

THE POSITIVE AND NEGATIVE RIGHTS OF PRE-NATAL ORGANISMS AND INFANTS/CHILDREN IN VIRTUE OF THEIR POTENTIALITY FOR AUTONOMOUS AGENCY

ANNA-KARIN ANDERSSON

Stockholm University

Abstract. In this paper, a rights-based argument for the impermissibility of abortion, infanticide and neglect of some pre-natal organisms and infants/children is advanced. I argue, in opposition to most rights-ethicists, that the potentiality for autonomous agency gives individuals negative rights. I also examine the conjecture that potential autonomous agents have positive rights in virtue of their vulnerability. According to this suggestion, once an individual obtains actual autonomous agency, he or she has merely negative rights. Possible solutions to conflicts of rights between parents and their offspring are investigated. Finally, I discuss a lexical order between positive and negative rights, which may solve conflicts between the rights of potential autonomous agents and actual autonomous agents.

In this paper, I will examine the following hypothesis: pre-natal organisms, from conception, as well as infants/children, have negative rights not to get killed and positive rights to the means necessary for them to develop autonomous agency. Actual autonomous agents have, according to this suggestion, merely negative rights. The pre-natal organism or infant/child has, according to this suggestion, positive and negative rights in virtue of his or her possessing certain properties to be specified in short.

The basic normative outlook of this paper is a libertarian theory of negative claim-rights, which, as will be seen, allows for certain positive claim-rights of potential autonomous agents. The scope and strength of these rights will become clear as the argument proceeds.

My discussion of the arguments for and against these claims will proceed in the following way. In section I, I suggest, in opposition to most rights-ethicists, that potentiality gives individuals negative rights. I discuss an objection to this claim advanced by Michael Tooley, and argue that the objection can be met by formulating a proper characterization of potentiality in the morally relevant sense. In section II, some further rights-based arguments for and against the claim that potentiality gives individuals negative rights are discussed. In section III, I investigate whether potential autonomous agents have positive as well as negative rights, while actual autonomous agents have negative rights only. In section IV, I discuss ways of resolving conflicts of rights between pre-natal organisms or infants/children, and their parents, and then I summarize the conclusions of the paper.

I. Negative rights in virtue of the potentiality for autonomous agency: Characterization of potentiality in the morally relevant sense

The first conjecture to be defended in this paper is that pre-natal organisms and infants/children have negative rights not to get harmed or killed, in virtue of their potentiality for autonomous agency. Rights-ethicists have denied this claim. Michael Tooley, for example, has pointed out in *Abortion and Infanticide* (1983) that objections to abortion which claim that abortion is wrong because it destroys a potential person must rely on a precise and non-arbitrary characterization of the concept „potentiality” in order to be understandable and able to be evaluated. In addition, the characterization must apply to „normal human fetuses”. Tooley uses the term „foetus” as including all pre-natal organisms. Tooley claims that since any of several possible characterizations of potentiality necessarily are either arbitrary or vague, or do not apply to normal human fetuses, this „raises doubts” regarding the moral importance of potentiality.

Tooley discusses three characterizations of potentiality for personhood, to be labelled as follows: active potentiality, latent potentiality, and passive potentiality. He argues that the concepts „active potentiality” and „latent potentiality” do not apply to the pre-natal organism, and that the concept „passive potentiality”, though applying to the pre-natal organism, is either arbitrary or vague.

Tooley characterizes „active potentiality” in the following way:

An entity may be said to have an active potentiality for acquiring some property P if there are within it all the positive causal factors needed to bring it about that

it will acquire property P, and there are no other factors present within it that will block the action of the positive ones (Tooley 1983, p. 167).

Several difficulties are involved in attempts to formulate a sharp distinction between obstacles „within” and obstacles outside of the pre-natal organism. One such problem is determining whether only defects within the pre-natal organism as such ought to be considered as internal obstacles, while defects in the umbilical cord, the placenta, or the circulation of the blood of the mother ought to be considered as external obstacles.

I believe it is reasonable to claim that the umbilical cord and the placenta are parts of the organism, for the following reasons: (1) they are carriers of the same genetic code. (2) the rest of the organism develops out of the cells that constitute the umbilical cord and the placenta. (3) at least at early stages of the organism's development, removing the umbilical cord and the placenta will deprive it of something that it cannot survive without (unless the umbilical cord and the placenta could be replaced with something that filled their functions). All this supports the claim that the umbilical cord and the placenta are temporary organs of the organism. Therefore, defects in the umbilical cord, the placenta, or the circulation of the blood of the mother ought to be considered as internal obstacles. Since the circulation of the blood is part of the umbilical cord and the placenta, defects in it are defects within the pre-natal organism as well.

Someone might object that cases of twinning, where two organisms share a placenta, constitute counterexamples to the claim that the placenta is part of the organism, since it cannot be decided which part of the placenta belongs to which twin. But such cases do not undermine my conclusion; Siamese twins sometimes share certain organs, but there is no doubt regarding whether their shared organs are parts of them; the organs belong to both.

It seems, however, as if I have only moved the difficulties to another level. How ought the distinction between internal and external factors causing defects in the mother's blood, the umbilical cord and the placenta to be formulated? If the defects in the blood, the umbilical cord and the placenta are caused by, for example, drugs, alcohol or violence, I am inclined to classify such obstacles as internal obstacles for the pre-natal organism, caused by external factors. My reason for doing so is the fact that the damage resulting from such factors is not the result of a normal development of the mother or the pre-natal organism. However, once the pre-natal organism is harmed by such external factors, internal obstacles are present.

Tooley characterizes „latent potentiality” in the following way: „It has a latent potentiality if all of the positive factors are present within it, but

there is some feature of it that will block the action of those factors.” (Tooley 1983, p. 167).

Tooley characterizes „passive potentiality” as follows: „Finally, it has a passive potentiality for acquiring property P if other things could act upon it in such a way as to bring it about that it acquires property P. (Tooley 1983, p. 167).

Having made these distinctions, Tooley suggests that the claim that a pre-natal organism has active, latent, or passive potentiality is problematic. The pre-natal organism cannot, according to Tooley, be considered as possessing active potentiality or even latent potentiality, since nourishing during pregnancy and childhood is necessary in order for it to develop into an actual person.

Tooley discusses the difficulties involved in characterizing potentiality in terms of the concept „passive potentiality”, which he considers to be the remaining option once the applicability of the concepts „active potentiality” and „latent potentiality” has been rejected:

Passive potentialities include cases ranging from, at the one end, «almost active» potentialities, where almost all of the positive factors are present in the entity, and very little has to be added, through to cases, at the other end, of almost totally passive potentialities, where nearly all of the relevant factors have to be added, and where there is little more than bare receptivity to change imposed from without. To characterise potential persons as entities that have a passive potentiality for becoming persons would have the consequence that random collections of matter that could, with sufficient knowledge and technological advances, be transformed into human organisms would have to be classified as potential persons (Tooley 1983, pp. 167-168).

Tooley concludes that an attempt to characterize potentiality in terms of the concept „passive potentiality” leaves us with two unattractive options: either we must arbitrarily „pick out a certain range of passive potentialities, toward the active potentiality end of the spectrum, and define the concept of a potential person in terms of that”, or stay content with „a vague characterization of the range” (Tooley 1983, p. 168).

Tooley leaves us with the following challenge: if a characterization of potentiality for being a person necessarily is either precise but arbitrary, or vague, „doesn’t this raise doubts with regard to the contention that these notions are morally important?” (Tooley 1983, p. 168).

According to Tooley, is „sufficient to make something a person” though „the claim that this property is necessary does not seem very plausible”

(Tooley 1983, p. 142). For this reason, his distinctions within the concept „potential person” seem to apply to potentiality for autonomous agency as well. Hence, the criticism above hits the concept „potentiality for autonomy” and the concept „potentiality for personhood” with equal force.

I agree that a precise and non-arbitrary characterization of potentiality is necessary in order for arguments relying on an idea of the moral value of potentiality to be comprehensible. I will, however, argue that Tooley is mistaken in claiming that a characterization of potentiality in terms of the concept „passive potentiality” is either arbitrary or vague. The arbitrariness as well as the vagueness can be avoided by formulating the *morally relevant* characterization of potentiality according to some normative theory. After detecting what properties the normative theory of our choice considers as potentiality in the morally relevant sense, we can conclude that potentiality in the morally relevant sense occurs at the stage of development of the organism where the property in question occurs for the first time.

This procedure results in a precise characterization of potentiality, and, since it is motivated by a certain normative theory, it is no more arbitrary than is the choice of the normative theory itself.

The basic normative outlook of this paper provides part of such a morally relevant characterization. According to this normative outlook, certain properties (rights-ethicists differ regarding which these are) of an entity give it rights. The existence of rights presupposes bearers of rights. What entities qualify as bearers of rights? Nozick’s suggestion seems to be that a necessary, though not sufficient, criterion for being such a rights-bearer is being an organism (Nozick 1974, pp. 38-39). Potentiality for autonomous agency of an organism occurs at conception. Therefore, one necessary, though not sufficient, criterion for potentiality in the morally relevant sense is met no later than conception.

Objections have been raised to the claim that a conceptus *is* an organism from conception rather than an entity that can *give rise* to an organism at a later stage of development. Also, it has been argued that potentiality in the morally relevant sense occurs before conception. I will, examining the objections in the order stated above, argue that potentiality in the morally relevant sense occurs at conception.

It has been objected by Eric Olson that before the conceptus has attained a certain level of maturity, it is not an organism, but rather material that can give rise to an organism (Olson 1997, pp. 89-93). His reason for claiming this is that the organism „comes into being ... when the cells that develop into the foetus (as opposed to the placenta) become specialized

and begin to grow and function in a coordinated manner.” (Olson 1997, p. 91). I believe it is reasonable to claim that the umbilical cord and the placenta are parts of the organism, since they could plausibly be considered as organs of the organism. Other objections have been put forth within the extensive discussion regarding the criteria for personal identity. These objections deny that the organism can ever possess properties characterizing a person, since the organism and the person are numerically different. These objections rely on metaphysical assumptions that are in no way uncontroversial. I will, in the remainder of the discussion, assume that an organism can possess properties for personhood, or can have the potentiality for doing so.

Having argued that a necessary, though not sufficient, criterion for potentiality in the morally relevant sense is met at, but no later than, conception, I will now argue that there is no entity qualifying as a rights-bearer before conception. The following questions have been discussed thoroughly: couldn't *both* an unfertilized ovum and a sperm be considered as right bearers? Couldn't *either* the unfertilized ovum *or* the sperm be considered as a right-bearer? Couldn't the *collection* of the unfertilized ovum and the sperm be considered as a right-bearer?

Jim Stone argues in his 1987 article „Why Potentiality Matters” that an unfertilized ovum and a sperm cannot both be potential adult human animals, since „The sperm and egg cannot each be identical to the adult human being they produce, for then, by transitivity of identity, they are identical to each other, which is manifestly false” (Stone 1987, p. 816). I believe this is correct. Stone then examines the plausibility in claiming that either the sperm or the ovum is identical to the future adult human animal. Stone correctly notices that this claim faces severe difficulties.

[I]f the sperm is identical to the zygote it in fact produces (as it must be if it is identical to the adult the zygote produces), then (by parity of reasoning) the sperm would have been identical to this other zygote too. It follows (again by the indiscernibility of identicals) that the zygote the sperm actually produces is the zygote the sperm would have produced if it had penetrated a different egg. Plainly this is false. It follows that the sperm is not identical to the adult human animal either. The same reasoning applies to the egg (Stone 1987, p. 816).

Stone then examines the suggestion that the collection of the unfertilized ovum and the sperm is a potential human adult animal, and claims that it leads to bizarre consequences:

[I]t follows that this animal would have existed if the egg and sperm had found different partners. Given two sperms and two eggs we have four animals, only two of which can survive their initial stages. We are committed to the absurdity that the planet sustains billions of additional animals, each existing in a divided form from beginning to end, its cells having nothing to do with one another ever, and each cell part of countless other animals of the same kind. Plainly the human animal does not exist before conception: my body was once a fetus but never a sperm or an egg. Both the sperm and the egg can produce something which has potential of becoming an adult human being, but neither the sperm nor the egg has that potential itself (Stone 1987, p. 817).

The following objection could be raised against the claims advanced in the quotation above. One might argue that a collection of an ovum and a sperm do have rights if isolated and intended for fertilization. The possibility of them finding different partners is then eliminated. This suggestion avoids the problem of multiplied individuals. If such an isolated collection can be considered as a potential agent, it might have rights to the same extent as does the zygote. However, until fertilization is complete, the collection only consists of genetic material that can be used to produce a potential agent. The collection is not identical to the organism. I conclude that there does not exist an entity, which qualifies as a rights-bearer before conception.

Even if we accept that potentiality in the morally relevant sense occurs at conception, the existence of an organism is merely a necessary, not a sufficient, criterion for potentiality in the morally relevant sense. Potentiality, in addition, depends on the condition of the pre-natal organism. In order for the pre-natal organism to be considered as a potential agent, it must have capacity for following a path of normal development.

How ought we to understand the concept „normal development”? I will try to provide some precision to this concept by discussing a suggestion put forth by Stone in the article referred to above. He characterizes „normal development” in the following way:

Talk of normal development for an entity belonging to a biological kind presupposes the existence of a developmental path determined primarily by the biological natures of members of the kind to which the entity belongs, a path which leads to their adult stage. Further, talk of normal development presupposes that the particular entity in question has the nature sufficient to be the primary determinant of its following a path which leads to the adult stage of members of its kind (Stone 1987, p. 819).

A sperm, an ovum, or a hair-cell (unless cloned) do not possess „strong” potentiality, and cannot develop normally in the sense described above,

since they do not have „the nature sufficient to be the primary determinant” of their developing into an actual autonomous agent. None of them are „an instance of a human genetic code” that can be the primary determinant of the entity’s developing into an agent. The collection of an ovum and a sperm is the mere material for such an instantiation.

The meaning of the terms „primary determinant” is not obvious. A pre-natal organism carries a certain genetic code, which is a necessary but not sufficient factor for the organism’s developing actual autonomy. What gives the genetic code the status of „primary determinant” of the entity’s developing autonomy? Nourishment and proper surroundings for the organism are necessary factors as well. It seems reasonable to interpret Stone as understanding „primary determinant” as a distinguishing factor: nourishment and proper surroundings are necessary in order for any biological entity to develop while the genetic code determines at least some distinguishing features of the entity.

John Andrew Fisher argues in his 1994 article „Why Potentiality Does Not Matter-A reply to Stone” that the paths of development of an organism are indeterminate, not necessarily leading to a „unique and common result” such as possession of autonomous agency. Stone replies in his 1994 article „Why Potentiality Still Matters” that even though it is „causally possible” for the organism to „follow a range of developmental paths”, „one and only one goal-state is determined by the complete expression of the embryo’s genetic code” (Stone 1994, p. 285). Hence, if the pre-natal organism is genetically „pre-programmed” to develop autonomous agency, and it does develop autonomy because it is pre-programmed to do so, it develops normally.

This characterization of „normal development” does not exclude Chimeras, individuals with two genetically distinct types of cells, from the category of individuals who are capable of normal development. The combination of the distinct genetic codes is the primary determinant of the individual’s developing autonomous agency.

There are, however, cases where it seems difficult to determine whether the genetic code is the primary determinant of an individual’s developing autonomous agency. PKU (phenylketonuria) is a disorder of body chemistry that is inherited, and *if untreated*, or if proper diet is not provided, causes mental retardation. Ought the individual’s genetic make up to be considered as the primary determinant of his or her developing autonomous agency, or ought the treatment or diet that prevents mental retardation to be considered as the primary determinant of his or her developing autono-

mous agency? I tend to believe that the former is correct, at least in cases where a certain diet but no medication is required, since the effects of the genetic disorder are then *triggered* by external factors. I do not, however, rest any confidence in this conjecture. I suggest that even though it is, in some cases, difficult to determine whether the genetic make up is the primary determinant of the individual developing autonomous agency, the problem lies in the *application* of the view advanced in this paper, though it is not a problem for the view *itself*.

Dean Stretton argues in his 2003 article „The Deprivation Argument Against Abortion” that a computer with „a certain internal instruction set” built into it, determining it, will, if not interfered with and provided with „certain external materials”, be self-aware and classify as a mechanical nature possessing rights. If this were correct, being an organism would not be necessary in order to be a rights bearer. In order to be a rights-bearer, it would merely be necessary to be an entity that is the carrier of a primary determinant for developing autonomy. I do not find this implication counterintuitive, but will limit my discussion to organisms from here on.

Identical twins might pose a challenge to the claim that potentiality in the morally relevant sense exists from conception onward insofar as there exists an entity carrying a genetic code that is the primary determinant of the entity’s developing autonomous agency. If the conceptus develops into identical twins, is it then not reasonable to claim that the potentiality, in the morally relevant sense, possessed by each twin does not exist until the ovum is split? Before the split of the ovum, neither of the identical twins exists. Hence, the objection continues, it is morally permissible to abort the pre-natal organism before the split. It seems as if the conceptus merely provides the genetic material for two or more individuals, as do the ovum and sperm before conception. Does it then not follow that the rights of the conceptus are non-existent if it will split into identical twins? The answer to this question depends on whether the unprovoked split is pre-determined in the genetic code of the conceptus. If it is not, the conceptus has rights until the split is initiated. When the split is complete, the original organism is dead, and replaced with two new organisms. If the unprovoked split is pre-determined in the genetic code of the conceptus, it merely constitutes genetic material for the future twins, and holds the same moral status as sperm or an unfertilized ovum. A provoked split is always equivalent to killing the organism, and if it was not, at the time of the provoked split, genetically predetermined to split, splitting it would also be a violation of its rights.

I argued above that the pre-natal organism's being an entity with a capacity for normal development towards autonomous agency is a necessary criterion for a pre-natal organism's being a rights-bearer. Is it sufficient as well? I pointed out that nourishment and lack of harmful intervention are necessary in order for the pre-natal organism to develop actual autonomous agency. Lack of intervention and the presence of nourishment ought not to be considered as necessary in order for the pre-natal organism to *be* a potential agent in the morally relevant sense. Provided that it *would* develop autonomy, were it not interfered with and were it provided nourishment, it *is* a potential agent in the morally relevant sense. The pre-natal organism nevertheless has *rights* not to get harmed or killed, and has rights to the nourishment necessary for its developing autonomy. This claim requires thorough defence, to be elaborated below. I will continue my defence of the conjecture that the pre-natal organism has negative rights, and then argue that it has positive rights until the development towards autonomous agency is complete.

II. Arguments for and against the moral importance of potentiality

I will now propose that a valid argument for claiming that sleepers, or in other ways temporarily unconscious adults have rights refers to their potentiality, and that, since pre-natal organisms are similar to such adults in all relevant respects, pre-natal organisms too have rights in virtue of their potentiality. (Robert Howell has suggested that pre-natal organisms, sleepers, and in other ways temporarily unconscious adults, are similar regarding their possession of capacities. He argues that it is equally permissible *or* impermissible to kill a pre-natal organism and a sleeping adult. See Howell 1973, pp. 407-410). Tooley denies that pre-natal organisms as well as sleeping or temporarily unconscious adults possess a property that justifies them in having rights to an equal extent. He has argued that adult humans who are „temporarily unconscious”, in an „emotionally unbalanced state”, or have „been conditioned not to want the thing [e.g. survival] in question” (Tooley 1973, p. 419) are exceptions to the principle that only individuals actually possessing the morally relevant properties ought not to be killed. He argues that it is the fact that the temporarily unconscious person

had a desire to go on living during the interval immediately prior to that in which he is unconscious that makes it a violation of his rights to kill him while

he is unconscious. It is this feature that constitutes the central difference between a temporarily unconscious adult on the one hand, and a fetus or newborn baby on the other (Tooley 1973, p. 421).

Tooley qualifies this claim further by adding that it is also morally impermissible to violate certain future preferences of an individual who has, in the past, been an actual person. One may not expose such an individual, in the future, to certain behaviours that he or she would wish not to have been exposed to. It is also, according to Tooley, morally impermissible to harm a potential agent in a way that will cause him or her harm in the future, *if he or she survives and develops personality*. Killing a potential agent is, however, permissible at all times. He does not provide any argument for the claim that the property of having had certain capacities is more valuable than the property of having potentiality for the same capacities. Hence, he has not successfully argued that the property of having had certain capacities constitutes a morally relevant difference between sleepers or in other ways temporarily unconscious adults and pre-natal organisms.

I will now leave Tooley's argument, and discuss other possible objections to my thesis. Someone might argue that a morally relevant difference between sleepers or in other ways temporarily unconscious agents and pre-natal organisms is that if woken or brought to consciousness, the agent would possess the morally valuable property. This is not true of the pre-natal organism. Since the sleeping agent could, in Tooley's words, be considered as possessing passive potentiality „toward the active potentiality end of the spectrum” his or her rights might be more extensive than the rights of the pre-natal organism. This argument assumes that potentiality can be present to a higher or lower degree. It also assumes that a higher degree of potentiality in an individual justifies him or her in having rights to a greater extent than an individual possessing potentiality to a lesser degree.

Potentiality in the morally relevant sense exists when the entity would develop towards actual autonomy along a path pre-determined by the genetic code of the entity in question, given certain normal circumstances. It is reasonable to claim that as the entity attains full autonomy, it acquires, gradually, actual autonomy. It does not make sense to talk about an entity's having more or less potentiality, rather, either it has potentiality, or it does not.

An argument that might support the claim that a sleeping or in other ways temporarily unconscious person has rights to a greater degree than a pre-natal organism is available. One might claim that the sleeper or in

other ways temporarily unconscious person possesses a greater amount of *actual* autonomy than does the pre-natal organism.

Alan Gewirth has suggested a morally relevant difference between sleepers and pre-natal organisms/infants by claiming that „A potential agent is not the same as a prospective agent, for the latter already has the proximate abilities of the generic features of action even if he is not currently acting” (Gewirth 1978, p. 141) This claim faces severe difficulties. What does this claim mean? In what sense do prospective agents *have* capacities? It cannot be that prospective agents, while sleeping or unconscious, have capacity for agency, since they could not, while sleeping or unconscious, demonstrate agency even in the absence of external obstacles. In this sense, they are similar to pre-natal organisms. Gewirth must, then, mean that sleepers and in other ways temporarily unconscious individuals will become actual agents. In this, too, they are similar to pre-natal organisms following a normal path of development.

One might argue that prospective agents, though not potential agents, have a dispositional capacity for agency. Such dispositional capacity could be considered as potentiality at a different level than the potentiality possessed by the potential agent; the potential agent has potentiality for acquiring dispositional capacities, while the prospective agent has potentiality for actualizing his or her dispositional capacities (I owe this suggestion to Bo Petersson).

This difference, however, does not constitute a morally relevant difference between potential and prospective agents, since both have potentiality for actual autonomous agency. It does not make sense to claim that potentiality in the morally relevant sense can occur in degrees. Even though waking up (some) sleeping agents *may* require less effort and resources than providing (some) potential autonomous agents with resources necessary in order to develop autonomy, this fact does not support the claim that potentiality which requires more effort and resources in order to develop into actuality is potentiality to a lesser *degree* than potentiality which requires less effort and resources in order to develop into actuality.

III. Why do potential autonomous agents have positive and negative rights, while actual autonomous agents have negative rights only

Having argued in defence of the claim that some pre-natal organisms have negative rights in full, I will now suggest that these pre-natal organisms, in

addition, have positive rights to the means necessary for developing full autonomous agency. All agents capable of fulfilling such positive rights are obligated to do so. Once autonomy is developed and once the agent has been autonomous long enough to have the opportunity to secure his or her future autonomy, the agent has negative rights only. Potential agents have positive rights in virtue of their vulnerability. These rights decrease as the organism's vulnerability decreases, and as it attains actual autonomous agency.

Here, one might object that autonomous agents, at times, are vulnerable as well. What, then, is the relevant moral distinction between the vulnerability of the pre-natal organism, infant or child, and an autonomous agent? The relevant moral distinction consists in the fact that an individual who has been autonomous for a long enough period has been given the opportunity to prevent his or her future vulnerability, while the pre-natal organism, or infant, or child, has not been given such opportunity.

What about the rights of senile individuals, who may possess the same capacity for autonomous agency as a potential agent? Do senile individuals have positive and negative rights to the same extent as does a potential agent with the same capacity for autonomous agency?

First, provided that the senile individual has been given the opportunity to establish autonomy and remain autonomous for a long enough period to arrange proper insurances for his or her diminished days, the senile individual has no positive rights. Note that one has no positive right that others agree to such insurances. It is, of course, possible to imagine an individual who loses his or her capacity for autonomy before he or she has been able to secure future autonomy, though the possibility of regaining it remains. Such an individual ought to be considered a potential agent, and as having the same positive rights, as does a pre-natal organism or infant or child possessing the capacities to equal extent.

Can a senile individual's possession of negative rights be justified? If he or she will, in fact, never regain his or her capacity for autonomous agency, the answer is no, since he or she is neither an actual nor a potential agent.

One may still argue in defence of the impermissibility of exposing such individuals to harm by referring to his or her preferences regarding his or her future, non-autonomous existence, which he or she held before his or her diminished days. Harming such an individual is equivalent to frustrating the preferences of, and thereby violating the rights of, the autonomous agent he or she once *was*. This is not saying that an individual who is neither a potential nor an actual autonomous agent has rights.

Someone might suggest that the negative rights of the pre-natal organism are more extensive at early stages of the organism's development, decreasing as the organism attains actual autonomy, and justify this claim by arguing that greater vulnerability calls for more extensive negative rights than those of actual agents. This conclusion is mistaken. The flaw in it can be realized by a clarification of the moral importance of vulnerability. A potential agent's being vulnerable without having been given the opportunity to prevent his or her vulnerability is not a *reason* for his or her possession of negative rights. The vulnerability is a reason for his or her having positive rights, fulfilment of the positive rights being a *presupposition* for his or her being responsible for the outcome of his or her life. Hence, vulnerability is no reason for having negative rights, though it is a reason for having positive rights, which are presuppositions for the individual's being responsible for the outcome of his or her life. The only reason for having negative rights in full is being a potential or actual agent.

IV. A principle for resolving conflicts of rights between pre-natal organisms, infants/children and parents

The claim that the pre-natal organism has as extensive negative rights as does an actual autonomous agent may appear problematic in cases where the positive and negative rights of the pre-natal organism not to get killed conflict with the negative rights of the mother to defend herself against a lethal threat. If the life or health of the mother is threatened unless the rights of the pre-natal organism are violated, could one reasonably claim that such conflicts justify the rights of the pre-natal organism being cancelled or overridden?

The claim that the pre-natal organism has as extensive negative rights as does an actual autonomous agent may also appear problematic in cases where the pre-natal organism will die as a foreseen side-effect of some medical treatment necessary in order to save the mother's life.

In what follows, I will assume that all measures have been taken to prevent the pregnancy from becoming threatening, or the mother's disease from occurring, and that the probability of the conflict occurring was low at the time of conception. The medical treatment is obviously necessary in order to secure the mother's autonomy. But it seems that the medical treatment is intentionally trading the life of the pre-natal organism against the life of the mother.

Other arguments for the impermissibility of killing the pre-natal organism are available if we accept that potential agents have positive as well as negative rights, while actual autonomous agents have only negative rights.

I will now examine whether the possible moral impact of the pre-natal organism having positive as well as negative rights, while the parents have negative rights only, may help in solving such conflicts of rights. The pre-natal organism has negative rights in virtue of its potentiality. The parents have equally extensive negative rights in virtue of their capacity for actual agency. They are also responsible for the course their lives take, provided their positive rights have been fulfilled during their childhood and adolescence. The pre-natal organism does not carry any responsibility at all. It also has a positive right to the means necessary for developing and establishing autonomy, which is a presupposition for carrying responsibility in the future. All this speaks in favour of the conclusion that the total amount of rights of the pre-natal organism outweighs the total amount of rights of the parents.

Conflicts can, of course, occur between the rights of any pre-natal organism or infant/child and the rights of any autonomous agent. In case of such conflict, the rights of the potential agent ought to take priority, because of the reasons defended above. In case of conflict between the negative rights of two potential agents, whose rights ought to take priority? Such a scenario is not altogether unrealistic, and several versions of such a case can be produced. I will now discuss a few such cases.

First, imagine two twin pre-natal organisms. It is necessary to remove, thereby killing, one of the organisms, in order to save the other. By doing so, we will violate one twin's negative rights, and fulfil the positive rights of the other twin. By killing one twin, we also make impossible the fulfilment of this twin's positive rights. The removal of one twin may be a means to saving the other, and the one twin's death is a foreseen side-effect of removing him or her. The removal of one twin may also be a foreseen side-effect of treating the other twin. In either case, if nothing is done, both twins will die, and both twins' positive rights will be violated. It does not matter who is sacrificed and who is saved, for each of the two organisms will survive if the other is removed. Regardless of which course of action is chosen, an equal number of rights are violated: either one negative and one positive right, or two positive rights. This conflict, then, cannot be resolved by choosing the course of action which leads to the least number of violated rights.

But it seems that one is, *when possible*, morally obligated to act in such a way as to minimize the total number of rights-violations. This is equiva-

lent to accepting a kind of „utilitarianism of rights” in cases of conflicts between two or more potential autonomous agents. Accepting the normative view examined in this paper, this conclusion seems impossible to avoid.

It is necessary to add some qualifications to the claim that we are, in some cases of conflicts between positive and negative rights, morally obligated to act in such a way as to minimize the total number of rights-violations. According to the view advanced above, the positive and negative rights of one potential autonomous agent cancel the negative rights of any number of actual autonomous agents who have been autonomous long enough to have the possibility to prevent his or her future vulnerability. The positive and negative rights of one potential autonomous agent are, however, cancelled by the positive or negative rights of a greater number of potential autonomous agents. The rationale for these claims is that positive and negative rights of potential autonomous agents are equally weighty, since potential autonomous agents have not been given the possibility to prevent their vulnerability. Actual autonomous agents who have been autonomous long enough have been given this opportunity; hence, their negative rights are less weighty compared to the rights of potential autonomous agents.

V. Are negative rights lexically superior to positive rights?

In this section, I will discuss the following suggestion. One way of avoiding a „utilitarianism of rights” would be to claim that negative rights are lexically superior to positive rights, regardless of whether the bearer of negative rights is a potential autonomous agent or an actual autonomous agent. One rights-bearer’s negative rights may never be infringed in order to prevent other negative rights from being infringed or violated, or in order to fulfil positive rights. Negative rights can conflict, and if they do, the positive rights will cut the tie. If an equal number of positive and negative rights are infringed regardless of what the agent does, all available behaviours carry the same moral status. If the agent is morally responsible for being in the situation where he or she must make such a choice, all available routes of action are morally impermissible. If the agent is not morally responsible for being in the situation where he or she must make such a choice, all available routes of action are morally permissible, since „ought” implies „can”.

What arguments can be advanced by an advocate of the normative outlook of this paper, in support of the claim that negative rights are lexically

superior to positive rights? One could argue for this claim by referring to the core principle of the normative outlook of this paper: potential and actual autonomous agents ought to be treated as ends in themselves, that is, they may not be used merely as means to the gain of others.

Now, requiring actual autonomous agents to contribute to the satisfaction of the needs of potential autonomous agents *is* using the former as a means to the gain of the latter. Suppose that we, nevertheless, accept that *some* use of actual autonomous agents is morally permissible because such use is necessary in order to fulfil the positive rights, which potential autonomous agents have in virtue of their vulnerability. To what extent may actual autonomous agents be used? An apparently plausible suggestion is that they may not be used in a way that decreases their own capacity for autonomy. The fulfilment of positive rights for a sufficiently long time is a presupposition for an individual to be morally responsible for the course his or her life takes. But if we claim that it is permissible to decrease the level of autonomy of the agent once he or she has developed full autonomy, there seems to be no reason to claim that it is impermissible to abstain from bringing him or her into the autonomous state in the first place. Hence, we must reject either the claim that potential autonomous agents ought to be brought into an autonomous state, or the claim that an autonomous agent's autonomy may be decreased. Since the claim that we ought to bring the potential autonomous agent into a state where he or she is autonomous is very plausible, we ought to reject the claim that it is permissible to decrease an autonomous agent's autonomy. This may be a strong argument in favour of the claim that negative rights not to have one's level of autonomy decreased by others are lexically superior to positive rights.

But could one not claim that agents are morally obligated to bring potential agents into an autonomous state, even if the former later decrease the latter's level of autonomy, and argue for this claim by saying that doing so is necessary in order to bring a greater number of potential agents into an autonomous state?

This argument, however, relies on the assumption that it is permissible to treat moral subjects *merely* as means to the gain of others, and not in any respect as ends. I aim at formulating a principle for *morally acceptable* use of autonomous agents. A principle which is inconsistent even with the weaker requirement that moral subjects may not be used *merely* as means to the gain of others is clearly unacceptable.

Someone might suggest that autonomous agents are required to bring potential autonomous agents into an autonomous state, and then decrease

their level of autonomy to the gain of potential autonomous agents, *only to such an extent that the deprived individual still can be held responsible for the course his or her life takes*. This suggestion seems to avoid the objection that it seems pointless to bring potential autonomous agents into an autonomous state, and then deprive them of their autonomy. Since the deprivation is limited, the deprived individual has still gained greater capacity to direct his or her life, than if he or she had received no support in the first place.

My response to this suggestion is that only agents who have been given the opportunity to remain fully autonomous long enough to secure their future autonomy and prevent their future vulnerability may be held morally responsible for the course their lives take. Hence, the individual's autonomy may not be decreased *at all*.

However, if the agent's level of autonomy is decreased, the agent can rely on his or her previous efforts to secure his or her future autonomy, which will compensate him or her for the loss, either by providing means for remaining autonomous, or for remaining in some other state which the „insured” agent prefers.

It seems, then, that only reductions of autonomy that cannot be fully compensated for, e.g., death, are morally impermissible. If so, this seems to be a strong argument in favour of the claim that the negative right that others not decrease one's autonomy in ways that *no insurance can compensate for* is lexically superior to positive rights.

But there are strong arguments in favour of the claim that *all* deprivations of the means necessary in order for the agent to remain fully autonomous are morally impermissible. Forcing agents to rely on their insurance is morally impermissible, since it is in itself a deprivation of the means necessary to remain fully autonomous: the agent is placed in circumstances which he or she cannot avoid.

Even though it is morally acceptable to deny the autonomous individual all aid except the one provided through insurance, it is morally unacceptable to disable the individual by limiting his or her freedom of action just because he or she has an insurance that will secure some, but not all, of his or her autonomy. Permitting such disabling would be equivalent to forcing the individual to adapt to living under the threat of being used to the gain of others. Such adaptation would involve buying more expensive insurances compared to the ones the agent would buy if the threat did not exist. I conclude that all deprivations of the means necessary in order for the agent to remain fully autonomous are morally impermissible since they

counteract the very purpose of granting the potential autonomous agent positive rights. Hence, there are strong arguments in favour of the claim that the negative right that other agents not decrease one's autonomy is lexically superior to positive rights.

When applying this principle to the twin-case discussed above, we see that agents are morally prohibited from killing one twin in order to save the other, even if both twins will die anyway.

I have hitherto assumed that the parents are *not* morally responsible for being in this kind of situation. Now suppose that, in the conflicts discussed above, the parents *are* morally responsible for being so situated. They are then acting wrongly in causing themselves to be in such a situation, but once the situation has occurred, they ought nevertheless to let both twins die.

Conclusions

In this paper, I have formulated and defended a morally relevant characterization of the potentiality for autonomous agency. I have defended the claim that such potentiality is of moral importance against rights-based objections. The main argument examined in this paper is that pre-natal organisms and not yet autonomous infants and children have positive rights in virtue of their vulnerability, as well as negative rights in full due to their potentiality for autonomous agency. In cases of conflict between the rights of the pre-natal organism or infant or child and the rights of any potential or actual autonomous agent, the negative right that other agents not decrease one's autonomy is lexically superior to positive rights.

References

- Fisher, J.A., 1994, „Why Potentiality Does Not Matter: A Reply to Stone”, *Canadian Journal of Philosophy* 24, No. 2.
- Gewirth, A., 1978, *Reason and Morality*, Chicago: The University of Chicago Press.
- Howell, R., 1973, „Correspondence”, *Philosophy and Public Affairs*, Vol. 2, No. 4.
- Nozick, R., 1974, *Anarchy, State, and Utopia*, New York: Blackwell.
- Olson, E.T., 1997, *The Human Animal*, New York: Oxford University Press.
- Quinn, W., 1984, „Abortion: Identity and Loss”, *Philosophy & Public Affairs* 13, No.1.
- Shoemaker, S., „Self, Body and Conscience”, *Proceedings of the Aristotelian Society*, suppl. Vol. 73, pp. 287-306.

- Shoemaker, S., Swinburne, R., 1984, *Personal Identity*, Oxford: Basil Blackwell.
- Stone, J., 1987, „Why Potentiality Matters”, *Canadian Journal of Philosophy* 17, No. 4.
- Stone, J., 1994, „Why Potentiality Still Matters”, *Canadian Journal of Philosophy* 24, No. 2.
- Stretton, D., 2003, „The Deprivation Argument Against Abortion”, <http://www.pcug.org.au/~dean/dep-arg.html>.
- Thomson, J.J., 1971, „A Defence of Abortion”, *Philosophy & Public Affairs* 1, No. 1.
- Tooley, M., 1973, „Abortion and Infanticide”, *Philosophy & Public Affairs* 2, No. 4.
- Tooley, M., 1983, *Abortion and Infanticide*, New York: Oxford University Press.

Copyright of Forum Philosophicum: International Journal for Philosophy is the property of Forum Philosophicum and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.