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THE PERILS OF PERSONHOOD

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In the abortion debate, one of the more overworked arguments concerns the if and when of the humanity of a fetus. For those who argue along these lines, the answer to these questions guarantees a resolution of the entire abortion issue. Thus, if the fetus is human, it must not be aborted except when the mother's life is endangered (and, for some, not even then); but if it is not human, it may be aborted under any circumstances.

Despite some fine discussions taking this approach, many sense its futility, if only because each side is hopelessly deaf to the protestations of the other; each insists not merely on the correctness of its view but on its self-evidence.² Inevitably, philosophers turn elsewhere for answers.

One alternative is to challenge the validity of the implication, "If X is human then X may not be killed" (instead of focusing on the truth of the antecedent). This is the route traveled by Thomson. In her article, "A Defense of Abortion,"³ Thomson grants the humanity of the fetus *from the moment of conception*, but nevertheless rejects the view that abortion is therefore impermissible in all cases (notably in the case of rape).

Another alternative, supported by Mary Anne Warren and Michael Tooley,⁴ among others, diverts our attention from such concepts as "human," "human being," and "*Homo sapiens*" as they apply to the fetus, and centers it instead on a new concept, "personhood," claimed to be

1. An especially enlightening article is Lawrence C. Becker's "Human Being: The Boundaries of the Concept," *Philosophy and Public Affairs* 4, no. 4 (Summer 1975): 334–58.

2. See Roger Wertheimer, "Understanding the Abortion Argument," *Philosophy and Public Affairs* 1, no. 1 (Fall 1971): 67–95, esp. 70–75.

3. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (Fall 1971): 47–66.

4. Mary Anne Warren, "On the Moral and Legal Status of Abortion," *The Monist* 57, no. 1 (January 1973): 43–61; Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2, no. 1 (Fall 1972): 37–65.

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distinct from these others in a most crucial and decisive way. It is to this concept that I now turn, as the major concern of this paper.

I intend, then, to propose and defend the following three theses:

I. "Personhood" is the natural and logical consequence of a rights-centered approach to abortion.

II. The implications of the "personhood" view are at times absurd and at others dangerous.

III. Rights alone can therefore not form a solid basis for the moral issue of abortion; the importance of duties emerges.

I.

"PERSONHOOD" AND THE ROLE OF RIGHTS IN THE ABORTION ISSUE

Ordinary usage, for the most part, easily interchanges such expressions as 'human being' and 'person' (except perhaps in these modern times when 'person' becomes synonymous with 'woman' as in 'salesperson,' 'chairperson,' and 'spokesperson!'), and, until recently, philosophers have followed suit.⁵ But something in the abortion debate has caused some to press for a hard-and-fast line between these concepts. Our first task, then, will be to discover just what caused this change.

Let us begin by considering this fairly standard statement of the value of defining "humanity": "The importance of these definitional questions for moral philosophy is obvious. Human beings protect themselves with a thicket of rights they do not grant to other beings, and some of these rights are said to be *human* rights—rights one has simply by virtue of being human. Any conceptual uncertainty about when an entity has become or has ceased to be human is a problem for the ascription of such rights."⁶

The implication of this excerpt is clear: Considerations regarding the definition and application of the term 'human' are not essential in themselves, but as a means to a further end; the *end* is plainly the ascription of rights. We ask whether or not the fetus is human because we want to know whether or not it has rights. The attempt to determine the moral permissibility or impermissibility of abortion by way of defining 'humanity' is thus ultimately grounded in the notion of rights.

Once the appeal to the definition of humanity is revealed as a concern about rights, the following natural, logical, inescapable question arises: If it is rights we are after, why seek definitions of humanity? Unless there is some *necessary* connection—between being *Homo sapiens* and having rights, it is far more productive (because it assumes much less) to tackle directly *this* question: What sort of thing has rights? This is a *moral* question—not a question of biological fact—and hence far more appropriate in this context. For, as Tooley notes, difference in species is not in itself a morally relevant difference, and since what we seek *is* a morally relevant difference,

5. See, for example, works on abortion by such philosophers as J. Thomson, R. Wertheimer, R. M. Hare, G. Grisez, and B. Brody, to name just a few.

6. Becker, pp. 334–35.

our distinction must be drawn not between “humans” and “nonhumans” but rather between entities that have rights and entities that do not, between “persons” and “nonpersons.”

It must be stressed that the concept of personhood is not introduced as a contribution to the debate on the humanness of the fetus; it is not a criterion for determining if and when a thing becomes human.⁷ For proponents of personhood, discussions of the humanity of the fetus are *at best* arbitrary and irrelevant; a brief survey of the host of stages in a fetus’s development proposed as possible boundaries between nonhuman and human (conception, spontaneous motility, quickening, appearance of hands and feet, viability, birth) makes this all too apparent. At worst, these discussions are biased and self-serving, for they presuppose that humans, *and only humans*, have rights. What is called for, therefore, is a nonarbitrary, rationally defensible, morally relevant standard by which to establish not the biological status of the fetus but its moral status. We must seek criteria relevant to a thing’s having rights, that is, to its personhood, and must steer quite clear of any attempt to find criteria by which to determine a thing’s humanity.

Indeed, when our goal is to ascertain whether or not a fetus has rights, the question, “Is X a person?” marks an improvement over the question, “Is X human?” for two reasons: (1) It escapes hopeless entanglement in the numerous arbitrary and irrelevant points of entry into humanity, and (2) it eradicates the “speciesist”⁸ bias that only *H. sapiens* can have rights.

II.

THE DANGEROUS AND ABSURD IMPLICATIONS OF THE PERSONHOOD VIEW

Although the concept of personhood has definite advantages over that of humanity, it is not entirely problem free. Its concentration exclusively on rights renders it subject to its own brand of arbitrariness. “Rights are the stamping ground of intuitionists,” says Hare,⁹ and no means of assigning rights is fully immune to the intrinsic subjectivity of intuition.

Warren certainly seems to be aware of this, for she admits that there are likely to be a great many problems in formulating even rough criteria for personhood (i.e., for having rights). But she does propose a tentative formulation of five such criteria (consciousness, and in particular the

7. Becker incorrectly assumes that personhood is such a contribution and hence makes the following unfair accusation: “It taxes the concept of membership in the species too far to say that a fourteen-year-old, so catastrophically deficient as to warrant the claim that he or she is not a ‘person,’ is not a member of the species” (p. 348).

8. This term is borrowed from Peter Singer, “Animal Liberation,” review of Stanley and Roslind Godlovitch and John Harris, eds., *Animals, Men and Morals*, in *New York Review of Books* (April 5, 1973), pp. 17–21.

9. R. M. Hare, “Abortion and the Golden Rule,” *Philosophy and Public Affairs* 4, no. 3 (Spring 1975): 203. Since Hare believes that our intuitions result from our upbringing, he urges that we resist the temptation to allow our ethical positions to be based on an appeal to intuition.

capacity to feel pain; reasoning; self-motivated activity; the capacity to communicate; the presence of self-concepts, and self-awareness, either individual or racial, or both), along with two important qualifiers: (1) that an entity does not need to have all these attributes to be properly considered a person, and (2) that it is not absolutely essential that any one of these conditions be a necessary one. However, she does think that any being which satisfies none of these criteria is certainly not a person.

Tooley, on the other hand, refuses to “share the general pessimism about the possibility of resolving the issue of abortion” in terms of rights,¹⁰ for he believes himself to have found a satisfactory and *nonarbitrary* necessary condition for having rights: for him, it is quite evident that if entity *A* either lacks consciousness, or has consciousness but is incapable of desiring *X*, then *A* has no right to *X*.

Interestingly, neither Warren nor Tooley explicitly specifies sufficient conditions for personhood; for their purposes, they simply do not require sufficient conditions. Since, in their hands, the criteria for personhood are primarily weapons in the fight to legalize and vindicate voluntary abortion (and quite effective ones at that, since they never dirty those hands by denying the fetus’s humanity),¹¹ all they wish to do is disqualify fetuses as persons. For this limited end, it is surely sufficient to show that fetuses do not fulfill some *necessary* condition. It is quite evident that the fetus fulfills neither Warren’s nor Tooley’s criteria for personhood.

One unfortunate side effect of this emphasis on personhood is that since infants are no more (or scarcely more) persons than are fetuses,¹² they too must be denied rights. Appropriately, this is the position of both Warren and Tooley,¹³ and Tooley is even hopeful that infanticide may, in some cases, increase human happiness; with infanticide, people would not be forced to raise children who suffer from gross deformities or from severe physical, emotional, or intellectual handicaps. The strong emotions which infanticide arouses in us, he claims, are visceral reactions—not rational ones—and, as such, surely should not be allowed to stand in the way of increased human happiness.

10. Tooley, p. 44.

11. Had their objective not been to put abortion on a par morally with getting a haircut, Warren and Tooley might have been content with Thomson’s argument (which they both applaud) that granting the fetus a right to life does not automatically render all abortion impermissible. But, as Warren explicitly states, the flaw in Thomson’s view is that, in treating abortion as a morally complex issue, it remains unacceptable to opponents of restrictive abortion laws for whom abortion is more like a morally neutral act (see Warren, p. 52, and Tooley, p. 52).

12. Infants at least fulfill the first and third of Warren’s criteria.

13. Warren added a “Postscript on Infanticide” to a reprint of her article which appears in Richard Wasserstrom’s anthology *Today’s Moral Problems* (New York: Macmillan Co., 1975), pp. 120–36. In it she states unequivocally that an infant has no right to life, but she does offer two arguments in opposition to infanticide. The first is that at least in this country and in this period of history there are people who wish to have newborn babies unwanted by their parents. “Thus, infanticide is wrong

Of course, there is no reason to assume that only fetuses and infants are to be excluded from personhood. Especially when we are seeking to increase human happiness, it becomes of the utmost importance to check the personhood of *anyone* who poses a threat to such happiness. In this context, we begin to appreciate the importance of sufficient conditions. As Tooley himself is aware, his necessary (but not necessarily sufficient) condition may be a theoretically incorrect cutoff point, but if it is, at least it has the merit of erring on the side of caution. But if we are concerned with maximizing human happiness, caution is no virtue; we should aim at accuracy. We should make every effort to discover both the necessary and the sufficient conditions for personhood, and permit all nonpersons to be killed. A suitable necessary and sufficient condition for personhood might be the ability to communicate, for surely if one can *claim* rights, one can have them.¹⁴ But even if we regard Tooley's cautious criterion as both necessary and sufficient, and even if we could then defend the rights of the sleeping or temporarily comatose (through the use of counterfactuals, for example), how could we possibly save the permanently comatose or the severely retarded? What rights could these "human vegetables" possess? Since species is not a morally relevant factor, they obviously possess the same rights as nonhuman vegetables: none.

It is thus evident that from the perspective of personhood strict moral reasoning must condone at least feticide and infanticide, and potentially other killings as well, pending only the establishment of the requisite sufficient conditions.

Let us now examine the implications of personhood from another angle. Tooley maintains that if *A* has a right to *X*, then *A* is the sort of thing

for reasons analogous to those which make it wrong to wantonly destroy natural resources or great works of art" (p. 135). Second, as long as there are people who are willing to pay additional taxes in order to provide the means to care for unwanted infants, it is wrong to destroy them. (These arguments do not apply to feticide because fetuses violate their mothers' rights to freedom, happiness, and self-determination, and the rights of these mothers override the rights of those who would like the fetuses preserved.) Of course, however, since the infant has no right to life, should an occasion arise in which society cannot afford to, or is unwilling to, care for an unwanted or defective infant, its destruction would be permissible. Technically, Tooley does not regard the term "person" as synonymous with "one who has rights"; he restricts it so that it applies only to those who have a "serious right to life." The reason he gives for this is that not everything that has rights necessarily has a serious right to life. But that does not explain why he cannot have the term "person" refer to anything that has rights and some *other* term refer only to things that have a serious right to life. In fact, his criterion for "personhood" is just his general criterion for having rights applied to the specific right to life, as follows: To have a right to *X*, one must be capable of desiring *X*; to have a right to life, therefore, one must be capable of desiring to live.

14. This is so common a criterion for having rights that Becker fails to notice that the argument for personhood need not rest on it. (Tooley makes a point of avoiding it.) Since Becker (p. 349) lodges his attack against this criterion, his criticisms of "personhood" are largely ineffectual.

that is a subject of experiences and other mental states, *A* is capable of desiring *X*, and it is wrong for others to deprive *A* of *X* if *A* desires it. Tooley concludes from this that feticide and infanticide are permissible (since fetuses and infants, who do not possess a concept of continuing self, cannot desire to live), but that killing adult animals (non-*Homo sapiens*), is not permissible (if they possess a concept of continuing self). He also believes that whereas it is permissible to kill a kitten (since it cannot desire to live), it is not permissible to torture it (since it can desire not to suffer pain). On his view, this means that though a kitten has no right to life, it does have a right not to be tortured. In other words, since it is wrong for others to torture the kitten given that it desires not to be tortured, the kitten must have the *right* not to be tortured.¹⁵

This is the sort of right—the right that derives from someone else’s wrong—that Thomson discusses at length. According to Thomson, we use the word “wrong” to cover a variety of activities, not all of which involve a violation of rights. There are acts that may indeed be “heinously evil” (as Tooley characterizes the torturing of a kitten), but which nevertheless do not imply infringement of rights. And there are degrees of wrong. There is the wrong of the Good Samaritan, the wrong of the Minimally Decent Samaritan, and the wrong of one who violates another’s rights. We are thus not justified in deducing rights from what is wrong. Is it in fact *only* wrong to violate rights?

On Tooley’s view, or any view in which rights form the sole basis of morality, this is indeed the case. It must turn out that unless kittens have the right not to be tortured there is nothing wrong with torturing them, and unless fetuses, infants, kittens, the permanently comatose, the severely retarded (and others?) have the right to life, it is not wrong to kill them at will.

III.

THE IMPORTANCE OF DUTIES

If these are indeed the implications of a personhood morality, perhaps such a morality is inadequate. Let us consider the following situations described by Wertheimer: “I stumble in the dark over my sleeping schnauzer; I stumble over my ottoman: To *blame* either nonperson is irrational; to blame the dog is also *unfair*, but to blame the furniture is

15. Tooley thinks that the notion that a kitten’s rights are determined (in part) by what it can desire helps to account for the phenomenon “that while in the case of adult humans most people would consider it worse to kill an individual than to torture him for an hour, we do not usually view the killing of a newborn kitten as morally outrageous, although we would regard someone who tortured a newborn kitten for an hour as heinously evil” (p. 63). It is no accident that Tooley chooses to contrast an adult human with a *newborn kitten*, for were we to substitute “adult cat” for “newborn kitten,” our moral intuition would most likely remain unchanged, and yet, on Tooley’s view, it should change: Adult cats, unlike newborn kittens, do fulfill the necessary criterion for having a serious right to life.

neither fair nor unfair. So too: my bitch leaves me five pups. Without special reason it would be *unfair* to apportion the food unequally among them.”¹⁶ Would we wish to say in the first instance that a dog has a *right* not to be blamed, or, in the second, that the pups have a *right* to an equal share of the food?

Two possible answers to this question suggest themselves. The first, which accords with Tooley’s intuition, is that if the dog or the pups have no such rights, then it is a mistake to say that it is “unfair” to blame the dog or “unfair” to distribute the food unequally among the pups. The second, which accords with *my* intuition, is that we can consistently affirm the unfairness of these activities while at the same time denying the dog and pups any *rights* to have us refrain from such activities.

But there is more here than a difference of intuitions. Hart, in his article “Are There Any Natural Rights?”¹⁷ points to a confusion in the view that for every wrong there is a corresponding right that has been violated. If *X* promises *Y* to look after *Y*’s mother, then it is surely wrong for *X* not to look after *Y*’s mother. But there is more than one wrong here: *X* has wronged both *Y* and *Y*’s mother; he has broken a promise to *Y* and has neglected *Y*’s mother (who, I suppose, needs looking after and stands to suffer by not being looked after). Clearly, only one of these wrongs involves the violation of a right, and that is the broken promise. The other does not, since *Y*’s mother has no rights with respect to *X*. We may thus distinguish two kinds of wrongs: (1) the wrong that involves violation of a right, and (2) the wrong that adversely affects a victim.

As moral agents, we must be concerned about every activity that brings harm. We have duties *with respect to* beings even if they have no rights against us. Such duties are not difficult to justify. Becker points out that our duties may derive from our special roles as parents, teachers, friends, doctors, etc., or from the consequences for the agent or society. They also “may be justified as a requirement of those patterns of life or character traits of which we can justifiably approve, morally.”¹⁸ In none of these justifications is there any need to appeal to rights.

In terms of the abortion issue, a shift of emphasis from the rights of fetuses to the duties of moral agents must have a tremendous impact. If we can have duties concerning fetuses even if they are not persons, abortion may turn out to be absolutely impermissible. And this surely holds true for infanticide as well.

There is one argument in support of abortion that does present a problem even for an agent-centered morality: Since (1) fetuses are potential persons, (2) potential persons do not exist, and (3) entities that do not

16. Wertheimer, p. 90, n.

17. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64, no. 2 (April 1955): 175–91.

18. Becker, p. 350.

exist cannot be the objects of duties, then (4) fetuses cannot be the objects of duties.¹⁹

Even if we grant the truth of premise (1), which is acceptable to Warren and might be acceptable to Tooley as well, and premise (2), which surely requires much elucidation, the validity of the argument remains doubtful because of an ambiguity in premise (3). The notion of being an “object of duties” contained in premise (3) could mean one of two things. It could mean either that since one has duties only to things that have rights, these rights-possessing things must exist in order to be objects of duties, or it could mean that one cannot have duties even *with respect to* things that do not exist. It seems to me that whereas the former is true, the latter surely is not. Rights do *belong to* individuals, and unless those individuals exist, the duties corresponding to these rights cannot arise. However, as long as we recognize a sense in which we can have duties without recourse to corresponding rights, we need not locate existing individuals to whom these rights belong. Thus, for example, we may have duties with respect to future generations (e.g., the duty not to pollute water and air); future generations do not exist and hence do not have rights, but nevertheless they do qualify, in one sense, as objects of duties.

There yet remain two serious objections to the idea that a morality in which all duties have correlative rights is inadequate. Both are suggested by William Frankena in response to the Hart essay mentioned above. If, says Frankena, these so-called duties which have no corresponding rights are introduced because, unlike ordinary duties (which appeal, according to Hart, to the equal right to freedom), they appeal to actual or possible benefits or suffering, then this is nothing but the old distinction between justice and benevolence. And if they are introduced because they, as opposed to ordinary duties, are not legislatable, it must be pointed out that there are in fact ordinary duties in which legal coercion would not be appropriate.²⁰

However, Frankena is surely mistaken if he supposes that duties which have no corresponding rights but which *do have victims* are to be considered mere benevolence. *Justice* may demand that we refrain from harming or mistreating even those who have no claims on us. It is not benevolence that requires that we not torture kittens or that we distribute food equally among pups or that we not blame the schnauzer over which we stumble.

Also, far from being of no concern to the law, these duties have been and should be included in the law. Thomson, for example, believes that Minimally Decent Samaritanism has been legislated elsewhere and ought to be legislated here,²¹ and Hart points out that important legal codes, such as

19. This argument is cited by Hare in “Abortion and the Golden Rule” (p. 219), but is not supported by him.

20. See William K. Frankena’s “Natural and Inalienable Rights,” *Philosophical Review* 64, no. 2 (April 1955): 215.

21. Thomson, p. 63.

the Decalogue, make no reference whatsoever to rights. In fact, he says: "Most natural law thinkers down to Hooker conceived of natural law in this way: there were natural duties compliance with which would certainly benefit man—things to be done to achieve man's natural end—but not natural rights."²²

If it is indeed possible to legislate duties with no corresponding rights, issues that were closed under personhood once again become vital questions. Intriguing questions such as these raised by Thomson—Should we distinguish between a pregnancy due to rape and a pregnancy for which the mother is responsible? Would it make any difference if a woman were pregnant for nine years instead of nine months? Does the mother's physical or emotional illness constitute a justification for abortion?—are dead ends in terms of rights.²³ Even the case in which the fetus threatens its mother's life has no easy solution. The dubious principle of "double-effect," if operant, absolutely rules out abortion even to save the mother's life, and Thomson, in order to *justify* therapeutic abortion, appeals to a principle no less objectionable—the principle of self-defense.²⁴

If, however, we approach the abortion issue from the perspective of duties rather than of rights, all these questions begin to allow and require reexamination. Are our responsibilities as moral agents greater with respect to a fetus that we intentionally create than with respect to one forced upon us by rape? Precisely how much hardship are we required to undergo for the sake of fetuses? Must we surrender our lives even though the fetus has no rights against us?

Similarly, in terms of duties, though not in terms of rights, the question "Is the fetus human?" is once more significant. For just as our duties to our families, friends, and countrymen are stronger than our duties to strangers, so might our duties to humans be stronger than our duties to nonhumans.

22. Hart, p. 182.

23. Thomson, in order to answer these questions in terms of rights, is forced to define "right to life" as the "right not to be killed *unjustly*." In this definition, "unjustly" does all the work Thomson assigns to it in order to secure her view that abortion is permissible in the case of rape for whatever reason and in no other case except when the life of the mother is threatened. Thus it is not "unjust" to kill a fetus that is a product of rape or one that threatens its mother's life, and the fetus's right to life remains intact.

24. Baruch Brody, in his article "Thomson on Abortion," *Philosophy and Public Affairs* 1, no. 3 (Spring 1972): 335–40, disputes Thomson's claim that, in self-defense, a woman may procure an abortion when the fetus threatens her life. According to Brody, in order for X to be justified in killing Y in self-defense, at least two conditions must obtain: (1) The continued existence of Y must pose a threat to X's life, a threat that can be met only by the taking of Y's life. (2) Y must be unjustly attempting to take X's life. Since in the abortion case only the first of these conditions is met, self-defense remains unjustified. The only time it is permissible to take Y's life when only the first condition is satisfied, according to Brody, is if Y is going to die shortly anyway.

It is now also possible to make sense of the role the fetus's *innocence* might play in the abortion controversy. Right-to-lifers have often pointed to this innocence in demanding the prohibition of abortion. However, the innocence of the fetus does nothing to counterbalance the fact that it simply is not a person. But this same innocence may figure significantly in considerations regarding the duties of others toward it: It is likely that our duties toward noninnocents are not as great as those toward innocents.

Finally, as Thomson notes, "opponents of abortion have been so concerned to make out the independence of the fetus in order to establish that it has a right to life, just as its mother does, that they have tended to overlook the possible support they might gain from making out that the fetus is *dependent* on the mother."²⁵ Indeed, our responsibilities to the fetus arise not out of its rights, but rather out of its needs and its total dependence on *us*.

25. Thomson, p. 58.