

Beyond infanticide: How psychological accounts of persons justify harming infants

Keywords

infanticide, persons, personhood, pre-personal acts, sex, harm, abortion, consent

Abstract

It is commonly argued that a serious right to life is grounded only in actual, relatively advanced psychological capacities a being has acquired. The moral permissibility of abortion is frequently argued for on these grounds. Increasingly it is being argued that such accounts also entail the permissibility of infanticide, with several proponents of these theories accepting this consequence. We show, however, that these accounts imply the permissibility of even more unpalatable acts than infanticide performed on infants: organ harvesting, live experimentation, sexual interference, and discriminatory killing. The stronger intuitions against the permissibility of these 'pre-personal acts' allow us to re-establish a comprehensive and persuasive *reductio* against psychological accounts of persons.

Introduction

Advocates of the moral permissibility of abortion often base their views on a conception of rights or interests which apply only to a specific subset of human

beings – usually termed ‘persons’ – where one is a person only if one satisfies certain psychological, cognitive, or other requirements. Although this is not the only way of generating the conclusion that abortion is permissible – others appeal to maternal bodily autonomy or similar considerations independent of the value or rights of the foetus – it is one of the more common and persuasive.¹ Since foetuses lack the relevant psychological apparatus or features (either in kind or degree), they lack certain rights or interests that adult humans ordinarily have, including the right to life.² It is often held, by extension, that these considerations likewise justify early infanticide in some or all circumstances, since there is no relevant disparity between the capacities or abilities of, for example, late-stage foetuses and infants. On this account, therefore, infants also lack the serious right to life which we typically predicate of adult humans.

The conclusion that infanticide is permissible was once widely considered a convincing *reductio ad absurdum* of psychological accounts of persons, rights or interests.^{3,4} Given the growing acceptance of the permissibility of infanticide, whether

¹ We note that several of our interlocutors here have objected to the autonomy-based arguments for the permissibility of abortion.

² We do not hereby imply that a ‘right to life’ is indefeasible – only that the extent to which a human life is morally or legally protected, according to the authors in question, is a function of these psychological capacities. For those undisposed towards ‘rights’, our argument can be adapted, *mutatis mutandis*, for various accounts of the wrongness of murder.

³ It is possible that a psychological account of rights is true while a psychological account of personhood is false – if personhood and rights come apart, for example. For ease of discussion, however, we stipulate that ‘person’ means something like ‘bearer of the serious rights we normally accord to adult humans’. So we leave open the possibility of, for example, entirely unconscious beings being ‘persons’, laying aside the Lockean tradition of taking ‘person’ to verbally imply certain conscious traits. When we refer to ‘psychological accounts’, therefore, we are referring to both psychological accounts of personhood and psychological accounts of value and rights, since ‘personhood’ in our essay just is the status of having those rights.

⁴ e.g. Sumner 1981.

for severely disabled infants or more broadly,⁵ this has gradually ceased to be the case. But if infanticide is no longer too big a bullet to bite, there remain bigger ones. It is therefore worth exploring other implications of psychological accounts, many of which receive no such analogical support⁶. In doing so, we attempt to re-establish a persuasive *reductio*. Given psychological accounts, we argue, it follows, first, that infanticide is permissible for healthy infants. Secondly, infants can be harvested for organ transplants (or, perhaps, for more trivial reasons). Thirdly, infants can be subject to live, invasive experimentation. Fourthly, infants can be used for sexual gratification. Finally, infants can be actively discriminated against on the basis of what are generally accepted protected characteristics for mature humans.

Psychology and personhood

Let us consider more closely how and which psychological capacities are supposed to generate a serious right to life. According to defenders of psychological accounts, psychological capacities and abilities are thought to confer moral value, often by generating intermediary ethical currency which may depend on such capacities - desires and interests, for example. In a variety of ways, these impose normative obligations upon others within the community of persons - what McMahan (2003) calls the 'morality of respect'. One such obligation has been characterised as the 'right to life'. For clarity, we take 'x has a right to life' to mean that other humans ordinarily have an obligation to refrain from killing x (excepting perhaps cases of

⁵ Some contemporary examples of arguments in support of some form of infanticide include: Räsänen 2016; Schuklenk 2015; McMahan 2013; Hassoun and Kriegel 2008.

⁶ As, for example, the palatability of infanticide has been strengthened by its link with euthanasia in cases of severe disability.

self-defence, and so on).⁷

Philosophers have therefore frequently sought to establish those properties of objects or agents which constitute or indicate personhood, or which otherwise establish a right to life. We do not seek to delineate the precise relationship between psychological capacities and rights here, nor do we hasten to establish a comprehensive account of these rights and their theoretical underpinnings. Rather, we will briefly outline the theoretical background of the main defences of infanticide, before arguing that the same accounts which permit infanticide fail equally to prohibit considerably more unpalatable actions.

Such accounts normally include reference to certain conscious capacities.⁸ Tooley's initial work, for example, suggested the following account: 'An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity' (1972, p. 44). Since rights are based on desires, and desires of necessity require conceptual (though not necessarily linguistic) understanding of the desired state of affairs, the desire to continue existing requires the concept of a continuing self, and so beings lacking such a concept cannot have the desire (and hence nor the right) to live.

⁷ It is plausible that this right entails not only negative duties as mentioned here but also positive duties: so, for example, many think it plausible that societies have an obligation to protect and preserve life through healthcare, etc.

⁸ David Boonin (2003) requires 'organized cortical brain activity', which is detectable by the 25th week of gestation, for the right to life. As this is not strictly a psychological account, we will not discuss his views further here.

Along similar lines, Joel Feinberg (1974) argues that to have rights, an entity must have *interests*, which are composed in some way of conations such as wishes, desires and hopes. Although he ultimately concludes that infanticide is normally wrong for pragmatic reasons, he indicates that it is not intrinsically wrong in virtue of killing a person. Tooley (1988, p. 87) later adopted the notion of interests in a slight modification of his view: 'a thing's interest is a function of its present and future desires'. Foetuses and newborns are not included, however, because there *is* no person who persists from infancy to adulthood, and so they do not have future desires. And so the conclusion remains broadly the same.

One widely suggested psychological criterion is self-awareness. Self-awareness in young children has historically been measured by the mirror self-recognition (MSR) test (Rochat and Zahavi 2011). However, children do not commonly pass the MSR test until between 18-24 months of age (Broesch *et al.* 2011) and the exact meaning of the test is still disputed⁹. Furthermore some psychologists have presented various stages of self-awareness that do not culminate in children until 5-years of age (Rochat 2003); under some psychological accounts this would significantly increase the threshold for possessing a right to life. In addition, children do not perceive themselves as an enduring self across both time and space until they are 3-4 years of age (Rochat 2003); this has serious implications for psychological accounts of persons which rely on a particular kind of self-awareness. Given the length of time it takes for self-awareness to unfold in children, Giubilini and Minerva's (2013) case for

⁹ One reason for this is the significant cross-cultural variation that has been demonstrated in the MSR test pass rates, which may undermine its use as a reliable universal measure of self-awareness. In one cross-cultural study looking at 18- to 20-month-olds, over 50% of German, Greek and Costa Rican children passed the MSR test, compared with 4% of Cameroonian children.

neonaticide or 'post-birth abortion' is actually very conservative. Of course, other psychological criteria will not be so restrictive - we note here only accounts need to be very carefully drawn even to include young children in the morality of respect.

Kuhse and Singer (1985, p. 120) cite Joseph Fletcher's requirements of 'self-awareness, self-control, a sense of the future, a sense of the past, the capacity to relate to others, concern for others, communication, and curiosity', while Singer (2011) elsewhere refers to the simple Lockean themes of rationality and self-consciousness. Mary Anne Warren's (1973) classic article outlines five criteria, including 'the presence of self-concepts, and self-awareness'. More recently, Giubilini and Minerva (2013, p. 262) state that a person is an 'individual who is capable of attributing to her own existence some (at least) basic value such that being deprived of this existence represents a loss to her'. It is unclear exactly what this means or how it could be measured, but it seems to require the capacity for self-awareness. Elsewhere, they suggest that infants can be harmed by killing insofar as they have 'aims'. Again, how rudimentary these may be (or in fact are) is not specified.

Finally, McMahan (2003) makes explicit a two-tiered account¹⁰ in which only beings with psychological capacities or properties above a certain threshold are granted full moral status and are subject to the 'morality of respect'. According to this account, the killing of any such being is equally wrong, *ceteris paribus*. McMahan's account of

¹⁰This is implicit in other accounts too, e.g. where authors say that infants have no right to life but still have a right not to have pain inflicted on them. But McMahan's is seemingly distinctive in that he appears to attribute some *value* to the infant's life, rather than just granting it the right not to have pain inflicted.

this threshold makes no detailed claim about where the threshold lies: we do not know what constitutes the threshold, he suggests, but given that animals fall below it, and given that it is based on psychological capacities, fetuses and infants must also fall below it.

Below this threshold of respect, killing is not as serious as the killing of an adult person, as the object/agent does not have equal moral status. Although killing is still a harm, it is not a harm that applies equally: rather, it is governed by McMahan's time-relative interest account (TRIA), where S's interests are a function of the good contained within S's future if S does not die, and the strength of the psychological connections between S and S's future self.

Pre-personal humans and pre-personal acts

According to these accounts, not all human beings are persons. There is a threshold (usually taken to be a complex of psychological properties and capacities) that must be attained for a human to be regarded as a person and to gain the rights most adult humans have. Although fetuses, newborns and infants may have some rights in virtue of their limited psychological capacities, they come nowhere near to having a serious right to life. And, in particular, the rights they do have are typically overridable by the rights or interests of actual persons.

Warren (1973), for example, allows that a *potential* person may still possess *some* right to life, but states that this can never outweigh the rights of an *actual* person, in

particular the mother, who has a right to protect her 'health, happiness, freedom and even her life'. That is, a person's rights should always outweigh the rights of a non-person. Similarly, Giubilini and Minerva (2013, p. 263) state that 'the interests of actual people over-ride the interest of merely potential people to become actual ones'. They do note that non-persons have a right not to have unnecessary pain inflicted upon them, just as it is generally accepted amongst utilitarians that pain should not be gratuitously inflicted on any sentient creature.

Let us call human beings who have not yet met the criteria for personhood *pre-personal humans*. More precisely for our purposes, a pre-personal human is any human who has not yet attained the capacities or other features sufficient for inclusion within the community of full rights-bearers. We also define *pre-personal acts*: acts performed on or with a pre-personal human. It is to these we now turn.

1. The permissibility of infanticide

The first implication normally drawn from psychological criteria for personhood is the relative permissibility of abortion at any stage of pregnancy. Foetuses, even at the later stages of pregnancy, are not (according to some accounts) self-aware or rational, and lack the concept of a continuing self, even though they may be minimally conscious (Lagercrantz and Changeux 2009); they are, therefore, not persons. Consequently, they do not have a right to life.

It is important to note that under McMahan's TRIA, a foetus that is conscious does have an interest in living, albeit a weak interest because of its minimal psychological continuity with its future self, despite significant possible good in its future. But it does have an interest, which is why McMahan considers late-term abortions morally different to early-term abortions. However, its weak time-relative interests cannot prevail against the much stronger time-relative interests of existing persons such as parents, and since it has no right to life, McMahan regards late-term abortions as still permissible.

Infants are little different to conscious foetuses psychologically, and so according to typical psychological accounts of personhood, value and rights, they also lack a right to life. Again, their weak psychological continuity with their future selves means they have a similarly weak time-relative interest in living. The natural implication is that infanticide is at least sometimes permissible, and typically, ethicists who hold to psychological accounts agree that this is true for cases of severely disabled infants whose quality of life is likely to be poor.

As several defenders of infanticide point out, however, these considerations actually imply the permissibility of infanticide in a much wider variety of cases – most of the aforementioned authors do not make room in their accounts for any rights for foetuses and infants (excepting perhaps the right not to be subject to pain), while the other accounts suggest that in view of their minimal psychological capacities, their rights are present but easily overridable and, in McMahan's (2003, p. 339) words, 'may permissibly be weighed and traded off against the time-relative interests of

others in the manner approved by consequentialists'. If this is correct, of course, it is plausible that infanticide is sometimes *obligatory*.

While some defenders of infanticide have focused on cases of severe disability, therefore, this focus has only pragmatic grounding. If the rights of infants are overridable by the rights of actual persons, there is no reason why healthy infants should be immune from the utilitarian calculus: if the interests of adults can be furthered sufficiently by killing the infant, there is no theoretical ground for opposing such killing. And even those who offer pragmatic reasons for limiting infanticide do not deny that there could be fairly simple goods outweighing these practical considerations.

Ethicists are increasingly advocating more liberal approaches to infanticide. McMahan acknowledges the problem, concluding that his views entail that orphaned infants could be (and, perhaps, *ought* to be) utilised for organ transplants to save other children. According to McMahan (2003, p. 360), 'most people will find this implication intolerable', and he freely confesses 'that I cannot embrace it without significant misgivings and considerable unease'. Despite his unease, however, McMahan (2003, p. 361) feels he is inexorably forced into accepting that newborns must be 'in principle, sacrificable'.

Giubilini and Minerva (2013, p. 262), likewise, have recently referred to infanticide as after-birth abortion to emphasise their view that it is morally equivalent to abortion: 'we claim that killing a newborn could be ethically permissible in all the

circumstances where abortion would be'. Giubilini and Minerva suggest that this might be the case for at least a few weeks after birth. While they give no detailed exposition of when abortion is acceptable, it includes circumstances where the infant will have an (at least) acceptable life, but the well-being of the family is at risk. One suspects, of course, that for many people the circumstances in which abortion is thought to be acceptable are considerably wider.

It seems clear that despite the intention on the part of some to limit infanticide to severely disabled infants, other ethicists are not so reticent to embrace the consequences of these psychological accounts in endorsing the killing of healthy infants. For those who hold to a form of consequentialism (and for those who hold to consequentialism below the 'threshold of respect'), it is not difficult to find reasons why existing persons will benefit from ending the life of healthy infants. If parents decide that their child is not wanted after birth due to financial and emotional constraints, this may be regarded as sufficient reason.

The implication that infanticide of healthy infants is permissible in certain scenarios under psychological accounts is for many, perhaps most, a conclusion to be avoided. But while some have been happy to bite the bullet on infanticide, there remain other, less widely discussed implications of these accounts. Our moral sensibilities may have been chastened by the increasing acceptance of the permissibility of infanticide. But, we suggest, they are likely to remain sensitive to more unpalatable pre-personal acts, which we now consider.

2. Pre-personal use of infant's organs for actual human persons

Involuntary organ donation is one possibility, mentioned by Kaczor (2014) as an implication of McMahan's views. There is a critical shortage of organ donors worldwide, and if pre-personal humans that are unwanted by parents or relatives could help meet this need, there may be a moral obligation to use them thus. In the UK alone there are approximately 6,500 people waiting on the national transplant waiting list, 400 of whom die every year before they never receive an organ donation (O'Carroll *et al.* 2017).

Indeed, we've noted that McMahan (2003) concludes it is morally permissible (and perhaps obligatory) for orphaned newborns to be used for organ transplants. Elsewhere (2007), he states that they 'fall outside the scope of the constraint against harmful using'. And while he does not comment explicitly on non-orphaned newborns, it seems that his view should hold for all newborns. If parents have decided that their newborn is unwanted (for example, because it is disabled in some way, or they have financial constraints, or perhaps even much more trivial reasons) and the rights of the child are dependent only on their overridable, weak time-relative interests, it is a short step to thinking that their organs could be used for the benefit of existing persons rather than be discarded. Knowing that their child is preserving the life of another child who is likely to have a better quality of life could be of considerable comfort to parents in this situation. Moreover, it is difficult to see how there could be any strong argument against even the commercialisation of this

practice. And of course, they could even use their child's organs to prolong their own life or that of the child's sibling. Given their connection to the child, this is an even stronger case than for providing organs to anonymous recipients. While Singer argues strongly against organ harvesting from infants, citing the attitude of care and protection of infants that he considers rules out the practice¹¹, it will seem to many people that this does not generate the principled restriction on organ harvesting which sits more comfortably with their intuitions. In any case, if that requirement were very stringent, it is not clear why infanticide of disabled infants – or abortion itself – would be permissible, since these also very plausibly run counter to our basic attitude of care and protection towards infants.

If psychological accounts are correct and infants are not persons, there may even be a moral obligation to utilise available organs to maximise benefit to existing persons. Non-consensual organ harvesting, while desirable because of the obvious benefits to those in need of organs, is constrained by our obligation to respect surviving interests of the dead such as the previously expressed desire for bodily integrity after death. There are no such surviving interests for infants - their weak time-relative interests cannot survive their death. Discarding their organs appears to be unjustifiable, given the great goods that would accrue to actual persons from their use.¹²

¹¹ Singer and Wells think that this attitude is important 'for the sake of the welfare of all our children' (1984, p. 149). But if he thinks we should all accept his arguments that infants and children are fundamentally different entities with different rights then, were we to do so, having an opportunistic attitude towards infants would be entirely consonant with having a protective attitude towards more mature children. In that case, there would be no obstacle to organ harvesting from infants.

¹² It is at least worth considering whether more trivial benefits for actual persons might equally justify this practice. After all, if the deontic constraints on killing humans are absent for infants, and if they are sufficiently anaesthetised (for example), it becomes difficult to explain why only the great benefit

It may also be permissible for infants to be deliberately conceived or created to alleviate the shortage of human organs. Hypothetically, it may eventually be feasible to prevent brain development and thus the development of self-awareness. We could keep infants permanently unconscious, so that they never have the opportunity to become persons, a scenario suggested by Peter Singer and Deanne Wells (1984). Similarly, Carol Kahn has suggested 'body clones' - brainless bodies cultivated for rejection-free body parts (Kahn 1989), as has McMahan (2003). These 'baby-farming' scenarios would allow the development of more mature organs over a period of months or even years.

3. Pre-personal use of infants for medical research

There are similar pre-personal acts which could benefit actual persons. Foetal tissue from aborted fetuses has for many years been used in medical research, in areas as diverse as HIV/AIDS, developmental biology, eye development and diseases, infectious diseases, vaccines, and transplantation. According to bioethicist R. Alta Charo (2015), nearly everyone in the United States (US) has benefited in some respect from research using foetal tissue. But with similar justification, tissue obtained from infants whose lives have been ended by infanticide could also be used.

of saving lives via organ transplants would justify the practice - why not more trivial benefits, like purely hedonic ones?

The use of euthanised infants' organs and tissues in this way is not the only possibility. Of necessity, much medical research is conducted on living beings, including human beings who volunteer themselves and animals who do not volunteer. If infanticide is permissible (which, we recall, follows relatively naturally from these psychological accounts of rights), it seems that using infants for medical research prior to being euthanised (or even without being euthanised) would also be permissible, provided sufficient benefits to actual persons accrue. It would be necessary to ensure that the research does not cause pain, but this is compatible with relatively extreme actions as long as appropriate safeguards are in place (e.g. a requirement for sufficient analgesia). It might even be that a degree (perhaps a large degree) of pain is morally acceptable, provided it is not gratuitous, and provided the benefits are sufficiently large. It is also possible that this could be a commercial transaction.

Peter Singer notes this possibility when addressing animal experimentation. As a utilitarian, he acknowledges that if the benefits (for animals or humans) are substantial and could be obtained by sufficiently small suffering to animals, animal experimentation may be morally acceptable. He challenges those in favour of doing so to likewise be willing to experiment on 'orphaned humans with severe and irreversible brain damage' (Singer, 2011, p. 57), given their very limited cognitive capacities. But it is a small step to suggest experimenting on infants with similar cognitive limitations, given the massive potential benefits for actual persons. The implication that infants could permissibly be used for live invasive experimentation will be a deeply uncomfortable one for many people.

4. Pre-personal use of infants for sexual gratification

One of the most unpalatable pre-personal acts is the use of pre-personal humans for sexual gratification. Provided that such acts do not result in physical damage or pain, such acts could be permitted on any human that is yet to reach the threshold of personhood, including those that will become persons in the future. Given their very weak psychological connection to that future person, in this scenario it seems that little to no harm has been done to any person. Of course, if the infant is subsequently killed, harm that would manifest in the future may not even be relevant. Consequently, the hedonic benefit to existing persons does not need to be overwhelmingly great to override the interests of the pre-personal human. In any case, since there is no principled objection to using infants in this way according to the morality of respect, all that is necessary to justify it is sufficient gratification for the actor. Effectively, this could legitimise sexual abuse of very young children, whether it be parents abusing their own children, or other persons doing so with the parents' consent. Again, as with organ harvesting and experimentation, this could even be commercialised.

We can get a tighter grip on this by considering non-consensual sex with animals. Although for most of us bestiality elicits revulsion, many find it difficult to explain why it is morally wrong provided the animal is not harmed. Of course, animals cannot give informed consent, but there are circumstances where animals seem to participate willingly. Peter Singer, for example, has concluded that it is 'not wrong

inherently in a moral sense' (Olasky, 2004), even if the animal qualifies as a person according to his psychological criteria. If we are to ground the common intuition that having sexual relations with infants is wrong, we will need an explanation of why infants have a non-negotiable right to sexual integrity but animals do not, without relying on species exceptionalism¹³.

On the psychological accounts of rights in question, it is difficult to give such an explanation. While we do not have the space to exhaust possible explanations here, we can use two recent accounts of the wrongness of rape to illustrate the difficulty here. Archard's (2007) careful account follows Feinberg initially in taking 'harm' to mean a 'setback to another's interests'. We can see already that those accounts which deny the foetus interests (in virtue of not being a continuing self) or which give the foetus at best weak, overridable interests are going to have difficulty locating the particular heinousness of rape of infants in the harm it causes to the infant.

On Archard's account, rape is wrong since sexual integrity is a central concern or interest of a person and of one's identity - 'our sexuality is an interest which defines who and what each of us is'. He continues, 'The more central interests are to personhood, the greater the harm, and hence moral injury, done to someone in overriding her consent in relation to the interests. So if sex is central to personhood, [non-consensual sex] assaults the very 'core' of the self and causes great moral injury' (Archard, 2007, p. 390).

¹³ It is possible that one might deny, *pace* Singer, the permissibility of bestiality (as the authors do). But in that case we will need an explanation for *both* the wrongness of bestiality (with animals of similar cognitive capacity as infants) and the wrongness of using infants for sexual gratification.

But if infants are not persons in any relevant sense, and if they are not part of the 'morality of respect' in virtue of being 'one of us', it is difficult to see how rape could constitute such an assault on them. And it is especially difficult to see, if infants are not 'one of us' in a way that accords them broadly the same rights as us, why we should attribute to them the same interest in sexual integrity which we have. For those who oppose abortion and infanticide, one way to attribute the same interest here is in claiming an identity relation between foetuses, infants and adults, and to suggest that identity relations are sufficient (though not necessary) to preserve interests and rights.¹⁴ But to posit a relation that preserves interests without preserving rights seems entirely ad hoc. Yet that is the sort of move a defender of infanticide must make to defend an infant's right to sexual integrity in the sort of framework Archard suggests.¹⁵

Berkich (2009, p. 397) helpfully surveys a broad range of views concerning what makes rape so heinous, eventually concluding: 'I submit that rape is heinous because it involves the sexual appropriation of a person, where rape sexually appropriates a person in Frankfurt's sense by contravening an important class of the second-order desires which constitute the person'.

¹⁴ This is not the only way, of course.

¹⁵ Archard does mention that one need not consider sex to be central to one's personhood or to be highly sexually motivated for sex to be a central interest of ours. We think this is true, but does not help the psychological theorist generate an account of the wrongness of using infants for sexual gratification.

'The appropriation of a person for personal use' is taken by Berkich (2009, p. 391) to be part of what makes rape so heinous. But he notes that certain kinds of heinous act can be more heinous than others. In the case of rape, following Archard, he notes that rape is particularly heinous in virtue of its attacking a domain central to personhood. But he goes further: drawing on Frankfurt's work on personhood and love, Berkich draws attention to one particularly important feature of persons, namely, their capacity for second-order desires. Rape attacks our second-order desires in at least two ways. Firstly, it attacks our second-order desires about sex itself: so, for example, date-rape still constitutes rape despite the first-order desire for sex potentially being present. Secondly, love itself is best characterised as caring for the beloved, where caring involves second-order desires, e.g. by setting aside our own desires to care for our beloved, or by deliberately shaping our own desires and wills in order to desire and will what is best for our beloved: 'sex between lovers reflects the rich and complicated reflective or second-order desires we have regarding the affections we have towards ourselves and others' (2009, p. 395). Since rape attacks our personhood so centrally, by attacking our second-order desires in such personal and important domains, it 'reaches through the will to dominate the person herself in a way mere assault does not' (2009, p. 396).

Again, however, it is difficult to see how this account could explain the heinousness of sexual relations with infants if a psychological account of rights is granted. For the account essentially follows Archard in suggesting that rape violates something central to personhood. And the modifications Berkich makes do not help here. If infants are not persons, and if they can be dealt with 'in the manner approved by

consequentialists', it is unclear why they should not be appropriated for personal use. And it is not at all plausible that infants are sufficiently attuned to second-order desires of love and sex for this to provide separate reason against violating them thus.¹⁶ So if infants - like animals - are excluded from the moral community of persons, it becomes difficult to explain why they may not be used opportunistically - occasionally even sexually.

Lest this seem uncharitable, we note that this implication is borne out by the recent case of Anna Stubblefield, who was convicted of aggravated sexual assault on a 29-year-old man with severe cerebral palsy and sentenced to 12 years imprisonment.¹⁷ While McMahan and Singer (2017) objected primarily to the judgment on empirical grounds, they offer a comment in passing on the sexual rights the victim would have if he *were*, in fact, too cognitively impaired to consent: 'it makes it less clear what the nature of the wrong might be ... if Stubblefield wronged or harmed him, it must have been in a way that he is incapable of understanding and that affected his experience only pleasurably'. It is similarly unclear what the nature of the wrong might be in cases of infants used in analogous circumstances. This is a strong mark against psychological theories of value and rights.

There are, of course, good utilitarian reasons why such behaviour with infants should be prohibited. It would be difficult to guarantee that infants were not physically

¹⁶ Tooley's account of desiring *x* requires conceptual understanding of *x*, and it is implausible that infants have such conceptual understanding. Of course, it might be that they have latent second-order desires against being used sexually, but the admission of latent second-order desires would only serve to prohibit abortion and infanticide similarly.

¹⁷ The conviction has been overturned on appeal and a retrial has been ordered.

harmed, and it may encourage some adults to abuse older children. While these reasons might indeed be powerful, and of course, defenders of psychological accounts do not, in fact, endorse sexual activity with infants, it is difficult to see how this prohibition is implied by their *theories*. For the problem with such justifications is that most people would recoil at the idea that there are only instrumental reasons for the prohibition on sexual activity with infants: the heinousness of sexual activity with infants is surely something intrinsic to the action itself - not merely a pragmatic concern.

5. Pre-personal discrimination

Our final example concerns pre-personal discrimination. We ordinarily think it is wrong to harm or kill those who are 'one of us' – persons, humans, or members of the moral or human community. We think that it is especially wrong to do so on the grounds of that person's skin colour, sex or sexual orientation (whether or not these constitute a separate harm or merely aggravate the initial harm need not detain us here). But most of us agree that such protected characteristics apply only to *us*, and not to pebbles, crocuses or mosquitoes. It is not racist to selectively destroy beige pebbles on a beach (because one prefers the other colours aesthetically), and it is not sexist to selectively kill female mosquitoes (for example, to help stop the spread of malaria).

We suggest that human infants are more similar in kind to human adults than pebbles and mosquitoes in this respect. It would be wrong to selectively destroy black infants because one prefers white infants aesthetically, just as it would be

wrong to selectively destroy female infants for the same reason (or to help prevent the spread of Duchenne muscular dystrophy). Or, supposing we could tell from an early stage whether a child was likely to be same-sex attracted or not, it would be wrong to kill an infant on those grounds (this need not result directly from antipathy towards same-sex attracted people: one might have only the resources to raise one child, and yet strongly desire grandchildren, in a country where same-sex attracted adults were banned from adopting). The killing of infants because of their skin colour, sex or sexual orientation, we suggest, would strike most people as heinous – and rightly so, we think.

But why? If infants are one of us, and part of our moral and human community, we can rule out such killings on the same grounds. The exact reason racism is wrong may be disputed, but many have thought it wrong on the grounds that it is our common humanity that grounds our human rights, such that discriminatory treatment on the grounds of protected characteristics attacks the human dignity of the victims. This sort of account accommodates the intuition against the discriminatory killing of infants quite readily.

And yet the psychological accounts do not. For there is no general prohibition on discrimination on the grounds of colour or sex, as we saw earlier. Such prohibitions apply only among members of the human moral community. But the psychological accounts exclude infants and fetuses from the human moral community, making them more like pebbles and mosquitoes in this respect. We suggest, therefore, that

the intuitive injunction against the discriminatory killing of infants undermines the proposed psychological accounts of value and rights.

Again, we note that there is some precedent for this sort of pre-personal discrimination. For example, disabled fetuses can be aborted up to birth in the UK, while there is otherwise a limit of 24 weeks. Yet discrimination against disabled adults is prohibited by law. Similarly, recent cases of apparent sex-selective abortions being offered led to UK MPs voting against a clarification in the law prohibiting sex-selective abortion. Moreover, when a private prosecution was brought against a doctor implicated in such a practice, the case was taken over by the Crown Prosecution Service (CPS) who subsequently dropped it as it was deemed to be 'not in the public interest' (CPS, 2013). So it is not possible to dismiss this as a strawman implication of psychological accounts.

Discussion and conclusions

We have detailed these five scenarios as a *reductio ad absurdum* of psychological accounts of value and rights. They each appeal to a strong moral intuition that killing, harming or otherwise violating innocent human beings, including infants, is wrong, and that the behaviours described in these scenarios constitute such violations.

Proponents of psychological accounts of personhood often (though not invariably) share these intuitions, but argue that other intuitions pertaining to personhood and value imply that a serious right to life requires certain actual - not potential -

psychological capacities. This entails the permissibility of abortion, but since infants, like foetuses, lack the relevant psychological capacities, they also lack a right to life. Moreover, given the tenuous psychological continuity between infants and the future person they may become (may, because the infant survives only in our fourth scenario, and not necessarily so), that person will not be significantly harmed by unremembered pre-personal acts on the infant. Consequently, psychological accounts *prima facie* imply the permissibility of our five scenarios, contrary to our intuitions about their wrongness or heinousness.

Moral theories that violate our strong intuitions need to explain why these violations do not undermine their status as moral theories. As McMahan (2013, p. 109) comments, 'one might even wonder what claim a theory might have to be a moral theory if it has foundations that are wholly independent of the intuitions that have shaped the common features of all recognizably moral codes'.

There are two options for the defender of psychological accounts: to reject these intuitions, or to explain why each of these scenarios is morally problematic. In the former case, there is not much we can do other than to strengthen the intuitions and defend them from undercutting defeaters. We take it that most people will feel the force of these intuitions and not give them up lightly. Although there is a strong intuition against infanticide which we have strengthened, we have also detailed further scenarios against which there are even stronger intuitions, such that the cost of giving them up is augmented. Of course, the cost must be weighed against other intuitions in favour of psychological accounts. While we do not have the time to

respond to those other intuitions here, we note that they are not without controversy. But our primary task here is shoring up the intuitions against pre-personal harms and exhibiting the cost of rejecting them.

Some ethicists take up the latter challenge: for example, Feinberg discusses infanticide as a potential *reductio* of his position on personhood, concluding that 'infanticide *is* wrong' (1986, p. 210) despite infants not being persons. Feinberg explains that kindness towards infants has social utility, and that 'insofar as infanticide would tend to weaken that socially valuable response, it is, on utilitarian grounds, morally wrong'.

Other ethicists who also allow the permissibility of infanticide in very restricted circumstances (e.g. for severely disabled infants) implicitly indicate that the implications are problematic. They go to considerable lengths to justify the restriction on circumstances and emphasise that they do not think that infanticide is generally permissible. For example, Kuhse and Singer (1985) allow infanticide on the basis that some infants are unlikely to be able to live a worthwhile life, and they are concerned about the impact on families of caring for a severely disabled infant. As previously noted, Singer and Wells strongly opposes our organ donation scenario, describing it as 'a prospect that almost everyone will find repellent' (1984, p. 148).

McMahan (2013) argues that as infants are more psychologically developed than fetuses, according to his TRIA they are harmed to a greater extent by being killed. Infanticide is also likely to 'elicit more intense grief and guilt than abortion typically

does', and the burden of caring for unwanted infants can be met by the state in most instances.

Do these sorts of moves succeed? We think it unlikely. We have shown in this paper that the implications of these accounts are more radical than their defenders have frequently supposed. And this is increasingly recognised by those authors. Hence, McMahan reluctantly concludes that infanticide of orphaned babies for organ transplants may be permissible (or obligatory). He does not go on to explain why babies unwanted by their parents might not also be utilised for the same purpose (or more sinister but pleasurable purposes). Tooley (1988) has long supported infanticide for a short period of time after birth, with apparently no restrictions. And in recent years, we have seen that Giubilini and Minerva have embraced the implications of their views, regarding infanticide as permissible for any reason abortion is permissible.

Singer and Feinberg are utilitarians, and it seems obvious that sacrificing unwanted healthy infants (who are not persons) could benefit many existing persons. Singer's claims about the importance of society's attitude of care and protection of infants are not convincing, especially since this does not seem to be a consideration when it comes to abortion, as Oderberg and Laing note (1997). Feinberg is subject to the same criticism about the value of kindness towards infants.

So the task is not merely to explain why these scenarios involve moral wrongdoing. It is to explain, firstly, why they involve wrongdoing in ways that, for example, abortion

does not. Secondly, since the intuitions here are not merely that the scenarios are to be avoided but that they involve intrinsic wrongdoing, we need an explanation of their *intrinsic* wrongdoing without reference to practical concerns that might easily be outweighed. In particular, we need an explanation of their *heinousness* which, as Berkich (2009) has credibly shown, requires (at least) reference to essential and *significant* features of an action – features that are not merely coincidentally present (e.g. as common consequences), and features which set a minimum bound of heinousness for *every* instance of such an act. Explanations appealing only to contingent features, or which allow for these actions to be only negligibly wrong insofar as other wrong-making characteristics are absent, will not suffice.

In the absence of such accounts, we conclude that our overall *reductio* succeeds. That is, psychological accounts of personhood do at present suggest the permissibility of infanticide, even for healthy infants. These accounts also imply the permissibility of pre-personal acts such as forced organ donation, use of infants for medical research, use of infants for sexual gratification, and discrimination against infants. It is difficult to see how these implications can be escaped.

We suggest that infanticide and these other pre-personal acts are morally heinous and that this judgment is rightly widely shared. Insofar as this is the case, the credibility of psychological accounts is thereby diminished in proportion to the strength of the intuitions against such acts. And for most people, we suggest, such intuitions have considerable force. But if all this is true, it has significant implications for abortion ethics. As we noted in the introduction, many contemporary defences of

abortion depend on denying fetuses (and often infants) the status of personhood on the basis of psychological accounts of rights, value and personhood. If, as we suggest, those accounts are made implausible by the *reductios* described above, defenders of the permissibility of abortion will have to appeal to alternative arguments.

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