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KLAUS JACOBI

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Abortion: The Relevance of Personhood

A Critique of Dworkin¹

Abortion is clearly an important moral, legal and political issue. But although this vexed question calls for philosophical analysis, the problem itself also contributes to determining the shape and contents of philosophy. And one of the most central philosophical questions raised by the abortion problem is what kind of ethical theory we should have.

A received view is that ethics must accommodate the basic facts of morality. Now, the concept of the person certainly is central to our moral view (at least in Western culture) – a fact duly noted in Kant's Categorical Imperative. According to the Formula of Humanity, the task of morality is to protect humanity in both our own and in any other *person*. Hence, for Kant persons are the sole objects of direct moral concern. But of course, respect for persons is not the exclusive property of Kantian ethics. Since it plays such a pivotal role in the morality of real life, it is indeed – albeit on highly different interpretations – integral to a great many theories about morality. Due to this centrality of respect for persons in ordinary morality as well as in ethical theory, personhood offered itself as the natural focal point of philosophical analysis when abortion came in the forefront of the political agenda in the 1970s. Thus it was generally assumed that the morality of abortion – in particular a woman's right to have an abortion on demand – crucially depends upon whether the fetus is a person.

However, all along there has been an undercurrent of critics who attack the approaches in terms of personhood. They maintain – on various grounds – that person-centred analyses are inadequate and hence, that the problem of abortion requires altogether different approaches. If correct, the critique will naturally spread beyond the analysis of abortion, and may eventually lead to a complete overthrow of person-centred ethical theories, such as Kant's. But if wrong and unchecked, the critique, throwing the baby out with the bath-water, threatens to subvert morality itself.

Ronald Dworkin's book *Life's Dominion* is one of the latest voices in this undercurrent. Dworkin agrees with the moral philosophers who see personhood as largely irrelevant to the problem of abortion. The traditional insistence that the

¹ Ronald Dworkin, *Life's Dominion. An Argument about Abortion and Euthanasia* (London: HarperCollins, 1993).

pertinent question to ask is "whether a fetus is a person?" is, in his opinion, itself a reason why public debate has become so polarized.² But as Dworkin's criticism differs in important respects from that of earlier critics, I shall summarize the main points of the early critique, adding a brief counter-argument against each, before I get to his.

I

A well-known critic of the person-view³ is Richard Hare. He held that the predicate "person" has too fuzzy edges to be of any use for deciding cases on the borderline.⁴ So presumably, appeals to personhood cannot be of help for settling the disagreement between "pro-life" and "pro-choice". However, while I agree that the concept of the person has fuzzy edges, I can't see why that should disqualify the person-view. For the fuzziness is not the source of the problem in the first place. It is equally counter-intuitive to ascribe personhood to the fertilized human ovum as it is to withhold it from the infant and the formed human fetus. There is, to be sure, a grey zone in between, but the fact that public debate primarily concerns phases in which ordinary moral language is clear with regard to personhood shows that the real problem rather concerns the validity of our ordinary concept of the person.

A somewhat different criticism was levelled at the person-view by Jane English, who insisted that the concept of the person is a cluster of features including various psychological, social, legal and rationality factors. An individual might lack some of these factors and still qualify as a person just as it might display the majority of them and still not be one. On this basis English urged that analyses of personhood in terms of necessary and/or sufficient conditions are impossible, and therefore, that there is no chance of settling the abortion issue by determining when a human being becomes a person.⁵ But as Michael Tooley has pointed out, the factors English listed are hardly all relevant for personhood, and she has given absolutely no argument against the possibility of isolating those that are morally relevant in themselves so as to arrive at "a 'single core' that specifies what makes something a person."⁶

The probably most widespread basis for rejecting the person-view is that it

² *Ibid.*, pp. 10-11, 30.

³ As I use it, the term "person-view" refers to all person-centred analyses of abortion.

⁴ Richard M. Hare, "Abortion and the Golden Rule," *Philosophy & Public Affairs* 4 (1975), reprinted in James Rachels (ed.), *Moral Problems*, third edition (New York: Harper & Row, 1979), p. 154.

⁵ Jane English, "Abortion and the Concept of a Person," *Canadian Journal of Philosophy* 5 (1975), reprinted in Joel Feinberg (ed.), *The Problem of Abortion*, second edition (Belmont: Wadsworth Publishing Company, 1984).

⁶ Michael Tooley, *Abortion and Infanticide* (Oxford: Oxford University Press, 1983), pp. 92-5.

has unacceptable consequences. Critics typically hold up Tooley's interpretation of personhood as a proof to that. Tooley famously argued that a person is a being who *qua* a subject of experiences and other mental states has an interest in his own continued existence. To have such a "survival interest" requires the concepts of identity, time, the future, continued existence, and of a subject of experiences and other mental states, as well as the belief that one is such a subject. And these requirements place personhood well beyond human infants.⁷ Critics of the person-view see this counter-intuitive result as representative and therefore as showing that all analyses in terms of personhood are doomed to fail. Whereas this kind of criticism seems more popular outside philosophy, notably in theology, one of its most ardent philosophical advocates is Rosalind Hursthouse, who grounded her rejection of the person-view on an unargued premise that a person is a rational and self-conscious being.⁸

But this is a controversial premise which at the very least must be argued for. However, I doubt that a sound argument is feasible. The plain fact that we ordinarily do classify infants as persons tells strongly against it. And the history of ideas supports and explains this usage of the concept. According to Boethius' classical definition of the person as "an individual substance of rational nature," the fetus develops into a person long before becoming a rational, self-conscious agent. Boethius' definition, which was European standard for centuries, is formulated within the framework of the Aristotelian delayed animation theory, according to which a fetus becomes a human being (in the Aristotelian sense) when informed by the rational soul. This happens at the time when it acquires a distinctly human body.⁹ Clearly, the classical conception of the person does not have the counter-intuitive implications that according to critics disqualify the person-view.

The above criticism of the person-view assumes an ultra-liberal definition of the person. To some extent this is an inheritance from Locke, who defined 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."¹⁰ Locke's definition is roughly equivalent to Tooley's.¹¹ But obviously, in order to

⁷ *Ibid.*, pp. 104–5 and Section 11.5. For a German advocate of the position, see Norbert Hoerster, *Abtreibung im säkularen Staat. Argumente gegen den § 218* (Frankfurt am Main: Suhrkamp Verlag, 1991).

⁸ Rosalind Hursthouse, *Beginning Lives* (Oxford: Blackwell, 1987), pp. 6, 91.

⁹ G.R. Dunstan, "The Human Embryo in the Western Moral Tradition," in G.R. Dunstan and M.J. Seller (eds.), *The Status of the Human Embryo* (London: King Edward's Hospital Fund for London/Oxford University Press, 1988).

¹⁰ John Locke, *An Essay Concerning Human Understanding*, A.C. Fraser (ed.) (New York: Dover Publications, 1959) Vol. 1, Bk. II, Ch. XXVII, § 9, p. 448.

¹¹ Cf. Helga Kuhse and Peter Singer, *Should the Baby Live? The Problem of Handicapped Infants* (Oxford: Oxford University Press, 1985), p. 132. I say *roughly* equivalent, for unlike Tooley, Locke identifies the person with the rational and moral agent. Locke, *op.cit.*, § 26, p. 467; Tooley, *op.cit.*, pp. 138 ff.

have a case against person-centred analyses of abortion at all, critics like Hursthouse must first argue that personhood should be defined in, roughly, Lockean terms rather than in classical terms.

II

Curiously, Dworkin does not refer to these earlier critics of the person-view, although some of his points resemble theirs. He says that "it would be wise [...] to set aside the question of whether a fetus is a person [...] because it is too ambiguous to be helpful."¹² He accepts the view underlying Tooley's definition of personhood, that rights protect interests, and, in particular, that the right to life protects an interest in continuing to live.¹³ He also agrees that interests in the morally relevant sense require consciousness of some form.¹⁴ But he doesn't take into account the arguments given by Tooley, and before him Feinberg,¹⁵ that the relevant form of consciousness must be *cognitive*, not just sentient.¹⁶ I believe this explains why Dworkin doesn't draw Tooley's ultra-liberal conclusion. This will prove significant (see end of my paper). Here I shall only stress that for Dworkin the connection between rights and interests implies that a human fetus becomes a person with rights at a relatively late stage in pregnancy.¹⁷ This may plausibly have contributed to his rejection of the person-view. But his main argument against it and its accompanying preoccupation with rights is different from all the above: "We cannot understand most people's actual moral and political convictions about when abortion is permissible, and what government should do about abortion, in this way. The detailed structure of most conservative opinion about abortion is actually inconsistent with the assumption that a fetus has rights from the moment of conception, and the detailed structure of most liberal opinion cannot be explained only on the supposition that it does not."¹⁸ Dworkin's objection is that seeing the problem of abortion as one about when the fetus becomes a person with rights obscures the position of both the

¹² Dworkin, *op. cit.*, p. 23.

¹³ *Ibid.*, pp. 11, 15–18, 24, 72–73. Evidence that he accepts an interest-based definition of personhood "in the philosophical sense," is also his reference to Tooley in note 31 on p. 245.

¹⁴ *Life's Dominion*, pp. 16, 23.

¹⁵ Joel Feinberg, "The Rights of Animals and Unborn Generations," in William T. Blackstone (ed.), *Philosophy and Environmental Crisis* (Athens, Georgia: University of Georgia Press, 1974).

¹⁶ Evidence that he doesn't hold cognition necessary for interests in the relevant sense is e.g. his claim that "Creatures that can feel pain have an interest in avoiding it, of course." Dworkin, *Life's Dominion*, p. 16.

¹⁷ *Ibid.*, pp. 17–18.

¹⁸ *Ibid.*, p. 31.

conservative and the liberal. Regarding the former, he believes that analyses in terms of fetal personhood and rights cannot, in particular, make sense of the fact that the great majority of those believing abortion to be terribly wrong would nevertheless allow for abortion in order to save the mother's life, and a significant number of them also in the case of rape. Regarding the liberals, he believes that the person-view cannot make sense of the fact that they too find abortion morally problematic even at early stages. Rather, he urges, the issue concerns the sanctity of human life, – a value which both parties share, while placing different emphasis on different aspects of it.¹⁹

I believe this criticism is directed at a too simplistic version of the person-view. A more complex analysis allows for the considerations Dworkin believes are excluded. One must distinguish between three separate moral dimensions of the issue: abortion on demand, abortion on indication – which both concern moral questions of direct relevance to the law – and finally, the private morality of abortion. With regard to abortion on demand, the traditional idea is that once a fetus becomes a person, it is a party to the decision. From then onwards abortion on demand is ruled out by the fundamental principle of justice that no one can be a judge in one's own cause. However, being a person does not always rule out homicide, e.g. in self-defence, so neither is the fetus who has become a person morally protected in all circumstances. In fact, the claim-rights that come with the status of personhood have restrictions in cases of abortion that go beyond other cases of homicide. The reason is that a fetal person is located within another person, whose rights should also be respected. This opens for abortion on indication, e.g. rape. Many Western legislations thus allow for late abortions if the case meets various criteria, even though their prohibition on abortion on demand entails that the fetus is taken already to be a person at that stage. Finally, personhood also explains why even early abortions may be immoral. Only now it is not the moral status of the fetus that matters. Rather, the rationale for moral reservations about early abortions is that the fetus is protected *indirectly* by moral duties which the pregnant woman has to the father and – more importantly – to herself *qua* a person entitled self-respect.

In light of this sketch, it appears that Dworkin's criticism has missed the mark. The traditional emphasis on personhood reflects the preoccupation with abortion *on demand* in public debate. While this problem does not comprise the abortion problem in its entire complexity, it can't be mistaken to invoke personhood to that end if the person-view doesn't represent an obstacle to the analysis of the two other moral dimensions of the problem. But it doesn't; at least this cannot just be assumed. Dworkin's claim that his thesis that the issue is really about a value which, in his view, is detached from personhood and rights – the sanctity of human life – is alone capable of explaining our moral intuitions, runs afoul of the suggested arguments for the permissibility of late and the impermis-

¹⁹ *Ibid.*, pp. 10–28, 31–4, 68–69, 89–101.

sibility of early abortions. To sustain my critique, let us see in some detail how the person-view accounts for the moral intuitions he appeals to.

III

Turning to conservative moral intuitions, Dworkin's thesis is that what appears to be a "derived" objection to abortion really is only a "detached" objection. Construed as a "derived" objection, the claims that a human fetus is a human being with a right to life, and that abortion is murder, pertain to the system of justice. Construed as a "detached" objection – as one which "does not depend on or presuppose any particular rights or interests" – the same phrases express religious or spiritual adherence to the sanctity of human life.²⁰ Among his arguments that conservatives make the "detached" objection are polls showing that a large percentage of those who object to abortion in terms of conservative rhetoric still do not believe it should be made illegal. But this does not make for a persuasive case that even *adamant* conservatives, who vigorously urge that human fetuses have a moral right to life that ought to be protected by law, and that abortion generally is murder, intend this in the "detached" sense.²¹

In Section IV, I argue that there is no such "detached" idea of the sanctity of human life. In the present section I shall consider Dworkin's principal argument for the above thesis: taken in the "derived" sense, i.e. literally, the conservatives' ban on abortion in general would be *inconsistent* with exceptions even they approve of:²² "It is a very common view, for example, that abortion should be permitted when necessary to save the mother's life. Yet this exception is also inconsistent with any belief that a fetus is a person with a right to life. [...] Abortion conservatives often allow further exceptions. Some of them believe that abortion is morally permissible not only to save the mother's life but also when pregnancy is the result of rape and incest. The more such exceptions are allowed, the clearer it becomes that conservative opposition to abortion does not presume that a fetus is a person with a right to live. It would be contradictory to insist that a fetus has a right to live that is strong enough to justify prohibiting abortion even when childbirth would ruin a mother's or a family's life but that ceases to exist

²⁰ *Ibid.*, pp. 11–15.

²¹ *Ibid.*, pp. 12–13, 20–21. A much more plausible explanation of the fact that they insist on the counter-intuitive position that even human fertilized eggs have a right to life is that they are guilty of the well-known fallacy of confusing a biological-genetic and a moral sense of the term "human being". See Mary Ann Warren, "On the Moral and Legal Status of Abortion," *The Monist* 57 (1973), reprinted in Joel Feinberg (ed.), *The Problem of Abortion*.

²² For his application of this argument to German abortion law, see Dworkin, *op.cit.*, pp. 64–65.

when the pregnancy is the result of a sexual crime of which the fetus is, of course, wholly innocent.²³ This is a weak argument. It is not at all clear that saving the mother's life or any of the other common indications are inconsistent with the person-view. Nor is it obvious that the conservative who accepts an exception when a pregnancy results from a sexual crime, but who doesn't accept the social indication, contradicts himself. Judith Jarvis Thomson has forcefully argued that even granting a fetus is a person with a right to life from fertilization does not rule out all abortions.²⁴ The rationale, as I have mentioned, is that the fetal person is located *within* the mother, who is, of course, also a person with rights. This *asymmetrical* relationship implies that a mother can only have a moral duty to keep a fetus in her womb given certain conditions, which are not met in cases of threat to the mother's health and life, rape and probably in some other cases too. In the case of threat to health and life abortion may be assimilated to self-defence. It is highly unreasonable that a mother should not be permitted to defend her life and health just because the fetus is wholly innocent of the harm. People are not permitted to defend themselves against accountable aggressors solely.²⁵ Dworkin still believes this doesn't justify even the life indication on the "derived" view. He is confident that people agree with him, because "It is morally and legally impermissible for any third-party, such as a doctor, to murder one innocent person even to save the life of another one."²⁶ But here he ignores Thomson's point, that since a fetus is housed within its mother, killing it is not an infringement of its right to life, i.e. is not murder. The asymmetrical relationship between a fetus and its mother justifies a third-party to privilege the mother's life.²⁷ Since we may even defend an important but lesser value by killing the source of the harm, this rationale may also extend to mere threats to her health. In the case of rape, a fetal person's right to life does not impose upon its mother the corresponding duty to keep it in her womb for the plain reason that the pregnancy is involuntary. The innocence of the fetus is irrelevant, simply because forcing her to shelter and nourish it in her body in such circumstances would be a breach of her right to decide how to use her body. However, having the status of a person, a fetal person is morally protected against being killed should it survive the physical separation from its mother. Conservatives typically do not allow for more exceptions than the life and rape indication, at most. And the arguments for these exceptions do have more intuitive force than those for

²³ *Ibid.*, p. 32. For an explicit statement about the rape indication, see *ibid.*, p. 95.

²⁴ Judith Jarvis Thomson, "A Defence of Abortion," *Philosophy & Public Affairs* 1 (1971), reprinted in Joel Feinberg (ed.), *The Problem of Abortion*.

²⁵ See discussion in § 7, esp. pp. 218–220, in Joel Feinberg and Barbara Baum Levenbook, "Abortion," in Tom Regan (ed.), *Matters of Life and Death. New Introductory Essays in Moral Philosophy*, third edition (New York: McGraw-Hill, 1993).

²⁶ Dworkin, *op.cit.*, pp. 32, 94.

²⁷ Thomson, *op.cit.*, pp. 177–178.

aborting fetal persons when "childbirth would ruin a mother's or a family's life." After all, self-defence and involuntariness are central exculpating factors in ordinary morality, whereas the social indication cannot be justified by means of them. Nevertheless, Thomson's argument may perhaps – because of the location of a fetus within its mother's body – be extended to the indications which conservatives usually do not approve of, such as serious fetal deformity,²⁸ innocence or mental retardation of the pregnant woman,²⁹ insanity, and possibly even the social indication.

The soundness of Thomson's argument may of course be questioned. But so may the exceptions themselves. While I believe her argument is sound, the only point I need in order to rebut Dworkin's criticism is that *in so far as* the conservative allows for any indications at all, his underlying rationale might well be – and probably *is* in light of his condemnation of abortion in general as murder – of a kind related to Thomson's. Dworkin has not, however, offered any arguments to the contrary. Instead, he casually dismisses Thomson's argument for construing a mother's moral obligation to a fetus she is carrying as a moral obligation to a stranger.³⁰ But this is way too fast for someone whose position depends upon the unsoundness of Thomson's argument. In light of his criticism of Thomson, it is somewhat curious that Dworkin cites with approval this Jewish argument in support of abortion for rape victims: "Abortion for rape victims would be allowed, using a field and seed analogy: involuntary implantation of the seed imposes no duty to nourish the alien seed."³¹ The appeal to involuntary implantation of alien seed in the Jewish "field and seed" argument closely resembles the feature in Thomson's which Dworkin rejected. Still, he is right that the Jewish argument works only within the framework of a "detached" objection; it cannot justify aborting fetal persons. But as we have seen, the feature it lacks, the asymmetrical relationship a fetus stands in to its mother, is indeed crucial for a full vindication of the common stance that at least some exceptions are consistent with the "derived" objection.

Notice, however, that Thomson's argument for the permissibility of aborting fetuses who are persons does not render the question of when the human fetus develops into a person irrelevant to the abortion issue. The argument implies only that abortion does not infringe a fetus' right to life under certain conditions, whereas abortion *on demand* would be morally acceptable only within that gestation period in which fetuses are not yet persons.

²⁸ Wayne Sumner, *Abortion and Moral Theory* (New Jersey: Princeton University Press 1981), p. 72. For Dworkin's view to the contrary, see *Life's Dominion*, p. 34.

²⁹ Hursthouse, *op.cit.*, p. 188.

³⁰ *Life's Dominion*, p. 249, note 4.

³¹ *Ibid.*, p. 96.

IV

Turning to liberal intuitions, Dworkin's claim is that they too attest to a belief in the sanctity of human life. But he doesn't investigate whether the person-view has room for the moral qualms about early abortions he is impressed with. As suggested, even if a woman has a right to abortion on demand in the period in which fetuses are not persons, abortion is still morally wrong in many cases for reasons pertaining to private morality. I shall argue that these moral considerations add up to what Dworkin – in a distorted way – renders as the "detached" objection.

One such consideration is a pregnant woman's obligation towards the father of the child. This is one of the moral qualms Dworkin reports that women have.³² But since it would be horrendous to give a father the right to *force* his decision upon the pregnant woman against her will, her moral duty to him clearly belongs to private morality.

Another kind of consideration pertains to the traditional view that we have moral duties to ourselves. I believe that ordinary morality acknowledges this; the idea that smoking, for example, is a breach of the duty to take care of the body, regardless of its effects upon others, is still available to us. I am not now concerned with the effects smoking has on the fetus; obviously, that would constitute a harm even if the damage is inflicted before it becomes a person, as long as it lives up to be one.³³ Smoking was meant here only as an analogy to the idea that a pregnant woman has a self-regarding duty which puts constraints upon what she may do to her own person; having an abortion may therefore conflict with the duty that she has to respect, among other things, her own procreative power. So although the embryo is not an organic part of her body, it is protected indirectly in virtue of the pregnant woman's duty to respect humanity in her own person. I believe this underlies the feminist intuitions cited by Dworkin, that a woman feels a moral responsibility for her fetus as "More than a body part, but less than a person."³⁴

Dworkin does cite women concerned with moral responsibilities they have to themselves, but primarily as a reason for having an abortion.³⁵ He does not stress that duties to self more often give a reason for *not* having one. This may explain why he thinks that the only way to account for the fact that women who choose to abort still find the decision morally problematic, is that they too regard human life at any stage as sacred.³⁶ But that does not follow once we realize that fetuses are protected *indirectly* by the pregnant woman's moral duties to herself.

³² *Ibid.*, p. 59.

³³ Dworkin agrees, see *op.cit.*, p. 19.

³⁴ *Ibid.*, p. 54.

³⁵ *Ibid.*, pp. 33, 36.

³⁶ *Ibid.*, pp. 59–60, 69–70, 88.

Here it might be objected that on the above indirect duty view human fetuses are morally protected only because they belong to the reproductive system of women. But the attitude at issue is rather a sense that a human fetus calls for protection due to the fact that it is a beginning *human* life.

Although the protection granted a fetus on grounds of the former consideration is crucial for an account of widespread reservations against early abortions, a defence against Dworkin must also find room for the latter consideration. He constantly stresses that we all – liberals and conservatives alike – presume that incipient human life is sacred.³⁷ However, his justification of this thesis is inconclusive: "But though the presumption that a fetus has no rights or interests of its own is *necessary* to explain the paradigm liberal view, it is not sufficient because it cannot, alone, explain why abortion is ever morally wrong. Why should abortion raise any moral issue at all if there is no one whom it harms? Why is abortion then *not* like tonsillectomy? Why should a woman feel any regret after an abortion? Why should she feel more regret than she does after sex with contraception? The truth is that liberal opinion, like the conservative view, presupposes that human life itself has intrinsic moral significance, so that it is in principle wrong to terminate a life even when no one's interests are at stake."³⁸ It obviously is correct that a liberal view that the fetus is not a person with rights (and interests) cannot explain why most of us – liberal or conservative – judge even early abortions wrong, at least if demanded for seemingly frivolous reasons. I even agree that one of the missing considerations that accounts for this judgment is that we ascribe intrinsic moral significance (value) to fetuses that are not yet persons. Still it does not follow that the truth is what Dworkin claims it to be, viz. that we see incipient human life as sacred. There is a venerable alternative he has ignored.

That account invokes self-regarding moral duties to protect natural emotions that support morality. It was argued above that a woman's moral duty to respect her bodily integrity gives a fetus moral protection thanks to its connection with her. By contrast, duties to protect "edifying" natural emotions account for the attribution of intrinsic moral value to beings that are not persons. Animals, for example, are morally protected against cruelty on grounds of the moral duty not to brutalize ourselves, which is a self-regarding duty incumbent upon us *qua* persons. In virtue of being objects of the natural feeling of compassion which we are all bound to preserve, animals are invested with intrinsic moral value. Although they remain objects of only indirect moral concern, we are morally obligated to treat them well for *their* sake. In a similar way, non-sentient life – even lifeless nature – is protected by another kind of self-regarding duty. The point is well argued by Kant. His argument implies that what is today sometimes called a preservationist, as opposed to a conservationist, attitude to nature is really

³⁷ See e.g. *ibid.*, pp. 25, 99.

³⁸ *Ibid.*, p. 34.

based upon the moral duty to protect and foster our capacity to love something without regard for its usefulness for us. Hence, a duty to self grounds an obligation to uphold an attitude of awe of nature which is not a matter of its instrumental value for people. This self-regarding moral duty therefore confers intrinsic moral value upon the whole inorganic and organic nature: we are to handle nature with care for *its* sake, not merely for the sake of other people.³⁹

Obviously, the self-regarding duty which underlies the preservationist attitude to nature in general also grounds an obligation to relate to incipient human life with awe. Indeed, human life must plausibly be accorded *stronger* protection on this ground than any non-human parts of nature. On account of the impressive fact that human fetuses develop into full-fledged human beings, it is fitting that they should inspire a stronger feeling of awe than any other purely biological object.

Dworkin has construed women's recognition of the intrinsic value of human life as an expression of *respect* for the embryo. For the sanctity of human life is the unconditional value correlated with respect. But according to the indirect duty view, the attribution of intrinsic value to incipient human life cannot be taken as the expression of a respect for the fetus. We tend to confuse awe of incipient human life with respect because awe is *grounded* in personal self-respect. But once we realize that awe of purely biological *human* life is a species of awe of nature in general, it should be evident that awe of incipient human life is not identical to respect. Hence, the intrinsic moral value projected onto human fetuses by awe is not sanctity of human life. I therefore believe that there is no basis for Dworkin's thesis that the intrinsic moral value attributed to early human fetuses testifies to a belief in the sanctity of incipient human life.

If this is right, it seems that Dworkin is a victim of the amphiboly in moral concepts of reflection exposed by Kant, i.e. Dworkin has conflated moral duties *with regard to* beings, with moral duties *to* them.⁴⁰

V

Let us now turn to Dworkin's positive thesis that the controversy about abortion turns on the sanctity of human life. While I believe he is right to emphasize the

³⁹ Immanuel Kant, *Die Metaphysik der Sitten*, Tugendlehre, *Werke in Zehn Bänden*, Wilhelm Weischedel (ed.) (Wiesbaden: Insel Verlag, 1956), §§ 16–18; see my "Does Humanism grant animals and the environment moral protection," *Environmental Values* (forthcoming). My use of "intrinsic value" here is consistent with Dworkin's distinction between instrumental and intrinsic values in Dworkin, *op.cit.*, p. 71. It is noteworthy that also he compares the intrinsic value of human fetuses with the intrinsic value of nature. *Ibid.*, pp. 75 ff.

⁴⁰ Kant, *loc.cit.*

central place of this value in our moral scheme, I also believe that he has misconstrued it.

Dworkin construes the sanctity of human life as a result of what both nature and people have invested.⁴¹ According to his theory, "It is a waste of the natural and human creative investments that make up the story of a normal life when this normal progression is frustrated by premature death or in other ways."⁴² The idea is that "Recognizing the sanctity of life [...] means [...] not frustrating investments in life that have already been made."⁴³ But the sacred value of a mature human being surpasses that of an early fetus by far, since the natural and human creative investments in the latter's life have been less.⁴⁴ In Dworkin's view, the real conflict between conservatives and liberals concerns the relative moral importance of these two factors, – the conservative placing more weight on the natural (which many see as divine creative) investment, the liberal more weight on the human creative investment.⁴⁵

I can't see that Dworkin's theory captures our inherited idea of the sanctity of human life. The normative significance of that idea consists in there being severe limits to what a moral agent may do to himself and to other persons. In the Kantian formula, we ought never to treat a person just as a means but always also as an end. But the way Dworkin construes the sanctity of human life there just are no reasons why parents ought not to treat their fetus as they see fit: after all, they have invested in its life, and at this early stage the investment by other people is negligible. So why could they not treat their "investment" as they please? That is, why could they not use the fetus they have wrought as a mere means, say, as an organ bank for their own medical needs? Dworkin's theory so closely resembles Locke's theory of property rights that the second aspect of the theory, viz. that nature too has "invested" in the human fetus, should make no difference to my objection. Nature's "investment" in e.g. fruits does not ground a moral prohibition against eating them. And the investments people have made in these fruits would, at most, prohibit others from eating them. By the same token, the "investments" made by nature and parents in human fetuses cannot justify the kind of limitations that would have been placed on our actions if fetuses were protected by the principle of the sanctity of human life.

Dworkin places personhood and the right to life in the system of justice along with interests on the one hand, while the sanctity of human life is placed in a spiritual or religious sphere of morality on the other hand.⁴⁶ The traditional Humanistic view, however, is that personhood and the right to life are them-

⁴¹ *Life's Dominion*, pp. 81 ff., see esp. p. 84.

⁴² *Ibid.*, p. 88.

⁴³ *Ibid.*, p. 99.

⁴⁴ *Ibid.*, pp. 84, 91.

⁴⁵ *Ibid.*, pp. 91ff.

⁴⁶ *Ibid.*, pp. 86, 101, 154 ff.

selves expressions of the sanctity of human life; it is the life of a *person* which is sacred. Kant has attempted to give a secular argument for this position.⁴⁷ And the justification he offers is not that so much has been invested in the person, but rather that as a person he has the very capacity for morality, which is picked out by morality itself as the object of respect. In virtue of possessing that capacity, the whole embodied human person is sacred and accorded a moral entitlement to be treated with respect. On the Kantian view, the sanctity of human life, or rather the sanctity of the human person, is that which constitutes the moral core of human rights and renders them inviolable.

In separating the sanctity of life from personhood and justice, Dworkin must find some other basis for rights. So it should come as no surprise that he invokes the predominant contemporary view, that the task of rights is to protect interests. Tooley and Hoerster have argued convincingly, however, that in order to possess interests in the morally relevant sense an individual must have cognition. Therefore the interest-based interpretation of personhood and rights entails the ultra-liberal position. This lands Dworkin in the uncomfortable position that not even human neonates are entitled a "derived" governmental protection. True, they would be protected indirectly through the protection of people (including themselves when they become persons). And while I believe that the intrinsic moral value they have even before they are persons does not, in itself, justify any form of governmental protection, Dworkin presumably would grant them a "detached" governmental protection; it would be of the kind that accrues to other intrinsically valuable objects without rights and interests, such as endangered animal species and objects of art, only stronger.⁴⁸ Nonetheless, the lack of a "derived" governmental protection of neonates in their own right implied by the interest-based interpretation of personhood and rights flies in the face of a moral conviction at the heart of our humanistic tradition. That is a strong recommendation for revitalizing the classical conception of personhood by way of a philosophical defence of the conviction that human neonates are persons with human rights, – a defence that should also issue in a criterion for determining when a human fetus becomes a person.⁴⁹

⁴⁷ See *Kritik der praktischen Vernunft*, A 155.

⁴⁸ Dworkin, *op. cit.*, pp. 108–109, 149, 162, 164–168.

⁴⁹ I have made an attempt at such a defence on Kantian grounds in my doctoral dissertation, *The Moral Ontology of Human Fetuses. A Metaphysical Investigation of Personhood*, University of Oslo 1993.