

The Inviolateness of Life and Equal Protection: A Defense of the ‘Dead Donor’ Rule

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Abstract: There are increasing calls for rejecting the ‘dead donor’ rule and permitting ‘organ donation euthanasia’ in organ transplantation. I argue that the fundamental problem with this proposal is that it would bestow more worth on the organs than the donor who has them. What is at stake is the basis of human equality, which, I argue, should be based on an ineliminable dignity that each of us has in virtue of having a rational nature. To allow mortal harvesting would be to make our worth contingent upon variable quality of life of judgments that can only be based on properties that come in degrees. Thus, rejecting the ‘dead donor’ rule comes at the expense of our egalitarian principles with respect to the value each individual human life has in relation to the protections against killing.

Introduction

There are increasing calls to reject the ‘dead donor’ rule (DDR) and permit “organ donation euthanasia” in organ transplantation [1–3]. In these proposals, the donor authorizes a surgical team to extract however many vital organs are needed for transplant before death is declared with the understanding that the surgery will bring about the donor’s death (what Khushf calls “mortal harvesting,” [4, p. 331]). What could be said against such proposals? One might think that permitting them would have bad effects on donor trust and thereby cause a net loss of organs donated for transplant. Others might think that they are incompatible with the physician’s role as healer, which forbids killing patients for any reason [5, 6]. As interesting as these arguments may be, I set them aside in order to develop what a “sanctity” or “inviolateness of human life” view might say against them, since it is largely neglected in the literature, but was influential in guiding the ethics of the early transplanters [7]. What to call this view does not really matter to me. What does matter is that it be identified by its connection to political equality in the sense that Elizabeth Anscombe claimed when she said that, “In a just system of law, there will not be some class of people, identified by their origins or social status, who can murder or be

murdered with impunity” [8, p. 254]. Unlike Anscombe, however, I will not pursue the meaning of “murder” (though I sympathize with her view).¹ Rather, I will argue that the fundamental problem with mortal harvesting is that it bestows more worth on the organs than the one who has them insofar as it requires that we judge a class of people (the donors) to have lives that are less worthy of protections against killing than those of another class (the recipients). What is at stake, then, is the very basis of human equality, which, as I will also argue, should be based on an ineliminable dignity that each of us has in virtue of having a rational nature inherent our human life form. To permit mortal harvesting is to make life’s worth contingent upon variable quality of life of judgments that can only be based on properties that come in degrees. As I see it, the problem is that some people will be deemed less worthy of protections against killing based on differences in health status that will be more arbitrary or difficult to determine (or both) than the currently accepted death criteria.

In the first section I frame the issue in terms of what makes killing wrong, and defend the notion that the wrongness of killing involves an act of disrespect. I deny that it is our autonomous choice that is the primary object of respect; rather, I contend that it is the human person embodied as an individual substance with a rational nature — an instance of human life. In the second section, which is the heart of the paper, I explain that our rational nature is marked by the possession of a basic, natural capacity for rational action — a capacity to acquire the various social and creative capacities for actions that are ordered to, and constitutive of, human flourishing. This account conceives of human beings as members of a natural kind and kind-membership is what matters for having these capacities, not a certain degree of their actual performance. I then address the appeal to “marginal cases” (anencephalic infants, PVS patients,

¹ Her view is that the intentional killing of innocent human life is the “hard core” of murder; destruction of human life that is careless of, or indifferent towards, its worth, also falls under the concept [9, p. 262].

etc.) which allegedly shows that killing such individuals is of no more concern than killing a non-human animal. In the third section I address the objection that true respect involves honoring the autonomous choices of the donor, and not the donor's life. In the final two sections I show how our political equality is threatened by a policy that would permit mortal harvesting. What follows, then, is my account of why we should not adopt mortal harvesting policies.

1.1 The wrongness of killing: A matter of respect

Respect-based theories feature prominently in the ethics of killing. They are typically contrasted with harm- or deprivation-accounts, which make the badness of the victim's death central to the wrongness of killing. The deprivation account is represented well by Don Marquis (though see qualifications below). He says "for any killing where the victim did have a valuable future like ours, having that future by itself is sufficient to create the strong presumption that the killing is seriously wrong [10, p. 195 emphasis original]. Thus, he contends, "Persons who are severely and incurably ill, who face a future of pain and despair, and who wish to die will not have suffered a loss if they are killed. It is, strictly speaking, the value of a human's future which makes killing wrong in this theory" [10, p. 191]. This claim seems intuitive and a vivid illustration of its power comes from Jonathan Glover:

It does not seem plausible to say that there is no *conceivable* amount of future misery that would justify killing someone against his will. If I had been a Jew in Nazi Germany, I would have considered very seriously killing myself and my family, if there was no other escape from the death camps. And, if someone in that position felt that his family did not understand what the future would feel like and so killed them against their wishes, I at least am not sure this decision would be wrong [11, p. 82 emphasis original].

Suppose this is right. Then how would we explain the wrongness of, say, a Nazi SS officer's action when he shoots a distraught mother dead on her way to the gas chamber? After all, he eliminates the cause of her distress: the thought of watching her two small children die from poison gas twenty minutes later (let us suppose that because of this distress, she is incapable of

enjoying the little time left with her children). We might think his action is wrong insofar as it causes bad effects on her kids and those around her, or insofar as it comes from a vicious character (or both). Be that as it may, neither of these explanations address what he does *to her*, and since the deprivation account is only concerned with what he takes away from her, which certainly is not a “future of value,” he does nothing bad to her and perhaps something good. This is hard to believe. What remains unexplained is the fact that he *wrongs her*—he does not merely *act wrongly* with respect to some principle of utility or theory of what makes someone virtuous. Furthermore, there is a sense in which the Nazis wronged their victims *equally*. Suppose the woman’s children die in the gas chamber with their elderly grandfather; the killing of grandfather is just as objectionable as the killing of the grandchildren even though a greater deprivation of life-goods is suffered by the children. While our sense of tragedy may vary with the amount of life-goods lost, our sense of injustice does not. Why is this? An intuitive, though I think not fully satisfying, answer is that the Nazis took their victim’s lives without their consent. As Warren Quinn explains,

Among the several moral reasons you may have not to kill me, take me captive, or subject me to your idea of the good life, perhaps the most important lies in the simple fact that I *choose*, or would choose were I to consider the matter, that you do not. Viewed in this way these rights are *nothing other* than equally distributed moral powers to forbid and require behavior of others, and violations of them are *nothing other* than refusals to respect the exercise of these powers [12, p. 49 emphasis original on “choose”; emphasis added on “nothing other”].

Since the choice to go on living is all-or-nothing, the violation of that choice is all-or-nothing. Hence, a principle of respect for autonomy remains unsatisfied, and this seems sufficient to explain how it is that the Nazis not only wronged their victims, but wronged them *equally*.

1.2 The disjunctive theory and its discontents

Respect for autonomy, however, is not absolute; nearly everyone agrees that it would be

impermissible to kill healthy people upon their request.² Fortunately, respect-theorists need not and should not deny that part of what explains the wrongness of killing is that it harms the victim in terms of a deprivation of life-goods lost in death. Nor are deprivation-theorists required to deny the moral significance of respect (as Marquis does not). Hence, the prominence of what I call *disjunctive* theories, which are deprivation theories that incorporate the moral significance of respect, and identify autonomous choice as the relevant object of respect. Though they vary in their details, what unifies them is the general claim that the wrongness of killing can be explained either in terms of the harm done to the victim, or the disrespect to the victim's autonomy, or both [e.g. 12, 15, 16]. On this view, it is permissible to kill an innocent person, S, if and only if (1) S is not (or is only acceptably) harmed by death, and (2) S gives valid consent to be killed by some humane means; it is wrong to kill S if just one of these conditions is unsatisfied. That killing someone who meets these conditions might benefit others, as it would in organ donation, only bolsters the reason for killing by transplant surgery; hence, the disjunctive theory is attractive to those who would permit mortal harvesting.

Plausible as it may be, the disjunctive theory is unsatisfying. What exactly counts as a "harm" and who decides whether or not it is "acceptable?" If harm is just a setback to one's interests [2, 17], and one has an interest in sacrificing one's life for others above all else, why must the donor even be sick? A healthy person, perhaps like the main character in the film *Seven Pounds*, could claim to be unacceptably harmed and disrespected if his preference goes unsatisfied, which just reduces the case for mortal harvesting to the logic of preference

² A notable exception is John Harris who writes, "Should I be permitted voluntarily to donate a vital organ like the heart? Again, if I know what I am doing then I do not see why I should not give my life to save that of another if that is what I want to do" [13 p. 113]. Yet his respect for autonomy is merely pragmatic, since he (in)famously argued that it would be permissible to institute a "survival lottery" in which some people were killed at random for their organs regardless of their consent [14]. Those who insist that healthy people have an autonomy-right to be mortally harvested will avoid the equality problems I raise in this argument (thanks to Brookes Brown for pressing this point).

satisfaction making the disjunctive theory redundant.³ To be sure, the relevant sense of harm assumes something objectively valuable is lost in terms of a “worth-while life” [11, p. 52], or “biographical life” [19, p. 179], or “a future of value” [10, p. 191] or an immediately exercisable ability “to act or do things” [20, p. 3]. It seems that there is little if not nothing left to lose near the end of life if these sorts of things constitute what is lost in an act of harmful killing. But who decides whether there is little if not nothing left to lose? If it is the patient, then we are back to the logic of preference satisfaction again, which makes the disjunctive theory redundant. If it is the doctor or some legal authority, then someone other than the patient is in a position to determine whether the harm of death would be acceptable or not if the patient’s wish were to be honored. That is to say, we would privilege the patient’s wishes only when *someone with standing* has judged the patient’s life to not be worth living. Consequently, the patient’s self-determination ends up being quite limited because she is only empowered to choose mortal harvesting under the condition that her life is (or will be) expendable for the sake of others when she is in a diminished state [21]; an autonomous choice for death deserves no respect if she is sufficiently healthy. Moreover, as David Velleman argues [22], if the patient is terminally ill but chooses to go on living, her choice will require some sort of justification if she is to be judged rational. Since we expect people to provide reasons for their choices, the patient is required to justify her continued existence under the pain of irrationality in a way that healthy people are not. This inequality is contingent upon one’s health status, and therefore places an unfair burden on the sick so that they might enjoy one of the most basic rights in a just society: the right not be killed. The sort of “autonomy” given to the dying by whomever is authorized to grant it

³ That healthy people are willing to give up their lives for the sake of organ donation is not a fanciful one. It was reported that Stanford’s heart transplant team was contacted by healthy individuals who wanted to sacrifice their lives for the sake of saving others and advancing medical knowledge [18].

ironically masks an insidious form of paternalism about what lives are worthy of protection. Therefore, this version of the disjunctive theory should be rejected if autonomy is to have the sort of worthiness of respect we assume it to have.

On the other hand, it is reasonable to think that the disjunctive theory would have us respect autonomy *too much*. It may be against your will for me to poke you in the belly, but violating your autonomy in this way is not nearly as serious as me killing you against your will even if you have little time left. What your will is concerned with matters quite a lot more than just the mere fact that you have a will concerned with something, which indicates that the respect-worthiness of your autonomy is partly determined by goods that are more fundamental than the good of autonomy itself [23, p. 58–59; *pace* Quinn’s “nothing other” clause above]. Another way autonomy may be respected too much is found in arguments that conclude that incompetent individuals are just as entitled to the so-called “benefits of death” as competent individuals from considerations of suffering [24]. Since the suffering of the incompetent matters no less than that of the competent, it is unfair for the competent to be entitled to the so-called “good of death” and not the incompetent. Indeed, the disjunctive theory is recognized as a “dishonest” [19, p. 179], *ad hoc* proposal that compromises between autonomy-based and harm-based justifications for killing for the sake of garnering legal support for euthanasia. As Daniel Callahan explains:

Each [of the justifications] has its own logic, and each could be used to justify euthanasia. But, in the nature of the case, that logic, it seems evident, offers little resistance to denying any competent person the right to be killed, sick or not; and little resistance to killing the incompetent, as long as there is good reason to believe they are suffering. There is no principled reason to reject such logic, and no reason to think it could long remain suppressed by the expedient of an arbitrary legal stipulation that both features, suffering and competence, be present [25, p. 108-9].⁴

⁴ While competence may be “present” through an advanced directive, it still raises the question as to why they would be needed at all if the good of death can bring about an end to suffering and a set of healthy organs to others who need them.

Even if the legal stipulations were to remain intact with respect to mortal harvesting practices, there would be no reason why the disjunctive theory should not be deployed to justify killing for the sake of medical experimentation.⁵ For those who are not willing to go that far, these problems at least motivate a search for a better account that answers the fundamental question: what is it that ought to be respected in a respect-based view of killing?

2.1 The life of the human person as the primary object of respect

I submit that the life of the individual human person ought to be the primary object of respect. By “human person” I mean a flesh and blood Aristotelian substance that is a rational animal, not something that just so happens to fall under an abstract description of being an “autonomous agent” whatever that might be. Classically understood, the human person is an “individual substance of a rational nature” [27, p. 93], a definition that is hard to improve upon [28]. This enduring idea includes both autonomous and non-autonomous individuals, something that is recognizable in the Belmont Report’s statements on “Respect for Persons.” As it says, “persons with diminished autonomy are entitled to protection” and may be so severely compromised that they should be excluded from activities that may harm them [29]. Human persons, on this view, are simply instances of the human-life form (more on this below), and they are entitled to a measure of respect no matter how diminished they might be.

One must distinguish this view from the one that reduces respect for personhood to respect for autonomous agency, and consequently leaves those with diminished autonomy at risk of not being protected. As Lysaught has shown [30], one can find this shift from the particular human being to the property of autonomy in the early editions of the Beauchamp and Childress’ *Principles of Biomedical Ethics* as well as the U.S. government’s report on research involving

⁵ Something that has been recently advocated by Julian Savulescu [26].

human embryos [31]. In the first edition of their famous book, Beauchamp and Childress interpret Kant as saying “a moral relation between persons is *always* one where there is mutual respect for autonomy” and then infer that, “The principle of autonomy thus applies to persons with autonomous choice” [32, p. 59,60 emphasis added]. What might protect those with diminished autonomy is what they call “the principle of human worth” according to which “human life has an intrinsic value irrecoverably destroyed” in an act of killing [32, p. 87]. While this resembles what I am defending it is too abstract and impersonal, which perhaps explains why they thought the most reasonable interpretation of it is that “killing is *prima facie* wrong and so permissible only if it is necessary to save the life of at least one innocent person...” [32, p. 88] — something that is quite compatible with mortal harvesting!⁶ Contrast this watered down “principle” with the statements of Paul Ramsey who prohibited mortal harvesting “out of respect” for the human being that is “presented to us with its moral claims solely within the ambience of a bodily existence” [33, p. 191]. Further contrast Ramsey’s notion of respect as “holy awe” [34, p. 76] with the contemporary rhetoric of “respect” that has become so separated from the norms of protection and so abstracted from the bodily subject before us, that we can be called to give “profound respect” to human embryos while at the same time being told it is quite permissible to destroy them for research purposes [35, p. 101]. Such “respect” is neither “profound” nor the kind anyone should want.

A recovery of a respect for persons in their bodily life, where they are prioritized above whatever contingent properties they might have, is not only necessary for safeguarding the individual from abuse, but also sufficient to explain what is fundamentally wrong with killing: it

⁶ The remaining part of the sentence concealed by the ellipses is “...or if it is necessary to preserve a morally worthy society.”

simply *destroys* someone.⁷ Theories of the wrongness of killing that focus exclusively on the loss of the properties of the person, whether it be a future of value or an autonomous will, are pathologically forgetful of the particular *bearer* of these properties in their accounts of what makes killing wrong when it is wrong.⁸ As Chappell remarks, “deprivation is not the main thing wrong in killing, even when it is part of what is wrong. In killing, the main point is not that something is taken away from someone, but that the someone is taken away” [37, p. 111]. The issue, then, is what *grounds* our dignity, that is, our worthiness of respect such that we, as innocent persons, should *always* be protected from being destroyed for utilitarian benefit.⁹

2.2 The species-norm account of the basis of human dignity

I submit that the species-norm of a rational nature, as defined by the human’s ultimate capacities for rational action, is the basis of human dignity. The point of this account is to indicate the priority of species membership, and how membership in the human species *endows* one with a certain moral status rather than that status being something that is individually *achieved* through some degree of rational performance. Thus, I proceed with what might be called a “group-based” account of moral status in which membership in the natural kind

⁷ Or for those pesky substance dualists, it simply destroys someone *on this earth*.

⁸ When killing is wrong depends on whether the victim is innocent or not. One might wonder why non-innocence should make a difference to a view that bases moral status on the possession of a rational nature. If non-innocence makes a difference, then having dignity and being entitled to protections against killing are not coextensive. I accept the point. Here, I follow Craig Paterson [36, p. 83], who suggests that it is not *the intrinsic status of a good* (in this case, human life) that determines whether an instance of the good should be intentionally destroyed or not; rather, it is *the nature of the demands* imposed on us by the particular good in question. The life of an innocent human being, which ought to be respected in virtue of its dignity, demands that it not be intentionally destroyed. The life of a non-innocent human being cannot make that demand, since the activity of the non-innocent threatens the being and integrity of others who pose no threat. To protect non-innocent human life as much as innocent human life is to not protect innocent human life at all. Thus, the demands of human dignity are ordered to the protection of human beings who pose no threat to others, and the protections from killing one enjoys in virtue of having dignity disappears when one becomes a lethal threat. We should not think, however, that the non-innocent loses their dignity by virtue of their threatening behavior. Indeed, the respect non-innocent persons are due requires that the means undertaken to defend against their threat must be proportional to the threat they pose. Whatever one thinks of this argument is beside the point, however since all donors are innocent in the sense that they are not a threat to anyone.

⁹ Here I am thinking of Kant’s distinction between “price” and “dignity” [38].

“human” is sufficient (though not necessary) for having an ineliminable dignity that, at the very least, entitles its members to protections against killing.¹⁰ Issues to be sorted out is (1) what is meant by “human life-form” and “the human’s ultimate capacities for rational action,” (2) why these ideas matter morally, (3) how they account for so-called “defective” humans, and (4) how the charge of “speciesism” (and other objections) should be handled.

2.3 The human’s ultimate capacities for rational action.

What does it mean to say that the human life form has a rational nature? By “human life form” I mean something general like the idea of a healthy, well-working human organism, something we have a working knowledge of whenever we identify an individual as being alive [41].¹¹ Embedded in this identification is an act of representation, a picture of health relative to the human form that is neither defined by some statistical model of averages, nor falsified by a single counterexample; rather, it functions as a standard against which assertions about whether or not an individual instance of that life form is flourishing or working well. For example, the claim “humans have 20/20 vision” means that the standard for human vision is 20/20 regardless of the fact that the average measure for the human population falls well below 20/20. Likewise, the incomprehensible behavior of a toddler is no counterexample to the claim that “human beings give reasons for their actions.” Linguistically, they have the form “The S is (has or does) F,” “An S is (has or does) F), or “S’s are (have or do) F” and are used as “essence-expressing generics” [45, p. 231]. Thompson draws attention to how the truth of these judgments, what he calls “natural historical judgments” [41, p. 49], depend not on some hypothetical ideal, which involves referencing some other possible world where everything goes right for an individual,

¹⁰ For a helpful overview of these distinctions see Wasserman and Blustein [39]. For an account similar to mine that goes much deeper into the metaphysical issues, see Vukov’s excellent paper [40].

¹¹ Here I follow the thought of Philippa Foot [42] the magisterial work of Michael Thompson [43], and draw on the helpful summary of their work by Jennifer A. Frey [44]

but on a substantive knowledge of a paradigmatic instance of the life-form in question. Natural historical judgments have their own logic which presuppose that, at some time, the judgment's subject existed, and serves as an exemplar for its kind. That is to say, it fulfilled the purposes for which members of its kind are internally directed to fulfill and it lived how it is to *supposed* to live as the kind of thing it is. It is tempting to think of the human life form as a kind of Platonic idea or abstraction that each of us more or less exemplifies but that is a mistake. Rather, the life form of a living thing is embedded in the body that bears it, which I submit is characterized by its ultimate capacities, the fulfillment of which constitutes our idea of a well-working member of the species.

By "ultimate capacity" I mean an active and internally directed dispositional power that operates at the highest level or organization. The natural historical judgment that "the human uses language in order to communicate" is made true by the human's ultimate capacity for language use, which grounds the lower-order capacity to speak Spanish or English (or both). That some humans cannot use any language due to early-stage development or pathological condition does not negate the fact that they, or members of their kind, have this ultimate, higher-order capacity for language use; rather, it is blocked or in the process of acquiring the lower-order capacities to use a specific language. A being's ultimate capacities in the sense described define its intrinsic potentiality, a potentiality that is actively oriented towards bringing about its own fulfillment despite whatever obstacles it faces until death brings its activity to an end. It is not a *passive* capacity in the sense that a being may be capable of being modified to use language by some external work of genetic engineering or technological interference. While such a capacity tells us something about how the creature can be acted upon, it tells us nothing about how it is supposed to act. Ultimate capacities, by contrast, do tell us how it is supposed to act and

therefore, serve to ground (1) criteria that distinguish one kind from another, and (2) the line between health and enhancement for members of their kind. A life form's ultimate capacities, then, define what kind of life form it is, what it strives for, and what it means to flourish.

Lastly, I take "rational action" to be an umbrella term for actions that are guided by intentions to bring about some good or benefit, and that these intentions are communicable to others. To be sure, there is a sense in which some non-human animals like dolphins and chimps engage in "rational action" insofar as they engage in means-to-ends reasoning and pre-linguistic communication [46].¹² Yet what remains distinctive of human animals is that it is *within their nature* to acquire further capacities to not only pursue the goods constitutive of their flourishing, but also to give and evaluate reasons for pursuing them.¹³ To be sure, there will be disagreement about just what these goods are, but the goods of life and health are two of the most uncontroversial, since they are foundational to the pursuit of all other goods and worth pursuing for their own sake. Those who advance other criteria like the capacity for self-consciousness, or the capacity to form special relationships, or the capacity to feel pain face difficulties in denying that all of these things are shaped by our rational nature, which makes them qualitatively different from their occurrence in non-human animals. Hence, the enduring relevance of the rationality criterion despite perennial criticism of it.

2.4 Why ultimate capacities must matter morally

Whatever the criteria for "serious moral status" (dignity, in my view) may be, they have to be framed in terms of capacities. The mere occurrence of the morally relevant activity is just the *telos* of an immediately exercisable capacity to bring about it, which just is a first-order

¹² The implication, of course, is that chimps and dolphins should be accorded a measure of respect that would protect them from being hunted or experimented on as they often are. One might think they are on the borderline, but that is no reason not to err on the side of giving them a high degree of protection.

¹³ Here I am indebted to the work of Justin Matchulat [47] for helping me clarify these issues.

capacity to perform the relevant action that is not impeded by some circumstance or condition [48, p. 26]. Of course, this can be blocked rather easily — a little anesthesia will do the trick, but obviously we maintain our moral status while under anesthesia. The same is true of those who are in a coma. Terry Wallis, a man who awoke from a nineteen-year-long coma¹⁴ and recovered fluent speech [49], maintained human dignity throughout his ordeal — he did not suddenly regain it when he woke up.¹⁵ I submit that what accounts for this is that he retained a *second-order* capacity to possess the *first-order* capacity. It is by virtue of bearing a human life form, that his body presented observers with the fact that he was the sort of creature who is supposed to function in the ways relevant for being a subject of rights. That is to say, he had a nature characterized by a second-order or ultimate capacity to acquire the relevant capacities for moral agency even though they were blocked for a very long time. This is sufficient to generate duties in others to care for, and not kill him. Unless we want to deny that he maintained his status as a rights-bearer throughout this episode, we must take account of higher-order capacities. Yet, once we get on the wheel of arranging capacities in a hierarchal fashion in order to make sense of temporary change scenarios like these, we must terminate in what might be called an “ultimate” or “root” or “radical” or “basic” or “natural” capacity [50, p. 200-02], which explains why they must matter morally.

2.5 What about “defective” humans and permanent changes?

We all know some changes are permanent; some injuries are so devastating that there is no coming back from them. Since the forgoing argument is limited to temporary changes, in which there is a (realistic?) possibility of recovery, it seems inapplicable to those that are

¹⁴ This should be taken in a loose sense as Wallis was actually in a minimally conscious state.

¹⁵ I pause here to address the distinction between having dignity and feeling dignified. The former stays with us so long as we are alive while the latter comes and goes depending on whether we perceive that we are meeting, or being treated in accordance with, criteria for our conception of self-respect.

permanently changed or the possibility of recovery is vanishingly remote. Thus, as interesting as the argument may be for establishing the moral status of the very young or temporally unresponsive, it does nothing for those who are typically thought to be eligible for mortal harvesting: anencephalic children and PVS patients [51, p. 15]. The answer to this objection depends on whether we can survive the loss of our ultimate capacities for rational action. The question to be settled, then, is whether our ultimate capacities for rational action are essential to members of the human species. Why should we think anyone who has the capacity to live a biologically human life — one that begins at conception/twinning or implantation and ends in death — automatically has a capacity for rational action?

The answer derives from the natural goodness account of species norms articulated above: we cannot make sense of the human life form without conceiving it as having a rational nature. While this claim is startling, it is more plausible than one might initially believe. Indeed, evidence for it can be found even in the writings of the fiercest critics of the claim that human beings have a basic capacity for rational action. Consider the words of Jeff McMahan when he speaks of “a *defective* human embryo that lacks the potential to develop into anything other than an anencephalic infant” [15, p. 210 emphasis added]. Or those of Peter Singer who takes the following to be “*obviously* true” (emphasis original):

If we compare a *defective* infant with a nonhuman animal, a dog or a pig, for example, we will often find the nonhuman to have superior capacities, both actual *and potential*, for rationality, self-consciousness, communication, and anything else that can plausibly be considered morally significant [50, p. 201 emphasis added].

McMahan concurs when he says that those who are “severely retarded” are not only cognitively comparable to certain non-human animals, “they also have *no more potential* than those animals” [15, p. 205 emphasis added].¹⁶ Now, there is a sense in which these claims are obviously true if they are only talking about *some* level of intrinsic potential, but it seems they are making a stronger claim about *some* level of intrinsic potential *or other*.¹⁷ What is puzzling about these claims is that if such individuals lack an active, self-directing potential for rational action at *every* level, then they are not “defective” or “retarded” in any way. They simply develop as they are *supposed* to develop and actualize exactly what they are in potency; yet McMahan and Singer classify them in the set of things which have gone awry by use of pathological labels.¹⁸ Taken at face value, claims about “defective” humans are claims about how they are *not* supposed to be; rather, they presuppose the idea that humans are supposed to develop into, and function as, a mature member of their species. The old-fashioned ideas of a human nature perfected by its complete development and the species-grounded norms associated with concepts like proper function haunt these claims, despite their broadly neo-Humean background assumptions.¹⁹

We have good reason to believe that ultimate capacities for rational action are present even in cases of severe disability or injury, because we would not be able to make sense of ‘disability’ or ‘injury’ if these capacities were not essential to human beings in their nascent or

¹⁶ Throughout his treatment of potential, McMahan is concerned with the distinction between intrinsic and extrinsic potential, or in other words, an active and internally directed potential to develop according to an information-rich design plan and the potential to be able to receive an intervention from the environment or technology to bring about different stages of development. As interesting as his remarks are, I believe they are beset a pervasive and, in my view, unprincipled use of pathological labels (e.g. retarded, deficits, disability, etc.) that are inattentive to the significance of the logic of statements about natural defect, which ultimately presuppose the idea of the human life form I advanced earlier.

¹⁷ This also appears to be the case with Miller and Truog who, when writing of those who fall just short of whole-brain death, say, “these patients lack *any* capacity for experience, owing to profound brain damage and the absence of any responsiveness to stimuli indicative of sensory awareness...” [2, p. 121 emphasis added].

waning forms. While the language of “natural defect” has been spelled out most clearly by Thompson and Foot, the idea is not a new one, and is found in Aristotle when he says,

If, though either the thing itself or its genus would naturally have an attribute, it has it not; e.g. a blind man and a mole are in different senses ‘deprived’ of sight; the latter in contrast with its genus, the former in contrast with his own normal nature (*Metaph.* Bk.V: Ch.22 [59, p. 772]).

Human injuries and disabilities, then, are understood in light of the “normal nature” of human beings where “normal nature” is to be understood in terms of the species norms entailed by the human life form. As Thompson writes, “every thought of an individual organism as alive is mediated by thought of the life-form it bears. A true judgment of natural defect thus supplies an ‘immanent critique’ of its subject” [43, p. 81]. More clearly, he says,

Your observations, which are at bottom always observations of individual organisms, will thus lead in the end to a possible *critique* or *evaluation* of individual organisms and their parts and operations. And they will lead to the articulation of general standards of critique applying to organisms of the kind in question. This sort of critique of the individual is everywhere mediated by the attribution to it of a specific form; to bring an individual under a life form is, we might say, at the same time to bring it under a certain sort of standard [41, p. 55 emphasis original].

These evaluations need not be invidious or stigmatizing; rather, they should be taken as revealing

¹⁸ This tension is especially evident in McMahan’s writings where he seems to assume a ‘genocentric’ view of organisms, which views organisms and their features as being determined by their genetic code. This explains his difficulty in making sense of a human being without a genetic basis for the development of a rational nature that is still “internally directed toward the full realization of its inherent nature as a rational being” [53, p. 90]. Indeed, he ought to be puzzled if one’s genetic constitution exhausts one’s internally directed capacities. But why assume that? An ‘organocentric’ view of organisms takes more into account, specifically its dynamic epigenetic systems, to explain how it is that an organism’s development is internally directed [The genocentric/organocentric distinction belongs to 54, p. 3]. On this view, a condition like anencephaly would arise not from some genetic mutation, but from disruptions in the interaction of epigenetic factors. This controversy over the nature of the organism is not obscure either as it turns up in cancer research [55, 56]: is cancer caused by genetic mutations or developmental problems? My point, however, is not to say what happens in anencephaly; rather, it is to say that *if* it is a result of some genetic mutation and genocentrism is true, then we should not, as McMahan does, speak of human organisms with anencephaly as undergoing some developmental failure.

¹⁹ Note McMahan’s candid admission to Tim Mulgan [57], when he says Mulgan is “obviously right” when Mulgan says “McMahan wants to combine a naturalistic, broadly Humean, picture of a world where continuous properties come in degrees, with a set of Kantian intuitions that clearly require sharp boundaries between persons and non-persons. This is an essentially unstable combination” [53, p. 94]. It should also be noted that there is a tension in McMahan’s writings about how comparative judgments derived from species norms inform our ideas of deprivation despite his commitment to moral individualism (see Christopher Grau [58] for astute reading).

that the creature before us is unable to get what it needs to in order to fully flourish (the best ways to meet those needs are up for debate). As Jennifer A. Frey remarks, “This lack or absence of something that *ought* or *needs* to be present for the individual to flourish is the basis of the judgment of natural defect” [44, p. 95 emphasis original]. No doubt, all things considered, a blind person can be healthier than a sighted person, but if all other things are equal, a sighted person is healthier than the blind. Yet this *ceteris paribus* comparison does not hold between humans and moles; nor would it hold, for the same reasons, between non-disabled individuals and the sort of individuals Singer and McMahan call “defective” *if* they were correct that such individuals have no intrinsic potential for rational action at *some level or other* [48, p. 55].

One thinker who is refreshingly consistent on this point is Martha Nussbaum. She writes,

Some types of mental deprivation are so acute that it seems sensible to say that the life there is simply not a human life at all, but a different form of life. *Only sentiment* leads us to call the person in a persistent vegetative condition, or an anencephalic child, human [60, p. 187].

She believes this because “all possibility of conscious awareness and communication with others is absent,” and therefore, such individuals are incapable of flourishing despite our best efforts [60, p. 187]. Yet there has to be more than just sentiment involved.²⁰ Complex matters of personal identity and human ontology are at play that influence our ethics of killing, and I am not convinced that we do not bear the ultimate capacity to live a biologically human life [61]. It is one thing for a PVS patient’s friends and relatives to think that their loved one now lives a life not worth living or no longer exists as a person in some performative sense; it is quite another to think that their loved one is not there at all [62, p. 95]. No doubt, one could embrace a tough-minded body-self dualism, which identifies us with something that can only be accidentally

²⁰ The problem with sentiment is that it cuts both ways: it may very well be that what motivates some to literally dehumanize the PVS patient and the anencephalic baby is sentiment, the kind that expresses contempt rather than care for the body before us.

related to the human organism, but body-self dualism is both contrary to Nussbaum's assumptions and metaphysically dubious [63]. It fails to recognize the rational nature of the human life form as embodied and rather treats the living body merely as an independent object which contingently hides a rational self [47, p. 417]. Nor should we assume that the anencephalic child or the PVS patient lack the capacity to have a flourishing life at *every* level. It is reasonable to suppose that someone in a PVS who is protected and cared for has a more flourishing life than one who is starved, mocked, or sexually abused. The same can be said of the anencephalic child; better to be held and made comfortable in the little time that remains than to be thrown in the medical waste bin as if the baby was on the same metaphysical plane as its placenta: of human origin, but not a human being.²¹ It is simply not the case that nothing good or bad can happen to a person if that person has no way of experiencing what is happening. The capacity to experience one's state of flourishing may be absent, but that capacity is not required to have the opportunity to flourish as such.²² No doubt such opportunities are limited and will look quite different from those of a healthy adult, but they are nevertheless real opportunities with real human goods at stake.²³

Another problem: either the anencephalic child and the PVS patient are human or they are not. If they are not, then they cannot be called "defective" or "injured" for they cannot be appropriately measured against the human life form at all. That is to say, what we have is *absence* of mental capacity, not a *deprivation*, because the subject of deprivation — the human being — no longer exists. Nor is there any classification of these bodies; what exactly is the life form that they bear if it is not a *human* life form? No answer is given. Note also the oddness of

²¹ For an especially moving account of how an anencephalic baby was loved and cared for before dying and having its body being donated to research, see Sarah Gray's beautiful memoir [64].

²² The same is true of being harmed; one need not be aware of the harm in question to be harmed.

²³ I owe these points to Tollefsen [65, pp. 217-18].

there being a human organism *as a whole* the moment before it loses the relevant capacities, which suddenly goes out of existence and is instantly replaced by a similar looking organism *as a whole* free of any known species category. To be sure, an argument from oddness is not sufficient to undermine this view which literally “dehumanizes” these living bodies as a consistent metaphysical thesis and no amount of empirical evidence is going to determine whether or not this is the case. Yet Ockham’s Razor should lead us to adopt a simpler explanation: there is a human being there that is profoundly disabled, because it lacks what it needs to activate its ultimate capacities for rational action [66, p. 15].

What changes, then, in permanent scenarios is not the nature of the human being before us. The distinctive feature of permanent cases is that we do not know how to reverse the conditions of anencephaly or the PVS. Indeed, permanence is compatible with the idea that one’s condition *can*, but *will not* be reversed, because we lack the technical resources for how to reverse it and will continue to do so for the foreseeable future. The temporary change argument is concerned with the metaphysical conditions that assume (for conditional proof) enough time and technical know-how are operative to make the restorative changes, not the actual conditions in which a given patient might find themselves.

2.6 On species membership and its ethical significance

Obviously, the criterion for species membership I am working with is essentially metaphysical, not merely biological. In our experience the only rational animals around are human beings, so it is only natural to prioritize their lives over those non-human animals. If we ever encounter Martians, super-chimps, or the talking beasts of Narnia, they too should be classified as rational animals. We could even be generous like the Thomists and call them “human” too. If we hesitate to go that far, then so be it: all that matters is that we classify them as

rational animals, for that is sufficient to determine their moral status. Hence, the problem of “speciesism” is avoided since what is “problematic” about it is the assumption that only biological concepts of species are relevant for determining moral status and they are not; what matters is the metaphysical concept.

Is the metaphysical concept too broad? We might think it invites the “Anything you can do, an animal can do too” objection. McMahan’s articulation of it is representative:

[I]f it is physically possible, through some as-yet-undiscovered form of genetic therapy, to augment a defective fetus’s brain in a way that will enhance its future cognitive capacities, it is surely physically possible to achieve the same result in an animal—for example, a dog. If, therefore, we claim that a fetus with cerebral deficits is a potential person on the ground that it is physically possible for its brain to develop in ways that would be identity-preserving and would overcome or repair the deficits, we must concede that a dog is a potential person for the same reason [15, p. 312].

A dilemma emerges: either embrace the dignity-status of the whole animal kingdom or accept the charge of speciesism. Yet this objection assumes an ambiguous concept of potentiality.

While it may be the case that it is physically possible for *a* to *F* provided that *a* has the potential for *F*, it is not necessarily the case that *a* has the potential for *F* if it is physically possible for *a* to *F*. Consider again Aristotle’s mole; let us suppose that it is “physically possible” for the mole to see by way of some yet-to-be discovered technology. It does not follow that the mole has the kind of potential to see that I am talking about, an *active potential intrinsic to its kind that is internally directed by its own nature* to see. In the imagined case the mole is made to see, *in spite of its nature*, which is not internally directed towards the development of sight. My argument requires that only *active* capacities for rational action are sufficient for moral status. That there may be a *passive* capacity in place to receive active capacities for rational action is not.

Nevertheless, some think that the possession of basic active capacity for rational action is not ethically significant in itself, and that the degree of the remoteness or nearness of their actualization is. John Lizza offers the following thought experiment to illustrate why:

For example, suppose that we have the knowledge and technology to clone the skin cell but lack the knowledge and technology to correct the genetic defect in the anencephalic embryo. Suppose further that we had some dire need to increase the human population and that the cloning technology was in very limited supply. Even though the anencephalic embryo might be said [...] to have the active potential for intellect and will with assistance, we would not value it as much as the skin cell and cloning technology that could “produce” a human being. If one had to perform triage and devote resources to either the anencephalic embryo or the skin cell, it would be ethically justified to devote those resources to the skin cell rather than to the embryo [67, p. 24].²⁴

The implication is that the value of one’s potentiality for rational action, whether it be active (or passive), depends on the likelihood of its being realized. To be sure, the time it might take for someone to recover is going to factor into what sort of treatment options, if any, we might choose. Yet, I am not concerned with decisions to treat or the allocation of resources, but rather with decisions to destroy, and the decision not to treat is not necessarily a decision to destroy. Nor should we assume that potentiality only has instrumental worth and should not be taken as evidence of intrinsic worth. If I am now under anesthesia and will not wake up for another hour, and it is true that I will be killed by a falling meteor five minutes from now, I still retain my dignity-status. The contingent certainty of me not “coming back” is simply irrelevant as to whether I retain my worth as a human being, which generates duties in others not to kill me. Another way of stating the problem is that Lizza assumes that the ethical significance of human potentiality is exhausted by what its actualization *becomes*, i.e. a person, and therefore its importance depends on when and if, its actualization will occur. But active capacities for rational action that are intrinsic to a thing are constitutive of a thing’s *being*. That is to say, they indicate what the thing *is*, and help explain why it has non-instrumental worth regardless of its circumstances.

²⁴ Lizza also charges theories of potentiality like mine with the problem that it cannot adjudicate borderline cases in a non-arbitrary way. This is puzzling, because if it could adjudicate borderline cases in a non-arbitrary way, then they would not be borderline cases at all. Borderline cases are essentially indeterminate. It is worse if a theory gets the wrong results, and I am not convinced that mine has.

3 Is a “respect for donor” rule different from a “dead donor” rule?

A final objection worth considering to my thesis (that killing someone for their organs disrespects the worth of human life) is that I misunderstand the true nature of respect. As Elysa Koppelman claims,

By applying the [DDR], we are failing to help patients achieve the fate that best fulfills their personhood. And this failure, especially given the implications of medical progress, reflects a moral cowardice and an abdication of our common humanity. By changing our focus we will realize that life and death distinctions are not always compatible with respect for persons [68, p. 7].

She reaches this conclusion through an argument, which can be formalized like so:

1. If one has indicated that one wants to be an organ donor, and forgo life-sustaining treatment when brain-dead or in a PVS, then denying one the opportunity to donate in these circumstances harms the donor.
2. This harm is a form of disrespect.
3. Therefore, any person who is denied the opportunity to donate in these circumstances is disrespected.

Because the DDR is the source of disrespect, she calls for its replacement with the “respect for donor rule,” which considers a patient’s life history, decisions, and values, not whether they are dead or alive. This, in her view, is a more holistic view of human personhood. That is to say, one’s ends as set by the person and one’s life history as shaped by the person, including the directives for what others are to do after death or incapacitation, is what matters. These things, she thinks, are the substance of our shared humanity; the mere possession of a rational nature embodied in a human life form is not decisive. Therefore, if one’s life history includes directives to be volunteered for transplant surgery under the condition that one is alive but irreversibly unconscious, then the ethics of respect generate a duty in others to honor them.

A close inspection of her argument, however, reveals an ambiguity in the term “opportunity to donate.” Even those who deny that brain death is death can agree with her conclusion if “opportunity to donate” means “the opportunity to work with a transplant team to

remove vital organs after a determination of death by circulatory criteria.” This, of course, is compatible with the DDR, which is contrary to her assumptions. To make the conclusion incompatible with the DDR, “opportunity to donate” must mean “the opportunity to be killed on the operating table by one’s transplant surgeons.” But is it really the case that one is disrespected if one is denied this opportunity?

Suppose this true. It then follows that someone from the transplant community is *obligated* to kill the donor. This is because norms of respect generate rights-claims on behalf of the one who is owed respect, and rights entail obligations. Yet the fact is no one is obligated to kill her. The problem for Koppelman’s “respect for donor rule” is that it ends up demanding over-respect; it effectively nullifies the autonomy of transplant surgeons *not* to engage in mortal harvesting. Perhaps this outcome is not objectionable to those who are eager to deny conscience-rights to physicians, but I suspect that it is to many transplant surgeons themselves. If it is, then what is needed is an argument that reaches a weaker conclusion: that transplant surgeons are *permitted* to kill donors under such circumstances, not that they are *obligated* to do so.

This is no problem if Koppelman assumes (and she does) that the life of a PVS patient is of such a low worth that it no longer deserves protection from being killed through the framework of informed consent. If she wants to exclude healthy people from the donor pool (and she does), then she must answer the question as to what gives human life its worth, such that it should not be killed even upon request. Koppelman’s answer is the well-worn psychological property of being capable of forming desires and interests [68, p. 8; 69]. Contrasting the PVS patient, (whom she permits to be killed through informed consent) with the severe Alzheimer’s patient (whom she does not), she writes, “There isn’t really anything that being in such a state [the vegetative state] is like, for being in such a state is like being in no state at all” [68, p. 8].

Yet, the same is true of being under anesthesia or in a deep sleep: there is no felt experience of those states either. Clearly, what matters is some level of capacity to get out of those states, but then we are back on the wheel: what level of capacity for getting out is morally relevant? I argue that, for any non-ultimate level of capacity we choose, we can run a temporary change argument where one redevelops the capacities relevant for moral status, and then conclude that one had moral status all along. Without giving an argument for why we should believe PVS patients have no ultimate active capacity for rational action, we cannot safely claim that they lack moral status, which, again, is contrary to her assumptions.

Furthermore, Koppelman's preferred way to limit the freedom of healthy people from sacrificing themselves through mortal harvesting only serves to bolster my contention that basic, natural capacities are what is morally relevant. As someone who is sympathetic with Kant's moral framework, Koppelman believes "it can be argued that the end of giving vital organs when not in a suspended state [i.e. being brain-dead or in a PVS] is almost always irrational or immoral, while the end of giving vital organs when in such a state is not" [68, p. 8]. Here, she finds compelling Kant's argument that we should not respect a suicidal will since it seeks to annihilate the very thing that merits respect: a will that is capable of setting ends for oneself.²⁵ Kant's point is that an autonomy-based right to withdraw oneself from all the duties of respect one is owed involves a contradiction: we cannot divest ourselves of our worth by virtue of exercising the capacity that give us our worth [71, p. 84]. So, if PVS patients no longer have this capacity, then their wishes to die by transplant surgery as indicated beforehand generates no paradox of autonomy in which one wills both to be respected and annihilated. Yet, if we grant this line of reasoning, the question is begged with respect to whether PVS patients actually have

²⁵ See Cholbi [70] for an excellent overview of this argument.

the capacity for rational action *at some level or other*. I say they do, for, if they did not, then we could not intelligibly understand them to be injured. Therefore, we should not assume that donors can consent — even in advanced directives — to be treated in a way that makes their lives comparably less valuable than their organs, as if their disabled bodies were mere receptacle of coveted pieces of tissue that can be mined for beneficial purposes. This is what is fundamentally wrong with mortal harvesting.

4 The basis of human equality

Let us take stock. Essentially, my argument is that if anything has the basic capacity for rational action, it has dignity-status; all human beings by virtue of their life form have this capacity no matter their maturity level or disability status; therefore, all human beings have dignity-status, which entitles them to protections against killing. This argument was made with a view towards providing a basis for human equality. Any basis that depends on properties that come in degrees is flimsy at best. The chief virtue of McMahan's work is that our liberal egalitarian principles must be rejected if we are to make one's moral status depend on the instantiation of certain psychological properties. This is something he recognizes [53, p. 104], and he is willing to follow his principles where they lead. In particular, he is willing to claim that, *ceteris paribus*, killing a *healthy* orphaned newborn infant for its organs is permissible, since he thinks a newborn's "psychological connectedness" is not strong enough to generate a time-relative interest in continuing to live. He is worth quoting at length:

Suppose that a woman who wants to be a single parent becomes impregnated via artificial insemination, but dies during childbirth. She has no close friends and no family — no one to claim the child. The newborn infant is healthy and so is an ideal candidate for adoption. But suppose that, in the same hospital in which the infant is born, there are three other children, all five years old, who will soon die if they do not receive organ transplants. The newly orphaned infant turns out to have exactly the right tissue type: if it were killed, its organs could be used to save the three ailing children. According to the view I have developed, it ought to be permissible, if other things are equal, to sacrifice the newborn orphaned infant in order to save the other three children [15, p. 359; cf. 71, p. 152].

This frank acknowledgment appears in a discussion of implications of his view that could function as reasons to reject his view altogether. Nonetheless, he is willing to bite the bullet, because he thinks not biting it leads to morally inconsistent positions, specifically with respect to how we treat non-human animals [73]. By contrast, I have labored to develop an alternative account of the nature of human beings and a morally consistent view of the wrongness of killing to support my judgment.²⁶ Those who attach moral status to psychological properties that come in degrees should take heed, because more is at stake than we realize. The egalitarian principles, like those found in the Declaration of Independence, that have been foundational to democracy and an impetus for much social progress are at risk of being undermined.

My view implies that the dignity status we have in virtue of being rational animals is one that does *not* come in degrees. This is precisely what our egalitarian principles require, and they are elegantly satisfied by an all-or-nothing property: the possession of a rational nature. Human dignity is inherent and ineliminable, and there is a duty to respect it at every stage of development or at any degree of (non-ultimate) incapacity throughout human life. While some may be discomforted by the “conservative” implications this view may have for the practices of

²⁶ A clear way of expressing the disagreement between McMahan and me goes like this: he thinks it is *more* counter-intuitive to believe that a day-old embryo is entitled to the same protections from being killed as those of us reading this text *than* it is to believe that killing an orphaned healthy newborn infant for its organs is permissible — I do not.

abortion, embryonic stem cell research, euthanasia, and physician-assisted suicide, I embrace those implications. One should see my position as resonating with the ethical forecast given by G.B. Giertz at the 1966 Ciba Foundation Symposium on the ethics of transplantation. As he saw it, “respect for the value of the human being and hence democracy is in danger” when a society embraces social practices that deny “that every human life, even the most wretched, has a meaning” — or dignity, as I put it [74, p. 140].

Nonetheless, the view that human beings have some sort of non-instrumental worth by virtue of what they are, and that what they are is determined by their ultimate capacities shares a surprising amount of common ground among philosophers of divergent political persuasions. The so-called “capabilities approach” that recognizes the moral significance of the freedom to pursue one’s flourishing, and that one’s opportunity to do so is best understood in terms of their capabilities (or capacities²⁷), is one that is interpreted in various ways through Rawlsian and Aristotelian lenses [76]. Early in her development of the relation between human capabilities and human rights, Martha Nussbaum (a political liberal) notes that one of the senses of “capabilities” she is working with is called “basic capabilities” — “the innate equipment of individuals that is the necessary basis for developing the more advanced capability” [77, p. 289].²⁸ Similarly, to account for the notion that each of us possesses an ineliminable human dignity, Robert P. George and Patrick Lee (political conservatives) appeal to the notion of a “basic natural capacity” for conceptual thought that “human beings have in virtue of the kind of thing they are” [79, p. 185].

²⁷ I treat these terms as synonymous because both are able to name properties intrinsic to a thing’s nature as they do in Nussbaum’s writing in spite of her careful distinction that “capabilities” name the morally significant subset of “capacities” distinctive of human nature [74, p. 28].

²⁸ Nussbaum has since dropped this conception of basic capability, because, in her view, it does not adequately secure the political equality of those with severe mental and cognitive disabilities. She says, “that it is quite crucial not to base the ascription of human dignity on any single ‘basic capability (rationality, for example), since this excludes from human dignity many human beings with severe mental disabilities” [78, p. 362]. As I have tried to show for reasons stated against Singer and McMahan, I do not believe she needed to do this.

While I tend to side with Lee and George regarding the ethics of killing, it is striking how prominent the agreement is that basic capacities (or “capabilities”) for rational action are foundational to our egalitarian principles. And it is a good thing too. For it gives us a principled reason to care for a healthy orphaned newborn infant, and soundly reject as impermissible the proposal to kill it for its organs.

5 Mortal harvesting is incompatible with human equality

What often goes unnoticed in cases for mortal harvesting is how inimical they are to the notion of human equality. Common to every proposal is the proposition that the organs inside a potential donor are more valuable than the life of the donor. For example, although Miller and Truog believe few would be made dead by mortal harvesting who would not otherwise be made dead by withdrawing life-support, they readily acknowledge that some patients will die by transplant surgery who would otherwise continue to live because of our imperfect ability to prognosticate death after the withdrawal of life-support [2, p. 116]. They are willing to accept this risk, however, in light of the benefits that would come to organ recipients as well as the respect for the wishes of the donor to donate. What they are less willing to risk, however, is possibly damaging the organs in a donation-after-circulatory-death protocol. Perhaps for autonomy reasons they would allow such a protocol to be chosen, but it is not to be recommended because it “unnecessarily risks the viability of the organs owing to damage from warm ischemia during the time between cessation of circulation and organ extraction” [2, p. 121]. Consequently, their view implies that the risk of harming the organs outweighs the risk of harming the life of the donor. Of course, the only sense of “harm” they countenance is the sense of their being a setback to the donor’s interests; intending the destruction of the donor’s life falls

outside their concept of harm. This should not be the case, because they should not neglect the non-instrumental worth of human life which is not possessed by any human organ.

To be sure, the value of the organs in proposals like Miller and Truog's is derived from the value the donor and recipient places on them. Yet this just reveals that one's life may be medically sacrificed for the sake of another, owing to the assumption that the donor's life is not as worthy of protection from being instrumentalized to the point of death. Mortal harvesting is permissible only if the donor satisfies criteria for what might be called the "as good as dead donor rule" (AGDDR). There is no clear consensus on how to determine whether one has satisfied it, but some suggestions are worth pondering if only to see how varied and ill-defined they are. Potential donors, who are "terminally ill" [80], or have "no hope of meaningful recovery" [81], or are "on a trajectory that with or without organ procurement, would imminently lead to [their] becoming dead by stopping mechanical ventilation" [2, p. 145], are empowered to consent to their deaths via transplant surgery in order to meet the urgent needs of longsuffering recipients while those who fall outside these conditions, are not.²⁹ Those outside these conditions are permitted to choose mortal harvesting in their living wills for when these conditions apply and they must make their choice under the policy-recommended belief that life in these conditions would not only be not worth living, but would also not be worth protecting as much as we protect healthy people, which expresses to those in these conditions that they would not only be better off dead, but society would be better off too.³⁰ And, as I said before, since we expect people to be rational, those who are in these conditions (or on the cusp of them) that refrain from

²⁹ Perhaps strangest condition suggested in the literature is the condition of being engaged in "the Heideggerean activity of 'Being-towards death'" [82, p. 449].

³⁰ For an interesting analysis of the "expressivist objection" see Philip Reed [83].

choosing mortal harvesting must give some reason to do so upon pain of irrationality, which, again, is an intellectual burden no healthy person has to bear, and is therefore unfair [22].

The choice to refrain is not only burdened intellectually, but also morally. Given that every argument for mortal harvesting references the dire need for organs, this empowerment to die by transplant surgery quickly moves to an imperative that is easy to justify. One could marshal the framework of Singer's "Famine, Affluence, and Morality" [84] argument to conclude that you act wrongly if you satisfy the AGDDR but refrain from "organ donation euthanasia." Formulating the argument makes this clear:

1. Suffering and death from the lack of transplantable organs is bad.
2. If it is in your power to prevent something bad from happening, without giving up anything as equally important, it is wrong for you not to do so.
3. If you satisfy the AGDDR (e.g. you are "terminally ill" or have "no hope of meaningful recovery" or "on a fatal trajectory...") and if you refrain from donating, then it is in your power to prevent suffering and death by donating as many transplantable organs as you can, without sacrificing anything nearly as important.
4. Therefore, if you satisfy the AGDDR and if you refrain from donating, then it is wrong for you to refrain.

All parties to the debate agree with the first premise. Nearly everyone agrees with the second, as it seems perfectly wasteful to forbid transplants from freshly-dead bodies; yet, the third is precisely what is at issue. Mortal harvesting could not be justified as a matter of public policy without affirming it, and potential donors would be saddled with its moral stigma despite being permitted to refrain from sacrificing their lives. Now, a potential donor could invoke what I have argued for here to say that *there is* something that would be sacrificed that is just as important, that is, the inherent dignity of the individual human person in their embodied life. While I believe this is a good reason for a potential donor to refrain from undergoing mortal harvesting, the point is that no potential donor should have to bear the weight of rebutting this (question-begging) argument, which just assumes, as a matter of policy, that this not a good reason.

Worse yet, policy makers who would establish mortal-harvesting practices seem indifferent to the fact that a certain set of (perhaps unreliable) quality of life judgments along with their lethal implications would become a systematic part of the transplant enterprise. No doubt, these judgments are probably already tacitly involved in the system, but it does not follow that they should be codified in a formal policy as if this would somehow be an improvement over the status quo. It is doubtful that criteria for determining whether one satisfies the AGDDR would be better defined than the current diagnostic criteria for death, and it is likely that in time the categories will expand to those who claim “unbearable suffering” — a trajectory noticeable in parts of Europe [85]. Furthermore, if we were to adopt these proposals, then there is no reason why we should not be able to lethally experiment on the same class of people, so long as they consent to being used lethally for the sake of gaining medical knowledge.³¹ This, of course, would undo the fundamental ethical principles long recognized by the Nuremburg Code, the Declaration of Helsinki, and the Belmont Report. To allow mortal harvesting is not to just “rethink” the ethics of death, dying, and organ transplantation, but the whole bioethical enterprise itself. Are advocates of mortal harvesting prepared to go as far as their principles will take them? If not, why not?

Conclusion

In this paper I have labored to identify the basis that grounds our protections against killing with something that does not come in degrees, namely our kind-specific rational nature. Along the way, I have advocated for a model in which our dignity is bound up with a way of

³¹ It may be argued that the goods of medical knowledge are farther off in the future and not as immediately tangible as those of organ donation. That probably is the case for most scientific experiments, but it’s not hard to imagine some emergency involving an experimental intervention that could save a life except that we need to learn some more about it before using it, because it has a severe risk of causing death. The rules against doing this are based on the same principles that are foundational to DDR.

being rather than a way of *becoming*. If you bear a life-form with a rational nature, you have dignity; every human being bears such a life form, so every one of them has dignity-status. Concomitant to this belief is that our dignity is ineliminable, which makes it the case that our suffering always matters no matter how terrible it may be or how insentient we may become. Related to this view is a belief that I have not argued for here: we are not merely receptacles of value whose claim to life wholly depends on whether we can be the subject of some good state of affairs or pleasurable sensation. Modern accounts of killing tend to reduce human worth to the degree of happy properties one contingently exemplifies (which are just matters of fortune), and leave our natural, intrinsic dignity behind. “They are,” as Chappell says, “metaphysically superficial, because these accounts focus on what’s secondary, the properties of the individual person, while ignoring or bypassing the primary thing, the person herself” [37, p. 108]. Perhaps this is a consequence of our culture’s move towards secularization, which leaves behind the idea that human beings are made in the image God. Geertz certainly thought this when he remarked at the Ciba meeting that “The concept of unconditional human worth cannot, however, be justified rationally” [74, p. 144] — the implication being that it could only be accepted as a matter of blind faith. My hope is that it can be accepted rationally after examining the contents of this article. Once it is accepted, we can see that killing someone for their organs is disrespectful not only to the life of the one being killed, but also to the one who has them because it always values the organs more than one who has them.

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