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### *The moral status of potential persons'*

[239] The American philosopher Alan Gewirth has shown that moral norms possess no independent existence of their own. On the contrary, moral norms come into existence through and between agents, although 'behind their backs', as it were. Every agent logically must accept the supreme moral principle that every agent has the strict obligation to act in accord with the generic rights of her recipients as well as of her own (Gewirth, 1978, p. 135).

Now, agency as the ability of knowingly and voluntarily pursuing one's ends is a demanding concept. Not every human being is at least dispositionally able to act and therefore not every human being is an agent. Some are not yet agents, others are irretrievably no longer agents and still others can never become agents in a full sense, e.g. due to very severe forms of mental retardation. This gives rise to the question what, if any, the moral status of these human beings is. If we call, for convenience and according to the customs of bioethics, agents 'persons' and human beings who are not agents 'non-persons' we can reformulate this as the well-known question what, if any, the moral status of human non-persons is.

In this paper I will focus on the moral status of human fetuses and embryos. But, as it will become clear, it will be necessary to give a rough outline of the moral status of infants and young children as well. I want to show that because agents must attribute to themselves and to each other dignity they must, in different ways, regard human non-persons as connected to their dignity and therefore must confer, in different ways, moral status upon them. In order to show this we must briefly consider why and in what way agents have to attribute dignity to themselves in the first place.

### **[240] Dignity as the basis of generic rights**

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<sup>1</sup> In: HILDT, ELISABETH und MIETH, DIETMAR, *In Vitro Fertilisation in the 1990s – Towards a medical, social and ethical evaluation*, Ashgate 1998, 239-246.

In order to show that every agent logically must accept a supreme moral principle, Gewirth has developed a sequence of dialectically necessary judgements<sup>1</sup> every agent can only deny on pain of self-contradiction. The first judgement of the sequence is (1) ‘I do action A for the end E’. This judgement translates the fundamental structure of an action into a judgement of the agent. Gewirth has shown that this judgement necessarily implies – not semantically but from the reflexive perspective of the agent – further judgements and ultimately the judgement which formulates the supreme principle of morality. Here I shall confine myself to mentioning the main steps of the sequence only and to locating dignity’s place in this sequence.

The first step shows that agency has an ‘evaluative structure’ (Gewirth, 1978, pp. 48-63). This means two things. First, the agent has to consider each end of her action at the time of her acting as good according to some criterion. Second, she therefore has to consider her freedom to act and the other necessary conditions enabling her to act at all and the ability to act successfully at all as necessary goods. Gewirth has shown that the contents of these conditions can be specified (Gewirth, 1978, pp. 53-58). They comprise, in the Gewirth’s terminology of basic goods such as life and physical and psychological integrity, nonsubtractive goods as not to be stolen from and additive goods such as education. The necessary nonsubtractive and additive goods constitute respectively the necessary conditions for maintaining and furthering one’s level of purpose for being and remaining an agent at all.

The second step shows that agency is characterised not only by an evaluative structure but also by a ‘normative structure’ as well (Gewirth, 1978, pp. 63-103).<sup>2</sup> This means that the agent must consider a necessary good as something she has a right to. Now, a right is an other-directed normative concept, but up to this point of the sequence no other person or agent came into play directly or explicitly.<sup>3</sup> So how can we proceed from the necessary goods to right claims? The answer is that the agent has to make two factual judgements which function as premises in the sequence of the dialectically necessary judgement. The first judgement is that the necessary goods are no sure or safe possession of the agent. On the contrary, she is vulnerable and therefore can lose them. This premise contributes to the way the agent wants the necessary goods for herself. Here it is important to note that for the agent the necessary goods are not only necessary because of their instrumental function as means for her acting (and acting successfully at all). There is also a necessity in her wanting these goods. In connection with the first

factual premise this wanting must be specified as unconditionally not wanting these goods to be interfered with.

[241] This mode of wanting is latently normative as becomes clear, if we take the second factual judgement or premise into consideration. This is the awareness of the agent that the possession of her necessary goods depends on the conduct of the other agents. The agent can be interfered with by other agents, that is by persons who are able to control their conduct and therefore are able to refrain from any such interference. Therefore, in view of other agents, wanting the necessary goods necessarily takes on the form of an other-directed ought-judgement. The agent must regard all other agents as strictly obligated at least not to infer with her necessary goods. This means that, in view of the other agents, a normative claim is formed. The agent claims the necessary goods as something which is due to her and which she has a right to. Underlying this is a certain sort of necessary self-evaluation which can be interpreted in terms of a normative concept of dignity. For the agent has to attribute a status to herself where, in view of the other agents, she is ultimately not the possible object of a calculation or balancing of the interests of others.

Because the agent must attribute dignity and rights to herself for the sufficient reason that she is a prospective agent, she must acknowledge, in a third and last step of the sequence, that all other agents possess the same dignity and the same rights to the necessary goods. This leads to the supreme moral principle mentioned above.

### **The moral significance of potential agents**

My thesis is that human beings who are not yet agents must possess moral significance for agents for the sufficient reason that they possess the potentiality to become agents. The agent has to attribute to herself dignity by virtue of being an agent. Therefore agency necessarily represents for her an evaluatively and normatively outstanding quality. For it confers on her and every other agent a morally outstanding and unsurpassable status. Now if a being has the potentiality to become an agent and the agent is aware of this capacity, then the agent must see a morally relevant connection between such a being and herself and her dignity. At the same time the agent has to make two distinctions, the first underscoring the connection, the second specifying it.

First, the agent must see an evaluatively and normatively relevant difference between a being who is not yet an agent and those beings who, in principle, possess no potentiality to become an agent. As compared to the latter, the former must possess pre-eminence for the agent by virtue of possessing such potentiality. Second, the agent must see a difference between herself and those beings who are not yet agents. They do not possess the same moral status as agents for they do not possess dignity. The basis of dignity is that the agent inevitably *has* purposes she wants to fulfil. As they are not able to act, potential agents as such cannot meet this condition.

[242] Accordingly my argument is not affected by the standard objection against arguments from potentiality that, for example, a potential president is no president and therefore cannot possess the status or the rights of a president. My contention is not that for the agent the potentiality to agency must possess the same relevance as actual agency, but that for her it must possess *some* relevance. It is not possible that agency can in one case possess unsurpassing significance for the agent and in the other case no significance at all. For the agent to judge otherwise would be inconsistent.

It might be objected that it is important to take into consideration *who* the possessor of something is. One might greatly value one's own million dollars, but attribute no value at all to the million dollars of some other persons. Accordingly, the agent can attribute outstanding significance to her own agency, while the potentiality to agency of some other being might be without any value for her. There is no inconsistency involved.

In this form the objection is already directed against the universalisation of the claim to dignity and comes down to the contention that the agent may not attribute the relevance of justifying their dignity to the agency of other agents. This contention is untenable if, for the agent, her having purposes she wants to fulfil is a sufficient reason for her claim to dignity. I shall not discuss this here in greater detail (See e.g. Gewirth 1969 or Gewirth, 1978, pp. 115-119). Suffice to say that I do not contend that the agent must value all things she finds valuable for herself similarly when these are possessed by others. But the agency-based dignity forms an evaluation of a higher complexity and level. For the agent her agency is, in a normatively strict sense, *status conferring* and the status, that is dignity and the generic rights has a bearing on how the other agents ought to act against her. Therefore the agent must hold that the agency of others confers on them the same status with equal consequences for the conduct of others including herself.

These considerations show that ‘relevance’ is an ambiguous term reflecting different levels of complexity and evaluation. In connection with dignity ‘relevance’ means the presence of a moral status which grounds strict obligations. There is a lower level of ‘relevance’ at which, for the agent, her own agency is more important than the agency of others. For the agent can only do something with her own agency. On this level a comparability exists between one’s own money as against the money of others. Thus the objection misses the point because it does not take into consideration which sense of ‘relevance’ is meant. The potentiality to agency must be status conferring, if agency is status conferring, even if the potentiality to agency does not confer the same status as actual agency.

### **[243] Specifying the moral status of infants and young children**

Potentiality is not the only morally relevant aspect for the determination of the moral status of human beings who are not yet agents. Another aspect is their different levels of proximity to agency. In order to grasp the moral significance and range of this criterion I first want to consider young children who are very close to agency in the full sense. Thus I want to begin with those human beings whose capacities can be described as ‘able to act in a limited, rudimentary or initial way’. Due to insufficient cognitive abilities it is not yet possible to speak of voluntary and intentional conduct covering a relatively long period. The possibility for self-determination and self-control, consciousness of proximate relevant circumstances, and grasp of the effects of one’s conduct on oneself and on others are still so much reduced that the individuals in question cannot be held really accountable for their conduct. Needless to say that such a general description covers a whole range of different forms from rudimentary and isolated purposes to more differentiated actions which are more and more integrated into groups of actions and action plans.

Normally a child will go through this whole range of forms. As compared with those who are able to act in the full sense there are differences in competence and capacity which are in part considerable. Nevertheless, in the course of this development precisely that structure progressively emerges which justifies the normative claim of dignity, namely to have purposes one wants to fulfil. It is true that those who are only able to act in a rudimentary way cannot logically be required to perform that special kind of self-

evaluation through which the claim to dignity comes into existence. But, as the agent must recognise the decisive characteristic which leads to the justification of her dignity in those individuals, *she* is required to confer on them the same dignity as on herself. Thus, those who are only able to act in a rudimentary way somehow participate in the dignity of agents.

The dignity of rudimentary agents does not justify the same range of rights as does the dignity of agents. For, as generic rights are the rights which constitute agency, they are only partly applicable to rudimentary agents. But insofar as they are applicable (e.g. the rights to life, physical and psychological integrity), these rights are possessed by rudimentary agents. Besides, their dignity justifies rights which are special to them, namely rights to special protection and support

The scope of the extension of dignity to human beings who are not persons in the defined sense reaches beyond human beings who are not yet agents. For, on the other hand, it includes those human beings who are rudimentary agents but due to very severe forms of mental retardation can never become agents in the full sense. This has consequences for the aspect of potentiality. For even the potentiality to develop to the proximity of agency must confer a moral [244] status. On the other hand, dignity must be conferred on those human beings who are irretrievably no longer agents in the full sense but still show some rudiments of agency.

The argument from rudimentary agency does not apply to newborns. To call newborns rudimentary agents would imply stretching the concept beyond its morally significant characteristics. Nevertheless, there seem to be conclusive reasons for agents to attribute dignity to newborns. For us as agents the newborn baby is a bodily other who despite its dependence possesses a significant amount of independence and whose behaviour we contrafactually interpret as rudimentary acts. Accordingly, in the newborn child we must anticipate the agent or at least the rudimentary agent he or she presumably will become.

I am aware that in the presented form this last extension of dignity represents more of a sketch of an argumentative strategy than an argument itself. Nevertheless, I think at least so much has been shown that we may safely conclude that birth would be at best the earliest point for the attribution of dignity to a human being. This brings us back to the task of specifying the moral status of human embryos and fetuses.

## Specifying the moral status of human embryos and fetuse

As against infants and young children, the potentiality to become an agent is the only characteristic which is directly relevant for the determination of the moral status of human embryos and fetuses.<sup>4</sup> An important consequence of this is that we are inevitably confronted with an unsurmountable unsharpness in the criteria. We are able to specify the moral status of human embryos and fetuses by spelling out its normative implications in general, but often are not able to spell them out *in concreto*. As we know that their moral status is not that of dignity, we know that there may be circumstances in which the rights or interests of agents have precedence over the status of a human embryo or fetus. But it is impossible to determinate exactly which rights can still take such precedence and which cannot.

The general normative implication of the moral status of human embryos and fetuses as potential agents is a general prescription to preserve, protect and foster them. This implies the general prohibition of killing and harming them. General prescriptions and prohibitions can be balanced out by other important normative considerations. This is of importance for the moral problem of abortion. From the general prescription of preservation and protection it follows that basically and as far as possible there should be no abortions and that an abortion is a morally serious matter. But in the case of a direct conflict especially with the generic rights of the pregnant woman the general prescription of preservation and protection can be balanced out. It follows that an abortion can be morally justified. Due to the unsharpness of criteria it is not possible to [245] determine *exactly* which rights of the woman can balance out the status of the embryo or fetus and which cannot. On the one hand, there are cases where the priority of the rights of the woman is perfectly clear. On the other hand, there can be no serious dispute that certain reasons for an abortion would be frivolous. But between such clear-cut cases there is an insurmountable grey area. Nevertheless, the normative implications of this are clear in itself. There must be room for free decisions which must not be legally restrained.

The problem of abortion occurs in a conflict situation which is in many respects unique. Things are quite different if the conflict is created in a controllable and somewhat institutionalised way as a side effect of a medical procedure. If hormonal treatments of infertility or the placement of three or more embryos into the uterus as part of in vitro fertilisation or related technologies lead to a significant increase of multiple

pregnancies this will morally count against these procedures in the first place. For, on the one hand, the multiple pregnancy is connected with a high probability of serious harm for the mother, the fetuses or the future children the fetuses may become. On the other hand, due to the moral status of human embryos and fetuses, ‘pregnancy reduction’ is not a morally tenable strategy to deal with this problem. For, if there is a general prescription to protect human embryos and fetuses, ‘pregnancy reduction’ may be a morally tolerable solution in unforeseen tragic situations, but is not tolerable in the context of a knowingly induced, though unintended, problem.

### **The distinction between human embryos and pre-embryos**

There is some variation in the use of the term ‘embryo’. Thus it is important to stress that the above argument from potentiality refers to the embryo in the strict sense and not to the so-called ‘pre-embryo’. By this term is usually meant the fertilised human egg (zygote) and the further stages of its development during roughly the first two weeks. During this time there is a process of differentiation during which the pre-embryo differentiates into those cells which develop into the embryonic membranes and into the placenta and those cells which form the embryo proper. Stephen Buckle has made the important proposal to distinguish between two kinds of potentiality here (Buckle 1988). The pre-embryo has the ‘potentiality *to produce*’, for instance, the embryo. The embryo itself has the ‘potentiality *to become*’ an agent. It was this last kind of potentiality which figured in the argument from potentiality.

Thus, the moral status of the human pre-embryo is different and much weaker than that of the human embryo. It is difficult to see how the status of the pre-embryo as such could justify a categorical prohibition of its use for research. On the other hand, the question is to be considered to what extent and with what consequences we have to attribute to the human pre-embryo symbolic significance. Furthermore, the human pre-embryo as a possible subject of [246] research is not readily available but produced *in vitro*. The moral evaluation of research on human pre-embryos is not independent from a moral evaluation of the preconditions and the context of the ‘production’ of the pre-embryos. But all this is not the subject of this paper.



**Referances**

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<sup>1</sup> Gewirth explains: „An assertoric statement is of the form „p“; a dialectical statement is of the form „S thinks (or says, or accepts) that p“; a dialectically necessary statement is of the form „S logically must (on pain of contradiction) think (or say, or accept) that p“.’ (Gewirth, 1978, p. 152).

<sup>2</sup> In my presentation of this step I will somewhat depart from Gewirth’s presentation. For Gewirth’s treatment of the connection between dignity and rights see Gewirth, 1982, pp. 27-30, and Gewirth 1992.

<sup>3</sup> But we may say that they came into play implicitly because, for example, the nonsubtractive good of not being stolen from implies a potential thief.

<sup>4</sup> To be sure, the criterion of proximity to agency is applicable to fetuses as well. But here it does not yield definitive and uncontroversial normative results.