

# MISSING PERSONS

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Discussions about “rights” lie at the center of constitutional discourse, and those discussions are in turn heavily influenced by an approach to rights questions – I will call it the “persons and rights” approach – practiced by theorists such as John Rawls and Ronald Dworkin. This discourse often claims a sort of moral superiority over a different, more consequentialist (and to some more vulgar) mode of thought – an approach that seems more ascendant in nonconstitutional areas of law and that is most conspicuously manifest in law-and-economics theorizing.<sup>1</sup> The supposed superiority of the persons and rights approach lies in its reputed proclivity to respect the sanctity of persons,<sup>2</sup> and to avoid the counterintuitive or even monstrous conclusions to which a utilitarian or consequentialist approach can notoriously lead in particular (often hypothetical and far-fetched) circumstances.<sup>3</sup>

My purpose in this essay is to show that the persons and rights approach suffers from its own variety of moral obtuseness. More specifically, the persons and rights approach routinely ignores the momentous implications of what I will call “the logic of unrealized value” – a logic that we understand and routinely accept in many domains of life and that a more consequentialist approach has no difficulty in understanding. In ignoring or misunderstanding that logic, the persons and rights approach is guilty, on a colossal scale, of what in other contexts we would promptly recognize as demonstrable irrationality – and at huge moral cost. Though this failure is not limited to any particular moral question, it is perhaps most strikingly manifest in the context of the “beginning of life” questions such as abortion and contraception. Reflection on the implications of the logic of unrealized value for such questions suggests that current debates about these issues are profoundly misconceived, and that the most common arguments on all sides of the questions, both “pro-choice” and “pro-life” arguments, are tainted by that misconception.

It should already be apparent that my principal thesis will be mainly, and sweepingly, critical in nature. But lawyers and legal scholars are often interested primarily in the “bottom line.” They read the last chapter first; often they read *only* the last chapter (which is supposed to say “who’s right and who’s wrong,” and especially to explain “what to do” about the problem). So to antic-

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<sup>1</sup> Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29 (5th ed. 1998) (“Another common criticism is that the normative underpinnings of the economic approach are so repulsive that it is inconceivable that the legal system would embrace them.”).

<sup>2</sup> John Rawls, for example, rejects the consequentialist or utilitarian approach in favor of a more rights-based position in part because “[u]tilitarianism does not take seriously the distinction between persons.” JOHN RAWLS, *A THEORY OF JUSTICE* 27 (1971).

<sup>3</sup> See *infra* notes 6-8 and accompanying text.

ipate where this discussion may lead, and to save such single-minded readers some time, let me confess at the outset that my objective is not to take any particular side in specific controversies over, say, abortion; nor is it to nudge constitutional discourse in the direction of consequentialist ethics. On the contrary, though my criticism is directed mainly against the persons and rights approach, and though consequentialism is indeed more receptive than the persons and rights approach to the logic of unrealized value, that logic raises daunting moral and legal questions that neither approach seems competent to address. If there is a normative conclusion that follows from my discussion, it may be that "reason," or rationality (whether of the consequentialist or more Kantian varieties), does not and cannot play anything like the preeminent role in moral and legal thinking that it has traditionally played. Humans are, as Pascal recognized at the opening of the era of modern rationalism, far more creatures of imagination than of reason, and our legal and moral choices are determined more by the concrete pictures we see, or can conjure up, than by our theories or "Philosophers' Briefs."

I happen to think that a more vivid recognition of the limitations of reason would have implications for constitutional law; it would subvert one of the major justifications often given for letting constitutional law override more pragmatic and democratic decision-making.<sup>4</sup> But so far as I can see, nothing follows in any purely deductive way from the present argument for any particular constitutional controversy.

### I. THE "PERSONS AND RIGHTS" APPROACH

A quick review of how the moral stage is currently set will serve as a necessary preliminary for my more specific argument. We can begin by recalling that the bulk of modern moral thinking, especially within the legal academy, belongs to two sprawling and sometimes feuding families that sometimes go under the surnames of Bentham and Kant.<sup>5</sup> In many legal and public policy discussions the Benthamite approach seems to predominate; thus, at least since Holmes, legal scholars have yearned to convert law into a "policy science" that would be utilitarian or at least consequentialist in some sense or another. The law and economics movement is probably the most visible manifestation of this consequentialist tendency. As noted, though, utilitarian moral thinking is often accused of ignoring the sanctity of persons, or of leading to counterintuitive or even monstrous conclusions.<sup>6</sup> For example, from an unqualified utilitarian standpoint Peter Singer seems on solid ground in arguing that there is nothing

<sup>4</sup> This suggestion is developed at length in STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998).

<sup>5</sup> These two contrasting outlooks are represented, at least in a rough sense, in the acrimonious exchange provoked by Judge Richard Posner's 1997 Oliver Wendell Holmes Lectures. Compare Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) with Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

<sup>6</sup> J.J.C. Smart, though defending utilitarianism, concedes that "[i]t is not difficult to show that utilitarianism could, in certain exceptional circumstances, have some very horrible consequences." J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST* 69 (1973).

inherently immoral about infanticide<sup>7</sup> – a conclusion that many find appalling. And at the other end of life, it seems quite plausible to suppose that a hard-headed (and perhaps hard-hearted) utilitarian “felicific calculus” might justify liquidating large numbers of elderly people who no longer enjoy good physical and psychological health and who are unproductive or perhaps a net drain on society. These conclusions are not certain, of course – given our inability actually to perform the necessary quantifications and computations of utility, *no* moral conclusion is *certain* in a utilitarian scheme – but efforts to avoid them on utilitarian assumptions (by invoking factors like “anxiety,” for example) often have a “rigged” feel about them.<sup>8</sup>

Indeed, the moral awkwardness might go much farther. The venerable philosopher A. J. Ayer observes that most of the people in the world today lead stunted, deprived lives in which pain and misery may far exceed happiness, so that it is not rational for them “to wish their miseries prolonged.”<sup>9</sup> In utilitarian terms, these people represent a net deficit. If Ayer is right about this, and if we are in truth morally bound to achieve the maximum amount of happiness and the minimum amount of pain, then it might seem that the only moral course is to relieve these people of the burden of living. Probably the reform could be carried out quietly and painlessly while the “deficit” people are asleep.

Macabre meditations of this kind may shock us into the Kantian corner. So we may shun the consequentialist calculus in favor of a familiar strategy for addressing moral and legal questions that I am calling the “persons and rights” approach – an approach that, as noted, seems especially influential in constitutional discourse. This approach can be described in terms of two central premises. One premise asserts that among all the various things that compose or inhabit the universe, there is one class of entities – usually we call them “per-

<sup>7</sup> See, e.g., PETER SINGER, *RETHINKING LIFE AND DEATH* 128-31 (1994).

<sup>8</sup> Cf. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 58 (1983):

[U]tilitarianism can lead to monstrous results. Were there a group of people at once so few relative to the rest of society, so miserable, and so hated that their extermination would increase the total happiness of society, the consistent utilitarian would find it hard to denounce their extermination, although he would be entitled to note the anxiety costs that might be imposed on people who feared they might be exterminated next.

Posner seeks to avoid such monstrous results by advocating a different form of consequentialism in which what is maximized is not utility or happiness but rather “wealth.” To critics, however, this approach may seem even more monstrous, among other reasons because it causes the abjectly poor to disappear from the calculation of value altogether. See *id.* at 61 (“The individual who would like very much to have some good but is unwilling or unable to pay for it – perhaps because he is destitute – does not value the good in the sense in which I am using the term ‘value.’”).

<sup>9</sup> Ayer reports that life has been and continues to be a net benefit *for him* because of “[o]pportunities for travel, for acquiring pictorial skills and visiting galleries, for making and listening to music, for reading a wide variety of books . . . .” But most people do not enjoy these opportunities, so the calculation comes out differently:

The vast majority of the human race, in Asia, in Latin America, in Africa, in the so-called underclasses of the more affluent Western societies, are far too fully occupied in waging a losing struggle to achieve a tolerable standard of living for it to be rational for them to wish their miseries prolonged. Perhaps they do wish it, nevertheless. . . . I claim only that they can have no good reason to wish that life were longer than it is.

A. J. AYER, *THE MEANING OF LIFE* 187 (1990).

sons”<sup>10</sup> – that have an inherent dignity and preeminent moral status. This status is sometimes expressed by saying that “persons” must be treated as “ends” not “means,”<sup>11</sup> or that persons are “sacred,” or “inviolable,”<sup>12</sup> or perhaps (in a nontechnical but familiar locution) “infinitely precious.”<sup>13</sup> The second premise asserts that because persons are sacred or inviolable, they enjoy certain “rights” that others, including government officials, are obligated to respect. “Rights” may not be overridden on merely utilitarian grounds.

These two premises mean, in turn, that discussions in the “persons and rights” approach will revolve around two central questions. Perhaps the most common question is, “what rights do persons have?” So we argue about the existence and nature of rights to express ourselves, marry, procreate, act on conscience, be free of torture, and so forth. But of course there is a prior question – one brought most sharply into focus by “borders of life” controversies such as abortion or “mercy killing” of those who are permanently comatose – about “who counts as a ‘person’?”

This latter question generates a huge variety of responses, of course, but the leading responses are sometimes classified into two main groups.<sup>14</sup> One kind of response emphasizes genetics and biology; so it urges that even a fetus, even a zygote, is a “person” because it is alive and possesses the full genetic endowment of a human being. The other set of responses selects certain distinguishing characteristics or capacities of the mature human being – self-consciousness, for example, or rationality, or linguistic capacity, or the ability to enter into relationships with others – and uses these characteristics to define what a person is.<sup>15</sup>

Of course, each of these approaches provokes familiar objections. For example, the more biological approach suggests that there is no moral difference between terminating the life of a fetus and killing a newly born baby; either action takes the life of a “person” and hence should be regarded as murder. Those who believe that abortion is not inherently immoral, or at least that

<sup>10</sup> More precisely, Kant argued for the preeminent moral status of “rational” agents, but in modern moral discourse this category is treated as being pretty much coterminous with human beings or “persons”: other kinds of ostensible rational beings, such as angels, do not figure prominently in contemporary academic reflections.

<sup>11</sup> See, e.g., Bernard Yack, *The Problem with Kantian Liberalism*, in KANT & POLITICAL PHILOSOPHY: THE CONTEMPORARY LEGACY 224, 224 (Ronald Beiner & William James Booth eds., 1993).

<sup>12</sup> See RONALD DWORKIN, *LIFE’S DOMINION* 24-25 (1994).

<sup>13</sup> Cf. Antony Flew, *Tolstoi and the Meaning of Life*, in THE MEANING OF LIFE 209, 213 (E.D. Klemke ed., 2d ed. 2000) (quoting Pierre-Henri Simon) (“a life ephemeral but infinitely precious”). The phrase cannot be taken too literally: it is easy to show that we do not treat life as *infinitely* valuable, and that in fact we routinely engage in calculations and trade-offs involving sacrifices of life in favor of other kinds of values, even including convenience. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 17-18 (1970).

<sup>14</sup> James Walters describes these two approaches to the question as “physicalism” and “personalism.” JAMES W. WALTERS, *WHAT IS A PERSON? AN ETHICAL EXPLORATION* 17-53 (1997).

<sup>15</sup> See *id.* at 41-50. Ronald Dworkin describes a “complex set of capacities: to enjoy or fail to enjoy, to form affections and emotions, to hope and expect, to suffer disappointment and frustration.” He adds that “it is these more complex capacities, not the capacity to feel pain, that ground a creature’s interests in continuing to live.” DWORKIN, *supra* note 12, at 17-18.

there is a vast moral difference between abortion and infanticide, will thus find the biological approach problematic. They may adopt the capacities-based approach, consequently, and argue that a fetus is not in any meaningful sense a "person": it does not speak, reason, or consciously form relationships, which are the essential qualities of personhood.<sup>16</sup> But this response may seem to prove too much, because the newborn baby also lacks these qualities.<sup>17</sup> So it might seem that the capacities approach leads us back to what we might call the "Peter Singer problem": it leaves us with no objection *in principle* to infanticide (though of course we might come up with *practical* reasons – the need for "bright lines," for example – for prohibiting the killing of babies).

Advocates of the capacities approach sometimes attempt to deflect this objection by seizing upon the notion of "potential personhood" or, as James Walters puts it, "proximate personhood."<sup>18</sup> Neither a fetus nor a newborn exhibits the qualities of personhood, Walters argues, and so neither can be said to have "maximal moral status," or to possess the rights of actual "persons." But each *approximates*, to differing degrees, personhood; so each should have a corresponding moral status. "[T]he more a fetus, a newborn, or an infant approximates – or is proximate to – personhood, the greater his or her moral value and hence the greater the implicit claim to life."<sup>19</sup>

The Supreme Court took a somewhat similar position in *Roe v. Wade*. A fetus is not a person, the Court held, and accordingly enjoys no rights under the Constitution. Nonetheless, states have an interest in protecting "the potentiality of human life," and this interest becomes more compelling as the fetus grows and approaches birth.<sup>20</sup> The Court's pronouncement in *Roe* amounted to little more than an intuition that remained notoriously bare of justification.<sup>21</sup> But Ronald Dworkin, among others, has attempted a more sustained justification of the Court's intuition about the increasing value of "potential" persons. Indeed, Dworkin has extended the intuition into a more elaborate argument for what we might call a "sliding scale" of personal value – or of the loss of value when a given life is terminated – based on a notion of lost "investment."<sup>22</sup>

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<sup>16</sup> Cf. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 127 (1980) ("A liberal community . . . asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal polity. The fetus fails the dialogic test – more plainly than do grown up dolphins.").

<sup>17</sup> *Id.* at 129 (asserting that "a day-old infant is no more a citizen than a nine-month fetus").

<sup>18</sup> WALTERS, *supra* note 14, at 54-77.

<sup>19</sup> *Id.* at 63.

<sup>20</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>21</sup> Mark Tushnet has described "Justice Blackmun's opinion in *Roe* as an innovation . . . the totally unreasoned judicial opinion." MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 54 (1988).

<sup>22</sup> See DWORKIN, *supra* note 12, at 84-89. Dworkin explains the basic claim in this way:

It is a waste of the natural and human creative investments that make up the story of a normal life when this normal progression is frustrated by premature death or in other ways. But how bad this is – how great the frustration – depends on the stage of life in which it occurs, because the frustration is greater if it takes place after rather than before the person has made a significant personal investment in his own life, and less if it occurs after any investment has been substantially fulfilled, or as substantially fulfilled as is anyway likely.

*Id.* at 88.

The effort to avoid morally monstrous results by asserting the value or the claims of "potential" persons provokes a serious objection, however, the whole argument may appear to turn on a blatant *non sequitur*. Rights belong to *persons*, after all, and "potential persons" are by definition not actual persons; so why do they have any "implicit claim to life," as Walters contends? As non-persons, why do they have any rights at all? Joel Feinberg offers an analogy: "In 1930, when he was six years old, Jimmy Carter did not know it, but he was a potential president of the United States. That gave him no claim *then*, not even a very weak claim, to give commands to the U.S. Army."<sup>23</sup> By the same token, the mere *potential* of a fetus (or, for that matter, a newborn) to acquire the capacities needed to constitute a person does not seem to support even a weak claim to the moral or legal rights of "persons."

There may be a plausible rejoinder to this objection but, as I will shortly discuss, the rejoinder leads to an even more disconcerting perplexity that is central to my purpose in this essay. To see how this happens, we need to look more closely at one prospect for vindicating the "potential persons" position.

## II. THE LOGIC OF UNREALIZED VALUE

In many contexts, we *do* recognize (at least when we are paying attention to the question) that the loss of a *potential* good – or the failure to realize a potential good<sup>24</sup> – is as real a detriment as the loss of a previously-acquired good. The twenty-dollar bill that was given to me yesterday but fell out of my pocket is neither more nor less valuable than the twenty-dollar bill that I failed to notice on the sidewalk. Each is worth twenty dollars; consequently, each misfortune leaves me exactly twenty dollars poorer than I would otherwise have been. "Realizable but unrealized" value, in short, is as substantial a harm as "temporarily realized but then lost" value.

Economists are perfectly comfortable with the logic of unrealized value; indeed, under the heading of "opportunity costs," they insist upon it.<sup>25</sup> Let us say I decide to start a photography business. My "costs" include not just the time and money I put into that business, but also the profits I would have earned if I had devoted my resources to writing a steamy romance novel instead. These unrealized benefits (whatever they would have been) are not as visible and consequently not as quantifiable as the debits in my checkbook reflecting the purchase of cameras and film, but they are just as real – just as much "costs" – as the more visible expenditures. And insofar as I fail to take them into account in making a business decision, I am behaving "irrationally." I am being a foolish businessperson, in other words; I am failing to achieve my purpose of maximizing economic gain.

<sup>23</sup> Quoted in WALTERS, *supra* note 14, at 66.

<sup>24</sup> I will usually use the term "loss" in this essay in the way in which lawyers speak of "lost profits" – that is, as including failures to realize potential gains that would have been obtained, and not merely as the loss of already acquired "goods in hand." Readers who insist on a narrower usage and who associate the term "loss" only with the latter kind of misfortune – with "out of pocket" loss – are free to substitute some other term, such as "deprivation," "forfeiture," "sacrifice," "cost," or "failure to realize."

<sup>25</sup> For a brief explanation of the concept, see C. E. FERGUSON & S. CHARLES MAURICE, *ECONOMIC ANALYSIS: THEORY AND APPLICATION* 215-16 (3d ed. 1978).

To be sure, this kind of irrationality is pervasive. In a much discussed series of studies, psychologists Daniel Kahneman and Amos Tversky discovered that people respond very differently to objectively identical choices depending on whether the alternatives are described in terms of losses or, conversely, of unrealized potential gains. An option that people will reject when it is described as involving a loss, that is, will often be chosen when it is redescribed as a potential but unrealized gain.<sup>26</sup> Reactions to such choices thus depend heavily on "the vagaries of framing,"<sup>27</sup> and those vagaries in turn reflect the presence or absence of imagination in visualizing the goods in question – goods to be gained, or not gained, or lost – as real or merely possible. "An individual's experience of pleasure or frustration may therefore depend on an act of imagination that determines the reference level to which reality is compared."<sup>28</sup>

This observation resonates with everyday experience. The twenty-dollar bill that I touched, rubbed, and put into my pocket entered into my consciousness and figured in my plans: so I feel its loss. But the largish green bill that I failed to notice (or knew about but never actually held or owned) was not part of my life anyway, so I am less inclined to miss it. "Out of sight is out of mind." Appreciating the loss involved in a potential but unrealized gain would require a conscious act of *imagination*, a picturing of *what could have been*, while the loss of what was already ours requires no similar mental effort. The difference in required mental effort produces the kind of distortions in judgment that Tversky and Kahneman describe as "biases of imaginability."<sup>29</sup>

So one might say that "reason" is the slave not (or at least not only) of the "passions," as Hume famously observed, but of "imagination." Pascal remarked in this vein that imagination is "the dominant faculty in man, master of error and falsehood," against it, "[r]eason may object in vain."<sup>30</sup> A corollary is that rationality is constrained by *lack* of imagination. Thus,

[w]ho would think himself unhappy if he had only one mouth and who would not if he had only one eye? It has probably never occurred to anyone to be distressed at not having three eyes, but those who have none are inconsolable.<sup>31</sup>

These reflections may help to account for our subjective reactions to different forms of lost value. But they do nothing to show that the failure to

<sup>26</sup> Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, SCI. AM., Jan. 1982, at 160.

<sup>27</sup> *Id.* at 172.

<sup>28</sup> *Id.* at 170. See also POSNER, *supra* note 1, at 20 (footnotes omitted):

[W]e are prone to succumb to the "endowment effect" – valuing what we have more than we would value the identical thing if we didn't have it. For example, we might refuse to sell for \$100 a wristwatch for which we would not pay more than \$90. We also engage in "hyperbolic discounting"; that is, we weigh present pains and pleasures more heavily than future ones to a degree that is irrational, as when we overeat (present pleasure) knowing that we will soon regret it (future pain). We also give too much more weight to immediate vivid impressions than to what we read about (the "saliency heuristic").

<sup>29</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 47-48 (Hal R. Arkes & Kenneth R. Hammond eds., 1986).

<sup>30</sup> BLAISE PASCAL, PENSEES 38-39 (number 44) (A.J. Krailsheimer trans., Penguin ed. 1966).

<sup>31</sup> *Id.* at 59 (number 117).

realize a potential benefit is not a real loss – or to negate the observation that ignoring such benefits in our calculations is a kind of irrationality. Nor is it to the point (though it is probably accurate) to say that “objective” gains or losses in *economic* value may not correlate with gains or losses in “subjective” or *actually experienced* happiness; that is because the logic of unrealized value applies in either domain – the “objective” or the “subjective.” An unrealized (subjective) happiness that “might have been” is still a loss of happiness, that is, even for one who did not contemplate the possibility of what went unrealized – just as the (objective) loss of a twenty-dollar bill that we did not notice is a loss of twenty dollars. In each case the loss is real, even if we are not aware of it.

With this logic in mind, let us return to the problem of “potential persons.” The “persons and rights” approach assumes that personhood is a valuable good – indeed, a good so valuable that adjectives like “sacred” or “infinitely precious” are commonly invoked to give a sense of its magnitude. Moreover, it is surely not merely “personhood” as some sort of ethereal or abstract universal that is deemed valuable, but rather *persons* – or the instantiation of personhood (person by person) in individuals. Each individual person is a separate locus of value, so that the loss of any person (through untimely death, for example) is a loss of that value – even when there is no overall shortage of persons.

These observations are mundane enough. But now the logic of unrealized value kicks in to suggest that if personhood is a valuable good, and if each individual person reflects distinct and “infinitely precious” or “sacred” value, then every failure to realize that value is as much a loss as the extinguishing of an existing instantiation of personhood. The failure to bring into being a person who *could have* enjoyed existence (but did not) represents a loss just as real as that entailed by the termination of a person who *could have continued* to enjoy existence but does not (through untimely death). Indeed, if anything the former loss is *greater*, because total, than the latter.

To be sure, this conclusion still may not permit us to say that potential or “proximate persons” have the *rights* enjoyed by actual persons already in being. But the conclusion does let us say something that seems to have approximately the same practical and moral force: that there is a huge moral loss, a sort of moral catastrophe, in choices that prevent the “sacred” or “infinitely precious” value of a person from being realized.

### III. RIGHTS AND THE MORAL IMAGINATION

Why then do we rarely lament or even notice this loss of value? One reason, most likely, is that to accept the logic of unrealized value in this domain would have very disturbing implications. Some of these implications are probably already apparent. I will consider them shortly, and so I ask you to defer those difficulties for a moment. For now, let us notice one powerful reason for our failure to notice this problem: as a psychological matter we are subject in this context to the same limitations that we have already noticed in more mundane domains. That is, the person who is born and lives for a time is readily visible; she becomes a part of our world and our life, and so when she dies we notice and lament her absence. By contrast, it would require an act of imagina-



tion to appreciate the value that could have been realized with a potential person who never actually came into living, breathing existence. Rarely do we exercise that sort of imagination.

In this respect, our failure to lament the non-existence of potential persons is akin to the familiar phenomenon whereby we overlook or devalue the lives and deaths of persons not readily present to us *as persons* – foreigners, or enemy soldiers or civilians in war, or members of racial or socioeconomic classes removed from our own.<sup>32</sup> Nazi concentration camp officials devised a variety of techniques to avoid noticing that the subject matter of their genocidal activities consisted of *human beings*; they concentrated on describing and viewing their actions in terms not of “killing” but rather of “checking lists, driving vehicles, flipping switches, giving instructions, and the like.”<sup>33</sup> In this way they were often able to look past the humanity of their victims, and thus to live what were in many other respects regular and even decent lives in relative equanimity.<sup>34</sup> “Out of sight is out of mind.”

This observation permits us to appreciate a different dimension of the discourse of “rights.” As discussed above, one motive for adopting the “persons and rights” approach is the desire to avoid the morally monstrous consequences that might attend a straightforward utilitarian approach to moral questions. But a discourse of rights has its own morally numbing propensities. Insofar as we treat “rights” as something attaching to a restricted class of existing “persons,” a focus on “rights” allows us to insulate ourselves against the fact of losses in value, losses that might amount to moral catastrophes, because those losses do not come attached to any “person” within the restricted class.<sup>35</sup> So slaves may suffer, foreigners may starve, and animals may be afflicted with awful cruelties; but these losses can be depreciated or ignored because the sufferers do not belong to the class of those who enjoy “rights.” Neglect of the loss of value associated with “potential persons” seems to be an even more momentous manifestation of the capacity of a focus on “rights” to deaden our moral sensibilities.

I have been suggesting that our failure to appreciate the colossal loss associated with unrealized “potential persons” reflects a failure of our moral imagination. But in this case the failure is so severe – so overwhelmingly successful, so to speak – that it is difficult even upon reflection to accept the logic of unrealized value in this context. We are tempted to believe that there must have been some mistake, or some conceptual confusion in the preceding analysis of the problem. Some theorists, Ronald Dworkin for instance, assert that there *is* a conceptual flaw in the analysis. So before proceeding, it is worth

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<sup>32</sup> See ROY F. BAUMEISTER, *EVIL: INSIDE HUMAN VIOLENCE AND CRUELTY* 314-16 (1999).

<sup>33</sup> *Id.* at 339.

<sup>34</sup> Rudolph Hess and Albert Speer were notorious examples of people who, by adopting techniques to avoid noticing the humanity of their victims, were able to combine the incongruous roles of mass executioner and loving family man. *Id.* at 336-37; MIKE W. MARTIN, *SELF-DECEPTION AND MORALITY* 38 (1986).

<sup>35</sup> Cf. Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 69, 72 (1990) (contrasting “the atomistic focus on rights characteristic of Western liberal legalism” with a “Havelian” emphasis on “living in truth” – an ideal that would foster the “communitarian virtues of compassion, sympathy, fellow-feeling, and love”).

retracing our steps to see whether the path really leads to the current embarrassment.

#### IV. LOGIC AND PERSONS

Consider three likely objections to the foregoing argument. The first two objections can be addressed quite quickly, I think; the last requires lengthier consideration. One objection insists that the value of "persons," unlike the value of the sorts of "opportunity costs" economists usually consider, is not quantifiable in dollars, or in numbers. This assertion seems right, but also irrelevant. There is an understandable reluctance (which I entirely share) to quantifying the value of a person, or to treating a person as a "commodity."<sup>36</sup> But nothing in the logic of unrealized value depends on whether or how a particular unrealized value can be quantified; what is crucial, rather, is only that what goes unrealized *is* something of value. A valid analytical point does not lose its force merely because economists, or consequentialists, happen to acknowledge and use it. So you can apply whatever concept or adjective you like to describe the value of a person ("sacred," or "infinite," or whatever label seems appropriate). The fact remains that when a person who could have come into existence does not, that value remains unrealized. And unrealized value, by whatever label, is a real loss.

Ronald Dworkin attempts to deflect the logic of unrealized value with a different argument, which consists of a distinction supported by examples. More specifically, Dworkin distinguishes between "instrumental value" and what he calls (somewhat oddly<sup>37</sup>) "sacred" value. His highly idiosyncratic definition of "sacred" value is crucial to his argument.

The hallmark of the sacred as distinct from the incrementally valuable, is that the sacred is intrinsically valuable *because – and therefore only once – it exists*. It is inviolable because of what it represents or embodies. It is not important that there be more people. But once a human life has begun, it is very important that it flourish and not be wasted.<sup>38</sup>

Dworkin goes on to support this distinction by offering examples of various good things – great paintings, great lives, national flags – which we value when they exist even though we may not want more of them. For example, he declares: "I do not myself wish that there were more paintings by Tintoretto than there are. But I would nevertheless be appalled by the deliberate destruction of even one of those he did paint."<sup>39</sup>

This pronouncement amounts to a flat denial of the logic of unrealized value within the realm of what Dworkin calls the "sacred." But Dworkin does

<sup>36</sup> See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 56 (1996) (arguing that "[t]o understand [the qualities of personhood] as monetizable . . . is to do violence to our deepest understanding of what it is to be human"). Cf. Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 775 (1987) (arguing that "applying a market value approach to such matters merely appears grotesque or obtuse").

<sup>37</sup> For a critical examination of Dworkin's use of the term "sacred," see MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS* 25-29 (1998).

<sup>38</sup> DWORKIN, *supra* note 12, at 73-74 (emphasis added).

<sup>39</sup> *Id.* at 74.

not identify any error or limitation in that logic. Rather, his argument amounts to an attempt to defeat the logic of unrealized value by definitional fiat – by simply declaring into existence a kind of good that is said to be valuable only if and because it has been realized. Dworkin provides no reason to believe, however, that goods with this peculiar quality exist; he offers no account of how or why something would be “valuable because, and therefore only once, it exists.”

Nor do Dworkin’s examples strengthen his case. We can take it as a true report, I suppose, that Dworkin himself would be appalled by the loss of an existing Tintoretto painting but cares not at all that Tintoretto did not leave us with more paintings. In the same way, we can take it as a true report that many people regret losing a twenty-dollar bill they already had but do not regret failing to notice the bill they could have had – or that the less than astute business person notices the “out of pocket” costs but not the “opportunity costs” of his or her business. As noted, the phenomenon is perfectly common, and it simply reflects what Tversky and Kahneman call “biases of imaginability.” Moreover, this is a bias that many people manage to overcome. It is hardly uncommon for people to lament, for example, that Mozart or Chopin died at such young ages, thereby depriving the world of masterpieces that they might have composed.

A more challenging objection would acknowledge the force of the logic of unrealized value with respect to many potential but unrealized goods – Tintoretto paintings for example – but deny that this logic can properly be applied to potential but unrealized *persons*. Value, the objection asserts, does not exist impersonally or in the abstract. Rather, value exists only *to persons*.<sup>40</sup> “A good state of the world must be good to *someone*,” as Arthur Leff argued.<sup>41</sup> So, the failure to realize a business profit, or the premature death of a Mozart, represents a real loss because the unrealized potential goods – more money, more symphonies – are losses to persons – or *to us*. But the failure to bring potential persons into existence is not a real loss because the persons in whom value would have adhered are not real; they are mere abstractions, or illusions.<sup>42</sup>

Though some thinkers have resisted the premise of this objection – namely, that we can only talk meaningfully about value to persons<sup>43</sup> – the premise seems to me sound. Indeed, I have elsewhere argued for it.<sup>44</sup> But the conclusion seems a *non sequitur*. After all, the potential goods that we are considering *are* (potential) persons. There should be no difficulty in accepting, first, that those persons (or some of them) *can* as a practical matter be brought into being and, second, that *if* they are brought into being then they will have

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<sup>40</sup> The objection would be unaffected, I think, by expanding the category of “persons” to include animals, for instance, or perhaps “sentient beings.”

<sup>41</sup> Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1239 (1979).

<sup>42</sup> I am grateful to Michael Perry, who in correspondence has vigorously pressed this objection. I have tried to state the objection as accurately as I can even though, obviously, I remain unconvinced by it (and perhaps have not fully understood it).

<sup>43</sup> See, e.g., Michael S. Moore, *Good Without God, in NATURAL LAW, LIBERALISM, AND MORALITY* 221, 238-41 (Robert P. George ed., 1996).

<sup>44</sup> Steven D. Smith, *Review Essay: Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM. J. JURIS. 299, 310-16 (1997).

value. It follows of necessity that if they are *not* brought into being, that value will go unrealized.

Suppose we have a choice between *a* and *b*; *a* but not *b* will produce result *X*, which (at least once *X* is realized) will admittedly have value. It follows that choice *a* will produce the value associated with *X*, and there is no way to avoid the conclusion that choice *b* will entail the loss of that value. If *X* is a person, and if choice *b* represents a choice not to bring that person into existence, then there is no avoiding the conclusion that the value of *X* has been lost.

In this respect it is misleading to say that *X* (or the “potential persons” that we could choose to bring into existence) are mere abstractions. In a sense they *are*, at present, abstractions – just as *all* realizable but unrealized goods are abstractions. The crucial point is that these are abstractions that *can be made real*. So in acting to avoid realizing those abstractions, we inescapably lose the value associated with them.

In sum, there seems no good way of deflecting the logic of unrealized value in the context of potential persons. Nonetheless, I expect that this logic will continue to seem counterintuitive. The objection that potential persons are mere abstractions, though it does not defeat the logic of unrealized value, surely does identify a limitation in our ability imaginatively to apprehend what is at stake. And my own discussion to this point may have inadvertently reinforced this tendency to discount or ignore the losses of value that can be perceived only by an (uncommon and difficult) act of imagination. My discussion, that is, has employed bland or abstract terms – *as*, *bs* and *Xs*, “instantiations of personhood,” “unrealized value,” “losses,” “opportunity costs” – and this bloodless vocabulary might tempt us to dismiss the argument thus far as a merely “theoretical” or “academic” point (and a very counterintuitive point at that). Before proceeding with the argument, therefore, it may be helpful to consider the problem in a more concrete and human context in which we sometimes *do* at least come close to appreciating the staggering loss associated with unrealized “potential persons.”

## V. WHAT MIGHT NOT HAVE BEEN

I have argued above that we often fail to appreciate the logic of unrealized value, especially the unrealized value of potential persons, because we usually do not engage in the imaginative appreciation of what “might have been.”<sup>45</sup> But we come close to such an imaginative exercise with a more familiar sort of counterfactual reflection that is easier to perform. We sometimes pause to reflect, that is, about what “might *not* have been.” With considerable uncertainty, maybe, you decide to take a job in Peoria rather than one in Cleveland, and as a result you meet someone who becomes a close friend, or perhaps even your spouse. Every once in a while, perhaps, you find yourself wondering, “What if I hadn’t taken that job . . . ?” And so you imagine your life unfolding

<sup>45</sup> Occasionally we *do* engage in this sort of exercise. As I was completing this essay, I happened to see the movie “The Family Man,” in which the character played by Nicholas Cage engages in just the sort of counterfactual imagination I am interested in here.

without that person, and you ponder what a wealth of experience and understanding and mutual affection would have been missed.<sup>46</sup>

To be sure, this sort of familiar reflection still falls far short of the kind of imaginative exercise required to appreciate the unrealized value associated with potential persons. The person you would not have met if you had moved to Cleveland would still have *existed*, after all, even if *you* had never met him. Moreover, by taking the Cleveland job you would probably have met other people who might have become friends. Perhaps your life would have been even happier with them.

So do we ever engage in reflection about the lost value associated with a person who might never have existed at all? Rarely, I suppose; but we sometimes do this. One not so fanciful case begins with a couple trying to decide whether to have a child. *Ex ante*, the couple may think about the question largely in terms of costs and benefits to themselves. These costs and benefits will inevitably be abstract. They include the reputed joys of seeing a child grow, taking care of her, teaching her, playing with her. But these anticipatory joys will have a hazy, impersonal aspect; there is no actual child with a particular giggle, with dimples and unruly hair and a homely toothless grin, for the couple's reflections to distill around. On the debit side, there will be expenses and time commitments, not to mention unpleasant things like diapers and lost sleep and, later on, quarrels and loud music with screeching electric guitars. Though in some respects more susceptible to quantification, these prospective burdens are likewise, for the most part, indistinct and immune to measurement.

Suppose that the couple decides, with deep misgivings perhaps, to have a child. Ten or twenty years pass. What began as an *ex ante* assessment of indistinct benefits and burdens now assumes a totally different aspect. In part, of course, the difference is that both the costs and benefits are now much more concrete. They will almost certainly be completely different in magnitude from what was anticipated: both benefits and burdens, joys and sorrows, will likely far outstrip anything the couple could have anticipated. And the relative proportions of each may be different as well.

But these observations fall far short of capturing the radically different aspect of the *ex post* reflection. Now, if the parents pause to think about the matter, it will be wonderfully (or perhaps painfully) clear that it is not simply a question of value *to them*. Now there is another, real person in the picture – a person who is, once again, “sacred,” or “infinitely precious.” If the couple had invested in IBM and the investment had turned out to yield consistent losses, they could have unloaded it without compunction. But they would be aghast if anyone were to suggest similar loss cutting with a child who turns out (if they are candid) to bring more sorrow than joy. Such an action would be unthinkable – *not* just because the law creates obstacles or because the child has “inter-

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<sup>46</sup> Of course, the personal relationship that “might *not* have been” sometimes involves current, acute misery, not realized happiness. (“If only I hadn’t gone to that party, . . . I’d never have met the creep.”) Indeed, some studies suggest that “counterfactual thinking is more likely to follow negative outcomes than positive outcomes.” Neal J. Roese & James M. Olson, *Counterfactual Thinking: A Critical Overview*, in *WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING* 1, 19 (Neal J. Roese & James M. Olson eds., 1995).

ests” or “rights,” but because such an action would be a moral atrocity. It would be an absolutely unconscionable negation of value – of the value that we try to express with terms like “sacred” or “infinitely precious.”

Yet it is true that this same sacrifice of value would have occurred if, ten or twenty years earlier, the parents had decided (as perhaps they almost did – or ineffectually did) not to have the child in the first place. Some parents do on occasion think back and wonder, perhaps with a mixture of horror and relief, “What if we’d decided not to have her . . . ?” (Or, perhaps, “Imagine, if we’d been more careful . . . ?”) And for a moment they glimpse the possibility of a different unfolding of events – one in which not only their own lives but indeed the cosmic economy itself may seem incomparably poorer, tragically bereaved.

This tragic counterfactual might easily have been the actual, of course, and if it had been they conceivably might now ask the converse counterfactual question: “What if we’d decided to have a child . . . .” Realistically, though, this counterfactual question about “what might have been” is less likely to arise, or to arise with any vividness of feeling, because the potential value that was there to be realized or, as things in fact turned out, not realized is harder to imagine and appreciate in that context.<sup>47</sup> Once again, it is far easier to visualize what was at stake when the concrete particulars – the first steps and the birthday parties and the heart-to-heart talks – are actual memories and not just conceptual possibilities.

This is why the occasional counterfactual reflection of the parents who might not have been parents is helpful, I think – because it may be easiest in that context to appreciate that the logic of unrealized value is not merely an abstract academic point, even (or perhaps especially) where persons are concerned.

## VI. INTOLERABLE IMPLICATIONS

The argument thus far has suggested that the logic of unrealized value, which we readily accept in more mundane contexts, applies with equal force to the issue of “potential persons,” and that this is not merely an academic point but rather a valid one that in some contexts we actually come close to appreciating. But I have been deferring the really difficult problem – which is that in this context the logic of unrealized value also appears to have implications that no one (not even the most extreme or deeply committed pro-life activist) seems prepared to accept.

Probably the most immediately obvious implication is that abortion, at any stage of pregnancy, is as much a deprivation of the sacred value of life, and so presumably as immoral, as the killing of a child (or, for that matter, the killing of a teenager or an adult). Some “pro-lifers” already believe this, of course. But notice that from this perspective the immorality of abortion does not rest on the more common argument that a fetus has the full genetic endowment of a human being and hence is a “person.” Abortion is immoral, rather, because *whether or not* we classify the fetus itself as a “person,” the occurrence of an

<sup>47</sup> Cf. *id.* at 29 (describing research indicating that “it is easier to generate counterfactuals based on the deletion of a factual action than it is to imagine an action that was not in fact performed”). But cf. *id.* at 30-31 (discussing complexities and contrary data).

abortion prevents the realization of the "sacred" or "infinite" value of a human person.

For many, this conclusion will already provoke ardent resistance to the logic of unrealized value in this domain. But of course that logic produces the same disquieting conclusion when it is applied to the question of contraception. Contraception, that is, prevents a person who could have come into existence from doing so, and thereby results in the loss of the value of a person. So if the logic of unrealized value erases the moral line between abortion and infanticide, it wipes out the moral line between abortion and contraception as well. Contraception, it seems, is as immoral as abortion.

Even pro-life advocates who already equate abortion with infanticide may balk at this further implication. But the argument has not yet run its troublesome course. We might pause to admire the absurdities (or what to our conventional assumptions and common sense will seem absurdities). By the logic of unrealized value, every time a human being *could* but deliberately does not act so as to bring a new person into existence, he or she makes a conscious choice in favor of the same sacrifice of value that occurs when someone dies or is killed. Suppose you and your partner decide to have only two children, or only twelve, when as a matter of physical possibility you could have more: you have brought about the same diminution of value as a murderer does. Or you decide not to be a parent in order to devote yourself to pursuing the life of an artist, or a scholar, or a priest; your decision makes you responsible for the same sacrifice of "sacred" or "infinite" value, the same moral calamity as someone who throws a bomb into a crowded room. Celibacy becomes as morally costly as serial murder.

To be sure, even the logic of unrealized value would have *some* limits in this realm. At some point – and people will disagree about when that point is reached – the earth would become so saturated with human beings that not one could be added without subtracting someone else. At that point the moral duty to procreate would end. But it seems clear that no one, not pro-lifers or the most conservative Catholics, will endorse a duty that comes anywhere near such a "break even" point.<sup>48</sup> In short, no one seems willing to follow the logic of unrealized value to its logical conclusion, or even to follow it very far along its route.

So what should we make of this awkward situation? It would seem intellectually lazy and morally irresponsible just to remark that no one accepts the results of this logic and then leave the matter at that. After all, we *do* acknowledge the force of the logic of unrealized value in many contexts. To be sure, we understand that due to "biases of imaginability" people often fail to appreci-

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<sup>48</sup> In addition, as noted, we do not in fact treat life, or persons, as *infinitely* valuable; rather, we make trade-offs between lives and other kinds of goods. See *supra* note 13. The present argument does not speak to whether or how such "life vs. other values" trade-offs should be made. The argument suggests only that when and if such trade-offs occur, there is no adequate justification for ascribing high value to persons-in-existence while ignoring (or ascribing minimal value to) unrealized but realizable persons. But even this conclusion is radically incongruent with our usual approach to such matters: people who regard the achievement of an optimal population level through the use of contraceptive measures as morally unproblematic would likely be horrified at the suggestion that the same optimum level be reached by liquidating the "excess" population.

ate or act on that logic; but we say these biases produce distortions in judgment.<sup>49</sup> So how do we account for our flagrant defiance of the logic of unrealized value here?

## VII. BLOCKED ESCAPE ROUTES

It would be tempting at this point to retreat into the safe, reassuring discourse of "persons and rights." So we might just reiterate that "potential persons" have no "interests," or no "rights."<sup>50</sup> But the discourse of "rights" does nothing to disclose any fallacy in the logic of unrealized value; it simply provides a convenient way of shifting our attention away from that disconcerting logic. As discussed earlier, moreover, we know that the discourse of rights *can* be used, and sometimes *is* used, to induce a kind of moral numbness.<sup>51</sup> So I submit that merely to assert at this point that "potential persons" have no "right" to life, or to be born, is simply to close our eyes to the problem.

Is there any other way to explain what is wrong with the logic of unrealized value as applied to potential persons? I think there is, but the possible explanations carry objectionable features of their own. For example, we might rethink and then relinquish our assertions about individual persons having "maximal moral status" or "sacred" value. These time-honored assertions might be reclassified as mere sentimental pieties, or as manipulative devices employed by some to secure their own interests in a world that is *really* a Darwinian struggle for survival.

We *could* solve the problem in this way. But nothing in the preceding discussion warrants this nihilistic conclusion. The discussion has emphasized what seems to be one major limitation or blind spot in the persons and rights approach, but it has not criticized that approach for its positive claims – for its claims, that is, that persons have sacred value, or that persons have rights. The criticism, in essence, has asserted that the persons and rights approach has failed to ponder its own commitments to persons seriously enough, *not* that those commitments are flawed in themselves. Hence, to respond to the predicament presented by "potential persons" by abandoning the commitment to the sacred value of persons would be like curing a problem of nearsightedness by gouging out our eyes.

There are also more exotic solutions to the problem of "potential persons." For instance, we might adopt the sort of mystical or pantheistic view, offered in different forms in religious texts like the *Bhagavad-Gita* and by philosophers like Spinoza, which suggests that even if *life* (or perhaps something like "being") has great moral worth, what we perceive as *individuals* (or individual "persons") are really evanescent manifestations or glimpses of some larger and unified being, like the sparkles of moonlight on a rippling lake. So whether any particular manifestation, any particular "person," comes into or passes out of existence seems of slight moral consequence.

Or we might avoid the problem by adopting the common belief in what might be called "the anterior substantial soul." We could hypothesize, that is,

<sup>49</sup> See *supra* notes 25-31 and accompanying text.

<sup>50</sup> Cf. DWORKIN, *supra* note 12, at 18-19.

<sup>51</sup> See *supra* note 35 and accompanying text.



that the soul is a sort of "spiritual substance," existing before birth and independent of the body, that joins with the body to form a person. On this assumption, it seems that decisions for celibacy or contraception do not prevent any potential person from coming into existence. Instead, these decisions mean that a soul that might have achieved personhood by joining with a particular body at one time and place will instead become a person by uniting with a different body at a different time and place. Such decisions have important consequences, to be sure: they alter the cast or at least the placement of characters in the human drama. But they do not prevent the realization of any person who might but does not achieve existence. Or, if you prefer, such actions prevent the realization of one particular person who might have existed, but in doing so permit the realization of a different person who otherwise would not have existed. So there is, so to speak, a sort of moral set-off.

These more exotic possibilities, we should note, have seemed plausible to millions or probably billions of people over the course of human history wholly independent of any concern about the conundrum we are considering here. For example, religions and philosophies that accept the idea of reincarnation – Hinduism, Buddhism, Platonism, and Pythagoreanism – have endorsed the idea of the anterior substantial soul. Nor is that notion necessarily tied to reincarnation. It might be that the soul exists before a person's conception and birth but that each soul passes through this temporal sphere only once, like a leaf that waits all summer for its one fluttering journey from branch to earth. The Mormon religion currently teaches something like this idea. And an occasional person will come to this conclusion without the assistance of any particular religious teaching. For example, through poetic reflection and introspection, William Wordsworth developed a conviction that "the soul that rises with us, our life's star, hath had elsewhere its setting, and cometh from afar"<sup>52</sup> (though in his later years, as he gravitated toward Christian orthodoxy, Wordsworth became more tentative about this assertion).<sup>53</sup> Any of these positions would avoid the conundrum under consideration here – and without defying the logic of unrealized value or denying that logic's application to persons.

Still, the plain fact is that these solutions will be unacceptable in our current academic environment, which rigorously (if sometimes witlessly) enforces the law of parsimony in metaphysical matters. Almost a century ago, William James observed that "souls are out of fashion,"<sup>54</sup> and the dictum still holds. For example, the idea of the anterior substantial soul seems unavoidably to entail "substance dualism," and as Richard Swinburne observes, "few philosophical positions are as unfashionable as substance dualism."<sup>55</sup>

So although most people in the world's history might have had easy ways to avoid the conundrum of "potential persons" (and although even now most people not burdened by the metaphysical restrictions that obtain in academic

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<sup>52</sup> William Wordsworth, *Ode: Intimations of Immortality from Recollections of Early Childhood*.

<sup>53</sup> See MELVIN RADER, WORDSWORTH: A PHILOSOPHICAL APPROACH 166-74 (1967).

<sup>54</sup> Quoted in WILLIAM McDUGALL, BODY AND MIND xxiv (Bacon Press 1961) (1911).

<sup>55</sup> RICHARD SWINBURNE, THE EVOLUTION OF THE SOUL ix (rev. ed. 1997). Swinburne nonetheless defends that position, though perhaps not in a version that would avoid the conundrum of "potential persons" discussed here.

settings might have no difficulty with that conundrum), there is no very convenient way for academicians to avoid the difficulty.

### VIII. CONCLUSION: THE REIGN OF IMAGINATION

So what are we left with? It seems to me that if we are candid, we should begin by acknowledging a profound dissonance – it might not be too strong to say a gaping incoherence – in our leading approaches to central moral questions. We concede and indeed proclaim the logic of unrealized value in many domains. We have no very good explanation for why that logic should not apply in the matter of “potential persons.” We nonetheless cannot accept the implications of that logic in this context. And we have no very satisfactory account that would reconcile these disparate convictions and judgments.

If this admission of incoherence in such central matters operates to shake our confidence in our prevailing ways of addressing vital moral questions, perhaps that would not be such a bad thing. In a related context, the philosopher Richard Swinburne suggests that “if in some sense it is a mystery how [the mind or soul relates to the body] . . . then we should be humble and accept that there just are some things we cannot understand. . . .”<sup>56</sup> Or, once again, Pascal: “Reason’s last step is the recognition that there are an infinite number of things which are beyond it. It is merely feeble if it does not go so far as to realize that.”<sup>57</sup> If that recognition meant that academicians became less self-assured about writing prevailing moral theories into “philosophers’ briefs” to be submitted to the Supreme Court (directly or indirectly, through legal scholarship), or that the Court became a bit more hesitant than it sometimes has been about forcibly imposing the conclusions of those moral theories on society, those results might not be such a bad thing either.

More generally, the failure of our moral theories with regard to the momentous problem of “potential persons” might lead us to question the entrenched assumption, central to moral theories of both the consequentialist and Kantian varieties, that our central and defining feature is “reason,” or that our species is cogently described as that of the “rational animal.” It may be time to cope with the fact that, as Pascal said, we seem to be driven less by reason than by imagination.

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<sup>56</sup> *Id.* at xiii.

<sup>57</sup> PASCAL, *supra* note 30, at 85 (number 188).