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Engelhardt on the Abortion and Euthanasia of Defective Infants

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Introduction

In this essay I critically examine the views of Tristram Engelhardt, Jr. on the euthanasia of defective infants. Engelhardt offers two approaches to the problem, which he presents as complementary. I will argue that not only are the two approaches not complementary, they are even inconsistent with each other.

Further, I will compare Engelhardt's views on the euthanasia of defective newborns with those he expresses elsewhere on the issue of abortion. I intend to argue that the positions he takes in the latter essay are not entirely consistent with those he takes in the former, and that both are dubious.

In his essay, "Ethical Issues in Aiding the Death of Young Children," H. Tristram Engelhardt, Jr. attempts to clarify the issue of euthanasia involving defective infants.¹ Engelhardt argues that some

sort of euthanasia is permissible, and in some cases possibly mandatory, as a result of the following considerations. First, it is not clear that even normal small children are persons in the sense that adults are persons. Adults "belong" to themselves in the sense that they are "rational and free and therefore responsible for their actions."² Young children, on the other hand, are neither self-possessed nor responsible. While adults exist in and for themselves as self-directive and self-conscious beings, young children exist for their families and those who love them. Young children cannot in any sense be responsible for themselves, so if being a person is to be a bearer of rights and duties, young children are not persons in a strict sense.³ Small children have no self-defined identity. They are, rather, defined by their social role—for example, mother-child, family-child. They live as persons in and through the care of those who are responsible for them until they can develop to the point where they can define their own role in society.

Though newborn infants are not persons in a strict sense, they are valued highly because they have the *potential* to become persons in the strict sense. The rights and duties of the child are held "in trust" by others for a future time when they become "full-fledged persons."⁴ Defective newborns constitute a problematic case because not only are they not persons in a strict sense, but also because their likelihood for living a fully developed human life is very uncertain. Because of the remoteness of defective infants from full-fledged personhood, Engelhardt claims that it is permissible to euthanize a defective newborn in these cases where the prospects for a decent life are small and the prospective cost to the family in terms of money and anxiety is high.⁵ He claims that the decisions on these matters properly lie in the hands of the parents because "it is primarily in terms of the family that children exist and develop—until children become persons strictly, they are persons in virtue of their social roles."⁶ As a precaution, Engelhardt stipulates that society has a right to intervene and protect children whenever caring for them does not constitute a severe burden and when it is likely the child could be brought up to enjoy a good quality of life.⁷

It could be questioned, however, whether or not Engelhardt has provided sufficient protection for the interests of severely defective newborns. If they are truly defective, and their treatment is indeed a burden to the parents, the decision would be left entirely to the parents. Shouldn't there be some procedure whereby some representative of society's interest in the protection of life can intervene in case the parents' decision is questionable? On this issue, Engelhardt stipulates that

As long as parents do not unjustifiably neglect the humans in these roles so that the value and purpose of that role (that is, child) stands to be eroded (thus endangering other children), society need not intervene.

and also that

Society must value mother-child and family-child relationships and should intervene only in cases where 1) neglect is unreasonable and thereby would undermine respect and care for children, or 2) where societal intervention would prevent children from suffering unnecessary pain.⁸

Engelhardt's reference to the possibility of "unreasonable neglect" is revealing. This suggests that neglect could at times be "reasonable." It is likely, however, that neglect is by definition unreasonable. (For this point as well as many others, I am indebted to my colleague, Prof. John Donnelly, I would also like to thank my colleague, Prof. Dennis Rohatyn, for many useful comments.) Engelhardt might reply that this dispute is merely terminological, that he is simply referring to the nontreatment of defective infants. It is not clear that the difficulty can be resolved so easily, however. Generally, nontreatment of an ill patient is based on the grounds that it is in the patient's *own interest* to withhold treatment. Since that appears to be untrue in the cases with which Engelhardt is concerned, it remains unclear how failure to administer treatment can be rationalized.

Possibility of Abuse

Engelhardt's remarks concerning the possible abuse of defective infants are troublesome in other respects as well. By linking societal intervention to the erosion of respect for other children, Engelhardt may be setting the stage for at least sporadic instances of abuse. If the abuse of defective infants is sufficiently infrequent so as not to lead to an erosion of respect for other children, such abuse on Engelhardt's analysis may be not so much unfortunate, though unavoidable, as it is *permissible*. Further, it is not at all clear that the mistreatment or automatic euthanasia of defective infants would undermine respect for children in general; only similarly defective children would be endangered by the spread of a practice that Engelhardt advocates. It will be recalled that normal children have rights in virtue of the fact that they possess what the defective child lacks, namely the potential to develop into a person in the "strict" sense. In Engelhardt's schema, normal children are valued in terms of their potential to be persons in the "strict" sense and hence, once this fact is emphasized, the automatic euthanasia of less significant entities — severely defective infants — cannot be expected to erode that role. Indeed, Engelhardt's analysis is paradoxical in that the more morally questionable the decision is to allow an infant to die, the less likely it is to erode the safety of normal children. Assuming that the majority of persons would find that allowing, for instance, that the immediate euthanasia of mongoloid newborns is abhorrent, this would help guarantee that such actions are permissible if done only by the parents of mongoloid infants. This is because the majority would not act this way and would

be horrified by the practice. Such an attitude on the part of parents of normal children would, therefore, ensure the safety of normal children.

It is also unclear whether the second type of situation, when intervention is permissible, actually protects the defective infant. First, intervening only to prevent unnecessary pain would seem, in this context, to allow intervention most often to *cause* death, rarely to prevent it. What constitutes unnecessary suffering, moreover, is at least in part determined by the status of the infant. If the defective infant does not possess the feature that entitles normal children to rights, almost any suffering could be considered "unnecessary." If, however, a child is normal or has a reasonable chance of undergoing normal development, he at once has rights and a promising future, and any suffering which present treatment causes would have to be considered "necessary," i.e., justifiable. It could be, therefore, that Engelhardt's reference to preventing "unnecessary" pain in effect merely reflects the original ontological distinction between normal and defective infants. As such, it is not clear how it could be expected to operate successfully to hinder possible abuses of defective infants inspired by that distinction.

Thus Engelhardt's limiting principles do little to defeat the parental abuse allowed by his analysis of defective infants. Moreover, Engelhardt's analysis is questionable in that defective infants need not be dependent upon their parents for financial and emotional support. There are many organizations affiliated with institutions such as the Catholic Church which routinely take custody of defective infants. Thus the number of possible persons and groups from which the infant could receive support is significantly greater than Engelhardt allows. The parents of defective infants should only be allowed to decide their children's fate if no other agency or person is able to tender support to the children. The number of infants who cannot be saved in this manner would then presumably be reduced, if not eliminated.

Engelhardt's analysis can also be questioned in light of an earlier discussion of abortion. In his article, "The Ontology of Abortion," Engelhardt claims that the potentiality of the fetus to become a full-fledged person is not sufficient to confer on it any significant rights.⁹ Certainly not until it has reached the stage of viability can it be considered to have a right to life.¹⁰ Engelhardt allows that if a stringent definition of a "person" is accepted, there would be *prima facie* reasons for permitting not only the abortion of viable fetuses, but infanticide as well. This result need not obtain, according to Engelhardt, for although in early infancy a human person is not actually present, nonetheless

the child is appreciated socially as an individual to whom one has actual — not potential — obligations in a fashion quite different from the fetus in

the mother-fetus relationship. The newborn infant, unlike the fetus, can elicit a series of regular responses and activities from rational humans even though the infant is not itself rational. Even within primitive social contexts, its crying appears as a demand for food, etc., and initiates a series of activities directed to the infant as if it were a person.¹¹

It should first be noted that in this essay, Engelhardt argues that the potential to be a person in the "strict" sense is not morally significant. But if not, then the feature which distinguishes a defective from a normal infant in Engelhardt's later essay must be suspect. It would seem that either the distinction in terms of rights between normal and defective infants would have to be abandoned, or the contention that the potential of the fetus to become a person in the "strict" sense is morally significant.

Engelhardt's Reasoning

The reason Engelhardt advances for claiming that infanticide is impermissible deserves close scrutiny. Newborns and viable fetuses, though not rational, possess the property of being appreciated as beings whose needs or demands should presumably be honored. If so, then while abortion of nonviable fetuses may be permissible, infanticide, like abortion of possibly viable fetuses, is not. Unfortunately, if despite being in a nonrational state, the ability to be perceived as having needs is sufficient for ensuring a right to life, then surely defective infants would have at least as much claim to that right as normal infants. Defective infants are often even more dependent upon others than normal infants. All that seems to be needed is that some rational others perceive the expression of a need as a demand worthy of being honored. Indeed it seems that the criteria for ascribing rights Engelhardt introduces in this earlier essay are quite disparate from those proffered in the later essay. The criteria introduced in the earlier essay imply that entities which are not persons in the "strict" sense may nonetheless have rights if rational others can see them as persons. In the later essay, defective infants simply do not have rights because they are neither persons in the strict sense nor have the potential to become such. If, in accordance with the earlier criteria, defective infants were considered by a majority of persons to be persons, they would presumably possess a right to life. If so, then abuse of them would seem to be impermissible even if it did not lead to the abuse of other children, just as isolated abuse of normal children would be impermissible.

Engelhardt claims that the mother-fetus relationship is primarily biological and occurs automatically, without active involvement of the mother. The mother-child relationship is, however, active and explicitly social. The difference lies

in the social schema, the well developed social role "child" in which the infant can be acted upon as if it were a person and in which it acts back.¹²

In claiming that the infant "acts back" presumably "as if it were a person," Engelhardt must be speaking metaphorically. He has previously stated that they are not strictly persons but merely have the potential for becoming such. Thus they do not have the capacity for intentional action that normal adults possess. Infants, both defective and normal, would then seem to merely react to stimuli and to instinctively express their needs. Neither the healthy infant nor the defective one would seem to "act" (back) in the sense of intentional action.¹³ What then could be the possible basis for seeing the infant as if it were a person who can act and be acted upon? Presumably Engelhardt holds that within the social context of medicine it is true that infants are treated as if they were persons even though their continued healthy existence is *not* guaranteed. Fetal development on the other hand is automatic, and the fetus cannot be seen as a separate patient.

The above line of argument was rendered permanently irrelevant, however, almost before Engelhardt's essay appeared. With techniques such as ultrasound, amniocentesis, etc., the condition of the fetus as a separate patient can be ascertained. Moreover, as the following actual case shows, the fetus can be the object of therapy *in utero*. Recently, a young fetus was diagnosed as suffering from hydronephrosis, a disorder of the urinary tract which can lead to kidney destruction.¹⁴ Physicians waited until the seventh month of fetal development and then took steps to irrigate the fetal bladder, which abated the condition until the infant could be operated on after birth. As the physicians involved in the case put it, "We can now treat the fetus as a patient." Indeed, the National Commission for the Protection of the Human Subjects of Biomedical and Behavioral Research states that the fetus is a human subject who is deserving of care and respect. Their guidelines regarding therapeutic research directed toward the fetus include the following stipulation in such research:

The fetal subject is selected on the basis of its health condition, benefits and risks accrue to that fetus, and proxy consent is directed toward that subject's own welfare. Hence, with adequate review to assess scientific merit, prior research, the balance of risks and benefits, and the sufficiency of the consent process, such research conforms with all relevant principles and is both ethically acceptable and laudable¹⁵

Thus the concept of the fetus as a patient has been an integral part of medical policy since at least 1975.

On Engelhardt's analysis, it seems that fetuses can qualify as patients since they can be 1) the subject of therapy and 2) legitimately seen as persons. One distinction (according to Engelhardt) between newborns and fetuses is that the development of the fetus is automatic and requires no intervention by others. It seems, however, that only the development of the *normal* fetus will be automatic, i.e., such that it does not call for medical intervention. Contrast the gestating *defec-*

tive infant who calls for the application of therapeutic techniques, as in the example cited. Here again, it would seem that on Engelhardt's criteria the defective human would have more claim to rights than could the normal human. But surely this is odd, at least on Engelhardt's professed terms.

II

In any case, Engelhardt discusses a second important aspect of the euthanasia of defective infants. Suppose the defective infant has a right *not* to have its life prolonged.¹⁶ It could be that to such an individual its continued existence is an evil, not a good. The legal embodiment of this (moral) concept is the proposed legal notion of "wrongful life." Engelhardt notes that a number of suits have been initiated in the United States and other countries claiming that life or existence is a tort or injury to the living person. The concept of wrongful life presupposes that nonexistence is preferable to life and that arriving at such judgments is reasonable in specific cases. Engelhardt claims that the concept of tort for wrongful life is transferable, in part, to the

... painfully compromised existence of children who can only have their life prolonged for a short, painful, and marginal existence. The concept suggests that allowing life to be prolonged under such circumstances would itself be an injury to the person whose painful and severely compromised existence would be made to continue¹⁷

Engelhardt argues that there may be a duty not to prolong life whenever it can be determined to have a substantial negative value for the person involved.¹⁸

Engelhardt explicates these two approaches to the problem of defective newborns as if they were complementary or at least compatible. It seems, however, that the two approaches are not only not complementary, but indeed inconsistent. To the extent that one approach to the problem is adopted, the other must be abandoned. It will be recalled that the reason Engelhardt adduces for claiming that the euthanasia of defective newborns should be left to the parents is that they (newborns) have no "self-defining" identity of their own. Small children have only a social identity until they develop the characteristics of autonomy, and hence acquire rights and responsibilities. Until that time, the rights of normal infants are held in trust. Respect for the time when the infant will attain the status of a normal adult is what enjoins us to value infants highly. The case is different for defective newborns. They possess merely a social identity, i.e., that of "child." Moreover, their social identity must include the fact that they are a defective token of that type. They do not possess the characteristic which Engelhardt claims commands our moral deference — the

potential to develop into a normal adult, who is a person in the "strict" sense. This being the case, the parents, whom the small child "lives through" and who give it sustenance, can determine its fate as it apparently has no rights of its own. Unfortunately, if defective newborns only possess an identity through their social role and do not command respect in virtue of their potential to develop into a person in the "strict" sense, it is not clear how their interest could be represented in a civil injury suit. In a tort, reference is made to the damage to interests of "persons." The archetypical participant in such litigation is a person in "strict" sense. However, the interests of incompetent persons are protected in civil matters by a legal principle known as the "principle of substituted judgment" which allows for proxy consent on behalf of the incompetent. An attempt is made to "don the mantle of the incompetent" and choose what he or she would want if he or she were competent.¹⁹ In this way the particularly human characteristic of rational choice is extended to the incompetent, and respect for the inherent human dignity of the incompetent is sustained.

Allusion to Wrongful Life Suits

To make the allusion to suits for wrongful life (or the wrong of continued existence) on behalf of the defective infant is to imply that the infant has the rights of other citizens. If, however, the application of civil law to cases involving defective newborns presupposes that the victim has the status of a person, difficulties arise with regard to Engelhardt's first approach to the problem. To leave the decision to the parents, and to allow financial and emotional burdens to be determining factors does not accord well with the legal concept that the interests of a defective newborn are on a par with those of other individuals who are persons in a strict sense. If Engelhardt's first approach is adopted, and the legal fact that incompetents have standing equal to that of normal persons is recognized, the following absurd result is implied: anytime any person whose existence depends upon others becomes an emotional or financial burden, he can be killed or allowed to die. This result would obtain because leaving the decision to aid the death of defective infants up to the parents was based in large part upon the fact that the infants have no rights of their own; they live only through their parents. Once these infants are presumed to have the status of other persons, the parental sovereignty Engelhardt grants on the first approach appears excessive.

If, on the other hand, Engelhardt's first approach is abandoned in light of these considerations, treatment of defective newborns will, in some cases, take a different course. If the newborn is seen as having the same basic right to life as normal adult persons, emphasis will be

placed upon what is in *its* best interests, not someone else's. Hence, factors such as parental anguish and financial burden would correspondingly diminish in importance. Otherwise, we are forced to condone the possibility that the life of the infant may be sacrificed for the benefit of others.²⁰ If we acknowledge the defective newborn's interests as being as legitimate as the interests of other persons, we can then justify making the effort to secure conditions favorable to their existence even under physically, emotionally, or economically adverse circumstances. All that is required is that the infant be delivered from incessant pain; it need not be relieved of pain altogether. After all, no persons have an existence entirely free of pain.²¹ Indeed, some otherwise normal individuals suffer from constant or chronic pain and yet we do not therefore contend that they have less of a right to live. The fact that the defective may never possess the characteristics which Engelhardt claims entitle it to personhood in the "strict" sense is insignificant once we adopt the legal viewpoint. For as long as a reasonable lifeplan can be realized for the incompetent, that is all that is needed. By means of the principle of substituted judgment, the probable wishes of the incompetent can be ascertained. These preferences necessarily differ from those of other persons, but this does not imply either that their satisfaction is not important to the incompetent or that they are less worthy of being satisfied.

On the other hand, if Engelhardt's first approach is adopted, defective infants are neither persons in the "strict" sense nor do they have the characteristic which would confer such status on them. Hence, it is difficult to see how they could be represented in civil litigation or, for that matter, have any of their rights violated by continued existence. As a consequence, no strong moral duty could be ascribed to the physician to terminate or not treat a defective infant. This is for two reasons: 1) only persons are due serious moral consideration, and 2) physicians *qua* physicians are charged with the medical treatment of persons. Therefore, Engelhardt's second approach is simply inapplicable. Engelhardt's analysis puts the defective infant in a catch-22 situation. For the purpose of allowing those to whom it is a burden to decide whether to euthanize it, it has no serious rights of its own. For the purpose of deciding what is best for the infant, it has the rights of a person insofar as it can, through proxy consent, demand its own death.

The discussion in this section points inescapably to the conclusion that extreme caution is needed in deciding the issue of whether to treat defective infants. There is the danger of misguidedly elevating their status in order to claim that the infant has a right to die. When this is done, it becomes imperative to realize that by parity of reasoning the infant has the same right to life as any normal adult. In that case, it seems that Engelhardt has misguidedly argued for an effect opposite to that for which he argued in his first approach.

REFERENCES

1. The first essay appeared in *Beneficent Euthanasia*, ed. by Marvin Kohl (Prometheus Books, 1975). It was reprinted in *Biomedical Ethics*, ed. by T. Mappes and J. Zembaty (McGraw-Hill, 1981), pp. 384-391. The references in this essay will refer to the latter volume.

2. *Ibid.*, p. 386.

3. *Loc. cit.*

4. *Loc. cit.*

5. *Loc. cit.*

6. *Ibid.*, p. 387.

7. *Loc. cit.*

8. *Loc. cit.*

9. His essay appears in *Ethics*, vol. 84, no. 3 (April, 1974), pp. 217-234.

10. *Ibid.*, pp. 230-232.

11. *Ibid.*, p. 231.

12. *Loc. cit.*

13. Prof. Ramsey has pointed out to me that Engelhardt needs to justify his apparent presupposition that "acting back" confers moral status. In one sense, on Engelhardt's own terms, neither healthy nor defective infants can "act" in the sense that adults can; in another sense, they can "react" to stimuli just because they are alive. *Whatever* sense is given to "acting" back by Engelhardt, one cannot help but wonder if it puts into question the personhood of persons in possibly lengthy comas, paralyzed persons, etc.

14. Reported in *Newsweek*, Aug. 10, 1981. Even more recently, a two-month old fetus was removed from the womb, operated on and placed back into the womb to continue its development. Though the fetus ultimately died from other causes, the operation was successful.

15. Cf. *Report and Recommendations: Research on the Fetus* (1975), DHEW publication no. (05) 76-127.

16. Engelhardt, H. Tristram, Jr., "Ethical Issues in Aiding the Death of Young Children," *Biomedical Ethics*, ed. by Thomas A. Mappes and Jane S. Zembaty (McGraw-Hill, 1981).

17. *Ibid.*, p. 388.

18. *Loc. cit.* Professor Ramsey has pointed out to me that the concepts of the "wrong of continued existence" and of "wrongful life" (i.e., wrongful conception) are not identical. Only "wrongful birth" may be viewed as an instance of the wrong of continued existence.

19. Cf. John A. Robertson, "Organ Donations by Incompetents and the Substituted Judgment Doctrine," *Columbia Law Review*, vol. LXXVI, 1976, pp. 48-78; Gary E. Jones, "On the Saikewicz Decision," read at the Western Division Meeting of the American Philosophical Association, April, 1980, as well as at the Second Annual Conference for Applied Philosophy at Bowling Green University, May, 1980; Paul Ramsey, *Ethics at the Edges of Life* (Yale University Press, 1978), pp. 238 ff.

20. Cf. John A. Robertson, "Involuntary Euthanasia of Defective Newborns," *Stanford Law Review*, vol. 27, Jan., 1975, pp. 213, 214, 251-261.

21. If this criterion were adhered to, the number of cases of permissible euthanasia would greatly diminish. Cf. Robertson, "Involuntary Euthanasia of Defective Newborns," pp. 253 ff.