HUMAN BEINGS, PERSONS AND CONJOINED TWINS: AN ETHICAL ANALYSIS OF THE JUDGMENT IN *RE A*

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I. INTRODUCTION

When and why might it be permissible to kill one human individual to save another? How can life and death choices between individuals be justly made? These are the issues raised by the case of the so-called ‘Manchester conjoined twins’ which captured the public imagination not only in the United Kingdom but internationally. The drama turned essentially on the legitimacy of killing one of the twins so that the other might be saved and on who should decide such an issue. I will be concerned here principally with the confused and contradictory treatment of these issues by the judgments in the Court of Appeal and with the question of how we can consistently address dilemmas of this sort.¹ My own answer to the central question as to when and why it might be permissible to kill one individual to save another will suggest that the only consistent path in the case of the twins in this case is to pay attention to crucial differences between humans and persons. Neglect of these differences blocks the detection of false analogies.

II. BACKGROUND²

Rina and Michaelangelo Attard,³ the parents of the twins, came to Manchester from the Maltese Island of Gozo to give their twins the best possible chance of survival. They chose St. Mary’s Hospital partly

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¹ *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All E.R. 961. I am grateful to my colleagues Søren Holm and Kirsty Keywood for incisive comments and to Catherine Yates for her legal expertise with the cases cited, any errors are of course my own responsibility.

² For the background I have relied on the excellent account given by my colleagues Søren Holm and Charles Erin. I have followed the sound principle of plagiarism that wheels should not be re-invented unnecessarily. For this and for a brilliant ethical overview See S. Holm and C.A. Erin, ‘The Manchester Conjoined Twins: An Ethical Analysis’ (2001) 6 *Jahrbuch für Wissenschaft und Ethik*, published by the Institut für Wissenschaft und Ethik, Bonn.

³ Anon., ‘Siamese twin parents named’, *BBC News Online*, http://news.bbc.co.uk/1/health/newsid_1058000/1058223.stm, posted 6 December 2000.

because Malta has an agreement with the British National Health Service concerning specialised medical treatments that are not available in Malta and possibly because the paediatric consultant surgeon to Malta, Mr Adrian Bianchi, a doctor of Maltese descent (and also from Gozo), was a consultant at St. Mary's.

The twins were born on 8 August 2000, their bodies fused from the umbilicus to the sacrum,⁴ and the lower ends of their spines and spinal cords also fused. They shared a joined bladder; however the heart and lungs of the smaller twin (referred to as Mary) were non-functional, her supply of oxygenated blood coming from the larger twin (referred to as Jodie) whose aorta feeds into Mary's aorta. There were a number of other abnormalities present in both twins, including imperforate anus and a cloacal abnormality. Jodie seemed neurologically normal, whereas Mary had a number of severe brain malformations and abnormal neurological responses. The nature of Mary's neurological problems, if she survived into childhood, were unclear; but she was not brain-dead, nor in a state equivalent to Permanent Vegetative State (PVS), nor in a permanent coma.

It was believed and accepted by all that if the twins were not separated either Jodie's heart and lungs would slowly become affected by the strain of providing a blood supply for two bodies, and the twins would die of congestive heart failure (within a time-span estimated to be between six months and two years) or, Mary would die, possibly from thrombosis of major vessels, and it would be necessary to perform an emergency separation procedure in order to save Jodie.

An elective procedure to separate the twins involved an estimated mortality risk of around six per cent. No estimate was apparently made of the chances of performing a successful emergency separation in a situation where Mary dies before Jodie. Any separation operation would lead to the death of Mary. It was believed that, although Jodie would have to undergo a series of operations through childhood to correct her congenital malformations, she would eventually be able to lead a substantially normal life if separated from Mary.

On 18 August, ten days after the birth, the hospital initiated proceedings in the High Court under the Children Act 1989 seeking:

A declaration that in the circumstances where (the children) cannot give valid consent and where (the parents) withhold their consent, it shall be lawful and in (the children's) best interests to
(a) carry out such operative procedures not amounting to separa-

⁴ The medical facts related here were agreed upon by several teams of doctors, including specialists from other hospitals called in as experts by the Court of Appeal. See also *Re A*, *op.cit.* at 972, *per* Ward L.J.

tion upon (Jodie and/or Mary), (b) perform an emergency separation procedure upon (Jodie and/or Mary) and/or (c) perform an elective separation procedure upon (Jodie and Mary).⁵

This declaration was granted on 25 August.⁶ Both the parents and Official Solicitor acting on behalf of Mary appealed. On 22 September, the Court of Appeal dismissed the appeal and upheld the declaration. On 6 November, the elective separation operation was performed, Mary died in an operating room, and, according to Adrian Bianchi, Jodie is expected to enjoy a relatively good quality of life with her family.⁷

Mary was buried on Gozo on the 19 January 2001. The name on her gravestone is Rosie Gracie Attard.⁸

All along, the parents of the twins, whom we will continue to call Mary and Jodie, opposed an operation, allegedly on religious grounds,⁹ and wished nature to take its course with the result that both twins would die.

The courts chose not only to decide the issue of whether or not an operation to separate the twins was lawful but chose to rule that failure to perform the operation would be unlawful. The reasons offered in the Court of Appeal were so confused and mutually inconsistent that they fail utterly to justify, either legally or morally, the overruling of the parents' wishes.

III. THE PROBLEM

We will begin by examining the major reasons offered by the various judges in justification of their ordering the operation which must kill Mary and then we will try to say something about what the court should (morally speaking) have done and why.

⁵ *Re A*, *op.cit.* at 987.

⁶ *Central Manchester Healthcare Trust v. Mr and Mrs A and A Child* (unreported).

⁷ N. Bunyan, "Bright and Alert" Jodie makes Rapid Progress', *Daily Telegraph Online*, http://www.lineone.net/telegraph/2000/12/16/news/bright_45.html, posted 16 December 2000.

⁸ Anon., 'Siamese Twin Mary Laid to Rest', *BBC News Online*, http://news.bbc.co.uk/hi/english/world/europe/newsid_1125000/1125515.stm, posted 19 January 2001. Anon., 'Emotional Farewell for Siamese Twin Mary', *Manchester Metro News*, 26 January 2001.

⁹ The parents views are well set out in the judgment of Ward L.J (*Re A*, *op.cit.* at 985–6). The parents were devout Catholics but I say 'allegedly' because despite the intervention of the Cardinal Archbishop of Westminster, it is not clear whether this is the result that Catholicism demands. (My colleagues Søren Holm and Charles Erin pointed out to me that) Bishop Elio Sgreccia, vice-president of the Pontifical Academy for Life and Director of the Bio-ethics Institute of the Catholic University of Rome, was reported recently, commenting on another conjoined twins case, as saying that where both twins could not be saved operating knowing that one must die would be justified. See <http://www.zenit.org/english/archive/0005/ZE000530.html#item8>.

A. *Who Shall Live and Who Shall Die?*

Since English Law, confirmed by the Court of Appeal in this case, provides no basis for distinguishing between the value of the lives of Jodie and Mary and that of the lives of any two adults, I will start with the hypothetical case of conjoined adult twins Gilbert and George. We imagine that they are in their twenties and competent and that despite living so long their medical condition has suddenly altered so that the facts we rehearsed for Jodie and Mary and now true of them, viz:

It is believed and accepted that if the twins are not separated either George's heart and lungs would slowly become affected by the strain of providing a blood supply for two bodies, and the twins will die of congestive heart failure (within a time-span estimated to be between six months and two years). Or, Gilbert would die, for instance due to thrombosis of major vessels, and it will be necessary to perform an emergency separation procedure in order to save George.

If an emergency separation were to be performed, the doctors estimate that there is be a sixty per cent mortality risk for George, whereas an elective separation is estimated to have a mortality risk of only six per cent. No estimate is available of the chances of performing a successful emergency separation in a situation where Gilbert dies before George. Any separation operation will lead to the death of Gilbert.

Although I have changed the facts here in one important respect, namely Gilbert and George are both competent individuals with biographical lives—both are persons properly so called,¹⁰ this fact should make no difference to the legal situation since the law does not distinguish between human beings on the basis of their right to life. Here if Gilbert is killed by the operation to separate them he loses between six months and two years of a life we will suppose he wants to live and finds satisfactory. If he is not so killed they will both die within the same period. Would it be ethical in these circumstances to operate, would the courts so order? I believe the answer to both these questions is 'no', and we will shortly return to this case, but notice that in *all relevant respects* this case is the same as the one decided in *Re A*.

The judges in the Court of Appeal gave a number of grounds to justify their judgment which would also apply to Gilbert and George; we will look at them in turn.

¹⁰ See J. Harris, *Violence and Responsibility* (Routledge and Kegan Paul 1980); *The Value of Life* (Routledge and Kegan Paul 1985); and 'The Concept of the Person and the Value of Life' (1999) 9 *Kennedy Institute of Ethics Journal* 4 at 293–308 and the discussion below.

B. The Value of the Treatment not the Value of the Patient's Life

Both Ward L.J. and Brooke L.J. invoke a distinction attributed to John Keown and to Lord Goff. John Keown's version of the distinction is cited by Ward L.J. as follows: 'The question is always whether the *treatment* would be worthwhile, not whether the patient's *life* would be worthwhile . . .'.¹¹ Both Ward L.J. and Brooke L.J. approve of the following authoritative version of the distinction by Lord Goff in the *Bland* case:¹² '[T]he question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.' The distinction is equally spurious in both the versions attributed to Keown and to Lord Goff because it articulates a distinction without a difference. Suppose, thinking of Lord Goff's formulation, we believed that it was in the best interests of the patient to die, it would be clearly inconsistent to judge it to be 'in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care'. Since it cannot both be in someone's best interests to die and also in their best interests to be prevented from dying by treatment, the two questions are inextricably linked, we cannot address the question of the best interests of treatment independently of our assessment of whether or not the continuation of life that the treatment affords is of value to the subject of that life.

I belabour the point because it is astonishing that anyone should entertain this supposed distinction for a moment. Neither Keown's nor Lord Goff's formulations of the distinction avoid this problem. If we take first Keown's formulation, we must ask how can the question of whether or not the treatment is worthwhile be addressed independently of the question of whether the life it restores is worthwhile? The treatment is worthwhile if it contributes to the continuance of a worthwhile life, a life the continuance of which is a benefit to the individual whose life it is, not otherwise. Similarly in Lord Goff's formulation. It will be in the patient's best interests 'that his life should be prolonged by the continuance of this form of medical treatment' if and only if the treatment will prolong, or restore the patient to, a worthwhile life. In both cases 'worthwhile life' simply means a life that on balance is worth living. If it is plausible to believe that someone has a worthwhile life then it is not plausible to believe someone with such a life would be better off dead. The idea that medical treatments are an end in them-

¹¹ *Re A*, *op.cit.* at 1000, citing J. Keown, 'Restoring Moral and Intellectual Shape to the Law after *Bland*' (1997) 113 L.Q.R. 481 at 485.

¹² *Re A*, *op.cit.* at 1002 citing *Airedale N.H.S. Trust v. Bland* [1993] 1 All E.R. 821 at 869, *per* Lord Goff.

selves, quite separate from their contribution to the quality and quantity of patient's lives is clearly absurd. If it is in the patient's best interests (which include his wishes) that he should die now, then no life prolonging treatment is worthwhile. If it is in the patient's best interests to live (including of course his living through the treatment), then life prolonging treatment will be worthwhile but it could surely never be simultaneously in a patient's best interests to die AND to receive life prolonging treatment and vice versa. It could never be in a patients' best interests to live and to be denied life prolonging treatment.

Consider a case involving the following two illnesses: Illness (1) is a terminal illness which if treated is characterised by three weeks of intense pain followed by death. Without treatment death is immediate, the treatment has the effect of prolonging life for three weeks. Illness (2) is not terminal. It is characterised, if treated, by three weeks of intense pain, comparable to that in illness (1) but followed by complete remission and restoration of a worthwhile life. Without treatment, death is immediate and the only way to keep the patient alive for the three weeks required for the illness to pass its crisis is by the same treatment as in illness (1). In each case the treatment is the same and has the same effect: it prolongs life for three weeks, but in illness (1) the patient then dies and in illness (2) the patient then recovers.

Tom and Dick are identical twin brothers aged 30, neither is competent to make their own decisions but each has a life worth living prior to the illness. Tom suffers from illness (1) and Dick from illness (2). How can the question of the treatment of either Tom or Dick be addressed independently of the question of whether either will thus be given a worthwhile life or the question of whether it is in his best interests to live in such circumstances? If we judge it important to treat Dick we must surely, if Lord Goff and Keown are right, feel the same about treating Tom. But I doubt people do feel the same, indeed, in Tom's case such treatment would surely be gratuitous cruelty.

C. Bodily Integrity

Next we come to the alleged right or entitlement to bodily integrity which seems to have been plucked, literally from the air, by the Court of Appeal as a new basic right. This supposed justification for a separation which will afford bodily integrity to one individual at the cost of her life deserves short shrift. It is cited, apparently as one of a group of decisive reasons, by Brooke L.J., '[f]inally, the doctrine of the sanctity of life respects the integrity of the human body. The proposed operation would give these children's bodies the integrity which nature denied them'.¹³ The kindest way to interpret Brooke L.J.'s thinking here is that

¹³ *Re A*, *op.cit.* at 985-6.

he has simply confused two senses of 'integrity'. Bodily integrity protects individuals under the common law and many statutes from violations of their person. It does not mean that the body must be 'separated from all life preserving contact with other bodies or things'—how could it? Someone on a life-support system, or on dialysis, or fitted with a pace-maker, or with prosthetic limbs, arguably lacks bodily integrity, but the sanctity of life doctrine could hardly require that she be separated from these things. And if the doctrine of bodily integrity thus understood were sound it must apply equally both to Mary and to Jodie and so cannot assist in choices between them.

D. Necessity

All the judges discuss the doctrine of necessity, and half-digested sailors as well as half-digested arguments figure prominently in the narrative. How would necessity apply to Gilbert and George? As with Jodie and Mary, the continued life of each requires the premature death of the other (premature in the sense that the individual must die some months or years before they otherwise would). It is difficult to see how the operation on Gilbert and George would be ethical or legal with or without Gilbert's consent. If Gilbert refuses consent for the operation then to operate would be surely unlawful as well as unethical. Competent patients are entitled to refuse consent to being touched in any way and for any reason, and the law has always upheld such a right. People do not sacrifice their entitlement to life, nor is the sanctity of their life compromised, by short life expectancy. For example, neither Her Majesty Queen Elizabeth The Queen Mother, who is over one-hundred-years-old and therefore has relatively limited life expectancy, nor terminally ill patients are so compromised.¹⁴

But suppose that Gilbert is willing to consent to the operation that will surely kill him. The appropriate analogy here is surely with the live donation of a vital organ. I have always argued for the legitimacy of such self-sacrifice but I have always been told that it would be unlawful, and that doctors could never be persuaded to undertake the procedure.¹⁵ If it is right that a competent individual like Gilbert could not lawfully be operated on whether he consented or not, then clearly if he

¹⁴ See my 'Rationing Life: Quality or Justice?' in M. Ockelton (ed.), *Medicine, Ethics And Law* (ARSP, Beiheft Nr. 32. Steiner 1987) at 104–12; 'EQALYty' in P. Byrne (ed.), *Health Rights and Resources* (King's Fund and Oxford University Press 1988) at 100–28; 'More and Better Justice' in S. Mendus and M. Bell (eds.), *Philosophy And Medical Welfare* (Cambridge University Press 1988) at 75–97; 'Rationing Life' (1986) *Health and Social Service Journal* June; and my 'QALYfying The Value of Life' (1987) *Journal of Medical Ethics* 117–23.

¹⁵ See my *Wonderwoman and Superman* (Oxford University Press 1992) at 113–39.

were not competent (but not brain-dead or in PVS), the operation would be equally unlawful?

It is not that I am suggesting that necessity could not justify killing one individual or even one person to save another. Necessity I believe does and would justify such a thing, although apparently the law seldom agrees. Necessity is however unhelpful here on the question of which one to kill. If Gilbert is unwilling to sacrifice himself for George both Gilbert and George could plead necessity with equal force and plausibility. In cases like this necessity tells you that you may kill one, but not which one you may kill.

E. The Value of Life

In their summaries of the case which (and this is extraordinary to the layman) the judges insist should not be taken seriously¹⁶ all the judges reject the idea that Jodie and Mary were anything other than fully fledged human beings with all the rights and protections that implies.¹⁷ If that be the case, it is inconceivable that what it might be legitimate to do to Mary could be different than what it might be legitimate to do to Gilbert or indeed the Queen Mother. Thus, Ward says: 'I am compelled to accept that each life has inherent value in itself, however grave the impairment of some of the body's functions may be. I am satisfied that Mary's life, desperate as it is, still has its own ineliminable value and dignity.'¹⁸ Two paragraphs later he delivers himself of the opinion that 'the only solution is to balance the welfare of each child against the other to find the least detrimental alternative'.¹⁹ But that is precisely what you cannot do if you believe that each life has an ineliminable value and dignity, for by this hypothesis each life is of equal value and hence has an equal claim on the protection of the court. Of course, if killing Mary would save two lives not one, then the principle that each life has 'ineliminable' value can operate, because if each counts for one then two count for two.²⁰ But where there is no gain in the very value at issue—the value of life and arguably no gain for anything of equal

¹⁶ <http://porch.ccta.gov.uk/courtser/judgments.nsf> p. 95.

¹⁷ *Ibid.*, per Ward L.J. at 96, per Brooke L.J. at 99 and per Walker L.J. at 101. In the words of Ward L.J.: 'You must look to those written judgments (not the summaries) and only them for a record of our decision and the detailed reasons we give for it.' However as a philosopher I feel at liberty to take seriously what people, especially judges, say. And if they believed their summaries were inconsistent with the judgments it would be grossly irresponsible to give them. For arguments about personhood and rights see also C.S. Nino, *The Ethics of Human Rights* (Clarendon Press 1991) at 34ff. and the discussion of 'personhood' below.

¹⁸ *Ibid.* at 96.

¹⁹ *Ibid.* at 97.

²⁰ D. Parfit, 'Innumerate Ethics' (1978) 7 *Philosophy and Public Affairs* 301.

importance (justice for example), then each life is to count for one and none for more than one. Welfare, *contra* Ward L.J., cannot, (unlike justice), be a value of comparable importance for otherwise we would all be vulnerable when welfare sums indicate that our welfare is less than that of another whose survival our death could purchase.²¹

If each or any of us were vulnerable to deliberate (intentional) killing whenever welfare sums indicated our deaths could purchase increased welfare for others there would be no security of the person.

F. Self-Defence

The same goes for the attempt to apply principles of self-defence. The arguments of Ward L.J. about dignity and ineliminable value we have just rehearsed show that he believes Mary is a 'self' properly so called. That being the case self-defence cuts both ways and cannot be used to protect Jodie rather than Mary. There are only two ways in which this argument would work. One is if Mary is not a self (because she is both literally a parasite of Jodie and also not a person).²² The second is if Jodie must separate herself from Mary because of some wrongful act of Mary's which connected their fates in the first place and against which Jodie might legitimately invoke self-defence.²³

G. Intention

Walker L.J. in his summary, states: 'Mary's death would not be the purpose of the operation, although it would be its inevitable consequence. The operation would give her, even in death, bodily integrity as a human being. She would die, not because she was intentionally killed, but because her own body cannot sustain her life.'²⁴

We have noted the arbitrary nature of appeals to bodily integrity. To defend bodily integrity even if it costs your life is like defending a right to food to which the subject of the right is fatally allergic. But the denial that the operation involves the deliberate or intentional killing of Mary is unsustainable.²⁵ Brooke L.J. quotes with approval Lord Steyn's

²¹ This is basically Ronald Dworkin's argument for rights as trumps. See his *Taking Rights Seriously* (Duckworth 1977). Notice however that this is not the *Survival Lottery* since in that case one can only be sacrificed to save more than one other life. J. Harris, 'The Survival Lottery' (1975) *Philosophy*.

²² See below for a more detailed account of personhood.

²³ Judith Thomson writes as if this is the position we find ourselves in with respect to the famous violinist who has been plugged into us by the Society of Music Lovers. See J. Thomson, 'A Defense of Abortion' (1971) 1 *Philosophy and Public Affairs* 1. See also R. Nozick on innocent threats in his *Anarchy State and Utopia* (Basil Blackwell 1968) at 35ff.

²⁴ <http://porch.ccta.gov.uk/courtser/judgments.nsf> p. 101.

²⁵ Compare this claim of Walker L.J. with Brooke L.J.'s analysis of intention in his judgment. *Re A*, *op.cit.* at 1029.

articulation of the relevant principles:²⁶ 'Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen.' And Brooke L.J. concludes: 'Now that the House of Lords has set out the law authoritatively in these terms, an English court would inevitably find that the surgeons intended to kill Mary, however little they desired that end, because her death would be the virtually certain consequence of their acts . . .'.²⁷

We may conclude that Mary was unlawfully killed if the other claims by their Lordships have any weight or merit.

H. Designated for Death

One argument which appears in the Court of Appeal judgment and which might distinguish Gilbert and George, as the court believed they had distinguished Jodie and Mary, is the idea that some people might be 'designated for death' in a way that the courts must recognise. If it could be 'discovered' that some individuals had been 'designated for death' in a way that legitimates their being the subjects of a deliberate choice to kill them, then this might, if it could be shown that Mary had been designated for death in the appropriate way justify the decision that the Court of Appeal clearly wished to arrive at. The idea of 'designation for death' which was considered by the Court of Appeal arises from the bizarre exercise in labelling (one could not call it 'reasoning') attributed to some rabbinical scholars whose ruminations come to us (and came to the Court of Appeal) via the American bioethicist George Annas.²⁸ Apparently, considering an analogous case of conjoined twins, these sages relied according to Annas on two analogies. In the first, two men jump from a burning aeroplane. The parachute of the second man does not open, and, as he falls past the first man he grabs his legs. If the parachute cannot support them both, is the first man morally justified in kicking the second man away to save himself? 'Yes,' said the rabbis, 'since the man whose parachute didn't open was "designated for death"'.²⁹ The second involves a caravan surrounded by bandits. The bandits demand a particular member of the caravan be turned over for execution; the rest will go free. Assuming that the named individual has been 'designated for death' the rabbis concluded it was acceptable to sacrifice him. The way in which these sages allegedly allow the Grim

²⁶ *R. v. Woollin* [1999] 1 A.C. 82 at 96B-H.

²⁷ *Re A*, *op.cit.* at 1029.

²⁸ G.J. Annas, 'Siamese Twins: Killing One to Save the Other', *Hastings Center Report* (April 1987) at 27 as cited in *Re A*, *op.cit.* at 1041.

²⁹ *Re A*, *op.cit.* at 1041-2.

Reaper to be manipulated by brute bad luck or malevolent intent is breathtaking. The bandits are surely not unlike the Nazis, and to endorse the decision of maniacs to 'designate others to death', is hardly a justification. If the caravan must give up one of its own it is not because he has been 'designated' for death but because his death alone will save the others. If the death of an undesignated person would do the job and save the caravan, the justification for the death is complete and 'designation' adds nothing. If the bandits say 'you choose who will be sacrificed' the members of the caravan would be justified in sacrificing someone chosen by a fair procedure, by lot for example. Nothing is added by the fact of so called 'designation'.³⁰ Indeed one might think that bowing to the malevolent selection of maniacs, so far from being a selection procedure that should be accepted is one that should be resisted.

The idea of how someone might become 'designated' for death in a way that would justify the death of that particular person (unless chosen for the part by rabbinical scholars) is unclear, and no illumination is offered or apparently thought necessary by those who quote the example with approval.³¹ Moreover there seems to be no room for the diagnosis of 'mis-designation'. We all know of one Englishwoman who is clearly designated for death. That of course is the famous lady who has figured already in this narrative, the Queen Mother who aged at just over one hundred years is clearly marked by elapsed time for an early death. It is not clear however that this manifest designation by the Almighty himself has reduced Her Majesty's entitlement to life prolonging care, even when in competition with others whose designation is not quite so clear or immediate.

The first example used, that of the two men jumping from a plane, is rather different. If the man with the parachute has a justification for sending his colleague to a marginally premature death, it is either because he claims first occupancy (of the parachute) on sound Lockean principles;³² or, because the leg grabber has nothing to gain, they will both die and the period of lifetime lost to the leg grabber, is surely below the level of discrimination. Either first occupancy, maximisation of lives saved, or self-defence justify sacrificing the leg grabber. Again nothing is added by invoking the idea of 'designation for death'.

³⁰ This is a version of the famous trolley problem except that in most versions of the trolley all alternatives are 'innocent' in the sense of not unjust. See my 'The Moral Difference Between Throwing a Person at a Trolley and Throwing a Trolley at a Person: A Reply to Frances Kamm' (2000) *Proceedings of the Aristotelian Society Supplementary Volume* at 41–58; and F. Kamm, 'The Doctrine of Triple Effect' *ibid.* at 21–38.

³¹ *Re A*, *op.cit.* at 1041–2, *per* Brooke L.J.

³² J. Locke (ed. J.W. Gough), *The Second Treatise of Government* ch. V (Basil Blackwell 1966).

However, the idea behind 'designation for death' might be that if someone is going to 'die anyway', if they are going to die whatever happens, they are already out of account or of diminished account. However this is just to say that the value of life is correlated with life expectancy.

I. Life Expectancy

If the value of life can plausibly be correlated with life expectancy this would support the killing of Gilbert rather than George. It is a suggestion that attaches value to units of lifetime and prioritises life expectancy. It is found in the notorious Qaly and the equally notorious Daly (Quality Adjusted Life Year and Disability Adjusted Life Year) and other such measures as well as in some conceptions of utilitarianism. While it is one that I profoundly reject and have argued against at length elsewhere³³ it is not one that would appeal to the English Courts and, so far as I am aware, it has never been used to justify direct killing as opposed to letting die.³⁴

If it would not be lawful or ethical to perform the separation on Gilbert and George without Gilbert's consent and probably unlawful even with his consent, what is different about the case of Mary and Jodie?

IV. THE SOLUTION

Since none of the arguments or distinctions produced by the Court of Appeal are sustainable we must ask what might in fact justify the sacrifice of one of the twins in a Case like this? The idea that Mary was 'dying anyway' and could not long survive is I believe tenacious. However, as we have seen this is true in the case of Gilbert and George and also in that of the Queen Mother. Where the individual with short life expectancy has a life to lead and wants to lead it for whatever time is left,³⁵ as we supposed was the case with Gilbert and we will suppose is the case with the Queen Mother, it would seem inconceivable that they would be killed against their will by a decision of the courts. It is not

³³ See n. 10 above, and also J. McKie, J. Richardson, P. Singer and H. Kuhse, *The Allocation of Health Care Resources* (Ashgate 1998); and John Harris, 'Double Jeopardy and the Veil of Ignorance' (1995) 21 *The Journal of Medical Ethics* 3 at 151-7. Also, 'Would Aristotle Have Played Russian Roulette?' (1996) 22 *Journal of Medical Ethics* 4 at 209-15.

³⁴ The distinction between killing and letting die is of course unsustainable for independent reasons. See my *Violence and Responsibility* (Routledge and Kegan Paul 1980). Lord Mustill seems also to have accepted the unsustainability of this distinction, see below.

³⁵ J. Harris, *The Value of Life* (Routledge and Kegan Paul 1985); and 'What is the Good of Health Care?' in (1996) 10 *Bioethics* 4 at 269-92.

then life expectancy *per se* that makes a difference; but perhaps the *sort of life* that is available may be relevant?

If we say that Mary is going to 'die anyway' we may not be concentrating on the *duration* of the life expectancy but on some other feature of that life expectancy. I believe that there is something about Mary's life expectancy that makes plausible the decision in *Re A* and distinguishes Jodie and Mary from Gilbert and George. It is that the life expectancy of Mary between the time when the operation would take place and her inevitable death, would not have been expectancy of what might be called 'biographical life', not the life of a person. Indeed, neither Mary nor Jodie had started living biographical lives, neither were persons properly so called at the time of the operation. On this analysis, the life Mary would lose by the performance of the operation which would kill her, would not have been life from which she could benefit significantly, not life that could ethically be distinguished from her life *in utero*.

A. Personhood

Let's explore the idea that at the time of the operation Jodie and Mary were neither of them persons,³⁶ that neither had a biographical life and it is this fact that distinguishes their case from that of the hypothetical Gilbert and George and which has led (perhaps subconsciously?), the judges in *Re A* to such convoluted and fallacious reasoning.

I have developed an account of personhood at length elsewhere³⁷ and there is no space here adequately to establish and justify the concept of the person as a morally significant category. However, it is perhaps sufficient to note almost universal acceptance of the idea that the terms 'humans' and 'persons' are not co-extensive and that not all human beings share the same moral status. Normally we use the term 'person' as a synonym for 'human beings', people like us. However we are also familiar with the idea that there are or might be non-human persons, and humans who are not, or may not be persons or full persons. Non-human persons may include gods, demigods, ghosts, extraterrestrials, angels, and devils. They may also include animals, fictional and real, with special properties or characteristics. These will include both Winnie the Pooh, and, perhaps, educated non-fictional primates, like Washoe and Sarah.³⁸ Human non-persons or humans who are not fully fledged persons may include zygotes and embryos, or individuals who are 'brain-dead', anencephalic infants, or individuals in a PVS. Persons,

³⁶ See n. 10 above.

³⁷ *Ibid.*

³⁸ R. Allen and B. Gardner, 'Teaching Sign Language to Chimpanzees' (1969) 165 *Science* 664–72; E. Linden, *Apes, Men and Language* (Penguin 1975).

properly understood, are then individuals with a biographical life, individuals with full moral status in a way that non-persons are not. Persons, whom I believe are characterised by possessing the capacity to value existence,³⁹ can be harmed by being killed or allowed to die because they thereby may lose something they value. Non-persons, which lack such a capacity cannot, by hypothesis, be deprived by death of something they could coherently be said to value. The law of course recognises a distinction between human persons and human non-persons. Embryos and fetuses are human beings but not full persons and permitting abortion would not be coherent unless the law also recognised that the moral status of the embryo and fetus is not identical with that of the normal adult human. Recently this distinction has been extended to divide those in a PVS from *persons* properly so called.

Although there is always a period of pre-personal existence for developing humans, and it is this fact that justifies abortion, the same is not necessarily true at the end of life. Some end of life decisions are made easier if the individual concerned is clearly seen to have lost personhood. The only way of making sense of judgments in cases of PVS, for example,⁴⁰ is to conclude that individuals in PVS have permanently lost personhood. It was this fact that justified the decision, in the landmark *Bland* case to authorise cessation of life-sustaining food and hydration. Tony Bland's parents accepted that their son had ceased to exist in any real, biographical, sense although his body remained alive, and asked the English courts to declare that it would be lawful for medical staff to withdraw feeding and other life sustaining measures so that their son would die.⁴¹

Although, in *Bland*, the House of Lords were reluctant to change the definition of death, or even to address that issue, it is clear from their decision that they thought Tony Bland's life did not in fact retain the sort of value that required it to be sustained, and did not do so because he had lost all capacity for consciousness. In the words of Lord Keith of Kinkel: 'It is, however, perhaps permissible to say that to an individual with no cognitive capacity whatever, and no prospect of ever recovering any such capacity in this world, it must be a matter of complete indifference whether he lives or dies.'⁴² Here Lord Keith seems to appeal

³⁹ As I argued in the works cited in n. 10 above.

⁴⁰ *Airedale N.H.S. Trust v. Bland* [1993] 1 All E.R. 821 (H.L.). I discuss this case in more detail in my 'Euthanasia and the Value of Life' in J. Keown (ed.), *Euthanasia Examined: Ethical Clinical and Legal Perspectives* (Cambridge University Press 1995) at 6-22.

⁴¹ It is not clear why there was any necessity to take the *Bland* case to the courts since it is already well-established that there is no obligation to sustain a baby by feeding (*Re C* [1989] 2 All E.R. 782; *Re J* [1990] 3 All E.R. 930).

⁴² *Airedale N.H.S. Trust v. Bland*, *op.cit.* at 861.

to something like the conception of personhood outlined above. For what he identifies as mattering from a moral, and indeed a legal, perspective is not life, nor yet human life, but a certain cognitive capacity necessary to sustain a biographical life.

Lord Mustill in his judgment in that case appears to confirm the fact that it is not human life that is the determinant of moral significance but something akin to personhood:

The conclusion . . . depends crucially on a distinction drawn by the criminal Law between acts and omissions, and carries with it inescapably a distinction between, on the one hand what is often called 'mercy killing', where active steps are taken in a medical context to terminate the life of a suffering patient, and a situation such as the present where the proposed conduct has the aim for equally humane reasons of terminating the life of Anthony Bland by withholding from him the basic necessities of life. The acute unease which I feel about adopting this way through the legal and ethical maze is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable.⁴³

The key features of Lord Mustill's judgment are, first, the acknowledgement that the course of action requested of, and approved by, the courts 'has the aim . . . of terminating the life of Anthony Bland' and, second, the fact that the supposed difference between acts and omissions relied on by the common law tradition to make moral and legal distinctions, characterises two courses of action that are ethically 'for all relevant purposes indistinguishable'.

Aiming at terminating the life of a moral person like Lord Mustill or Gilbert in circumstances comparable to those in *Re A* would not be permissible in English law; neither would it be ethical. If the courts and indeed most people feel differently about the cases of Mary and that of Tony Bland for example, it is surely because they place such individuals in a moral category different to that of themselves and Gilbert. If that difference is not the difference between humans who are 'persons' and those that are not, then there is both a puzzle as to what it might be, and a bigger puzzle as to how legal abortions and the judgments in *Bland* and in *Re A* are to be justified. It certainly looks as though the judges tacitly assumed that Mary and Jodie were more like fetuses or individuals in PVS than persons.

The fact that neither Mary nor Jodie were persons at the time of the

⁴³ *Ibid.* at 885.

operation separating them and killing Mary explains the moral difference between such a case and that of the hypothetical Gilbert and George, and also explains why the decision to operate knowing that Mary must die was not unethical. However it also shows that had the wishes of the parents been followed and both Mary and Jodie had been allowed to die, equally this would not have involved the premature death of any persons. So that while reflections on personhood can perhaps alone provide the ethical justification for the decision in *Re A*, such reflection would also underpin the decision that I believe would have been the better decision. This would have been for the Court of Appeal to declare the operation to be *lawful but not mandatory* and that following the wishes of the parents would also have been lawful. Before the operation it was not clear what the outcome for Jodie would be. She then probably faced a range of disabilities and repeated surgery. In such circumstances the parents might reasonably judge that the death of both daughters while still not persons was the kindest outcome. This is a finely balanced judgment, but perhaps just because it is, the justification for overturning the choice of the parents is absent. Even those who, like the Court of Appeal, took a different view could surely not be so confident that their view was the right one to justify overruling parental preferences. And indeed the judges expressed frequently the difficulty of their decision. Where both courses of action, as this paper has argued, are ethically defensible for the same reasons, it is surely inappropriate for the courts to order an action that the parents find unconscionable.