

INTEREST AND PERMISSIBILITY: THE CASE OF MARY AND JODIE¹⁶

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Abstract. The separation in 2001 of the conjoined-infants Mary and Jodie Attard resulted in Mary's immediate death. This paper asks whether separation or non-separation was in the better interests of each twin and whether separation was morally permissible. I argue, with reference to Thomas Nagel's (1970) analysis of harms in death, that it was in the better interests of both babies to be separated. However, with reference to Judith Thomson's (1971) defence of abortion I argue that it was not a defence of their interests that could morally justify separation. Rather, separation was morally permissible only if performed in order to protect Jodie's right to life, distinguished from her "interests", against the threat posed to it by Mary's relation to Jodie.

¹⁶I am indebted to Ben Ferguson, Mischa Van Den Brandhof and Alex Voorhoeve for their critical assessments of earlier versions of this paper.

IN August 2000 conjoined-twins Mary and Jodie Attard were born with the correct number of organs required to sustain two babies, but only one “set” of these organs functioned well enough to circulate enough oxygenated blood for both to survive. The stress of supporting two bodies on one set of organs meant that if the babies were left conjoined, both would die within two painful years. However, if the twins were separated, one—Jodie—would have a set of organs that would sustain her for a life of relatively normal duration and health whilst the other—Mary—would die immediately.

A controversial legal case arose in 2001 from a disagreement between the babies’ parents, who did not want their daughters to be separated, and the doctors monitoring their daughters, who did want the girls to be separated. This paper asks two questions:

- (1) What, in the interests of the babies themselves, would have been better: separating the twins with the result of Mary’s immediate death, or not separating the twins and allowing both to die?
- (2) Was separating the twins morally permissible?

In the first section of this paper I articulate my use of Nagel’s (1970) analysis of harms in answer to (1). I argue that a focus on the natural possibilities as opposed to logical possibilities of life-content that an individual loses in death indicates that it was in Mary’s interest to die sooner rather than later and in Jodie’s interest to be saved from death. In the second section of the paper I answer (2) with reference to Thomson’s (1971) “violinist” scenario. I argue that it is not the interests of either Mary or Jodie that could morally justify their separation, but rather the motivation to defend Jodie’s right to life as a human individual against the threat posed by Mary in her relation to Jodie’s organs.

I

The babies' psychological state must affect an analysis of the harm of death to their interests. If we assume that neither Mary nor Jodie has the capacity to reflect morally or otherwise upon her own state of being, we cannot refer to present-tense *first-personal* representations of either on what constitutes harm to herself. Neither has capacity of what I term "self-reflective concern for past and future states". The result is that we cannot evaluate which events would be bad "to" either individual in terms of their own values—whether the individual is aware of the events or not. Rather, we must be prepared to employ a purely *objective* perspective of persons' lives which considers what is bad "for" each regardless of such values.¹⁷ Such a view can take account of experienced physical pain at distinct points on an individual's life-course as bad *for* an individual whilst not allowing an inference that the pain is therefore bad *to* that individual. This section argues Thomas Nagel offers such a view which provides an answer to question (1).

John Harris (2001) has argued that neither Jodie nor Mary should be viewed as "persons", by which he means neither can be characterised by possession of "the capacity to value existence". Non-persons cannot be deprived by death of something which "they value" (p.234). Thus, for Harris, accepting neither Mary nor Jodie as persons thus entails that separation and non-separation are equally ethical responses to their situation; putting aside the issue of parental consent (pp.234-246). I find this view dissatisfying for two reasons. First, it seems to assume an individual being cannot have interests without first-personal valuation. We can say, however, what is in the interest of an animal without projecting personhood onto that animal. Non-personhood is not equivalent, either, to brain-death: the twins experience, at the least, sensations which are either pleasant or painful for them. Secondly, it seems to miss the relation of present-time non-persons to their potential personhood at future-times. Mary, who is brain-damaged, seems to relate differently to a potential future personhood than Jodie, and this apparent difference is

¹⁷I thus agree with the case's judge in the first instance who concluded that Mary's "life was of no value *to* her".

not addressed on Harris' view.

Don Marquis (1989) has put forward such a claim regarding future-personhood in his attack on abortion. He asserts that though foetuses are non-persons, it is the relation of a particular foetus to a future it may come to value that makes the abortion of that foetus immoral. If we extend this future-oriented moral constraint to babies, it follows that *if* that baby has a future she will come to value that the death of that baby as a non-person would prevent from actualising, then it is immoral to end the baby's life. Jodie has interests conditional on separation from her sister, being—we might claim—only a temporary non-person. This by itself leaves us without basis, however, for evaluating whether Mary has interests better or worse served by separation or non-separation. Mary has no future she shall come to value, making her, by Marquis' argument, a permanent non-person with no moral constraint protecting her from death by medical-intervention. Furthermore, we might ask why such a non-person's future ought, in fact, to inform our moral agency towards that non-person "as-future-person" at the present time. Thomas Nagel (1971) offers a perspective regarding death's harm(s) in evaluating "natural possibilities" that suggests an answer to this question and which allows *both* twins to have interests as "non-persons", temporary or otherwise.¹⁸ Nagel holds that if death can be bad, it is bad because of what it deprives us of. Death can only be a comparative evil. Any death may be viewed comparatively both worse and better than an extended life for its subject considering all *logically* possible extended lives, but this should undermine the task of comparison. To adopt only *natural* possibilities in comparison of a given life with differently timed cessations, on the other hand, allows for the possibility of a life extension that would be comparatively worse for its subject than death at a particular time.

Nagel's objective view of interests thus focuses on the life-course of individuals as a whole rather than on their present state of mind, as a result of his deprivation account of death. In doing so it meets the cen-

¹⁸Nagel discusses what can be "naturally hoped for" and what is "inevitable". Though it is not clear Nagel accepts an employment of "natural possibilities" in his own conclusions on harm, the notion is derived and developed from his article on death.

tral demand of a moral evaluation of this case in our answer to (1), in which first personal valuation by the twins (that is, attention to their present state of mind) is neither possible nor, hypothetically taking it to be possible, informative. First personal valuation need not exist in the present to make an evaluation, but if it is, or shall be, in future then the objective view may draw on the natural possibility of future personhood in its assessment of the degree of deprivation death would cost a given life in light of the possible future interests that life-course contains. That is, it references future interests and valuations in comparing the different pains and pleasures a life-course would naturally-possibly include depending on what time that life-course ceases. What I will refer to as the Nagelian view thus allows room for a third-personal account of first-personal valuations, though it does not depend on such an account. It allows one to evaluate how bad a death was for some other individual, taking into account what was in their objective interests as well as in their first-personal (valued) interests. The “objective view” can be consolidated, then, with a *third-personal* view in an evaluation of harms to individuals that is not reducible to the former.

The Nagelian view applies to the twins as follows. A life extension that would be comparatively worse for its subject than death appears certain for Mary for (again) two reasons. First, extended life will mean extended pain. Second, if Mary does attain a “personhood”, later death will be worse *to* her as well as *for* her.¹⁹ Jodie, in contrast, has a naturally possible extended life of relative normality, meaning that her death at the present time would be relatively worse for her than it would be after a normal life of some duration.²⁰ If, on this objective view, Mary’s death is better for her the sooner it actualises and Jodie’s is better the later it actualises, then if medical intervention can procure both such actualisations it would be better for both Mary and Jody themselves that they be separated.

¹⁹Note, I do not claim that death is inherently good for Mary, but a comparative good.

²⁰On an externalised first-personal view, a later death may be worse to her on achievement of self-awareness of her deprivation of goods by future death.

II

I turn my attention now to question (2), “Is separating the twins morally acceptable?” It can be asserted that the absence of first-personal valuation on Mary’s part does not permit us to undermine a right to life held both by Jodie and herself. In other words, that the Nagelian view does not yet give an answer to the question, “Does Mary have a right to life which medical intervention would *violate*?” I shall argue after Judith Thomson (1971) that, provisionally granting that Mary may have a right to life as a human individual, the situation of the twins itself *still* makes permissible medical intervention to protect Jodie’s right to life by separation from Mary.

Thomson (1971 pp.47-66) employs a thought-experiment to demonstrate that the *innocence* of an individual who is directly causing the death of a second individual should not restrain the latter nor a third party from protecting herself against death *even if* protection entails the death of the former. The scenario is as follows. Imagine you wake up to find you have, without consent, been “plugged” into the body of a famous (and unconscious) violinist suffering kidney-failure. The violinist, also without consent, shares your blood-supply and depends now on your kidneys to survive.²¹ Her unwitting use of your kidneys creates such strain on them that if you remain “plugged-in” you will both die within two years. The third party who instigated this situation tells you that the violinist has a right to life and that if you unplug yourself from her you will violate her right to life. Therefore, they claim, you ought to remain “plugged-in” until your death.

Thomson’s claim is that there is a moral difference between saving your life with the result that someone else dies in this instance and acting with the same objective in, for example, a second situation which I present here as an “Injection” scenario.²² This situation is as follows.

²¹She can survive only by being plugged-in to you specifically; no one else will do.

²²Thomson’s own thought-experiment is one in which an authority figure threatens you with death unless you torture a third party to death. I do not believe the presence of torture is necessary to Thomson’s point. More importantly, it carries emotional and further ethical implications which are, to my mind, too different from those involved in

An authority figure sincerely threatens to administer a fatal-injection to you unless you administer a fatal-injection to some innocent third-party. You know that if you take the injection yourself, the third party will indeed be spared death. You must choose between two (we shall assume) innocent lives: your own and another party's.

The relevant moral difference between the two scenarios strikes me as follows. In both scenarios an innocent individual is "dependent" upon you for life, but the natures of these dependencies are distinct. In the Injection scenario your potential victim is not herself the potential cause of your death. That cause is instead the authority figure who threatens both you and the third party, such that you would be justified only in killing the authority, not the innocent third-party. In the Violinist scenario the potential cause of your death is indeed the Violinist. Defending your life involves harm only to the threat on your life. Your motivation is self-defence, therefore, with the *indirect* result that the violinist dies. If it was possible to defend yourself against the innocent violinist and save her, then her death would not be a necessary result of your protecting your right to life. That is, all else being equal, you would *not* be justified in purposefully ending her life, though you would be under no obligation to save her from dying once you had defended your life against her.²³

The distinction between the death of an innocent party as a direct, versus as an indirect effect of protecting one's right to life is crucial to an evaluation of rights-claims in the case of Mary and Jodie. Mary's right to life is insufficient to prohibit separation. If we accept that every human has a "just" claim to her own body, then regardless of Mary's innocence, her use of Jodie's organs creates an unjust situation in which Jodie's right to life is threatened by Mary's unwitting position vis-à-vis Jodie's organs and, by entailment in this case, her life expectancy. To intervene on Jodie's behalf is justified in that its intention is to put an end to an unjust situation, with the *indirect* effect that Mary shall die. Though by the Nagelian view it is in Mary's better *interests* to be separated, it

the violinist case to offer a fair contrast of situations to the reader.

²³See Thomson (1971) p.57.

is not ending Mary's life that can morally motivate or justify medical intervention, therefore, but Jodie's right to a defence of her life against Mary's use of her organs. Thomson's view allows us to grant those who count as permanent non-persons on Marquis' view a right to life without forcing us to accept that such a right to life is *a priori* absolute. Even if we rejected that Mary has a right to life (non-absolute or otherwise) because she is a permanent non-person, we cannot, morally, be freely motivated by a will to defend her interests in our actions *just in case* doing so conflicts with protection of Jodie's right to life if we still grant her one. The significance of Thomson's argument is that, *accepting* a distinction between persons and non-persons *and* the Nagelian point of view, there is no emergent principle which says in this case, "Medical intervention is in the interests of both Jodie and Mary; therefore, it does not matter morally the defence of which baby's interests motivate the separation". There is a moral asymmetry between Mary and Jodie. If we had found it was *not* in Mary's interests to be separated from Jodie, we could not have acted on her interests, since doing so would have undermined Jodie's right to life. It is *always* Jodie's right to life, distinct from her interests, specifically, that action must be evaluated in terms of the protection of.

CONCLUSION

My answer to (1) is that it was in the interests of both babies that they be separated from each other with the result that Mary died immediately and Jodie lived. Jodie, as a naturally possible future-person, would be deprived of what she would naturally possibly come to value if she was allowed to die together with Mary in absence of medical intervention. Mary would have gained more pain and, if she attained personhood, a death that was bad *to* her as well as, relatively, *for* her if she had not been separated. Separation on the other hand would reduce Mary's pain and prevent a death that was bad *to* her as well as relatively *for* her. It would furthermore allow Jodie's naturally possible future-personhood to actualise without threat of death due to her attachment with Mary. My answer to (2) is that separating the twins was morally permissible

only on condition that separation was performed solely in order to protect Jodie's right to life. Granting that both babies had a non-absolute right to life, Mary's relation to Jodie as a user of Jodie's organs without Jodie's consent created, though by no fault of Mary's own, an unjust situation. After Thomson's view, I have accepted that if one's right to life is threatened directly by another individual, intentionally or otherwise, then one is entitled to defend one's self against that threat even if that defence has the indirect effect that the other individual dies or is killed. Jodie's right to life being threatened by Mary, separation from Mary was taken as morally justified when motivated by the protection of Jodie's right to life. Jodie's right to life, therefore, has been taken as *distinct* from Jodie's interests understood third-personally and objectively through the Nagelian view. It is not the interests, thus distinguished, of both babies that could morally motivate this separation. Rather, there is space between the answers given to (1) and (2) that it would be of interest to examine in the future.²⁴

²⁴If a right to life is granted to an individual in virtue of their being human, as Thomson's view suggests, then both Jodie and Mary each has a right to life. However, if it was the case that Jodie's interests were worse served, on the Nagelian objective view (with acceptance of the distinction between permanent and temporary non-persons by upholding her right to life) then ought we to uphold her right to life though it is not in her interests? I have deliberately taken for granted in section 2 that we ought to uphold Jodie's right to life, and left as granted, therefore, that Mary's right to life ought to be upheld should she not constitute a threat to Jodie's. A similar question arises, therefore, in Mary's case. If Mary did not pose a risk to Jodie's right to life, ought her right to life to be upheld though it is not in her interests?

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