

There is not, however, a further general duty to treat persons with the kind of respect intimates show one another, nor do we enter into intimate relations in order to have occasions for the discharging of a duty of personal respect. On the other hand, once in an intimate relationship, persons treat one another with a respect that strangers are not in a position to show.

The moral weight of intimate relations can be accounted for in terms of a concept of moral individuality no less valid than that involved in the relations moral persons more generally enter into. The preservation of a personal realm of intimate relations, as well as individual projects and commitments, can also be seen as helping to sustain and strengthen our commitment to impersonal morality. As Bernard Williams observes:

Such things as deep attachments to other persons will express themselves in the world in ways which cannot at the same time embody the impartial view . . . yet unless such things exist, there will not be enough substance or conviction in a man's life to compel his allegiance to life itself. Life has to have substance if anything is to have sense, including adherence to the impartial system.¹⁸

When I have an allegiance to life, I have somehow come to view it as mine; it is *my* life that I want to lead and to which I am devoted, not life in the abstract. Moreover, things have meaning for me only insofar as I identify my life with them, that is, only as parts or aspects of my life, the only life to which I am loyal. In particular, it is only within the context of my life—a life that is of value to me for reasons other than those which have led me to pursue specific goals and embrace specific ideals—that being moral matters to *me*, rather than just matters. Here intimate relations become important. For, if there were no private realm within which the impersonal and impartial demands of morality cease to apply, if others were always to have a claim on our help, then for most of us our lives would not be our own. And, if this is so, then the demands for moral concern would turn out to be self-defeating.¹⁹

¹⁸"Persons, Character and Morality," in *The Identities of Persons*, Amelie Rorty, ed. (Berkeley: University of California Press, 1973), p. 215.

¹⁹Several people have offered helpful comments on earlier drafts of this paper. I particularly want to thank Raziq Abelson, Frances Myrna Kamm, Lowell Kleiman, and Virginia Held.

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13

Applying Ethical Theory: Caveats from a Case Study

Roger Wertheimer

1

In a mature discipline theoretical and applied activities work a two-way street. The more purely theoretical dimension develops the system of the most basic concepts and lawlike generalizations distinctive to the discipline. The applied activity puts the resulting theories to work on situations covered by the generalizations, and feeds them insights and information that may force alterations of the theories.

Applied ethics is a revised edition of a venerable enterprise freshly named to declare a refreshed faith in the power of theoretical ethics to provide rational resolutions of serious practical perplexities. The hopes here remain premature. As things are, no ethical theory can be trusted in anything like the way that scores of theories in the physical, social, and formal sciences can. None can now boast the evidentiary backing that commands acceptance by reasonable people and commends their abandoning common sense in the face of the theory's conclusions or even justifies their letting themselves be led by it in times of uncertainty and indecision.

Whether any ethical theory could be competent to serve as a practical guide is often doubted, most often for bad reasons. My own doubts are directed more at the modes of ethical theorizing taught today than at all the imaginable but yet unimagined approaches. The ethical theorizing we have seen is, I think, too often too presumptuously prescriptive. Like classical epistemologists and

philosophers of science, who laid down rules for acquiring knowledge, consulting only their own epistemological intuitions without first looking carefully at how people actually improved their understanding of the world, ethical theorists have issued ethical and metaethical pronouncements without sufficient respectful and unprejudiced study of how, in detail, people respond when actually confronted with morally serious problems.

Meanwhile, many ethical theorists humbly acknowledge the poor powers of their offspring and content themselves with claiming modestly that theoretical ethics at least supplies a store of analytical tools for sorting out issues and questions, refining our concepts and principles, and thereby rendering our deliberations more rational. That service, if well performed, is something to be proud of, but as things are, the quality of the contribution often does not merit the confidence with which it is offered.

I shall here review (all too briefly, I am afraid) some features of a topic—abortion—much treated in the short history of applied ethics. It is, I believe, a prime case in which reliance upon substantive, methodological, and metaethical concepts and principles developed and widely endorsed by ethical theorists is more hindering than helpful. One moral here is that we would be wise to put less faith in our theoretical presumptions and, instead, listen with less prejudice to untutored reasoning and allow theory to be challenged and informed thereby. Beyond that, the substance of the specific example may be of more interest than that moral.

II

The abortion debates present ethical theorists with a dilemma formed by a triad of facts:¹

F: The fact that some proposition is commonly believed is a good (but not conclusive) reason to presume it to be true.

C: Common belief is committed to the moral principle S:

S: The fact that something is a human being, one of our conspecifics, is itself a good reason for our refraining from harming it.

T: Currently respected ethical theories are committed to the principle B-S:

B-S: Biological properties in general and membership in the human species in particular are not in themselves morally relevant considerations.

Faced with this, a few theorists accept F, C, and thus S, and mistakenly deny T. Their justification of S (if any) usually derives from some currently respected ethical theory. This has some precedent, if not excuse, since more than one classical theorist has evidently seemed intent on justifying S. But their attempts manifestly fail since they really argue for the moral relevance of some psychological property (e.g., rationality, sentience) which is not always present in all human beings, let alone identical or essential to the biological property of being human.

Most theorists insist on T and deny S. Some of them concede C and deny F in general or claim that the presumption in favor of S is rebutted by their own expert moral intuitions or by T. Other theorists express commitment to F, but deny C. This latter position is a pretty illustration of a well-known principle that, to make sense of the words and deeds of others, we cannot but rely on our own conception of what makes sense, is rational, reasonable, and true, and thus we attribute to others principles and concepts as much like our own as we can. The consequences of these two positions are the same, and so too is their cause: an overweening confidence in one's own convictions. Evidently these theorists are not seriously troubled by the possibility that what most people seem to believe could be correct and their own intuitions and theories flatly wrong.

The response, rarely displayed, that I recommend is to recognize the truth of T, F, C, and thus S, conclude that something must be wrong with our theoretical tradition, and then begin to develop ethical theory that accounts for the moral relevance of biological properties in general and of being human in particular. This task is formidable, yet seems feasible, and might well be rewarding. I will not pursue it here, though some suggestions may show through some of my remarks.

III

Most theorists deny S with little extended discussion of F, but many seem sympathetic to Michael Tooley's defense of their practice.

¹See my "Philosophy on Humanity," in Robert L. Perkins, ed., *Abortion: Pro and Con* (Cambridge, Mass.: Schenkman, 1974): 107-128.

Tooley here addresses a restatement of F: "Other things being equal, what most people believe is likely to be true."

What is one to say about a belief that, though shared by most people, is also rejected by most people who are knowledgeable about the subject area in question? Surely this is not a case where other things are equal. And in such a case where the views of most people are not shared by those who have been trained to think about the relevant issues, and who have spent considerable time doing so, is it not more likely that it is the majority that have mistaken beliefs? In view of the fact, then, that virtually all philosophers reject the Standard Belief (S), it is surely unjustified to view this as a situation where other things are equal, and hence as one in which one is justified in concluding that what most people believe is likely to be true.²

The general epistemic principle appealed to is sensible: Presume the opinion of a strong consensus of the experts is right, whatever most other people believe. Where we have clear criteria of knowledgeability, where genuine expertise is recognizable, the opinion of the uninitiated means little even if the experts are divided.

But is there such a thing as expert ethical opinion? If so, what "training" is necessary, sufficient, or conducive to developing expertise? Is it the kind of academic training typically undergone to attain a rank of instructor or professor of ethical theory? Ethical theorists are "knowledgeable" about ethical theories, but are they knowledgeable about what is right and wrong and how people should live? Are they more so than logicians, linguists, lawyers, historians, clergymen, social workers? How much more? (For most of these others do not reject S.) (I am ignoring the bit above about spending "considerable time" thinking about an issue, since my experience is that most theorists don't do that with S: they instantly dismiss it and never seriously consider it.)

IV

Put those questions aside for a moment and consider why the truth of F might be important for ethical theory (for note that Tooley's view denies it *any* importance there.)³ A theory (ethical, scientific, or whatever) can be partially evaluated by internal considerations of

²*Abortion and Infanticide* (Oxford: Clarendon Press, 1983), p. 82.

³"Philosophy on Humanity," pp. 108-113.

consistency, comprehensiveness, simplicity, and the like. But, although theorists are specially adept at applying those criteria, internal considerations alone cannot determine the truth of a theory. To test the truth of a theory the judgments implied by its generalizations must be compared with the judgments from some external, independently credible source of judgment. Conjoining the generalizations with descriptions of situations covered by the generalizations entails judgments ("verdicts") about the situations. In science those verdicts are predictions (and retrodictions), and sense perception of the situations provides an independently credible source of judgments against which the empirically determinable verdicts can be checked. In ethics, the verdicts are to evaluate the situations and cannot be evaluated by them, so these verdicts are matched, not against sensory reports, but instead against moral intuitions. The source of such intuitive judgments is called "moral sense" (or "moral intuition"), by which is meant nothing more than that the judgment is made without use of the theory or its competitors.

Of course, the value of this kind of evaluation of a theory depends on the credibility or reliability of the independent source of judgment, be it perception or intuition. Such sources of judgment are inherently fallible; any of their judgments could be false. But insofar as they are genuine capacities for making judgments of the relevant kind, the judgments made do have some evidentiary value. How much evidentiary value a specific judgment has is determined by evaluating the condition of the judge's capacity in general and in the instant case by reference to a large, diverse, complex, and continually refinable set of criteria: Is the judge sane? sober? healthy? mature? experienced? careful? etc. Another criterion is the kind and degree of consensus on the judgment: How much agreement or disagreement is there among those whose judgments of the case is worth much?

v

Notice first that, even if the typical academic training of ethical theorists tended to refine and improve their moral intuitions, they would still have good reason to check their theories against the intuitions of the philosophically untutored, just because that very training renders their judgments suspect as not being truly independent

of and uninfluenced by the operation of a theory, and that suspicion deepens along with the depth of the theoretical principle at issue.

Further, while their academic training improves general argumentative and analytical skills, those dialectical skills seem distinct and separable from the processes peculiar to making a moral judgment. Many, perhaps most, theorists would insist, on the basis of experience or metaethical theory, that although analysis and argument may be necessary for acquiring an adequate understanding of a factual situation, once the factual description of the situation is understood and agreed upon, the moral judgment about the situation is not rendered more reliable by training. Again, the training may improve the capacity to extrapolate from a collection of moral judgments and discern some unifying principle, but the judgments forming the collection are not rendered more reliable by the training.

If anything, the ethical theorist's habits of thought and feeling are likely to render his moral intuitions suspect and less reliable. The competitive, cold-blooded, or playful style of thought inculcated and practiced in current academic philosophy is generally regarded and treated as topic-neutral, as appropriate for investigation of substantive ethics as it is for studying symbolic logic, linguistic theory, or the pre-Socratics. That detached stance may well have some advantages in ethical theory, as elsewhere; some advantages may be shared by the similar attitudes of surgeons toward the unconscious hunks of meat they slice and sew upon. Still, it is suppositious metaethics to assume that that style has no risks or costs for the ethical theorist. Perhaps ideally a physical scientist's conception of an object is utterly unbiased by any concern for it, but that attitude appears more antithetical than appropriate to ethical judgment.

Perhaps ethical theorizing has some peculiar occupational hazards. Normally a proper moral judge confronts each new case impartially, is properly moved, swayed, outraged, and the rest as the evidence accumulates, and, at the end, favors one party over another. By contrast, as researcher and educator, the ethical theorist must regularly review and present the same cases over and over, and frequently has good methodological and pedagogical reasons for treating as an open question what normally he would have appropriately strong feelings about. He systematically stifles and

bridles the natural attitudes of a competent moral judge. Those well-trained dispositions of detachment may themselves be reason enough for him to look carefully at the responses of those who consider cases from a more natural position.

The abortion controversy specially tests the propriety of a detached sensibility. Normally an equal and serious concern for the welfare of all parties affected by a dispute is a prerequisite for a fair evaluation of their competing claims. Yet with abortion the prime question is precisely what degree of concern is appropriate toward the fetus. Consider here that, presumably for good biological reasons, our sympathies are activated by the appearance of a human-like form. That fact figures prominently in the abortion controversy, not in a propositional format, but as fetuses in formaldehyde bottles and photos of little faces, little fingers, little feet.

"Proabortionists" rail against this practice, particularly when those pictures are thrust at prospective patients at abortion clinics. "It's so upsetting!" they complain. And of course it is and is supposed to be. But is it unfair or improper to inform adolescents and adults who frequently have only the blurriest, if any, ideas about what it is they are considering destroying? Is the information about what the thing looks like irrelevant to a well-informed decision to abort? And shouldn't that decision be well informed even if the decision maker would much prefer to be blissfully ignorant? (Can someone deny this while properly complaining about being called "proabortion" and insisting on the label "pro-choice"?) Or should we regard our natural sensibility as a prejudicial bias that we as "rational" agents had best overcome?

VI

The common conception of the abortion controversy is that the crucial question is, When does a human life begin? That fact is evidence of and explained by the truth of C, that people generally accept the principle S which recognizes being human as a property that provides a thing with a special moral status. Within the cloisters of ethical theory the question of hominization is sometimes discussed, sometimes insightfully, but more commonly it is curtly dismissed on the grounds that S is patently false, so whether the

fetus is a human being is utterly irrelevant to the propriety of abortion and its legal prohibition.

To resolve moral questions about abortion (and other subjects), theorists have thus been led to seek some surrogate for S. But although the general problem of identifying reasonable principles comparable to S is a worthy theoretical pursuit (for, even if S is true, it cannot be the only principle of its kind), the enterprise is doomed to sterility when cut loose from any credible system of independent judgments against which a theory or principle could be tested. Then conceptual analysis can yield only empty semantic relations which link with substantive moral claims only via each theorist's own idiosyncratic moral intuitions. Expectably, the alternatives to S that theorists offer are all over the map, with no means of resolving their differences.

Further, even if some degree of "expert" consensus here were achievable, the relation of the results to the very real and pressing practical concerns of the public and policy makers would be quite remote. Consider, for example, the U.S. Senate bill S. 158, introduced in 1981, which would have Congress resolve that "human life shall be deemed to exist from conception." Legislators and legal theorists on both sides of the bill recognized that, if Congress were constitutionally empowered to and did pass S. 158, then governmental prohibition of abortion from conception to parturition would be constitutionally warranted and perhaps mandatory, and indeed abortion would perhaps then be barely if at all distinguishable from murder in our legal system—and that, if Congress could not or did not pass S. 158, then the only means of achieving its legal effect would be the proposed constitutional amendment with an equivalent content which was also before Congress. That complex fact about our legal system is a fact because here, as is generally the case, our legal system embodies and sanctions with the force of law the moral heritage of our culture. Within this context theorists are free to declare that the abortion problem is being "radically misconceived" and that our legal system should be radically reconceived so that S. 158 would not have the legal implications it presently has. In turn, policy makers and governmental authorities confronted by S. 158 and similar legislative and judicial issues are free to regard theoretical and applied ethics as paradigm ivory-tower pursuits. (The facts surrounding S. 158 are some fraction of the evidence for the truth of C.)

VII

Practical concerns aside, by dismissing S and declaring the question of when a human life begins a "biological" question that ethical theorists have no competence or concern to answer, theorists are perpetuating some sorry metaethical assumptions.

Though these theorists profess a wide diversity of metaethical views about the nature and relation of "facts" and "values," they seem to speak with one confident voice about the common conceptualization of the abortion problem. They say that S is a putative moral principle, that when human life begins is a "biological," a factual, empirical matter, and that, although someone can, implicitly or explicitly, use "human being" as a value term (e.g., to mean "a member of our species with a right to life") that usage unnecessarily combines two issues which are best left separate.

Merely labeling the claims and questions is not in itself incorrect. The implications of the labels are another matter. Consider: in many contexts classifying certain judgments as "analytic" (i.e., true solely in virtue of the meanings of the constituent terms, or something of that sort) and others as "synthetic" (i.e., roughly, judgments whose truth value is dependent on extralinguistic factors) can be a relatively harmless and somewhat helpful way of sorting out issues. Lately, however, philosophers have learned that the distinction is dubious, so relying on it to resolve a philosophical problem is perilous. The same is true of the fact-value distinction, and partly because it is intimately related to the analytic-synthetic distinction. Again, the labels "fact" and "value" can be applied, but, if we look at the abortion issue with a minimum of metaethical presumptions, we discover reasons for rethinking our conceptions of just what a fact is and what a value is.

The dating of hominization, the question of when a human life begins, is restatable as the question of whether and, if so, when a human fetus becomes a human being. This latter is manifestly a question of categorization and classification. Whether this entity (the fetus) belongs to the category of human beings is not itself a definitional or conceptual question, though it might naturally generate one. We would be asking the same sort of question if we were wondering whether to cage the creature before us while worrying whether it is a gorilla escaped from the zoo or some actor off the set of *The Planet of the Apes*. In the latter case no definitional or concep-

tual problem is presented, for our question is answered with some obvious empirical tests guided by uncontroversial classificational criteria.

By contrast, a salient feature of the hominization debates is that all the *relevant subsidiary* facts about reproduction, genetics, fetal development, and the like are (or are thought to be) available and uncontroversial: no further empirical tests are (or are thought to be) necessary. Thus, within the context of the public abortion debates where principle S holds sway, the issue of hominization seems to be something like what, in a law court, jurists would call a question of law rather than a question of fact. Before exploring this idea let us survey the surrounding territory.

VIII

Our current understanding of genetics, fetal development, and related matters is actually still primitive, but our vast areas of ignorance and uncertainty seem largely irrelevant to the dating of hominization. Not totally irrelevant, since determining the correct application of some proposed criteria (e.g., inception of a self) depends on yet unanswered questions. But presently we are still stuck with the prior question of which of many fundamentally different criteria to use, and for that question we have an expert consensus on the essential facts. We could be wrong about this. (I dream of seeing in the supermarket next week's *Star* headline: PEORIA ZYGOTE SELF-CONSCIOUS.) But suppositious worries about possible future discoveries need not distract us now, since our concern here is not to determine the dating of hominization, but rather to understand the attempts people have been making and their failure to form a consensus.

Ethical theorists regularly say or seem to assume that, since the concept of a human being is a "biological concept," the conflict over hominization has some unproblematic resolution. Consider the following quote:

The concept of a Homo Sapiens is a biological one. If we want to know what it is for a thing to be a member of that species, we can find relatively determinate and uncontroversial criteria for answering this query.⁴

⁴Jay L. Garfield, "Introduction," in Garfield and Patricia Hennessey,

This writer does not say where these criteria are to be found, but presumably he is supposing, along with many of his colleagues, that these criteria are provided by what we call the empirical science of biology.

Now, to begin with, current science actually has no such criteria to offer. Taxonomical theorists have only recently begun to confront the daunting intellectual challenge of developing theoretically adequate criteria for individuating species and have yet to form a consensus on the major aspects of that problem. They have not even begun serious systematic work on the problem of individuating species members. Generally they now go about counting species members with the same conceptual equipment laymen use.

Amusingly, in response to attempts to legislate governmentally that a human life begins at conception, the membership of the National Academy of Sciences passed a resolution declaring that science could never provide a basis for a dating of hominization. It is likely that many scientists supported that resolution mainly from political motivations aided by confusions about the epistemology of science. (The resolution is not easily reconciled with the possibility of taxonomy's being a serious scientific discipline.) Of course, only a fraction of the supporters are themselves specialists in biology, but even the most eminent biologists are wont to spout silliness on this subject. Some, for example, suppose they offer insight by reminding us that human life is passed on from generation to generation without interruption and had its beginnings eons ago—which is true but irrelevant to the classification of an entity as a species member.⁵

Developing criteria of species membership is, let us assume, a proper task for taxonomical theory. What would or should result from properly pursuing that task is a matter wide open for speculation. Bear in mind here that the history of science shows again and again that what comes to be regarded as a properly "scientific" (let alone correct) hypothesis or procedure is not always generally recognized as such when first introduced. Despite the fact that this fact is

eds., *Abortions: Moral and Legal Perspectives* (Amherst: University of Massachusetts Press, 1984), p. 3.

⁵Daniel Wikler, "Concepts of Personhood," in Margery W. Shaw and A. Edward Doudera, eds., *Defining Human Life* (Ann Arbor, Mich.: AUOHA Press, 1983), pp. 15 ff.

well known, people (philosophers, scientists, and lay folk alike) keep succumbing to the temptation to suppose that we already know (in a rough and general way, they modestly disclaim) the sorts of procedures and products proper scientists will accept after exploring an area where gross ignorance now reigns, the rudiments of a serious theory lie in shadow, and no research has begun to uncover the inevitable unprecedented conceptual dilemmas lurking in the darkness.

I know of but one serious stab at treating the hominization problem in taxonomical terms,⁶ and that was by a philosopher, not a respected taxonomist, and I have yet to find a biologist who finds his construction compelling. My own understanding of taxa and their contents is too skimpy for me to competently assess serious hypotheses here, but from the little I have learned of the mind-boggling diversity of life forms and life cycles, I am sure that here, at least as much as elsewhere in science, a large and complex variety of considerations must be weighed against one another when evaluating proposed criteria.

Presumably a major motivation will be the manageability of criteria in furthering scientific research. And that seems cause enough for ecologists and their colleagues to continue to use, as they have in the past, the criterion of birth for species with a life cycle like ours, since a population census is too damnably difficult if you have to count intrauterine individuals.

That consideration will likely be weighty, at least until we discover a convincing answer to the crucial question of what explanatory function the concept of a species member is to play in biological theory. The concept of a species is central to the complex of explanatory theories in biology, and the problem of developing criteria for individuating species derives its point and parameters from those explanatory structures. Though the members are ontologically more fundamental and prior to the species, that abstract metaphysical truth tells little about what, if any, role in explanations is served by a concept of species member, or by something close to it and contrasting with, for example, an assortment of stage sortals (e.g., pupa, larva).

⁶Lawrence C. Becker, "Human Being: The Boundaries of the Concept," *Philosophy and Public Affairs*, iv, 4 (Summer 1975).

Very likely, no usable unitary criterion for species membership will apply across all species. (Consider cases where the question is which things are colonies or clumps of conspecifics and which are conglomerative individuals. Consider the centrality of reproducibility to the concept of species, and relate it to essentially sterile individuals: Are worker bees really members or mere auxiliary parts of the "real" members?) Conceivably the criteria will vary with the order or genus or even the species. Conceivably in species in which culture is the key to survival the criteria should be defined by the cultures themselves or by the viable cultures. Some such possibility appears less implausible when we consider that, in its inherent quest for comprehensiveness, biology must integrate its conceptions with the findings not just of physics and chemistry, but ultimately of physical anthropology, geography, social history, urbanology, and the rest of the human sciences.

ix

But now, why suppose that taxonomical science is authoritative or even especially relevant to the dating of hominization? That hardly follows from the *biological* character of the concept of a human being. The quick way with the assumptions here is to note the absurdity of arguing that, since the concept of a tree is a biological concept and since, in fact, taxonomy has no use at all for any such category, there really are no trees, and questions such as How many trees stand in my back yard? are not legitimate empirical queries.

Classification of fauna and flora or phenomena in general would be wide open to a profusion of equally pretty schemata if (per impossible) the purpose of the schemata were solely for representing the world, describing it, reporting, announcing, asserting, recording, sorting, filing, and repeating truths. Schemata could be compared for consistency, comprehensiveness, simplicity, elegance, memorability, and manageability, but those considerations alone still leave an incalculable array of options. Classification must serve more determinative purposes if it is to have a more determinative evaluation.

If we have an interest in inferring truths beyond those implicit in the schema, if we have a need for systematic inferential relations beyond the logical relations implicit in any schema, if we wish to

explain and predict phenomena or regulate and revise them, then our reasons for selecting some schema are much more selective. Yet explaining and understanding can themselves serve many purposes and take many forms. The classes used by carpenters and clinicians cut across the biologist's taxa; they do not correlate in any systematic way, but they do correspond just as much to contours *in rerum natura*, and they serve their purposes more powerfully than the biologist's taxa can.⁷ The latter are free from particular practical purposes, unconstrained by special interests such as cooks and woodcutters have, so they can systematically connect a wider range of phenomena and provide a more unified comprehensive conception of things. That conception is superior, controlling, authoritative only for purely cognitive purposes, only when we act in the world with no interest other than enlarging and improving this kind of comprehension.

As rational agents acting in the world with a multitude of interests we would be crazy to constrain our understanding of the world by the categories of science. For one thing, the objects of an interest form a class that can and commonly does cut across all usable scientific categories. For another, we constantly create things and classes of things whose essential properties are functional, not natural. Many such categories may be understood and applied from the cognitively detached view of the world the scientist takes. But some cannot, for we have an interest not only in the world seen from a passionless point of view, but also in the world as we experience it, shaped and colored by our emotions and sensibility.

Moreover, as rational agents acting in the world, we use our categories not only to represent, understand, and explain the world, but also to regulate, rearrange, and reform it. In the practical realms science can contribute to but cannot control our understanding and application of categories. Our epistemic authority is a practical authority, which may be an institution exercising its legislative and judicial powers in accordance with the purposes of the institution. As the supreme institutional authority of a society, a state may determine the authoritative classifications of that society.

Our courts have now assumed the novel task of defining new biological kinds; for they have accepted the patentability not of hy-

⁷John Dupre, "Natural Kinds and Biological Taxa," *Philosophical Review*, xc, 1 (January 1981): 66-90.

brids, but of unprecedented life forms concocted by biochemists.⁸ Every valid patent defines a class of objects, the profits from which the patent holder has claim to. Strip away the complexities, and the crucial questions of patent law—whether a patent is valid and whether an object (or profit from it) infringes the patent—are questions of categorization, of whether the patent class was contained in a prior patent class or contains the alleged infringing object. Taxonomical considerations may be pertinent to the new patents, but they are likely to play a minor role. Ultimately patent law and its classes, like law in general, will be evaluated by their service to the public interest, a great stew of competing interests in which purely cognitive and scientific concerns claim no priority.

The category of human being poses special problems for a state. The authority of any of a state's classifications derives its legitimacy from the propriety of the purposes it serves and its success in serving those purposes. We take for granted that the proper state purposes are defined in terms of serving the interests of persons and that our state is committed to recognizing every human being as a person. So the state cannot legitimately adopt some dating of hominization by any claim of serving the public interest without an independent determination of which beings are human beings. Any attempt by an institution or an individual to resolve the dating question on grounds of public policy or pragmatism inevitably begs the question.

x

So now, what interests or purposes does the category, human being, serve? And who is to determine its proper application? And how is he—or she or they or it—or we to do that?

"Human being" is, it seems, an all-purpose term, not subservient to any special interest, except perhaps a very general, pervasive, and obscure one: self-knowledge. Any discipline may add to or alter our understanding of the category, and a slew of special sciences are dedicated to doing that, but the concept is not the creature or under the control of any particular cognitive field.

The term is not indexical, like "I" or "we", but it refers to *our own* biological species, and that category is, like all our categories,

⁸*Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

one of *our* categories, not some Martianese correspondent. As such, the category is our prime category of self-identification: a human being is what each of us most specifically is, biologically, physically, and metaphysically, and thus normally psychologically. And for that reason, due to that (our) nature, it is what each of those we most closely identify with most specifically is. Our biological being, sexual and social, creates special concerns and cognitive interests in our conspecifics. Our attentions and affections converge on our kind. Our needs, our sense of union and community, are naturally satisfied by ligaments of lineage. And our experience of the world, even the modern world, regularly teaches and reminds us that being human is what we most basically are. The category is central to our self-understanding, our self-concept, and self-ideal, and thus to our morality. Again, the term is not indexical, but it might yet be peculiar, for its application and extension might be constrained by our capacity for identification and affection.

Nowadays the term's application is uncontroversial, save in some special sets of cases, only one of which is of urgent concern. Taking out terata, any creature conceived and borne of human parents is a human being. That is virtually universally acknowledged of any being from neonate up to but short of neomort. Dissension erupts when we consider including or excluding the prenatally secluded. How should we determine the dating of hominization? A good place to begin is by looking carefully at how we *do* try to determine it.⁹

XI

Theorists aside, normally people do not persuade others or become persuaded of some dating by first formulating or referring to some *definition* of "human being" and then checking off the features of the fetus against the definition to see whether it satisfies the stated conditions. Normally people do not argue from or about any definition. What they do is look at the facts and respond to them, and their response is expressed in a judgment affirming or denying that the fetus at a certain stage is a human being. They may also subse-

⁹Cf. my "Understanding the Abortion Argument," *Philosophy and Public Affairs*, 1, 1 (Fall 1971): 67-95.

quently look at the same facts or some others, or have some shoved in their faces by the world or their opponents, and then respond differently or the same. They may say that their judgment is the result of a "decision" or that they are "forced" to admit or concede the matter, or they may simply find themselves experiencing the fetus as a human being or not so experiencing it.

Arguments are offered. People point to various well-known facts to justify a dating. And normally the datings and arguments are comprehensible without supposing any shifts in the meaning or definition of "human being". Throughout, the term can be consistently rendered as "individual member of the biological species, *Homo sapiens*". The arguments may be said to assume or advocate differing criteria or conditions for species membership, and the application of a criterion does determine the application and extension of the term. However, the "choice" of a criterion is not dictated by strictly linguistic factors and does not alter what we mean to be saying of a thing when we apply the term to it. We all mean to mean the same, and we succeed as well here as we ever do. (The situation here is a prime example of the problems besetting the analytic-synthetic distinction.)

Some talk in this context is best described as involving shifting senses. A notorious example is the all too common sophism that an embryo is certainly human (not vulpine, canine, etc.) and certainly alive, a living being (not dead or inert), so it must be a human life, a living human being. The equivocation is evident, since the argument applies to any living cell of a human body. Also, commonly, pro-abortionists seem to concede that a fetus is a human being (usually when they seek to finesse the issue in hopes of focusing on other matters) when actually they think it is only a potential human being. Such liberals are notably less loose-lipped when they speak in our courts and legislative forums where our language is formalized and fixed to legal consequences.

Thus, although some factors may pull toward talk of people's having different definitions or senses of "human being", and although on some occasions ascriptions of idiolectical divergence are appropriate, generally it is more accurate and analytically useful to avoid such ascriptions. The fact is that people judge the dating differently. We should not say that they use the term in different senses, since that effectively precludes their genuinely disagreeing.

We *could* say that they have different concepts or conceptions of a human being or that they accept or employ different criteria for being a human being, but we probably *should not* say that, since that inevitably is understood as though it *explained* the disagreements when actually, at best, it only *re-describes* the fact of disagreement in judgment. Positing some ideational intermediary between people's beliefs about the subsidiary facts and their beliefs about the dating provides only a pseudoexplanation. If conflicts on the dating were due to factors that manifested themselves in other conflicts that are not simply consequences of the dating conflict (as a conflict over the propriety of abortion is), then it might be useful and accurate to speak of different concepts or criteria here. If, for example, affirmations and denials that members of another race are truly human beings (or inferior kinds of human beings) were generally correlated with certain datings of hominization, then we might have reason to talk of different underlying concepts or criteria here. That sort of thing might be present in some cases, but the available evidence indicates that this is not a general feature of the situation.

Certainly people have varying concepts of a biological species. Most minds remain relatively innocent of Darwinian theory and operate with some quasi-Aristotelian conception of a fixed immutable essence peculiar to each kind. Meanwhile, various candidate conceptions compete for acceptance among taxonomists. But the bearing of this on the conflicting datings seems dubious. After all, these conflicts are never about whether the fetus belongs to our species rather than some other species, subspecies, or sibling species.

Theorists do attempt to formulate, justify, and apply criteria here. Yet none of these processes need be operative in laymen for them to judge the issue competently. It is a hyperrationalistic delusion to think that laymen *must* be "applying some rule," at least unconsciously. Their conflicting judgments need not be due to applying different rules, because every rule is necessarily open to varying applications, and thus adding rules and rules for the application of rules cannot preclude the possibility of conflicting applications. The conflicting applications of the term 'human being' may have an explanation, but it need not involve differing ideational intermediaries.

The attempts by theorists to develop defensible criteria are not in principle misguided. Elsewhere they sometimes succeed in con-

tributing to a reasoned consensus on a general principle. But their success is contingent upon various contextual factors (e.g., institutional powers and constraints) which are not operative in this instance. Moreover, their endeavor is parasitic upon the pretheoretical judgment making, and the plausibility of any proposed criterion derives from its consonance with those pretheoretical judgments. But in this instance every serious proposal is equally good at catching the whole class of consensual judgments from birth on, and then seeks to show some coherence in a region where the dissensus is very wide and very strong. The efforts of theorists may be worth making and may produce various useful results in the process, but nothing guarantees them a real chance of success: there need not be a compelling justification of some criterion awaiting discovery. And there is reason to think there is none.

XII

Again, people select some date, some event (conception, birth, viability, etc.) and often cite some facts to explain their selection. But often they can say little about which items or aspects of the situation caught their eye. That may be due to lack of skills of reflection and articulation (which need not at all impugn their judgment) or to a sense that the matter is so obvious that there is nothing worth adding to what is immediately apparent. Such silence should be taken very seriously here.

Given the facts, all the popular datings have an obvious appeal. They make some sense, and not just to those who accept the datings. We can, if we allow ourselves, see the attractions of the datings we reject. We may feel moved, but not very far, though perhaps we might be more so if we were not concerned (as we properly are) about the practical consequences of the dating. Yet, when we try to formulate a compelling argument for any dating, we quickly discover that we really do not have much to say and that what we do say is all too easily rebutted.

Yet it is hardly that "anything goes" here. There really are not very many serious candidates (not if we exclude the far-fetched proposals which fascinate only a theorist or two). It is important for appreciating the depth of the cognitive dimension here to recognize that many possible datings have little natural appeal—including

some that at one time did, but, given what we now know, no longer do. Quickening is the clearest case. We can readily understand why it once made sense (and was indeed *the* standard for centuries) and why it is never taken seriously now.

Consider the birth date. Its cross-cultural popularity is impressive and utterly unsurprising. It seems completely natural, yet it may be the hardest to articulate any respectable rationale for. Since the newborn is undoubtedly a human being, the reasoning is directed at explaining the denial of that title to the babe before birth. At first glance the differences seem obvious and enormous, yet when we try to describe them it all dribbles away into the sand. When we consider incubated premature infants, the morphological and histological structures and capacities seem no longer relevant. The newborn's independence of the mother seems significant until we try to specify it, for the neonate is utterly dependent in so many vital ways. It soon seems that we are excluding the secluded simply for being sequestered, and that can seem to make no sense at all.

By contrast, although to many it seems plain zany to consider a zygote one of the folks, the argument for that conclusion is disturbingly elegant, simple, and direct, so much so that it can seem sheer sophistry, quite unconvincing. Yet there it is: the same spatiotemporal-causal-organic continuity linking an adult with an infant goes back as far as the zygote and stops there. The unblinkable biological and metaphysical fact is that the individual human organism begins back then. (Or a few days thereafter, since apparently the possibility of twinning is determined by post-conception events and, since the zygote cannot be identical with both of two distinct individuals and apparently is no more identifiable with one than the other, it cannot be identified with either; so the inception of each twin occurs at segmentation, and, arguably, so does the inception of any individual even when no twin appears.) But, having noted the fact of continuity of organism, the antiabortionist has nothing much to add to overcome the natural reluctance to regard the early mass of undifferentiated cells as a being no different from you and me. Yet, those who balk at the conclusion as an insult to common sense have not found much to say beyond that the cell mass seems too undeveloped, too different from what we have in mind when we think of a human being.

XIII

Here it is worth interjecting an example of how the kind of thinking peculiar to philosophical theorists can make a genuine contribution to common thought. Notably, it is not the application of any theory, but rather of the type of thinking practiced and developed in the process of developing and evaluating theories.

People generally agree on the application of the term 'human being' in most post-natal cases, and also in some instructive imaginable cases. It seems coherent to imagine (though its realization is remote) removing a human being's brain (and perhaps some other requisite sections of her nervous system) and transplanting it in the body of another in such a manner that her mind, her personality, character, memory, beliefs, and desires remain largely unaltered from the pretransplant time. And it seems that, confronted with this hypothetical situation, people find it natural to say that her former body becomes a corpse, that the human organism dies, but that she, the human being, continues to exist and live embodied in another organism.¹⁰

This need not mean that "human being" does not express a biological concept: for one thing, it seems that we would individuate the same way with a transplanted brain of an ape or a dog or any creature with much of a mind to move. It may mean that our concept of the biological has unsuspected contours and comes apart in curious ways. Perhaps what we call "biological science" is best conceived as concerned with biological organisms and not per se with the organically embodied experiencing subjects who can be objects of our "personalized" attitudes. (Though we may fear any kind of threatening thing, what calls forth our feelings of sympathy, affection, anger, and the like must, it seems, be conceived in some personal or anthropomorphic manner.)

The import of this Gedanken experiment for the issue of hominization is its providing some substance to a distinction needed by proabortionists. For it permits (but does not require) a reasoned resistance to the central antiabortionist argument that identifies the entity at the time of conception (implantation, or segmentation) with the individual at every subsequent stage it attains. That the life

¹⁰Cf. Mark Johnston, "Human Beings," *Journal of Philosophy*, LXXXIV, 2 (February 1987): 59-83.

of the individual organism begins back then seems as certain as any bit of biology. Yet since we elsewhere display a conceptual distinction between the organism and the human being, we are not being arbitrary if we refuse to concede that the life of a human being necessarily begins coincident with that of the organism. Actually, extending that Gedanken experiment suggests a contrary conclusion. For, so it seems, if we consider a case of transplanting a neonate brain, we get the same result as with an adult. But our intuition becomes decreasingly confident as we consider transplanting the decreasingly developed brain and nervous system of a fifth-, fourth-, third-, and second-month fetus. And the first-month cell mass (and much of the second-) is too undifferentiated for the supposition to have any sense.

All this makes the case for the first-month, and perhaps first-trimester, hominization less compelling, but not necessarily incorrect. Then too, this dialectical sword is double-edged, for all this also makes the case against hominization increasingly less compelling as time goes on, indeed rather tenuous (but not untenable) from perhaps as early as midterm on. Perhaps this form of argument will come to seem more compelling when we know more about the development of the cortex and its connections with what we would be willing to or forced to consider a self, something, someone who calls out our sympathies and calls upon our capacity for identification.

XIV

The power of such considerations may be substantial, but should not be overstated. It is doubtful they can be decisive. For note now a curious feature frequently found in the common-sense debates. The considerations people offer in favor of a dating are not normally moral or value claims. People point to factual matters and seem to treat the dating as a factual matter. The arguments do not pretend or aspire to show that the events of the favored date involve the acquisition of some morally relevant property, some attribute (power, process, or whatever) which in itself would justify moral or legal discrimination. The reasons are reasons for classifying the entity as a human being, and the moral and legal consequences flow from affirming or denying that classification, not from the reasons for the classification itself.

This is not always so, or not always obviously so, but the main exceptions are arguments concocted by ethical theorists. Theorists sometimes argue directly for some dating by arguing for the moral relevance of some property acquired at the time; often their datings are selected explicitly on that basis. (Sometimes this aspect is ambiguous, since the dating fixes on a feature that might plausibly be thought to be itself of moral significance or, independent of its moral significance, to be a conceptually appropriate mark of membership in our species: e.g., the inception of consciousness.) But this is rarely found in pretheoretical thought.

The curious part of the public debates is that what people commonly use as reasons for *rejecting* some dating are manifestly moral considerations. The antiabortionist denies the reasonableness of the proabortionist datings by insisting that the differential properties lacked by the fetus (just) prior to the date of birth (viability, brain activity, or whatever) are not morally relevant differences at all or anyway not sufficiently significant differences to warrant the profound difference in moral and legal consequences. Conversely, the pro-choice proponent denies the reasonableness of the pro-life datings by insisting that the properties possessed by the fetus at conception (segmentation, motility, etc.) are not morally relevant properties at all or anyway not sufficiently significant to warrant the profound moral and legal consequences that flow from that dating. The proabortionist may also turn the antiabortionist's form of the argument against him to produce a *reductio ad absurdum*: what is lacked by the entity just before your dating of conception is not morally significant enough to deny it those moral and legal protections, so you will have to protect sperms and eggs as well. So too, the pro-life proponent turns the proabortionist ploy against him and presents the threat of a slippery slope: the properties possessed before birth are not enough for you, and the properties added by birth are not morally significant enough to begin providing the protection, so you will have to permit infanticide, and then. . . .

Such arguments can be persuasive, though each side has ways of blunting the objections directed against it. In any case, theorists aside, people do not rebut such objections by denying the propriety of that kind of moral argumentation. They do not claim, as presumably a biological taxonomist would, that a property's lack of (sufficient) moral significance is totally irrelevant to its being a necessary or sufficient condition for membership in a biological cate-

gory. So an ethical theorist who sees this is likely to admit that, if such moral argumentation is allowed, then the taxonomist's efforts cannot themselves resolve the dating dispute.

The theorist is also likely to go a step further and complain that, if this is the situation, the controversy can't be kosher. He may say: "You are confused and deluded if you think that any answer you get with this kind of procedure could be some kind of objective empirical fact. Your term "human being" is not really the name of a biological species, but rather of some moral category. It's like "person" or "property" or "saint" (in some of their uses). By "human being" you evidently mean something like "member of our moral community." It's a category defined by some set of moral principles, and such principles don't define objective categories (though, of course, given some set of principles, it may be an objective fact that some entity satisfies its specification.)" But this theorist's response misdescribes the situation.

xv

The term "human being" does appear in moral principles like S. The importance of the term and of its application and its extension derives from that. Its application is debated against the background of such principles, but they do not define its intension or extension. S does require for *its* application that a human being be able to be harmed, but even a single cell is harmable.

The conflicting datings are not due to conflicting moral principles or differing conceptions of what properties are morally significant. Appearances and opponents' allegations notwithstanding, pro-choice advocates do not suppose that being in or ex utero is itself a morally relevant factor. So too, contrary to antiracist rhetoric of the last few hundred years, there is precious little evidence that racists have thought that skin pigmentation is in itself a morally sufficient reason for discrimination. White racists have thought, and quite rightly, that skin color normally evidences and is explained by membership in a particular race. It is the membership in another race—a kind differing from his kin, a kind he thinks inferior to his kin—that the racist focuses on. And, although it may not be obvious how or why that might be morally relevant, it is not such an obviously absurd idea, for, if it were, there would be no motive for the persistent misattribution of the racist's beliefs about skin color.

For animals as visually oriented as we are, skin color is no doubt a psychologically powerful fact which may well explain some aspects of racist attitudes, but the racist need not regard it as a good reason for his attitudes. So too, the fact that the fetus is hidden out of sight could hardly leave us unaffected, but those who date hominization at birth are not committed to crazy conceptions about the value of visibility.

xvi

It is also wrong to apply the label "value term" to "human being" if you have in mind any of the usual paradigms. Though "human being", like "man", does have an honorific usage, that is not the use involved here. We do praise someone for being a *real* human being, a Mensch, someone who is kind to those of his kind, just as we praise someone for being a man, manly, brave, courageous, and true. But no one is contesting whether to commend an embryo; no one is asserting or denying some virtue in fetuses.

That should be obvious, but we might be confused here since the whole abortion issue is commonly and confusingly said to be about the *value* of fetal life as compared with the value of things it might conflict with, such as the health or well-being of the mother. This talk of value rather than category invites us to model the abortion question on a question such as whether to destroy a sapling tree that threatens to obstruct the path leading from your home out into the world at large. If the sapling is your property (and assuming it impractical to transplant it elsewhere) then your question is whether you and your family value the joys of its beauty and the pleasures of caring for it and the comforts it may provide more than you value your convenience and safety. However, if the sapling belongs to your neighbor, you have no right to decide its fate on the basis of its value to you. In the abortion issue what is contested is not per se the value of the "property," but rather whose property it is: Is the fetus your neighbor whose tree of life you are cutting down?

People do speak of a human being's having a special inherent value, a value that inheres in simply being a human being. This value is unlike the value of a virtue or an artwork or a workhorse or anything else. The *conception* of value operating here is radically unlike our conception of value operating elsewhere, more radically different than people recognize. The conception is indeed of ques-

tionable coherence (and talk of this value is largely confined to modern, propter-Kantian culture). This value provides no reason for possessing or producing the things possessing this value: the world does not become a better world just by an increase in the number of human beings in it. We talk as though this value explained and justified principles like S, as though our reason for refraining from harming a human being derived from his having this value, whereas actually the attribution of value is a consequence of the rationality and categorical character of moral choices, not a precondition of them. The propriety of sacrificing one person to save the life of many in some cases and the impropriety of doing so in other cases cannot be explained on any coherent calculus of value. At any rate, a fetus acquires this value only by becoming a human being, and whether it has become one is not discoverable by checking for its possession of this value; so we cannot settle the abortion issue by any direct assessment of the value of fetal life.

xvii

I suspect that theorists misconceive the hominization debate partly because they regard the truth of the moral principle S and the truth of any dating of hominization as two separate and distinct issues which should and can be investigated in isolation from each other. They want us first to set out criteria for the term "human being" appearing in S and then do a fetal examination to see if and when it matches up.

Well, we do have criteria for that term, and generally they do just fine, but after the fetal inspection folks come to different conclusions. At this point theorists seem to be telling us that we need to reconvene the moral legislature and enact more specific principles to resolve the conflict. But that is a philosopher's fantasy: there is no such thing as enacting or adopting moral principles and no urposition we can betake ourselves to. We find ourselves in the world regarding certain things as reasons for doing (saying, believing, wanting) other things, and among those reasons are means for improving our understanding of the world and of our reasons, and for sometimes refining, sometimes revising, sometimes rejecting them. But we don't enact, adopt, or choose our reasons.

We are not and cannot be moral legislators. At best we are competent moral judges for whom S is a given, a fixed point of our

common moral-law heritage around which we deliberate the dating of hominization. Our task of classifying the fetus is adjudicatory, not an exercise in taxonomy taken on out of curiosity. Our task of classifying cannot be pried loose from practical consequences of inherently profound importance, and we would be derelict in our duty if we let ourselves be forgetful of that fact.

The correctness of our classifying and the correctness of our interpretation of the principle are not two separate questions. And, since we properly assume that the principle is valid moral law, we are bound to insist that its interpretation and application be judged by considerations of justice. Is it fair to exclude an individual from protection by this principle when it does not differ in morally significant ways from those included? Is it fair to include an individual and, thereby, heavily burden those who are certainly included, when it lacks any morally significant features? Those questions are properly and inescapably part of the classificational considerations in this case.

Does this mean that "human being" is a value term or the name of a moral category? Or does it mean that some facts in our world are framed and formed by moral principles or incomprehensible apart from our morality?"

"The development and refinement of this essay owes much to the charity and patience of the editors of this anthology, for which I thank them.