

Discussant Paper on Jude Dougherty's Paper

PERSONS, AND OTHER MEMBERS OF OUR SPECIES

by

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Dean Dougherty is, presumably, a Roman Catholic. I am, notoriously, an atheist humanist. Yet it seems likely that, in confronting most of the big issues of this world, we shall find ourselves on the same side. For, certainly, we are at one with regard to both the two conflicts most relevant to our present discussion. I agree with him, that is, that the courts of this country ought to be, as recently they have very conspicuously not been, constantly concerned with, and constrained by, the words and intentions first of the Founding Fathers and then of the legislature. I side too, like Dean Dougherty, with "the rights theorists" rather than with "the utilitarians".

This being so my Comment will consist in - It is, I comfort myself, bound to consist in - a series of usually short and scrappy footnotes and addenda. The nearest I have come to finding an uniting theme is in the suggestion embodied in my title. That suggestion is that, although all known persons are members of our species, it is by no means equally clear that all members of that species must qualify as persons; and that at all stages in their (our) lives.

Perhaps too I should say at once that it does not follow from this suggestion - As, it seems to me, Dean Dougherty is inclined to assume - that whether a human being is at any particular time a person or not becomes something to be determined by arbitrary fiat. It could be the case, and it surely is, that personhood, like both the universal (moral) rights of all persons and the particular (moral) entitlements of particular persons, is grounded in certain characteristics which are not, as a matter of fact, possessed at all times by all human beings.⁽¹⁾

1. Dougherty surely takes a false step in finding his first definition of 'person' in "the context of a discussion of the Trinity" (p.1)? For it is at least arguable whether it even makes sense to postulate incorporeal persons. Certainly, so long as all the persons indisputably known to us are members of one particular kind of creatures of flesh and blood, our paradigm cases cannot but be corporeal.

2. Dougherty insists that "Obligation implies adherence to a norm, and a norm logically presupposes a rational being as the addressee or subject of that norm" (p.3). This is, I think, as correct as it is important. But, when he goes on to draw out what he sees as implications, we are given both too much and too little. It is too much to assert: that this fundamental presupposes "that human needs are multiple and not confined to the material order" (p.3); and that "The recognition of rights is clearly based on ... a judgement with respect to what leads to personal fulfillment" (pp. 3-4). However true, these conclusions are not here logically presupposed.

It is, on the other hand, too little to speak only of "a rational being", without spelling out: first, that a rational being here has to be one which can have reasons for behaving in one way and not another; and, second, that this behaving in one way with the ever present possibility of alternative behaviour is not just to behave as the brutes behave. It is to act.⁽²⁾ Only in this understanding of the expression 'a rational being' does talk of such beings presuppose "the doctrine that man is self-determining" (p.3).

3. On page 6 a crucial word seems to have dropped out. As the text stands it reads: "The government cannot by fiat create rights and

duties." To make this statement true we need to insert the word 'moral' (as opposed to 'legal').

4. When Judge Charles Breitel of the Supreme Court of the state of New York "granted that the unborn were 'human' and 'unquestionably' alive" he did not need to base his refusal to admit them as persons upon an insistence that "it is not true that the legal order corresponds to the natural order" (p.8). He could have said, and he would - I submit - have been better advised to say, that, as a matter of manifest fact, they are not yet, in the understanding briefly explicated in Section 2 (above), rational beings.

Suppose that we admit among those essential attributes of a person which are not "purely physical features" (p.9) that of being, in that previous understanding, a rational being. Then this argument could have been, and can be, used to sustain the US Supreme Court decision "that an unborn human being is not a person" (p.9). Dougherty would, presumably, want at this point to ask whether "there is a substantial difference between a prenatal human being or a post-natal one?"

If the question is asked about an immediately postnatal human being, a newborn infant, then the answer has to be: ^(intrinsically) 'No'. But this, of course, does not mean that the law cannot and should not draw one of its own sharp, decisive lines at birth. We have here one of those many cases in which a difference of enormous human importance is a difference of degree; in the sense that cases which are unequivocally this are linked to other cases which are just as unequivocally that by long spectra of actual or possible cases, all shading almost indiscernibly one into another. (3)

When for legal or other purposes we draw a sharp decisive line across such a spectrum of almost indiscernable similars, the choice of the precise particular point through which to draw our line may be more or less arbitrary. Nevertheless the decision to draw such a line is often one of the least arbitrary and most rational of all decisions. One of the things which makes the abortion debate so intractable is that, between conception and birth, every place for drawing that crucial line appears to nearly all of us just as arbitrary and unnatural as every other.

5. Dougherty says: "If the state can decide that the unborn are not persons, why should the state not be able to decide that a week old infant or a senile eighty year old is not a person in the whole sense?"

The point here, presumably, is: not whether and by whom such decisions are or are not to be made; but whether there is a truly correct or incorrect, a morally right or morally wrong, about such decisions. I agree that there is. But if this is to be so, and if, too, persons as such are to possess moral rights which are not possessed necessarily and always by all members of our species, then persons have to have essential characteristics which provide the grounds for those rights. I have elsewhere argued that these grounds, or this ground, is provided by their, by our, being, in the understanding of Section 2 (above), rational beings.

6. Dougherty quotes Roderick Chisholm, and appears to assent when he "prescinds from potentialities which are variable and dependent upon circumstances at any particular time" (p.15).

Why? Why should we treat potentiality (and even ex-potentiality) as if it were present actuality? Why should we treat the foetus as if it were what it might (or might not) in fact become (and why should we treat the senile demented ruins of what was once a person, a rational being, as if it still was, and could be again)?

7. Dougherty reports, and most truly, that "Rawls has argued that utilitarianism does not take seriously the distinctions between persons" (p.16).

But Dougherty, like Rawls, seems not to have noticed that this properly devastating objection applies with equally annihilating force against the system in defence of what it was advanced. For Rawls is himself committed to regarding "the natural distribution of abilities and talents", and presumably also that of inabilities and deficiencies, as "arbitrary from a moral point of view". And furthermore: "Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense, is itself dependent upon happy family and social circumstances." So everything which differentiates one individual from another must be, according to Rawls, morally irrelevant.⁽⁴⁾ It is, therefore, only thanks to his refusal, sustained throughout his 600 plus pages, either to entertain any traditional definition of the key term or even to offer some preferred substitute, which enables him to present his kind of qualified Procrusteanism as A Theory of Justice.

NOTES

- (1) See, for instance, my 'Could there be universal natural rights?', in the Journal of Libertarian Studies Vol. VI Nos. 3-4 (Summer/Fall 1982), pp. 277-88.

- (2) See, for instance, A. Flew and G. Vesey Agency and Necessity (Oxford: Blackwell, 1987).
- (3) See, for instance, my Thinking Straight (Buffalo, NY: Prometheus, 1975), Sections 7.13 - 7.24.
- (4) See my The Politics of Procrustes (Buffalo, NY: Prometheus, 1981), Ch. III 2-5 and Ch. IV 1.