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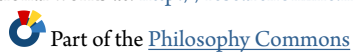
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Personhood, harm and interest: a reply to Alberto Giubilini and Francesca Minerva

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ABSTRACT

In the article 'After-birth abortion: why should the baby live?' arguments are made in favour of the moral permissibility of intentionally killing newborn infants, under particular conditions. Here we argue that their arguments are based on an indefensible view of personhood, and we question the logic of harm and interest that informs their arguments. Furthermore, we argue that the conclusions here are so contrary to ordinary moral intuitions that the argument and conclusions based upon it—including those which defend more mainstream methods of abortion—should be treated with immediate suspicion.

THE NEWBORN AS 'NOT A PERSON'

Giubilini and Minerva claim that 'a particular moral status can be attached to a non-person by virtue of the value an actual person (e.g. the mother) attributes to it' and they recognise this as a 'subjective' account of the moral status of the newborn. However, they maintain that this subjective account does not 'debunk their previous argument'. The previous argument to which the authors refer is not entirely clear, but presumably they are referring to the argument that it is the level of mental development which determines whether or not the fetus or newborn is a person.¹

However, the assertion that the moral status of fetuses and newborns depends upon the value which the mother attributes them would suggest that the status of fetuses and newborns will fluctuate according to the views of their mothers and perhaps others involved (as regards those 'actual' people's rights and interests). This is a curious assertion, since the moral status of a fetus becomes relative to those attributing that status and hence decisions about such moral status are open to inconsistency and even contradiction—for example, in cases in which a mother and father disagreed about the status of the fetus.

In fact the actual people involved in decision-making might differ on the moral status to be attributed to the fetus or infant and as regards their own rights and interests and their views of what constitutes an unbearable burden in relation to continuing a pregnancy. Giubilini and Minerva argue against adoption as an alternative to after-birth adoption, claiming that the argument from potentiality is not strong enough to outweigh the consideration of the interests of a natural mother for whom adoption might be more traumatic than abortion.¹ However, if the interests of those actual people involved were to clash, this argument is, at the very least, incomplete since surely their rights and interests are balanced by their responsibilities toward

actual others (as generated, in the account of Giubilini and Minerva, by the interests of those actual persons involved) and—we would argue—toward fetuses and newborns. One cannot be consequentialist in some scenarios and not others; once the bed is made it must be slept in.

Giubilini and Minerva have the support of Michael Tooley in arguing that it is the level of mental development and the capacity to make aims, attribute value to and appreciate one's own life which allows an individual being to be regarded as a 'person'. In his article, 'Abortion and Infanticide', Tooley clearly recognises that a defence of infanticide requires that one 'get very clear about what makes something a person, what gives something a right to life'.² He argues that human fetuses and infants are not persons since they do not have the properties a thing must possess in order to have a right to life. To be a 'person' one must have a serious right to life.² For Tooley, '[a]n organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity'.²

Peter Singer also challenges the view that the fetus has the status of a person. Like Tooley, he argues that the terms 'human being' and 'person' are not equivalent.³ He notes that the word 'person' has its origin in the Latin term for a mask put on by actors in ancient classical dramas to signify the fact that the actor was playing a role; and that John Locke provided the philosophical precedent for our assumptions about the person by defining a person as 'a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places'.³

It is Singer's contention that the embryo and the fetus cannot be persons given that they lack the capacities which identify human beings as persons, even though they are without doubt human.

The embryo, the later fetus, the profoundly intellectually disabled child, even the newborn infant – are all indisputably members of the species *Homo sapiens*, but none are self-aware, have a sense of the future, or the capacity to relate to others.³

The approach of Giubilini and Minerva to the question of whether or not the zygote or fetus is a person has two problematic aspects. First, like Tooley and Singer, the authors provide a definition of personhood which depends on properties that justify a right to life—properties which fetuses and infants do not possess, except in potential form; a distinction between persons and members of the

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species *Homo sapiens* is maintained and it is stipulated that human beings cannot be assigned a right to life simply on the basis of their membership of the species. Giubilini and Minerva support this view by noting that many humans are not considered subjects of a right to life, including spare embryos used for embryonic stem cell research, fetuses in cases where abortion is permitted and criminals where capital punishment is legal.¹ These descriptive examples of common practice miss the point, given that it is the moral permissibility of the first two of these actions which is in question; and that in the third example there is a distinction between questions of the legality of capital punishment by comparison with its moral permissibility. So before we accept the frightening premises of their argument, we might fairly ask Giubilini and Minerva on what philosophical basis (common practices aside) they rest their argument regarding the moral status of the fetus? Their assertion that all fetuses and newborns fail a 'self-consciousness' or 'self-awareness' requirement does not undermine the competing assertion that all human beings have a right to life. Equally their argument that only actual persons involved can attribute the moral status of person to fetuses and newborns is inadequate since the attribution becomes inconsistent and even contradictory given that it is relative to the particular actual persons whose own views may vary over time or conflict.

THE NEWBORN AS IMPOSSIBLE TO HARM

'After-birth abortion' rests on a number of key philosophical claims. Primary among them is acceptance of a definition of personhood closely connected to rationality (as discussed above), but equally important is the account of Giubilini and Minerva of harm. In short, the article mounts the normative claim that because a newly born infant does not enjoy the moral status of personhood, the termination of that infant should not be regarded as doing any harm: 'It is not possible to damage a newborn by preventing her from developing the potentiality to become a person in the morally relevant sense'.¹

This is a controversial claim, although the authors mask the controversy of it by asserting the significance that harm and personhood are somehow connected without providing any justification for doing so.

The moral status of an infant is equivalent to that of a fetus in the sense that both lack those properties that justify the attribution of a right to life to an individual. Both a fetus and a newborn certainly are human beings and potential persons, but neither is a 'person' in the sense of 'subject of a moral right to life'. We take 'person' to mean an individual who is capable of attributing to her own existence some (at least) basic value such that being deprived of this existence represents a loss to her. This means that many nonhuman animals and mentally retarded human individuals are persons, but that all the individuals who are not in the condition of attributing value to their own existence are not persons.¹

Harms, as Giubilini and Minerva argue, are only done when that which has been taken away (X) actually represents a loss to the fetus. 'This means that many nonhuman animals and mentally retarded human individuals are persons, but that all the individuals who are not in the condition of attributing any value to their own existence are not persons'.¹ X, on this understanding, is a good whose value lays its desirability to the subject; my desire to become a professor at my University is harmed when the manuscript of a book I am working on is stolen. The reason for this harm is that I have attributed value to X (attaining a professorship), and the possibility of achieving X has now been

taken away from me. Furthermore, part of my own self-identity and self-valuation is derived from the fact that I can imagine myself attaining the goal to which I have attributed value. It is clear that I could not be harmed if (a) there was nothing to which I attributed value, (b) I was unable to attribute value to anything or (c) I possessed everything that I valued and was unable to lose it.¹ Fetuses, for Giubilini and Minerva, fall into category (b).

Although there is a consistency to the argument by which Giubilini and Minerva reach the above conclusion, they fail to acknowledge that this argument relies on a particularly narrow understanding of harm which originates in Joel Feinberg's 1987 work *The Moral Limits of the Criminal Law*. That work, the most comprehensive philosophical treatment of harm, offers the now-popularised definition of harm as 'wrongful setback to interest'.⁴ However, although Feinberg places 'interest' (and, by extension, value-attributing capacities) at the heart of his treatise on harm, the narrowness of Giubilini and Minerva is not necessarily justifiable on a closer examination of Feinberg and a focus on what he calls 'welfare interests'.

The distinction between the type of interests that Giubilini and Minerva are interested in and welfare interests is outlined by Feinberg in a section entitled 'Welfare Interests and Ulterior Interests':

The importance of an interest to the well-being of its possessor can be determined by two different standards. According to one of these, a person's more ultimate goals and aspirations are his more important ones: such aims as producing good novels or works of art, solving a crucial scientific problem, achieving high political office, successfully raising a family, achieving leisure for handicraft or sport, building a dream house, advancing a social cause, ameliorating human suffering, achieving spiritual grace.⁴

These interests do require the psychological capacity to attribute value: the capacity to imagine the instantiation of a particular good and subsequently envision one's personal situation as improved as a result of that instantiation. It is these interests that Giubilini and Minerva deny, and subsequently they deny any harm; there can be no wrongful setback to interest if there is no interest.

However, Feinberg's interests are not limited to the above. He also has a concept of welfare interests: those things in which someone has a stake because the absence of them would make the instantiation of more powerfully desired goods impossible.

By a quite different and equally plausible standard, however, a person's most important interests are by no means as grand and impressive as these. They are rather his interests, presumably of a kind shared by nearly all his fellows, in the necessary means to his more ultimate goals, whatever the latter may be, or later come to be. In this category are the interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion. These are interests in conditions that are generalized means to a great variety of possible goals and whose joint realization, in the

⁴This was the basis of Stoic philosophy's denial of external goods, and Aristotle's description of the *megaloopsychos*.

absence of very special circumstances, is necessary for the achievement of more ultimate aims.⁴

So, welfare interests enable an individual to achieve ulterior interests, *even if those ulterior interests do not yet exist* (note Feinberg's explicit qualification 'whatever the latter may be, or later come to be'). And, given that the latter actualisation of an ulterior interest depends on the development of value-attributing capacities, it would be consistent with Feinberg's work to say that the denial of that development constitutes a serious harm, for all harms to welfare interests are morally grave. As Feinberg puts it:

When [welfare interests] are blocked or damaged, a person is very seriously harmed indeed, for in that case his more ultimate aspirations are defeated too; whereas setbacks to a higher goal do not to the same degree inflict damage on the whole network of his interests.⁴

In reality, the interests and harms whose existence Giubilini and Minerva ignored in their article are in fact equally (if not more) morally significant as those on which they focus, and the two different types of interests exist in relation to one another, not in isolation, so that lacking one type of interest does not mean one might not be harmed. My interest in becoming a professor relies also on continuing academic freedom in Australia; a welfare interest which if harmed will also harmful to my ulterior interest.

A further problem with the account of harms of Minerva and Giubilini is that they understand the role of interests, but not the less subjective concept of *stakes*. Consider their following comments:

There are many ways in which an individual can be harmed, and not all of them require that she values or is even aware of what she is deprived of. A person might be 'harmed' when someone steals from her the winning lottery ticket even if she will never find out that her ticket was the winning one. Or a person might be 'harmed' if something were done to her at the stage of fetus which affects for the worse her quality of life as a person (e.g., her mother took drugs during pregnancy), even if she is not aware of it. However, in such cases we are talking about a person who is at least in the condition to value the different situation she would have found herself in if she had not been harmed. And such a condition depends on the level of her mental development, which in turn determines whether or not she is a 'person'.¹

The reason that the child affected by a mother's drinking is harmed is because that child held a *stake* in his mother's sobriety. '[A] person has a stake in X (whether X be a company, a career, or some kind of "issue" of events) when he stands to gain or lose depending on the nature or condition of X'.⁴ Feinberg then connects stakes to interests, arguing that '[o]ne's interests, then, taken as a miscellaneous collection, consist of all those things in which one has a stake'.⁴ Not all interests, therefore, require any value-attributing capacity for their existence; in fact, given that (as the article acknowledges) the newborn baby is a bundle of potentialities,ⁱⁱ one might say that the newborn in fact has *more* interests and stakes than an adult because there are avenues of activity which the infant still has the capacity to achieve and which, therefore, the infant still has some stake in, regardless of their status as value-attributing (a status the article calls personhood) or not.

So far we have cast suspicion on the philosophical depth of the exposition of harm of Giubilini and Minerva, and on the connection among harms, interests and personhood (understood as the ability to attribute value), but finally, we must show what significance this has for their argument as a whole. The discussion of harm in 'After-birth abortion' is offered to support the following normative claim:

[N]ot only aims but also well-developed plans are concepts that certainly apply to those people (parents, siblings, society) who could be negatively or positively affected by the birth of that child [but do not apply to the newborn infant]. Therefore, the rights and interests of the actual people involved should represent the prevailing consideration in a decision about abortion and after-birth abortion.¹

However, aims and well-developed plans are concepts that *do* apply to infants, because of their stake in the protection of value-attributing capacity-development (a welfare interest for those with the potential to develop such capacities). This, in addition to the myriad capacities (and subsequent interests) that infants possess, implies that the primacy of the parents' ulterior interests over the welfare interests of the child should be questioned. There simply does not appear to be an argument for the parents' interests being morally preferable within the logic of interest and harm.

OUR INTUITIONS

Tooley notes that the typical reaction to infanticide is like the reaction to incest or cannibalism.² We might do well to consider the weight and the reasonableness of such intuitive reactions. Ethical decision-making involves reference to our feelings, everyday judgements and intuitions about behaviour as well as to the principles to which we subscribe. The process of achieving a balance between these aspects of ethical decision-making may lead us to question our intuitions, but equally it may indicate that the principles to which we subscribe are problematic or even indefensible.ⁱⁱⁱ

An argument such as that of Giubilini and Minerva, which countenances infanticide or after-birth abortion, provides an occasion to question the force of the principles to which Giubilini and Minerva subscribe. They provide us with the opportunity to consider whether the claim that only those human beings who satisfy a 'consciousness' or 'self-awareness' requirement have a right to life is defensible as a moral principle; and whether the claim that the rights and interests of the actual people involved in a decision about the permissibility of abortion or after-birth abortion can provide us with clear guidance, and if so, whether those rights and interests should be taken to be the prevailing consideration in such a decision.

When discussions of infanticide previously came to the fore through the work of Peter Singer, one of Singer's most outspoken critics was fellow Australian Raimond Gaita. However, Gaita sought to fault the logical premises in the argument, and pointed to the conclusion itself as evidence of the invalidity of Singer's views. For Gaita, a conclusion that contradicts a basic moral intuition such as 'a newborn baby is precious and should be protected' is sufficient evidence to dismiss the argument. Gaita argues that these types of arguments are based in a new myth:

ⁱⁱⁱThis is a Rawlsian view of ethical decision-making as an exercise in achieving 'reflective equilibrium' which Cohen and Grace explore in.⁵

ⁱⁱSee,¹ 'The fetus and newborn are potential persons'.

Response

[T]he myth that a serious thinker – a *true* thinker – will fear to think nothing. She will follow reason wherever it takes her, no matter how frightened or morally disgusted she might be at the prospect of embracing the conclusions it delivers to her.⁶

Gaita suggests that our moral intuitions matter: ‘the innocent should be protected from harm’ used to be a starting point for classes in moral philosophy, a claim with which everyone would agree. The point of using that claim in class was to show that morality is displayed in important shared values which all people recognise and accept, whether or not they are moral philosophers.

As well as identifying the logical and philosophical flaws in the argument of Giubilini and Minerva, we point to their conclusions supporting after-birth abortion as grounds for dismissing the arguments and reconsidering these arguments as they are used to justify more common abortion practices. If reasoning of this kind can lead us to conclusions which are abhorrent to many, it might be time to review those arguments, as Gaita acknowledges in his commentary on Singer:

If Singer’s arguments for infanticide are now accepted as deserving of serious consideration, it is not just because of their logical force. It is because changes in the culture have disposed us to accept a conclusion that only thirty years ago discredited any arguments that led to it.⁶

There are very forceful logical reasons for dismissing the claims of Giubilini and Minerva and we have outlined them here. Besides deferring to the very social norms they are trying to question and reform, they lack any justification for their

distinction between human beings and persons; they are selective in their application of interest; and incoherent in their account of harm. However, as well as these problems, we believe that our commonly shared moral intuitions matter and arguments that contradict them should be treated with grave suspicion. On this basis alone, the arguments of Giubilini and Minerva should be rigorously interrogated, and in our view they are found to be indefensible. We leave the final word to Gaita:

Were my commitment to philosophy to tempt to me such nihilism, I would give up philosophy, fearful of what I was becoming.⁶

Author note This article provides another perspective on the postbirth abortion issue, considering other perspectives on personhood, harm, interest and the function of moral intuitions in moral reasoning.

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