

## e. The Child-in-Utero and Personhood

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Does the human fetus qualify as a person or not? In the eyes of abortion rights advocates, this question may seem settled (via the decision of *Roe v. Wade*), or trivial and irrelevant to the prochoice position (via the Violinist Argument). But to proliferers the human fetus either is a person, or its personhood is inconclusive such that the prolife position has failed to establish a conclusive right to kill the child-in-utero. Both sides can admit that there is a juridicial sense of “personhood” addressed in *Roe v. Wade* and then there’s a metaphysical sense of “personhood.”

**Philosophical Personhood**—“what constitutes a person?” an abstract historical debate overlapping heavily with the deeper question of “what does it mean to be human.” It also overlaps with philosophy of biology insofar as animals (might) have personhood; and it overlaps with philosophy of religion regarding the nature of angels, god, or other spiritual beings. Typical responses to the question of personhood include: “rational animal,” “mind, will, and emotions,” or some combination of consciousness, goal-directedness, etc. This issue appears irresolvable and so it is problematic to base any legal policy any degree of resolution here (ex., for or against abortion).

**Legal Personhood**—“what constitutes a legal-rights bearing person as regards the interests of governing bodies.” This subject, as it regards abortion, has been answered—by case law—in the negative: children-in-utero are not legal persons. This area *is* relevant to the abortion debate in regards to the ethics of legal policy, and the administration and enforcement of abortion laws. Legal personhood is not entirely irrelevant to philosophical personhood, but they aren’t identical either. It could be that a person exists but without any means governing bodies to acknowledge, defend, or enforce their human rights.

### 1. Potential Biological Markers for when “personhood” begins

- a. **Conception/Fertilization**—when the mother’s and father’s DNA first join. The scientific consensus agrees that humanity begins at this point, even if onset “personhood” remains disputed. This view is the least palatable to pro-choice advocates, yet scientifically it makes great sense. The distinct human being has already begun at this point, and so it’s the same being that we would later call a “person.”
- b. **Gastrulation**—after this point, the developing human is no longer able to “twin”. This view has the advantage of distinguishing number of human beings, i.e., it’s odd/disordered for one person to be able to become two persons. However, it could be that human persons have this unique ability at early stages to twin, but they lose that ability in later stages.
- c. **Implantation**—When the embryo implants on the uterine wall. This is where it will stay for the rest of the pregnancy. This definition might be useful for prenatal medicine, since the survival rate improves drastically after this point. Natural abortions are much more common before implantation than after; however, it could be a human persons have a high mortality rate prior to implantation.
- d. **Blood/Heartbeat**—the circulatory system has begun to function, including a heartbeat. Identifying legal personhood at this point, is somewhat arbitrary, with the possible exception that survival statistics might improve after this point. The potential and capacities of the child, however, are unchanged before and after this point. Hence this milestone does not clearly differentiate one kind of being from another; instead it is the same being at two different stages of development. If it was a human being after, then this marker fails to show that it lacked “human-being-status” beforehand.
- e. **Pain**—the nervous system is sufficiently developed to where, the child-in-utero can feel pain. This point is difficult to quantify, however, because pain is a subjective sensation that defies objective quantification or observation even with adults, much less with children-in-utero. Plus, it’s not clear exactly what level of development in the nervous system would qualify.
- f. **Brainwaves**—human beings are distinguished from the rest of the animal kingdom, in large part, by their prefrontal cortex and higher reasoning abilities, including consciousness, higher order cognition, and goal-directed behavior (as opposed to mindless instincts). As such, the first appearance of brainwaves is thought, by some, to be the point at which distinct person status begins for a developing human.
- g. **Viability**—the child-in-utero can survive outside of the womb. This definition, however, is relativistic since it depends on medical technology and that is changing all the time. Plus, its nature hasn’t necessarily changed just because its relational dependence is different. Also, its nature is a different matter from it’s neediness/dependence. All of us lack viability outside of the environment for which are developmental stage is suited.
- h. **Breath/Birth**—the fetus is now born, is outside of the womb, and can breathe (supposing it is healthy). This point makes some sense for legal and civil matters, since the child is now a physically and locationally distinct individual, publically accessible, having a birth certificate, citizenship status and so on. However, this point is fairly arbitrary at least when compared to a fetus at the same gestational stage but which is in-utero. Its nature and substance are the same in-utero versus ex-utero. It seems odd/arbitrary for the same child to be protected against illegal infanticide but could have been legally killed through abortion 1 minute earlier.

### 2. Legal/juridical personhood has been decided in *Roe v. Wade*: the child-in-utero does not qualify as a legal person (1973). This ruling was based on several factors.

- a. (1) No US state, at the time had a ban on all abortions. Instead, the norm was for exceptions in the case of fetal deformity, rape, incest, and mortally dangerous pregnancies. Yet, such exceptions presuppose the “potential human” is not a rights bearing person.

<p>b. (2) Disputations and contradictions in the historic literature. The Blackmun decision considered religion and history to argue that history was quite friendly to abortion. Ex., it was once thought that human life begins at quickening, hence killing fetuses before then does not kill a person. Also, religion often defined life at the fusion of “soul” and body, again, thought to occur at the quickening.</p> <p>c. (3) Denying the conception definition of onset Human life. (VII)—admits relation (if not identity) of human life and personhood. The consistent reference in the Blackmun decision is “potential human.”</p> <p>d. (4) Asserting “strong support” that life does not begin till birth (IX, B). This follows the notion that child-law presupposes birth before, for example, rights of inheritance, state protection, or citizenship can qualify.</p>
<p>2. But, personhood could abide in spite of that legal decision if the child-in-utero is a person. In that way “person” would be a physical, metaphysical, or ethical fact regardless of its legal standing.</p>
<p>3. Evidences for Fetal Personhood</p>
<p>a. Personal Continuity over time</p> <p>1.1 You were once a single celled organism, but that means a single celled organism was a “you” and not merely an “it.”</p> <p>1.2 You were never a sperm or an egg, since those gametes were a different organism from the zygote thus they were substantially and genetically different from you.</p> <p>1.3 Personal continuity over time is the usual default when people look at a kindergarten picture of “themselves.”</p> <p>1.4 Denying personal continuity leads to the odd conclusion that the entity identified as you died at some point &amp; was replaced by something else. After some of these transfers “you” came to exist w/o organic continuity between you and the other things previously thought to be “you.”</p>
<p>b. Latent Personhood</p> <p>1.1 The fetus has all the capacities of personhood, even if they aren’t yet expressed.</p> <p>1.2 It’s capacities are natural and organic, as opposed to artificial/induced (such as with induced pluripotent adult stem cells/cloning).</p> <p>1.3 Attributes of personhood vary by degree and expression in adults, so one need not have them all nor have them fully expressed to be a person. One’s personhood could be unexpressed, or partly expressed without any loss of personhood.</p>
<p>c. Known persons fail to manifest some commonly accepted features of personhood, yet we acknowledge that they are still persons.</p> <p>1.1 Comatose patients and sleepers lack consciousness</p> <p>1.2 Paralyzed people lack full bodily autonomy</p> <p>1.3 Deformed people lack the normal physical appearance of human persons.</p>
<p>d. One’s developmental stage isn’t itself sufficient evidence to broadly/universally disqualify less-developed human beings as persons.</p> <p>1.1 Newborns/toddlers/adolescents aren’t disqualified from “personhood” status even if they’re less developed than adults.</p> <p>1.2 If personhood isn’t strictly contingent on developmental stage, by itself, then devel. stage isn’t itself sufficient to disqualify an entity from personhood. Something else must be added such as a particular attribute or lack therefore which disqualifies an entity from personhood.</p>
<p>e. Burden of Proof favors personhood—life receives the benefit of the doubt if there is indeed a reasonable doubt.</p> <p>1.1 Supposing personhood isn’t discredited beyond a reasonable doubt but a known human life still depends on whether to judge it a person or not, then the ethical burden of proof leans against abortion for supposing that we can/should be allowed to kill what may turn out to be a person.</p> <p>1.2 if we did not give life the benefit of the doubt then we run the risk of (permitting the) killing of an innocent person.</p> <p>1.3 The broiling popular debate about “fetal personhood” shows that this matter remains unsettled at the level where the widest spectrum of opinions (informed or not) are found.</p> <p>1.4 Neither is there a settled conclusion in philosophy, metaphysics, or ethics regarding what qualifies as a person.</p> <p>1.5 Matters of life and death merit a reasonably high degree of certainty, i.e., “beyond a reasonable doubt” before concluding that we are ethically permitted to kill the living individual in question.</p> <p>1.6 In philosophy it’s increasingly popular to identify consciousness w/ lots of things not otherwise thought to be persons. Panentheism, pantheism, and panpsychism are coming back. These assert consciousness as an innate/normal property of matter. Ex., Hartshorne, Plotinus, Sallie McFague, Whitehead, Process Philosophy/Theology, Bergson, William James, Ramanuja’s school of Hinduism, Schelling.</p> <p>1.7 Even Bertrand Russell, avowed atheist, showed settled sympathy for panpsychism saying, “My own feeling is that there is not a sharp line, but a difference of degree [between mind and matter]; an oyster is less mental than a man, but not wholly un-mental” (<i>Outline of Philosophy</i>, 1927, pg. 209), and “we cannot, on this ground [of memory], erect an absolute barrier between mind and matter. ... [I]nanimate matter, to some slight extent, shows analogous behavior” (<i>Ibid.</i>, 306). And, “[t]he events that happen in our minds are part of the course of nature, and we do not know that the events which happen elsewhere are of a totally different kind. The physical world...is perhaps less rigidly determined by causal laws than it was thought to be; one might, more or less fancifully, attribute even to the atom a kind of limited free will” (<i>Ibid.</i>, 311). Russell goes so far as to assert that memory applies to all physical objects and systems (<i>Portraits from Memory</i> 1956, pgs. 153-5).</p>

<p>1.8 RvW, Blackmun Opinion, IX., B refuses to speculate on when life begins, saying “Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.”</p> <p>2.1 Blackmun concedes the issue isn't resolved—this suffices shows the pro-choice position hasn't disposed of its burden of proof.</p> <p>2.2 It also shows that the courts conclusion on fetal personhood was <i>intentionally</i> uninformed by the best science of the time, and the vindicated conclusions of science since then (i.e., human life begins at conception).</p> <p>2.3 It also implies that Blackmun and the majority opinion justices acknowledged a critical association between fetal personhood and human life. The rest of the opinion consistently treats the fetus as only “potential” life.</p>
<p>f. The fetus is literally categorized as <i>homo sapiens</i>, normally and often called a “baby,” a “child” and a “human being” all of which are consistent with and predicted by the “fetal personhood” position.</p>
<p>g. The fetus has a “future like ours” which is what we would expect if it is a person, since all human persons share in a comparably human and personal future.</p>
<p>h. The RvW decision suggests close identity if not strict identity between “human being” and “personhood.”</p> <p>1.1 The RvW decision opts against conclusive positioning on the humanity of the fetus saying, “We need not resolve the difficult question of when life begins” and they are “not in a position to speculate as to the answer.” (IX, B)</p> <p>1.2 Were they able to distinguish person and human clearly, they could have conceded the human status of the fetus for the sake of argument and maintained non-personhood. It's unclear why they spend many pages arguing against its humanity if that's not closely identified w/ personhood.</p> <p>1.3 The RvW decision bases its non-personhood argument heavily on the phrase “potential human.” But this phrase is scientifically outdated, misleading, and wrong. Without this supporting pillar, however, it's not clear that the Roe decision could have stood</p>
<p>4. The Evidence Against Fetal Personhood Is Inadequate</p>
<p>a. “Legal personhood has already been denied in Roe v. Wade, and that case indicates a high degree of well-informed scrutiny.”</p> <p>1.1 But legal personhood should not rule over ethical, metaphysical, and philosophical personhood. Rather it should be subordinate to and informed by whatever the facts may be. That is, the law should be informed by reality at least as much as reality should be informed by the vindications of law.</p> <p>1.2 Legality isn't morality, laws can be ethically unjust or evil. For all the good of our legal system, it's imperfect. It has been wrong before and will be wrong again. This may be another case of legal error.</p> <p>1.3 Legality isn't reality. Laws can reflect errors in judgment, false claims, or bad science (as Roe v. Wade does in its “potential human” characterization of the fetus).</p> <p>1.4 Given the poor science of the Roe v. Wade decision, it's decision to treat children-in-utero as non-persons is likewise scientifically misinformed. The ruling of Roe v. Wade, therefore is suspect.</p>
<p>b. “The fetus is physically very different from a birthed child.”</p> <p>1.1 But personhood can admit differences of expression so long as necessary conditions of “personhood” are met.</p> <p>1.2 This proves different developmental stages but would need to show that only some developmental stages qualify as “persons.”</p> <p>1.3 Particular differences vary in evidential force, depending on whether human persons (after birth) can lack those attributes.</p> <p>1.4 If a human adult lacked brain waves, that individual may be dead, but even then he/she would be a dead <i>person</i> having lost the ability to think. Meanwhile, the fetus has the latent ability for brain waves but is denied that future by the abortionist.</p>
<p>c. “The pro-life position has failed to prove that it is a person.”</p> <p>1.1 But the burden of proof is on the pro-choice side to show that it's <i>not</i> a person.</p> <p>1.2 The pro-life position has shown, though imperfectly, that the fetus should be considered a person. Just because the conclusion is disputed doesn't necessarily mean it's logically incomplete, evidentially inadequate, or unsatisfying to objective and reasonable onlookers. The evidences given above suggest the fetal human is a human being and should be considered a person.</p>
<p>d. “‘Reasonable Doubt’ criterion fails by disanalogy, for example, it's legal/ethical to kill a potentially thieving intruder even if you have reasonable doubt about their intentions, whether they are a mortal threat on your life or not, and even about whether they are “intruders” or instead a mistaken bystander who took a wrong turn.”</p> <p>1.1 But, abortion is rarely ever a matter of self-defense but of convenience.</p> <p>1.2 A thieving intruder has willful intent, the child-in-utero does not.</p> <p>1.3 The thief had no natural invitation into the house, the child was naturally invited in-utero.</p> <p>1.4 The homeowner-thief relation does not entail the kind or quality of ethical duties that the mother-child relation does.</p>
<p>e. “‘Reasonable Doubt’ criterion fails by disanalogy: it's legal/ethical to kill in war even with reasonable doubt.</p> <p>1.1 But the war context changes everything. War contexts are categorically separate from peacetime settings because it suspends practical access to many civilized ideals that we otherwise acknowledge as good, true, and right.</p> <p>1.2 Even the “war on women” isn't literally a <i>war</i> when it comes to abortion access in the U.S.</p>