hasn't. It is incredibly intuitively implausible that one of these has a serious right to life while the other does not. But this is apparently what is needed to deny fetuses a right to life while giving adults a right to life. Perhaps the reason consciousness is relevant is because killing a substance denies it valuable conscious experiences in the future. But this plays into the anti-abortion advocates hands: after all, fetuses are equally deprived of future conscious experiences when they are killed, so even according to this criterion, it would seem that fetuses have a serious right to life.⁶

Independence and consciousness are two of the foremost subhypotheses under H_K , and they do a poor job of both being priorly probable and explaining the data we have. So $P(H_K|E)$ is very low. I think that $P(H_K|E)$ is much lower than 0.1, but I will grant the generous concession that it is as high as 0.1 anyway, so as not to be accused of being uncharitable.⁷ 0.1 may be seen as an upper bound for $P(H_K|E)$.

It is difficult to appraise $P(E|H_U)$, since H_U represents a disjunction of an infinitely wide range of theories about which property confers the right to life, most of which are unknown. But we can say something important about the composition of H_U and how the probabilities of its various disjuncts are affected by E . H_U is a sort of agnosticism regarding what confers a serious right to life on substances. Perhaps the search for such an account is so far fruitless, or even misguided completely. H_U is not very popular – perhaps because it is often thought that if we concede H_U , we can say virtually nothing about important ethical issues such as abortion. This probably arises from the false impression that we can only build a case for a substance having rights if we can demonstrate what the important rights-conferring property of substances is. But this is false. After all, we can still give *evidence* that something has a certain property or a certain right by noting other public properties it has which are correlated in certain ways with that property or right. For example, I can have evidence that a person is a girl even if I do not know what it is that makes that person a girl.

Similarly, we may use paradigm cases to note certain correlations between having a serious right to life and having some other property, the observation of which may then be instructive in non-paradigm cases. Indeed, we need to do this the whole time, even if only implicitly: when we come across a substance the destruction of which would be convenient, we may need to observe certain properties to give us evidence that it is a substance of a kind which cannot justifiably be killed. If (I think) I am about to conduct an autopsy and hear screams saying, 'don't kill me!', then I have good evidence that I am dealing with a substance right to life, even though I do not necessarily know what confers that right to life.

One obvious candidate for such an evidential property in this case is the property of being a human being. While an abundance of other features – race, gender, cognitive capacity, age, and so on – vary substantially, yet there is an obvious common core to those paradigm,

uncontroversial cases: the fact that they are all human beings. Considered as a theory, the theory of our shared humanity has been one of the most successful moral theories of the modern world. Many of the foremost activists and moralists of our times have critiqued oppressive and immoral systems on the basis that they degrade our fellow humans. And the notion of human rights has been central to most efforts to improve the status of the world. Movements to abolish infanticide, the slave trade and the Holocaust were all predicated on our common humanity.

Now suppose being human had nothing at all to do with having serious rights – that it does not even count as relevant evidence. Then it would be the case that all the great moral heroes of our age have been heroes by sheer accident, on the basis of a completely misguided moral principle. If this seems implausible, then it is surely because being a human being is so strongly correlated with having serious rights that something's being a human being is very good evidence that they do indeed have serious rights.

This point demonstrates that the anti-abortion advocate is not even committed to the thesis that it is being a human being which constitutes having a serious right to life.⁸ As long as being a human being is good evidence of having a serious right to life, then the argument may go through.

Do all human beings have a serious right to life?

What are the formal implications of this correlation, and the fact that other known properties (e.g. cognitive capacity) seem to correlate much more poorly in paradigm cases? The implications are that the evidence affects different disjuncts of H_U differently. Those disjuncts which predict the evidence we have involve those properties which are correlated strongly with being a human being, while those disjuncts which are not so correlated predict the data poorly. It follows that the probability space under $H_U \& E$ is dominated by those theories which specify properties strongly correlated with being a human being.

This allows us to appraise a new probability, the probability that all human beings have a right to life (H) given our evidence, and given that either H_H or H_U is correct.

$$\begin{aligned}
 P(H|(H_H \vee H_U) \& E) &= P(H|H_H \& (H_H \vee H_U) \& E) \times P(H_H|(H_H \vee H_U) \& E) + P(H|H_U \& (H_H \vee H_U) \& E) \times \\
 &P(H_U|(H_H \vee H_U) \& E) \\
 &= P(H|H_H \& E) \times P(H_H|(H_H \vee H_U) \& E) + P(H|H_U \& E) \times P(H_U|(H_H \vee H_U) \& E)
 \end{aligned}$$

$P(H|H_H \& E)$ is 1, since H_H entails H . $P(H_H|(H_H \vee H_U) \& E)$ is also fairly high, since H_H predicts E_2 much better than does H_U . For the reasons I have given, $P(H|H_U \& E)$ is also very high, since E_2 causes the probability space under H_U to be heavily dominated by those theories involving properties heavily correlated with being a human being. Supposing this correlation is not entirely spurious, it is probable that all human beings have a serious right to life, not because being a human being confers a right to life, but because it is very strong evidence that that

substance has the property which does confer the right to life. Let $P(H|H_U \& E) = 0.9$. Again, I think this is a generous concession.

It follows from all this that $P(H|(H_H \vee H_U) \& E)$ will be somewhere between 0.9 and 1 depending on the value of $P(H_H|(H_H \vee H_U) \& E)$. As another concession, I will say that $P(H_H|(H_H \vee H_U) \& E) = 0$, so that $P(H|(H_H \vee H_U) \& E) = 0.9$.

At this stage, we may put together the first two parts of my argument. Here, we must weight the probability of H given our theories of rights-conferral according to the probabilities of our theories of rights conferral themselves:

$$P(H|E) = P(H|(H_H \vee H_U) \& E) \times P(H_H \vee H_U|E) + P(H|\sim(H_H \vee H_U) \& E) \times P(\sim(H_H \vee H_U)|E)$$

I argued previously that $P(H_K|E) = 0.1$. It follows that $P(H_H \vee H_U|E) = 0.9$. $P(H|(H_H \vee H_U) \& E)$, as I have just argued, is also 0.9. so $P(H|E)$ is at least 0.81. The second addendum deals with the probability that all human beings have a right to life given $H_K \& E$. This will be non-negligible – perhaps even high – given Marquis’ account, but it will be reduced by the improbability of H_K itself. So I will assume – again, charitably – that the second addendum is 0. It follows that $P(H|E) = 0.81$.

Is the foetus a human being?

It is, however, possible that foetuses are not human beings (if that sounds *prima facie* incredible to you, you have not necessarily erred – it is intuitively obvious to most people, myself included). So we must also consider the probability, given the evidence, that foetuses are human beings. Let $F =_{df}$ foetuses are human beings.

F may seem obvious. Even aside from the question of whether the foetus from which I seemed to grow was the same foetus as the next day, and the same substance as the adolescent I am now, it will be clear to most people that the foetus is *a* human being, even if we never know *which* human being. But there is very good reason to suppose that the foetus from which I seemed to grow was, indeed, the same substance as me. This is not crucial to the argument, but if it is correct, then, since I am essentially a human being (or at least essentially distinct from my mother), it gives a lower bound to the probability that the foetus is a human being.

As with our theories of rights-conferral, we may not have an agreed constitutional account of what makes substances distinct from or identical to other substances. We seem to currently lack persuasive theories of both synchronic and diachronic identity, and this problem is especially acute in the case of persons. It is safe to say that no one has given a wholly persuasive account of what it is that makes two substances the same as, or distinct from, one another at the same time or across time. Perhaps there is no further fact explaining these, but rather that a deflationary account, where substances just *are* identical or distinct, is correct.⁹ As with the discussion of rights-conferring properties, it is often assumed that this lack of an account renders us unable to know with any confidence whether two substances are identical or distinct. But this is plainly

false: we make such judgments all the time – not because we know what it is that makes substances identical or distinct and publicly observe that thing, but because we have public evidence that two things are identical or distinct, even if that evidence isn't itself what explains their identity or distinction. The lack of a constitutional account of identity does not, therefore, preclude the adduction of evidence.

Consider our evidence set, E_3 : the fact that fetuses are genetically distinct from their mothers, that they are genetically similar to the adults they seem to grow into, that they have the same progenitors as the adults they seem to grow into, that there are no drastic physical changes from day to day (and in particular between the days before and after parturition), the intuitive use of language regarding *our* conception and gestation, and regarding *our child* being seen by ultrasound, the fact that putting the newborn back inside the mother after birth would not render it simply part of the mother, and so on. Consider all the evidence we have for thinking that I am the same substance as what seemed yesterday to be me, and ask whether a sizeable amount of similar kinds of evidence applies the day before that, and the day before that, and so on, and whether it applies also around the time of parturition, and before that. And then ask to what extent there is similar evidence that the foetus is the same substance (or part of the substance) of its mother. I think that any such evidential analysis will make it quite clear that the probability that the foetus is a human being, distinct from its mother, is exceptionally high. Again, in another generous concession, I will say that it is only 0.9. Assuming that E screens off H from F, it follows that $P(F|H\&E) = 0.9$.

The probability, given the evidence, that fetuses are human beings and that all human beings have a right to life, is a function of various probabilities we have considered so far:

$$\begin{aligned} P(F\&H|E) &= P(H|E) \times P(F|H\&E) \\ &= 0.81 \times P(F|H\&E) \\ &= 0.729 \end{aligned}$$

Conclusion

Since F&H entails L, the thesis that fetuses have a serious right to life, it follows that $P(L|E)$ is *at least* 0.729, even given the generous assumptions I have made (of course, if what I have said above is correct, then the probability is actually much higher). So the probability that fetuses have a serious right to life is high.^{10,11}

Endnotes

1. A serious right to life can be understood by reference to paradigm cases – you and me. It is the kind of right to life which renders it prima facie morally impermissible to kill you or me without our permission. This right is not typically diminished by considerations of my gender, level of development, race, cognitive capacity, or any genetic or mental disability (e.g. Down Syndrome). Nor is it superable by my mother's autonomy or preference. Note that fetuses having a serious right to life does not strictly entail that abortion is morally impermissible in all circumstances or that it should be made illegal. So my argument is for a more modest conclusion - that there is at least a moderate probability that fetuses have a similarly serious right to life as children. Whether or not fetuses (or indeed children) have a right not to be killed at the expense of their mother's bodily autonomy is not a question I will answer here.
2. Throughout this essay, I refer to various pieces of evidence, E_i , the conjunction of which is our total evidence set, E . These data, it will be noted, are not accepted by everyone, and depend on more fundamental questions in moral epistemology. In my full paper, I give a discussion of intuitionism and naturalism, noting my agreement with a broadly empiricist non-naturalist meta-ethical framework (an unpopular combination). But, I argue, many people of all meta-ethical persuasions accept the evidence set required for my argument to be successful. But, for reasons of space, I am unable to provide a defence of my evidence set here, so my audience will be limited to those who already accept it.
3. This is a generous assumption, since the more such properties there are, the higher the probability that fetuses have at least one of them. I am giving fetuses the smallest possible chance of having one of these properties (assuming they have a chance at all) by assuming that there is only one such property).
4. Again, in my fuller paper, I provide a defence of the use of the probability calculus in determining the credence we should have in various propositions. Motivations for probabilism include Dutch Book arguments, natural language arguments, nonpragmatic arguments, arguments from the success of probability theory in science, and arguments from the explanatory force of probabilism in various problems in the philosophy of science. In particular, I demonstrate that we do not need statistical data for probabilistic analysis (and, indeed, that in practice, even most statistical analysis relies on subjective assignments of probability comparable to the subjective assignments of probabilities in non-statistical situations). A useful introduction to, and reader in, the motivations for probability theory is Eagle (2011).
5. In my fuller paper, I give an argument for why the use of simplicity as an index of truth is a necessary principle in epistemic practice.
6. See Marquis (1989) for an argument against abortion based on this view.
7. In my fuller paper, I discuss the fact that probability works on a ratio measure, and why this implies that 0.9 is nowhere near as high a probability as is often thought – and conversely that 0.1 is nowhere near as low a probability as is often thought.
8. Nor are they, of course, committed to the thesis that the set of human beings is extensionally equivalent to the set of substances with a serious right to life.

9. For a defence of this view, see Pruss (2012). I am inclined to accept this view – in which case my analysis of the problem in terms of adducing relevant evidence of correlated properties is even more crucial.
10. Again, in the fuller paper, I argue for various theses based on this conclusion. In particular, I argue for the Prudence Thesis: that if there is a probability of at least 0.1 that a substance has a serious right to life, then it is prima facie immoral to kill that substance. It follows from this that my argument has to be drastically wrong at multiple points in order to avoid the conclusion that abortion is prima facie immoral.
11. My thanks to Jeff McMahan and Lydia McGrew for their helpful comments on an earlier draft of this paper.

References

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