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PERSONHOOD'S FATAL FLAW

by Bob Perry

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This past November, the citizens of Mississippi voted down a statewide referendum that would have “defined the word ‘person’ or ‘persons’” under the law and on that basis banned abortion “from the moment of fertilization.”¹ Similar personhood proposals went down to defeat in Colorado in 2008 and 2010. Though well-intentioned pro-life advocates propose these initiatives, and though the referenda may seem on the surface to make a principled stand in favor of the pro-life view, they continue to fail. The repeated defeat of these initiatives is emboldening abortion advocates and threatening the goal of eventually overturning *Roe v. Wade*, even at a time when pro-life sentiment is at its highest levels in recent history.² For these reasons, pro-lifers should avoid engaging in the subjective view of ethics on which personhood arguments inevitably rest. We need to stop trying to debate the definition of “persons” and instead concentrate our efforts on simply identifying abortion as the objective moral wrong that it is.

Writing for the *New York Times*, Notre Dame philosophy professor Gary Gutting offers an accurate application of critical thinking to the logic of the personhood argument and thereby exposes its inherent flaws. As he points out, “[the Mississippi referendum] showed that many Americans— including many strong opponents of abortion—are reluctant *to treat a fertilized egg as a human person*” (emphasis added). But if they are unwilling to draw the personhood line at fertilization, their opposition to aborting “persons” utterly breaks down. “Once we give up the claim that a fertilized egg is a human person (has full moral standing), there is no plausible basis for claiming that all further stages of development are human persons.”³

Therein lies the Achilles heel of pursuing a specific definition of personhood as a criterion for opposing abortion. It is a moving target that bobs and weaves with the preferences of those who consider it. In fact, the amorphous nature of “personhood” is what brought us the travesty of *Roe v. Wade* in the first place.

The Fourteenth Amendment to the Constitution specifically protects “all persons born or naturalized in the United States” from having the state deprive them of their “life, liberty or property.” The meaning of this is clear. Yet, while it seems equally ridiculous to contend that the framers either did *not* mean this to protect the lives of *all*

Americans, or that they *did* mean this verbiage to distinguish *between* human beings and human “persons,” that is *exactly* what Justice Harry Blackmun did.

Writing his opinion in *Roe*, Blackmun manufactured a distinction between *potential* human life and constitutional “personhood,” claiming that the preborn state of the former did not afford it the postnatal, protected status of the latter.⁴ In his argument, he cited several other federal cases, including *Steinberg v. Brown*,⁵ which he claimed supported the view that no legal precedent existed in federal law that specifically defined the meaning of “person.” What Blackmun failed to mention was that the *Steinberg* court completely contradicted him in its analysis, stating that, “Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.”⁶

Nevertheless, Blackmun set the standard that required that the “personhood” of preborn human beings had to be proven before they can be afforded the protection of the Fourteenth Amendment. Playing off Blackmun’s reasoning, abortion supporters ever since have used semantics and linguistic nuance to define “personhood” in ways that circumvent the intrinsic value inherent in the unborn entity’s human nature.

At its core, personhood rests on a subjective ethical view that is clearly revealed in an opinion rendered by Supreme Court Justice Anthony Kennedy in a case that challenged several aspects of *Roe*, while attempting to define the point at which the fetus deserves to be protected. “At the heart of liberty,” wrote Kennedy, “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life...We conclude the line should be drawn at viability, so that, before that time, the woman has a right to choose to terminate her pregnancy...there is no line other than viability which is more workable.”⁷

Note the assumption of literally unbound personal autonomy that Kennedy invokes. On his logic, there are no restrictions on who can be denied constitutional protection beyond those limits we allow some individual or group of people—be it a court or a voting electorate— to define for itself. “Viability” is in the eye of the beholder.

Take for instance a commentator on my personal blog who refused to refer to the unborn entity as a fetus, an embryo, or any other such commonly used term. Instead, he insisted that the thing in question be called an ESHLO (early stage human living organism) and further claimed that, “the ESHLO before about 24-weeks is not a person. It cannot perceive, think, feel, communicate, remember, or decide. It is not conscious or sentient. Its brain development *does not support these processes of a person*” (emphasis added).

When pressed with the fact that some premature babies have been born at as early as twenty-one weeks and survived, the writer remained steadfast in his insistence that even these were *not persons* until they reached twenty-four weeks of age. By his own definition, they are alive and they are human, but they are not persons worthy of protection from destruction.

There is something wrong with an argument that demands that the baby squirming in your hospital incubator is not a human person. The wrongness of the

argument does not disappear just because someone else may use the same criterion to insist that it is one.

Confronting these haphazard kinds of claims, some abortion opponents have attempted to counter by providing morally stringent definitions of personhood aimed at protecting the unborn human. These efforts are commendable, as are the goals they are trying to achieve. Their weaknesses arise because they are developed along the same insidiously relativistic line of thinking as that of their opponents, even if they employ that thinking toward noble ends.

As a result, advocates from opposing sides of the abortion debate have attempted to hinge personhood on the fetus's ability to feel pain, brain-wave activity, consciousness, gestational progress, viability, moment of birth, or, in the case of some of the more radical abortion "rights" folks, a demonstration of self-awareness, which may occur weeks or months *after* birth.

The confusing linguistic jousting that follows from this leaves the voting public with the chore of considering ballot initiatives like Mississippi's that seek solely to "define the word 'person' or 'persons,' as those terms are used in...the [state] constitution to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof,"⁸ while media commentators (such as Gutting cited above) couch the referendum as one that "treat[s] a fertilized egg as a human person." With "personhood" as the issue, the voters' focus is on approving the definition of a word, while the morality of abortion itself remains clouded behind a definitional smokescreen.

Accompanying the Mississippi ballot initiative in question, its opponents offered the following justification for why voters should not approve the measure: "If a fertilized egg in a Petri dish were to be defined as a person by passage of the Personhood Amendment, it is very likely that IVF (in- vitro fertilization) would no longer be an option in Mississippi—especially for couples at risk for having a baby with a life-threatening genetic defect who now can choose IVF and have a healthy baby."⁹

Apparently the irony involved in defending unlimited abortion by associating the acceptance of personhood with *a risk to having healthy babies* is lost in the fracas. When the case depends on swaying voting blocs instead of confronting the hideous reality of abortion, this is what we would expect. That is why the verbiage goes on to instill fear about genetic defects, birth control, and even the threat to the health of Mississippi mothers.

We cannot lose sight of the fact that these initiatives survive solely on the impulses of sympathetic voters or, worse, at the whim of some activist judge who discovers yet another hidden definition of privacy, or some previously unknown "right," and then overrides those voters because the judge believes they got things wrong. Even if they were to pass, state initiatives like these would allow abortion proponents the luxury of simply avoiding the states that do not share their personal definition of personhood. Finally, these initiatives remain focused on the beginning of life while leaving the door wide open to allow arbitrary definitions of "personhood" to be applied to end-of-life cases.

Meanwhile, the personhood movement touts its goal to seek ballot initiatives in all fifty states using the same strategy, while apparently expecting a different result.

The problem with all this is that to engage in the personhood argument is to focus on the wrong issue. We must remember that *the very language of personhood originated as an arbitrary legal construction meant to justify abortion*. It looks to define attributes the unborn human obtains, or to identify things it can do, in order to determine whether it is worthy of protection. The grotesque moral bankruptcy in this kind of thinking is obvious in Justice Blackmun's own assertion that the unborn human represents a "potential" life.

No it doesn't.

Science and technology have long allowed us to know unequivocally that the unborn entity, from the moment of conception, represents a unique, distinct, whole, human life. It is not a "potential" life. It is not some kind of random, unidentified entity. It is a human being—"a full-fledged member of the human community"¹⁰—whose worth is intrinsic to its nature and who deserves protection on that basis alone. Though that human being may undergo *instrumental* changes as it matures, it never changes *in kind*. Certainly, none of the instrumental changes would justify taking its life at any given stage in that development.¹¹

The upshot is that, even when pursued with the purest pro-life motivations, once we begin to argue about the definition of personhood, we have entered the fray on the same subjective ethical grounds as those who defend abortion and have thereby consigned ourselves to the same thought process of those who insist that ethical truth is a philosophical construction. We give too much ground to the relativistic rationalization of what is at its core an objectively immoral act.

To engage in the personhood argument is to focus on the wrong ideas because we are busy entertaining irrelevant assertions like those offered by Gutting in the *New York Times*: "What the Mississippi referendum showed us was that many of those strongly opposed to abortion do not believe [that a fertilized egg is a person]...they were not willing, for example, to forbid aborting pregnancies that result from rape or incest or that are necessary to save the mother's life."¹²

Notice that none of the dubious connections made here are to moral issues. The belief that a so-called "fertilized egg" is equivalent to a person is nothing but the expression of an opinion (which opinion is based on a woeful misunderstanding of simple biology), while citing the hard cases does nothing to address the other ninety percent of abortions. In fact, this descends so far into irrelevancy that the life of the human being involved does not even enter the discussion. Instead, we are treated to euphemisms about "aborting pregnancies."

Most importantly, not one of these dilemmas was settled when Mississippi voters proved unwilling to agree to the personhood referendum. There is a reason for this—a reason that winning the debate on personhood will never address. Not one of them engages the *rightness or wrongness of abortion*. There is only one question that can do that: "What is the unborn entity?"

If the unborn entity is not a human being, abortion is nothing more than an inconvenient outpatient surgical procedure. But if the unborn entity is a human being, any justification for taking its life has grave moral implications. Answering that question makes the answers to all the peripheral questions become crystal clear.

So, what is the alternative to the personhood project? What strategy would allow all pro-lifers to continue to seek to protect unborn human beings in ways that do not yield to this kind of subjective moral relativism?

Instead of operating within the empty assertions of the personhood rubric imposed on us by *Roe*, let's insist that the pro-life project be centered on the premises of the actual moral argument against abortion. Let's design those premises in such a way that "even judges would be embarrassed to dismiss, because even they could not contest their truth."¹³

Professor Hadley Arkes suggests the introduction of legislation that begins "with the old fashioned mode of a preamble which sets forth the premises of [a] bill" as follows:¹⁴

Premise 1: Cites passages from embryology textbooks that set forth the *scientific* fact that the development of a new, genetically distinct, human being (at this stage referred to as a human zygote) begins at the moment of fertilization.

Premise 2: Puts forth the *philosophical* case that, during its development from that point, changes that occur in its size, location, or degree of dependency do not in any way alter its human nature.

Conclusion: Therefore, any justification for taking this human life must be consistent with justification allowed by the law for taking any other human life.

At the very least, engaging the law in this way would have three effects. First, it would remove any pretext for abortion defenders to claim the case against abortion is a religion-based crusade. This argument relies only on science, philosophy, and logic.

Second, the efforts of some judge to deny the premises of this argument would strain credulity. This is not to say that some would not try, but their efforts to do so would be exposed for their intellectual dishonesty.

Third, it would change the game. The debate would shift from the subjective grounds on which the personhood battle has been waged to an objective platform that exposes the immorality of abortion and invokes the basic rights that every human being has been endowed with by his or her Creator.

This strategy would codify the moral argument against abortion—an argument that proves wildly convicting to those who are exposed to its irrefutable truths. This may be the most impactful aspect of this approach. It is especially effective with young adults who are led by the force of truth and logic to no longer be able to trivialize the injustice of abortion. They recognize abortion for the human rights issue that it is and

are rising up in growing numbers to oppose it. May that movement prove to be the one that ends the national nightmare that *Roe* brought upon us all.

This is not to question the motives or commitment of those pro-lifers in the personhood movement who have engaged in the honorable cause of putting legal force behind their convictions. It is simply to recognize that once we engaged the debate on the same philosophical ground as those who defend abortion, we soon found ourselves standing in ethical quicksand with them. We are playing by the opponents' rules instead of demanding that our opponents adhere to the same objective standards that define all our moral choices. The consequences of this move have become painfully obvious, and it is time to abandon the effort. —*Bob Perry*

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NOTES

- 1 *Mississippi Initiative 26: Definition of Person*, available at: <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.
- 2 "More Americans 'Pro-Life' Than 'Pro-Choice' for First Time," *Gallup Poll*, May 15, 2009. Available at: <http://www.gallup.com/poll/118399/More-Americans-Pro-Life-Than-Pro-Choice-First-Time.aspx>.
- 3 Gary Gutting, "On Abortion and Defining a 'Person,'" *New York Times: The Stone Blog*, November 30, 2011. Available at: <http://opinionator.blogs.nytimes.com/2011/11/30/on-abortion-and-defining-a-person/>.
- 4 Francis J. Beckwith, *Defending Life: A Moral and Legal Case against Abortion Choice* (New York: Cambridge University Press, 2007), 27, 45.
- 5 A 1970 Ohio case that "attack[ed] the constitutionality of state statutes forbidding abortions," available at: http://www.leagle.com/xmlResult.aspx?xmlDoc=19701062321FSupp741_1918.xml&docbase=CSLWAR1-1950-1985.
- 6 Beckwith, 28.
- 7 Anthony Kennedy, *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833 (June 29, 1992), available at: <http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=us&vol=505&invol=833>.
- 8 *Mississippi Initiative 26: Definition of Person*.
- 9 *Ibid.*
- 10 Beckwith, xii.
- 11 The *S-L-E-D Argument*, commonly used among pro-life advocates, originated with Stephen Schwarz and is clearly articulated in Scott Klusendorf, *The Case for Life* (Wheaton, IL: Crossway Books, 2009), 28.
- 12 Gutting, "On Abortion and Defining a 'Person.'"
- 13 Hadley Arkes, "The Design of Legislation: Searching for the Key," *The Catholic Thing*, June 21, 2010, available at: <http://www.thecatholicthing.org/columns/2010/the-design-of-legislation-searching-for-the-key.html>.
- 14 *Ibid.*