

**VALUE, UTILITY AND AUTONOMY:**

**A MORAL-CRITICAL**

**ANALYSIS OF UTILITARIAN**

**POSITIONS ON THE VALUE OF**

**PRENATAL LIFE**



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I, the undersigned

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Hereby declare that the work contained in this dissertation is my own original work and that I have not previously, in its entirety or in part, submitted it at any university for a degree.

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## Opsomming

### Probleemstelling

Utilitariste huldig sterk omlynde standpunte oor die waarde van lewe. Hulle redeneer dat menslike (inderwaarheid, alle lewende) wesens slegs op grond van twee eienskappe intrinsieke morele waarde kan verwerf: sentiëntisme, d.i. die vermoë om lyding te ervaar, en persoonstatus. Sentiëntisme is 'n bepalende vereiste vir morele status, maar regverdig nie 'n "reg op lewe"-aanspraak nie. Persoonsyn, verstaan as 'n vorm van selfbewustheid tesame met 'n bewuste belang by die voortsetting van eie bestaan, mag wel so 'n aanspraak regverdig. Voorgeboortelike (en "voorpersoonlike") wesens is egter nie persone nie; hulle word eers (aansienlik) ná geboorte volwaardige persone. Die implikasie is dat sulke wesens weinig morele status het, en byvoorbeeld, na willekeur gedood mag word.

Die morele probleem wat ek in hierdie dissertasie aanspreek is om die utilitaristiese beskouing ten opsigte van die morele status of waarde van voorgeboortelike lewe krities-filosofies te ondersoek en te evalueer.

### Metodologie en gevolgtrekkings

Eerstens maak ek na aanleiding van 'n gedetailleerde literatuurstudie 'n in-diepte analise van van die utilitaristiese posisie aan die hand van 'n aantal temas wat ek in hul argument geïdentifiseer het. Daarna volg 'n krities-filosofiese evaluasie van die utilitaristiese posisie, aan die hand van ses argumente:

- Utilitarisme is filosofies onsamehangend. Dit oorvereenvoudig die morele argument deur voor te gee dat gevolg al is wat moreel saakmaak. Die onderliggende utilitaristiese teorie bots met die morele eise vervat in kontemporêre sienings van menseregte en geregtigheid. Dit negeer die morele belangrikheid van spesiale verpligtinge teenoor spesiale belangegroepes.
- Utilitarisme het potensieel onaanvaarbare gevolge. Dit is inherent diskriminerend en kan lei tot onkeerbare glybaan ("slippery slope")-argumente.

- Utilitarisme bots met ons fundamentele morele intuïesies betreffende die waarde van voorgeboortelike lewe. Hierdie intuïesies word onder meer ondersteun deur die meeste hoofstroom godsdienste.
- Spesiësisme is, in kontras met die utilitaristiese beskouing, onafwendbaar vir ons selfverstaan as mense, soos aangetoon kan word met 'n beroep op die eksistensiële fenomenologie. Self-konstituering, gelyktydige konstituering van die wêreld van die mens, en selfs die moontlikheid van moraliteit is slegs moontlik vanuit 'n bepaalde spesiësistiese beskouing.
- Die potensialiteit van “pre-persone” om tot volwaardige persone te ontwikkel kan nie, soos die utilitaris doen, sonder meer geïgnoreer word nie.
- Daar is 'n basiese en onderliggende morele eis om swak en weerlose menslike wesens te beskerm. Hierdie idees bots lynreg met utilitaristiese teorie.

As 'n alternatief tot die utilitaristiese beskouing, ontwikkel ek 'n twee-fase posisie betreffende die morele waarde van voorgeboortelike menslike lewe. Ek noem hierdie posisie *agting vir voorgeboortelike en voor-persoonlike menslike lewe gebaseer op die menslikheid, potensialiteit en oorleefbaarheid van prenatale mense*. Dit lei, eerstens, tot die gevolgtrekking van 'n gegradeerde glyskaal konsepie van voor-persoonlike menslike morele waarde, min of meer parallel aan die vlak van ontwikkeling en die ontwikkeling van potensialiteit. Tweedens lei dit tot die gevolgtrekking dat die ontwikkeling van lewensvatbaarheid 'n moreel-beduidende afsnypunt is waarna die menslike fetus “normaalweg” aanspraak kan maak op 'n reg dat sy lewe voortgesit moet word.

In soverre dit die toepassing van my argument betref, ontwikkel ek 'n “gematigde” posisie vis-à-vis aborsie. Ek redeneer dat alle menslike voorgeboortelike wesens wat 'n redelike kans het dat hul intrinsieke potensialiteit verder sal ontwikkel, die geleentheid daartoe gegun behoort te word. Ek aanvaar ook dat nòg hierdie beskouing, nòg die kompleksiteit van die menslike bestaan “absolute” posisies moreel regverdig. Die problematiek en inherente spanning tussen hierdie oënskynlik-opponerende posisies word in die teks bespreek. Nogtans beskou ek die ontwikkeling van lewensvatbaarheid as 'n moreel insiggewende afsnypunt waarna terminasie net in buitengewone omstandighede moreel regverdigbaar is.



## Summary

### Problem statement

For utilitarians, human beings have intrinsic moral significance based on only two acquired characteristics: sentience, or the ability to suffer, and psychological personhood. Sentience is the entrance-requirement for moral significance, but does not justify a “right to life” claim; at most a “right” not to suffer. Personhood, described as some sort of self-conscious awareness with a concept of the future, may justify a “right to life” claim. However, since personhood is absent in prenatal beings, and only develops some time after birth, the implication is that such beings have little moral significance and may, for instance, be killed “at will”.

The moral problem that I address in this dissertation is to investigate, assess and evaluate the utilitarian position on the moral status or value of prenatal life.

### Methodology and results

I firstly, on the basis of an extensive literature study, make a detailed analysis of the utilitarian position with reference to a number of themes that I have identified in their argument. This is followed by a critical philosophical evaluation of the utilitarian position, based on six particular arguments:

- Utilitarianism is philosophically incoherent. It over-simplifies the moral argument in claiming that consequences are all that matter morally. Its underlying moral theory is at odds with moral claims contained in contemporary notions of human rights and individual justice. It ignores the moral significance of special obligations to special groups.
- Utilitarianism potentially has unacceptable consequences. It is inherently discriminatory and may lead to legitimate “slippery slope” fears.
- Utilitarianism clashes with our fundamental moral intuitions on the value of prenatal life. These intuitions are cherished in most world religions.
- Contrary to the utilitarian position, speciesism is inevitable to the human condition, especially argued from a position of existential phenomenology. Self-

constitution, simultaneous constitution of the world as we know it, and the very possibility of morality are possible only within a particular notion of speciesism.

- The potentiality of pre-persons to develop into persons cannot be as convincingly ignored as is done by the utilitarian.
- There is a basic and underlying need and intuition to protect vulnerable human beings, of which pre-persons are exemplars. These notions clash with utilitarian theory.

As an alternative, I introduce, set out and evaluate a two-phased position on the moral significance of pre-personal human life, a position of *respectfulness of prenatal and pre-personal human life based upon its humanity, potentiality and separation-viability*. This leads, firstly, to the conclusion of a graded, sliding scale conception of human pre-personal moral significance in line with the level of development and with the actuation of potentiality. Secondly, it leads to the conclusion that the advent of separation-survivability (viability) is a morally significant cut-off point beyond which the human fetus may “normally” have a justifiable right to the continuation of its life.

In as far as the application of my argument is concerned, I develop a “moderate” position with reference to the abortion debate. Whilst I recognize that all human prenatal beings of which it can be argued that they have a reasonable chance to develop their intrinsic potentiality, i.e., to become full-fledged persons, should have the opportunity to do so, I also recognize that neither this position, nor the complexities of life make it possible to hold “absolute” positions on the justifiability of abortion. I explore this extremely problematic notion in the text. That having been said, the advent of separation-survivability may imply a “moral cut-off point”, beyond which termination is only rarely justified. I argue that I find no moral hindrance to well-motivated research on human pre-embryos and stem cells.



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I dedicate this work to the memory of my late father, to my mother, and to my dear wife Marie and children Jeanne and Emile, whose unwavering trust and support have been instrumental in the success of all my projects.

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## CHAPTER 1: INTRODUCTION

### 1.1 Problem statement

The moral problem that I wish to address in this dissertation is to investigate, assess and evaluate the moral status or value of prenatal<sup>1</sup> life as described by certain prominent utilitarian moral philosophers.

The notion that human life is sacrosanct and therefore untouchable has historically informed a “traditional” view of bioethics.

Since about the middle of the 20<sup>th</sup> century this notion has come under increasing attack, primarily due to three developments. Firstly, medical advances culminating in the ability to sustain human biological existence almost indefinitely, with attendant social, legal and financial implications, have forced a radical revision of ideas about the meaning and value of life. Secondly, simultaneous societal demands have profoundly affected the traditional attitude to prenatal life. Particularly in certain prominent parts of the world, an ever-increasing number of women have started to demand the “right to choose” in matters reproductive – including a right to choose to abort. In this “action”, they have found powerful and persuasive partners in the ranks of philosophers, ethicists and policy makers. In most Western societies this right has been legally conceded and ensconced, albeit with limitations and qualifications.

The moral legitimation of these developments has mostly been characterised by a fundamentally utilitarian approach, a comprehensive analysis of which is the subject matter of Chapter 2.

Thirdly, there has also been a spontaneous revisiting of two basic questions from an abstract, philosophical viewpoint: why, and when is (human) life valuable? In the words of John Harris: “what makes human life valuable and, in particular, what makes it more valuable than other forms of life?” (Harris 1985:7), or “when (does) life begin(s) to matter morally”? (*Ibid.* 8)

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<sup>1</sup> It will soon become apparent that much of what the utilitarian has to say about prenatal beings applies also to postnatal “pre-persons”, i.e., those beings who have not yet developed the acquired characteristics that denote personhood. One could often substitute the term “pre-person” for prenatal, and, at times, I shall do so in the text. However, my primary focus is on the moral significance of prenatal beings.



Utilitarian thinkers such as Peter Singer, Helga Kuhse, John Harris and Michael Tooley have been prominent contributors to the ongoing bioethical debate on the value of prenatal life.

Utilitarianism, a moral theory proposed by David Hume (1711-1776), given a definitive formulation by Jeremy Bentham (1748-1832) and popularised by John Stuart Mill (1806-1873), has profoundly altered the way many people think about ethics, and has thereby radically changed society (Rachels 1995:90). Utilitarianism is a development of *consequentialism*, which, with the rule-based or *deontological* approach, constitutes the two main avenues upon which the theories of moral decision-making have developed. Baruch Brody (1983:10), explains consequentialist ethics in these words:

“The basic thesis of (consequentialism) is that the rightness or wrongness of an action is based solely on the consequences of performing it; the right action is that which leads to the best consequences.”

How to decide what is right to do in a given situation? Again, Brody explains:

“First, they (consequentialists) seek to determine all the available alternatives. Next, from a list of these alternatives, they try to foresee the consequences of performing each of them. Finally, they evaluate the consequences in terms of which is best. The action that is most likely to have the best consequences is the one judged to be the right thing to do.”

Consequentialists list four strengths of their theory:

- It accentuates the importance of morality in life (performing the right actions satisfies human desires);
- It suggests a clear procedure to solve moral problems;
- It supports the idea that morality is more flexible than traditionally viewed;
- It helps to avoid conflict between the claims that rules have on us in morally perplexing situations (or moral dilemmas) (*Ibid.* 16-18).

Two immediate concerns are apparent: By what standards do we weigh one set of consequences against another; secondly, whose interests are paramount? It is at this point that the utilitarian forcefully rises to the occasion. A *classical account* of these standards flows from a conception that the only thing worth pursuing in life is happiness – a concept that can be traced to ancient moral writings (Plato, Republic:126) – and is essentially *hedonistic*: our actions should promote pleasure and diminish pain. Therefore “pleasure is the (ultimate) good which morality aims to produce” (*Ibid.* 13). As to the question of whose interests are at stake here, most utilitarians reject *egoism* in favour of an *altruistic* account (Brody 1983:13; Wellman 1975:39).

In response to the problem of weighing consequences against each other, the utilitarian presents her case: *those results that produce maximal utility are best*. At face value, this appears to be a straightforward concept, but, in turn, it presents the adherents of utilitarianism with the challenge to *define utility*.

The utilitarian evaluates *all* consequences over the *long term*. Herein lie two further immediate concerns: firstly, the subjectivity of hierarchical ranking of consequences to be evaluated, and secondly, the definition of “good”. What does “good” mean in this context? Again the utilitarian would respond: *maximum utility*. Jeremy Bentham (one of the fathers of utilitarianism), regarded “the Principle of Utility” as the *only ultimate moral principle*, and in a classic formulation described utility as follows:

“... that property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil or unhappiness to the part whose interest is being considered; if that party be the community, in general, then the happiness of the community; if a particular individual, then the happiness of that individual” (Bentham, 1967, Chapter 1, ii).

John Stuart Mill, Bentham’s protégé who later pursued a line more independent from Bentham, has a more succinct way of expressing the same sentiments: “The utilitarian doctrine is, that happiness is desirable, and the only thing desirable, as an end; all other things being only desirable as means to that end.” As “*proof*” he suggests, “the sole evidence it is possible to produce that anything is desirable, is that people



desire it". He then makes the statement that "each person desires his own happiness" as the only premise to conclude "that general happiness, therefore, (is) a good to the aggregate of all persons" (Mill, 1967-89, vol. X:234).<sup>2</sup>

There are, therefore, as Bentham points out, negative and positive forms of utility: prevention of unhappiness and promotion of happiness. The net result is the same: *the promotion of happiness*. (Nevertheless, there is no general agreement that the prevention of unhappiness and the promotion of happiness are qualitatively the same). The definition of happiness in this context derives from a hedonistic conception as indicated earlier, but Brody (1983:15) defines utilitarianism as follows, and suggests the development of a *non-hedonistic* conception:

"We have considered a number of versions of consequentialism. The one that we will use ... is that an action is right if, in a given situation, it leads to a greater *satisfaction of desires*, taking into account all those affected, than does any other available alternative. We call this non-hedonist version of altruistic consequentialism *utilitarianism*."

Two other aspects of utilitarianism are apparent in these (and the following) definitions: *collectivism* (good concerns the outcome for all affected by the action), and *maximizing* (good ought to be maximized) (Landman 1990:160). Thirdly, utilitarianism is evaluator-neutral and cannot accommodate pre-theoretical moral intuitions (Portmore 2003:305). Robert Audi (1999: 942) suggests the following contemporary, and practical, definition of utilitarianism:

"... the moral theory that an action is morally right if and only if it produces at least as much good (utility) for all people affected by the action as any alternative action the person could do instead."

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<sup>2</sup> Elijah Millgram recently re-examined Mill's proof of the utility principle. The first stretch of Mill's argument, that something is desirable simply because someone desires it, has been traditionally challenged on the basis of circularity (Millgram 2000:288). Millgram defends Mill on the basis that ultimate ends do not require proof in the usual logical sense (*Ibid.* 287). "First principles" of conduct, are ultimate ends and not inferred from further premises. The only question about desires is then if they really exist, and from this follows the rather trivial truth that "people want what they want" (*Ibid.* 290-1). As to the second, and equally equivocal stretch of the argument to aggregate happiness, Mill is not committed to collective good. Millgram contends that Mill means that "among all persons, those capable of judging from experience, or at any rate a majority of them, find (or will find) the general happiness to be good (*Ibid.* 303).



A deed is morally “right” and therefore “good” if on balance more “good” than “bad” consequences result for those involved.

In the original or *classical* formulation of *act-utilitarianism* defended by Bentham and Mill, individual deeds are adjudged good or right if on balance more good than bad results from them. The theory, then, consisted of three propositions:

- First, actions are judged right or wrong solely on their *consequences*.
- Second, the only consequence that matters is the amount of *happiness or unhappiness* caused.
- Third, no one person’s happiness is to be counted as more – or less – important than any other person’s (Rachels 1995:102).

There are particular problems with this formulation that may require modification of the original. Possibly the best attempt to address these problems was Richard B Brandt’s development of *rule utilitarianism*. I shall shortly mention these difficulties here, but not discuss them in any depth. Some of them will surface again in Chapter 3.1, when I discuss the philosophical incoherence of the theory of utilitarianism:

- Firstly, there is the problem of conceptualising the nature of *value* (Carl Wellman’s word for “utility”; 1975:39). *Hedonism* as ethical principle confuses the nature of happiness that the utilitarian seeks with a type of happiness that is essentially a response we have to the attainment of things that we (already) recognize as goods (Rachels 1995:105).
- Secondly, we might ask if consequences are really all that matter. There are three problems with this claim: decisions so founded may contravene *individual human rights*, conflict with the principle of individual *justice* and do not allow for reciprocity based on *previous events* that should affect current decisions (consequentialism is not “backward looking” and does not recognize special interest groups).
- A third response evolves from the preceding; in the practical arena of real-life morality, moral agents need to make decisions regarding real and pressing

issues of concern to specific persons. The inherent arbitrary nature of act-utilitarianism may make it extremely difficult to make a realistic decision when the utility of each individual act has to be evaluated.

- Fourthly, a functional and functioning society requires moral rules. It is difficult to conceive of a society that can act justly without recourse to such rules

A short discussion of rule-utilitarianism is found in Chapter 2.7, p. 63, where R I Sikora's brand of rule utilitarianism is described (this is for the sake of comprehensiveness; the utilitarian philosophers I shall discuss are not rule-utilitarians).

The question is how and where the influential thinkers earlier referred to – Peter Singer, Helga Kuhse, John Harris and Michael Tooley – fit into this utilitarian scheme.

In the debate on the moral status of prenatal life and the related questions of the ethics of abortion and infanticide, utilitarians by and large support freedom of choice, and in the case of those mentioned above, the principle of infanticide. The utilitarian supposition would be that on balance more benefit, advantage, good or happiness ensues by allowing abortion than by disallowing it. This conclusion is based on a threefold argument that is supported by reference to various different aspects of utilitarianism.

The first argument relates to sentientism. It draws on the classical utilitarian, in fact Benthamian supposition that the *moral domain is demarcated by the possession of sentience*. As Bentham put it: "... the question is not, Can they reason? Nor, Can they talk? But, *Can they suffer?*" (Bentham 1780:283). Arguments from sentientism are therefore instances of *classical utilitarianism*. The second argument – that to do with personhood – is a form of *preference utilitarianism*; utility is judged according to the satisfaction of particular preferences. In order to cogently argue for the moral wrongness of killing persons, an addition to the two arguments from classical utilitarianism (diminishing aggregate happiness, and incidental side-effects upon others, e.g. friends) has to be formulated. As Landman (1990:162) aptly puts it: "Preference utilitarianism regards the frustration of the desire of persons to go on living as morally wrong in itself, other things being equal." As will be apparent as the argument develops, the rational or experiential definition of personhood excludes (*inter alia*)



prenatal forms and infants, and the argument therefore has a double effect: legitimating a position that prenatal human beings and fetuses are not persons, and therefore have no morally justifiable right to “continue living”, and secondly, that persons – people as we encounter them in life – do have a moral right to continued existence because they have non-momentary preferences that project into the future, and frustrating those preferences is morally wrong.

Although there are nuance differences and variations in the arguments, the philosophers referred to earlier, and whose work will be examined and evaluated in Chapters 2 and 3, by and large support similar central themes. These arguments will be introduced here, and are fully discussed as central themes in utilitarianism in Chapter 2. The third argument, that of respect for autonomy is not a utilitarian argument, but is nevertheless important for the utilitarian project, and is often quoted by utilitarians; its application will be discussed in Chapter 4.

Firstly, there is the argument about sentience and, leading on from that, of speciesism. In essence, the argument explores the extent to which this basic ability may bestow moral value on the being in question, and its validity to justify a “right to life” claim by sentient beings. Moreover, not only human beings are sentient. Most animals – certainly most vertebrates – are also sentient. How should conceptions of animal sentience impact on our arguments regarding sentience and moral value in humans? Is a sentient animal of equal moral value as an equally sentient human being? Is a sentient animal more valuable, morally speaking, than a pre-sentient human being? Suffice it here to state that utilitarians, by and large, deny that sentience in itself justifies a “right to life”. However, the ability to suffer is the entrance-requirement to any conception of moral significance. Singer (1979:118) contends that until such time as sentience is present in prenatal life, “abortion up to this point terminates an existence that is of no intrinsic value at all”.

The philosophical comparison of human and non-human animals will be explored in the text.

The second and, for the utilitarian, more significant acquired characteristic utilised to deny moral worth for the prenatal human being is that of a rationally defined conception of *personhood*. John Harris defines personhood as an ability to value one’s own life (Harris 1985:17). When is a living being – human or otherwise – able to “value her own life”? Utilitarians contend that the development of a minimum of



rational functions especially self-awareness are required before an interest in continued existence (a future) can develop – some considerable time after birth. The fetus clearly does not (yet) have this ability. Depriving her of her life does not remove a capacity she has ever had or experienced; she can never be aware of what has occurred. Singer extends his argument to include the newborn:

“... birth does not mark a morally significant dividing line. I cannot see how one could defend the view that fetuses may be “replaced” before birth, but newborn infants may not be” (Singer 1993:188)

“Replacement” here refers to the substitution of a present being by a later one, which in classical utilitarianism, as long as net happiness is not diminished, is morally acceptable, and is an argument used by Singer to distinguish between persons who have a personal preference in their continued lives, and non-persons, who cannot have such capacity. Such persons are “non-replaceable”. This development is called *preference utilitarianism*. It will be discussed in more detail later.

Michael Tooley (1999:21-35) challenges the contention that human fetuses and infants *necessarily* have a “right” to life by discussing what properties something should possess in order to have a serious right to life based on moral worth. Tooley’s basic claim for personhood is a similar “self-consciousness requirement” (*Ibid.* 24). In his 1972 publication (*Ibid.* 24), Tooley argues for a “self-consciousness” criterion. This is explicitly excluded in his 1983 formulation with the proviso that *some form of the concept of a continuing mental substance* is necessary (Tooley 1983:304).

(See note<sup>3</sup> for a short description of the less prominent rule-utilitarian position of R I Sikora; for the sake of comprehensiveness, this position will be discussed at the end of the next chapter).

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<sup>3</sup> On R I Sikora: A third, less prominent utilitarian argument supports the main theme of the utilitarian position, i.e., the utilitarian conception of personhood. R I Sikora (1993:87-109) develops a rule-utilitarian argument along the following lines: overpopulation causes unhappiness defined as suffering, deprivation and famine on a grand scale. Limiting overpopulation may diminish suffering and improve happiness, making abortion both good and right. However, the fundamental supposition remains: prenatal moral value is denied. This argument is not used by the more prominent utilitarian moral philosophers, and clearly is not comfortable in the presence of the arguments set out above. Nevertheless, Sikora calls himself a utilitarian, and it may be useful to include his argument as an example of a rule-utilitarian argument, especially since e.g. Singer is described as a mixed classical- and preference utilitarian.



This then is the *crux* of our moral problem: based primarily on the personhood-argument, supported by the sentientism argument, the utilitarian argues that the prenatal human being as it progresses through gestation to term and beyond, *is devoid of moral value*, or its value is negligible; it does not warrant meaningful consideration *for its own sake*. It may warrant consideration *only inasmuch as it contributes to or detracts from the nett benefit, advantage, good or bad of others*, however, not as a person in itself. Is this position morally defensible? I think not, and this dissertation is a presentation of both my critical analysis of the utilitarian position, and the alternative view that I wish to develop.

## 1.2 Theoretical ethical approach

The ethical approach in this dissertation is not any particular theoretical framework or approach. I am attracted to an approach essentially corresponding to Zygmunt Bauman (cf 1993) and Hans Jonas's (cf 1984) *ethics of responsibility* – an approach that attempts to transcend the strict dichotomy of deontological and utilitarian approaches. In moral decision-making, both types of considerations are inevitable. Strict and unyielding deontology does not recognize the complexity of real moral dilemmas. The demand to act responsibly vis-à-vis the moral other can be subjugated by hiding behind rigid rules. Both the Kantian, as well as the utilitarian approaches to moral reasoning, and principlism, have an underlying view of what Blum has called “impartialism”: “ethics is based on impartiality, impersonality, universal principle, and formal rationality” (Allmark, 1995:19). In contrast, an ethic of responsibility underwrites contextuality, “situationally based responses” (*Ibid.* 20).<sup>4</sup>

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However, the inference should not be taken that it is regarded as a very important or indeed cogent utilitarian position. The argument, as presented in the next chapter, should be evaluated against this background.

<sup>4</sup> Bauman derives and develops many of his central ideas from the work of the Lithuanian born French philosopher Emmanuel Lévinas, especially as far as the “awakening to moral responsibility” is concerned. The intimacy of this initial awakening has to be extended to the moral plurality of society, through “comprehensive thematization and systematic objectification, (though this holds the danger of) reducing all otherness (yet it has a) subordinate truth (...) with regard to the economic and political conditions of universal justice towards all individuals whom I cannot encounter personally. With and through the other I meet all humans.” Herein lies the origin of equality and human rights. (Audi 1999:498). Bauman's position on the nature of moral responsibility can be summed in the following excerpt (Bauman 1993:73-74):



On the other hand, an ethics of responsibility is uncomfortable with the crude fashion in which utilitarian approaches contest some of our most basic moral intuitions, e.g. that killing human beings because they are defenceless, young, undeveloped and lack acquired characteristics that denote them as persons worthy of moral consideration is morally in order. Added to this is the inherent conflict between utilitarianism and basic human rights that cannot comfortably coincide (a point that will be further explored later).

This ethic ruthlessly demands justification and responsibility for all of our actions, even if justification is not moulded in conventional moral argumentation. It asks that we contextualise moral problems, and attempt to recognize the importance of contextual social, political and cultural factors in moral deliberation. The detail of this approach, and its implications for the problem addressed in this dissertation, will be worked out in Chapter 4, pp. 156-162.

### **1.3 The aim of the study**

The study sets out to critically examine the utilitarian position on the value of pre-personal life. Firstly, the existing literature shall be examined in order to form a sound understanding of the utilitarian position. Secondly, with reference to 1.2 above, this position will be evaluated with reference to six groups of critical questions will be examined and evaluated:

#### **1.3.1 The theoretical coherence of utilitarianism**

This complex of questions addresses the philosophical coherence of utilitarianism from four perspectives: its claim that consequences are all that matter morally, its compatibility with moral claims contained in contemporary notions of

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“The other is a face in as far as I lead the way, spearhead her command, anticipate it and provoke: as I command her to command me. The Other is an authority since I am willing to listen to the command before the command has been spoken, and to follow the command before I know what it commands me to do.” “...the other is weak, and it is precisely that weakness that makes my positioning her as the Face a moral act: I am fully and truly for the other, since it is I who give her the right to command, make the weak strong, make the silence speak, make the non-being into being through offering it the right to command me. “I am for the other” means I give myself to the other as hostage. I take responsibility for the Other. But I take that responsibility not in the way one signs a contract and takes upon himself the obligations that the contract stipulates. It is I who take the responsibility, and I may take that responsibility...as if it was mine without ever being taken by me. My responsibility, which constitutes, simultaneously, the Other as the Face and me as the moral self, is unconditional.”



human rights and of individual justice, and the question of the accommodation of special obligations to special groups.

### 1.3.2 The consequences of utilitarianism

This complex of questions address consequences of the utilitarian approach in a manner more serious than perhaps utilitarianism itself does. With reference to “societal institutions” like apartheid, racism, sexism, homophobia and the Holocaust, what are the long-term societal effects of these utilitarian positions? What happens to the fundamental moral fibre of society if infanticide is practiced on the scale that many utilitarians argue for, or the more immediate realism of allied arguments that legitimises 45 million abortions annually worldwide? What is the moral nature of the message we send to society’s dispossessed, elderly, frail and handicapped? Are utilitarians arguing that society has reached the end of its patience, and refuse further tolerance? Does this underlie a realistic threat of a new Holocaust? Whom do we regard as “moral others”? What is the norm of normality, and should there be such a norm? Is this not a fundamental attack on diversity? Are these “slippery slope” arguments legitimate in principle?

### 1.3.3 The argument from moral intuitions

How should we reconcile the conflict between basic moral intuitions and the consequences to which Singer and Harris’s apparent consistent extension of utilitarian positions (as outlined before) apparently lead us? How should we conceptualise the power of our apparent primal moral intuitions? What are their origins and status, and what role do – or should – they play in our moral orientation?

### 1.3.4 The inevitability of speciesism

Humans generally seem to regard their species as “superior”. But is this not just a self-oriented prejudice based on the power humans exert over other creatures, particularly (other) sentient animals, and as such devoid of moral foundation? What are the *morally significant* arguments to support the importance that being members of the human race holds for us? Do these arguments apply to pre-personal beings, and if so, why?

### 1.3.5 The argument from potentiality

Pre-persons, it seems, have the inherent potentiality to develop into persons if their lives are not prematurely terminated. But what is the moral nature of this type of potentiality? And should all potentiality be actuated and, on the basis of that, demand moral respect? Do we have a moral obligation to the pre-person to facilitate this? Can factors extrinsic to the pre-person affect her “right” to actuation of potentiality? How can future actuation impart present moral value?

### 1.3.6 The responsibility to protect the vulnerable of society

An ethics of responsibility that directs us to protect the interests of the most vulnerable members of society is a potent anti-utilitarian argument. We find racism and sexism abhorrent precisely because it stigmatises vulnerable groups in society with the aim of discriminating against them. Racism has e.g. led to the Holocaust and apartheid. According to this argument, embryos, fetuses and infants form a much more vulnerable group. Responsibility charges us to protect them; this exhibits a basic indicator of moral civilization that is the undeniable *desideratum* of any decent society. This position has obvious Christian-theological undertones: “God is the god of the oppressed and vulnerable, and we, as His representatives have the responsibility to protect and care for the such-like.” The question is: what should be made of this type of argument?

## 1.4 The plan of the study

Chapter 2 comprises a comprehensive study of utilitarian positions on the nature of prenatal life with reference to the work of Peter Singer, Helga Kuhse, John Harris, Michael Tooley and R I Sikora, as outlined above, along the lines of certain identified *themes*:

- Sentientism, speciesism and a “right to life”
- Differentiation between human beings and persons
- The utilitarian concept of personhood
- Personhood is not restricted to human beings
- Justified infanticide
- Replaceability



- Rule-utilitarian positions on the value of fetal life

Chapter 3 is a critical assessment of the utilitarian positions based on five sets of critical questions earlier raised earlier in this chapter.

Chapter 4 comprises an alternative justified assessment of the moral value of prenatal life: a position that I shall call *respectfulness on the basis of humanity, potentiality and viability* (separation survivability). In this argument I describe the development of pre-personal moral value in two phases.

Firstly, a notion of basic respectfulness of human life is developed in a deliberate speciesist manner. Human life has inherent value based on two intrinsic factors: its *humanity* and *potentiality* to become a human person (when this is the case). Value is moderated through *intrinsic* and *extrinsic* contextual factors. I shall argue for a *graded or "sliding scale"* concept of moral value, with increase in value as potentiality is actuated, but balanced by other intrinsic, and extrinsic factors. I shall explore, and offer my own definition of potentiality.

Secondly, I shall develop a notion of respectfulness of viability; I shall argue that there is no justifiable moral difference between neonates and viable third semester fetuses. These entities should therefore be treated equally. I shall argue that our basic moral intuitions direct us to protect the lives of (normal) neonates, therefore, also all viable fetuses. It is, *prima facie*, morally unacceptable to take the life of an infant or neonate, and equally wrong to take the life of a viable fetus.

I shall explore the implications that this argument has for some of the most controversial moral questions of our time: abortion and embryo/stem cell research. As far as abortion is concerned, my argument is compatible with a *moderate* position: fetal moral significance develops during pregnancy. However, the complexities of life prevent absolute positions. I shall explore the problematics of the inherent tension between these two ideas in the text. As far as human embryo and stem cell research is concerned, I find no moral objections.

## CHAPTER 2: THE UTILITARIAN POSITION ON THE VALUE OF PRENATAL (AND PRE-PERSONAL) LIFE

As indicated in the Introduction, the intention in Chapter 2 is to investigate the utilitarian position on the value of prenatal life with reference to certain identified themes. The following themes have been identified as representing aspects of the utilitarian position, and will for the sake of clarity be examined individually, although, admittedly, the utilitarian argument is a confluence of these themes:

To start with, I shall examine the utilitarian position on sentientism and speciesism, with particular reference to the question of whether this accords a “right to life”. The utilitarian makes a very clear distinction between *human beings* and *persons*; this is the second theme that I shall investigate. The utilitarian concept of personhood is a critical cornerstone in the argument on the value of life, and this is my next theme. The next three themes develop from this conception of personhood: personhood is not limited to human beings, personhood, when taken to its logical conclusion, seems to justify infanticide, and all pre-persons are “replaceable”, that is, they are not unique, morally significant individuals. Finally, to round off the discussion, I shall examine rule-utilitarian positions on the value of life.

### 2.1 Sentientism, speciesism and a “right to life”

The *New Penguin English Dictionary* (Penguin Books, 2000:1273) defines “sentience” as “rudimentary feeling and perception as distinguished from thought and the higher emotions”. “Sentient” is defined as “capable of feeling through the senses; conscious”. “Sentientism” can be defined as a belief or philosophical theory that rudimentary perception or a form of non-rational consciousness of pleasure and pain imparts moral value. How does this fit into the utilitarian conception of pre-personal moral worth? Sentience is an acquired characteristic of the fetus – it is not something that can be present in the earliest pre-embryonic, embryonic or fetal life forms. The reasons for this are twofold. Firstly, the absence, in early forms of prenatal human life, of the primary condition for sensory perception, a developed central nervous system of



sufficiently integrated complexity. It is in fact only when the central nervous system starts to appear with the advent of the “primal streak” that the fetus attains the potential of becoming a sentient being, because this denotes the commencement of development of the central nervous system, without which sentience is impossible. Even then they may not become sentient; anencephalic fetuses, even if they were to develop to term and be born alive, are not sentient beings. Secondly, the developmental psychological requirements equally essential for the interpretation of sensory signals as noxious are not yet present.

In Peter Singer’s account, presented here because it best captures the essence of the utilitarian argument, sentience – redefined in utilitarian terms as “the capacity to feel pleasure or pain” (Singer 1990, reprinted 2002:197) – is regarded as the “minimal characteristic needed to give the embryo a claim to (moral) consideration”. In fact:

“Until that point is reached, the embryo does not have any interests and, like other non-sentient organisms.... cannot be harmed – in a morally relevant sense – by anything we do.... because its total lack of awareness means that it has never had any interests at all”.

In this short paragraph, Singer summarizes the essence of the utilitarian argument on sentientism. It is not merely being a member of the human race that matters when considering morally worthwhile lives, but some other characteristic that is not necessarily exclusive to humans. However, Singer subsequently develops or refines his conception of the nature of the required awareness to capture what he sees as the essential aspect of sentient life. He develops this conception from the classical work of Bentham whom he quotes:

“What else (instead of pure speciesism) is it that should trace the insuperable line (of sentientism between species)? Is it the faculty of reason, or perhaps the faculty of discourse? ... the question is not, Can they reason? nor Can they *talk*, but *Can they suffer?*”

In this passage, suggests Singer, “Bentham points to the capacity of suffering as the vital characteristic that gives a being the right to equal consideration.” This – the capacity for suffering and/or enjoyment or happiness – is not just another capacity



comparable to the capacity of language, etc.; Bentham is saying that this is a “prerequisite for having interests at all, a condition that must be satisfied before we can speak of interests in any meaningful way.”

Bentham’s, and Singer’s deduction that the essence of prenatal moral worth has to do with *the capacity of prenatal beings to suffer, enjoy or be happy* fits in perfectly with the utilitarian conception of morality. The hedonistic classical utilitarian aim is to maximize aggregate pleasure directly, or indirectly by diminishing suffering, and in this conception species differences are ignored. Moral worth is linked to this basic capacity of being able to suffer. Beings that have the capacity to suffer are therefore moral beings. The deduction that it is morally wrong to cause suffering and right to alleviate it is consistent with utilitarian morality.

The above quotes open the argument to introduce the importance and value of so called “other” animals. It is at this junction that some utilitarians, notably Michael Tooley (original 1972; this reprint 1999), and Peter Singer (original 1974, 1979 and 1990; this reprint 2002), introduce the related argument of *speciesism* – the unwarranted and unfounded prejudicial theory and practice to accord members of “my” species with superior moral rights and privileges, primarily, says Tooley, because we have the *power* to do so.

The essential speciesist position is the assertion that human moral value is linked to membership of *Homo sapiens sapiens*, and this is what for instance Tooley wishes to attack: “difference in species is not in itself a morally relevant difference” (1999:29). In the *Infanticide* section of his book *Abortion and Infanticide* (1983:324), he writes: “second, even if this principle (that killing a innocent member of the species *Homo sapiens sapiens* is always wrong) were true, it would not provide us with an ultimately satisfactory account, since principles involving reference to membership in a particular biological species *cannot be basic moral principles*.” The speciesist implies that even if she is unsure of what it is that makes humans morally superior, and human lives therefore intrinsically morally (more) valuable, all that is required is to believe this to be so. From this automatically follows that all human organisms have (equal) moral status. If a claim to a “right to life” were to be deduced from such status, then all human beings would automatically have an equal right to such a claim.

What is the utilitarian response to this position? It is embodied in the *principle of species equality*, applicable to “all mankind, and not to them only, but so far as the



nature of things admits, to the whole of sentient creation” as recognised by John Stuart Mill (Rachels, 1995:98). In practice this principle equates to the “equal consideration of interests”:

“Given a moral theory based on interests, it is easy enough to argue that we are not justified in ignoring or discounting the interests of any human being on the grounds that he or she is not a member of the race or sex to which we belong” (Singer, 1987:5).

Once accepted, all beings with *interests*, including non-human beings, are included in this conception because there is no adequate moral reason to exclude them. Speciesism, therefore, is a form of prejudice, just as racism and sexism are. Our treatment of others, “ought not to depend on what they are like, or what abilities they possess” but on the “principle of equality” or equal consideration of interests in our moral deliberations. The conception of equality is in this instance based on the *capacity for suffering*, as outlined previously. (Singer, 1999:83). The argument to refute speciesism, therefore, is similar to the one against racism and sexism. I shall not digress further into this argument, other than to make two observations on what seems to be the inevitable conclusion of Singer’s argument: firstly, that we should not be inconsistent in differentiating between different species of sentient beings, and, secondly, that if slaughtering sentient animals is morally acceptable, the utilitarian in Singer finds it inconsistent that society may object to the killing of sentient human pre-persons; based upon the principle of equality, the interests of both demand and deserve equal consideration. Rephrased in the language of the aim of this study, Singer concludes that sentient animals and (merely) sentient human beings have lives of equal moral value based on their capacity for suffering, and should be treated equally according to the principle of equality. We are inconsistent in differentiating between animals and humans in this respect. To be consistent, we need either to revise our treatment of sentient animals, or of sentient humans.

However, utilitarians do not agree that sentience as such is an adequate reason *not to kill* sentient (human) beings, or a guarantee of moral worth, especially since we do kill other sentient beings – animals. As Landman explains:



“In sum, the only moral objections relevant to killing non-personal sentient beings – certain animals, human fetuses and human infants – are, first, the indirect objection from side-effects and, second, the direct effects from decreasing happiness. Should these objections not obtain, then these sentient beings could be killed – painlessly, of course – with full moral justification.” (Landman 1990:160)

Michael Tooley makes the point somewhat more forcefully (Tooley, 1972, reprinted 2002:32). He argues that torturing a kitten may be morally despicable because it is sentient, but killing it (painlessly) not; it therefore has sufficient moral value to justify the deduction of a “right” not to be tortured, but not enough to justify an unqualified “right to life”. To be able to justify a right to life, much more is required of a being; it has to be *self-aware*. Tooley’s (developed) 1983 position is stated as follows:

“The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual’s value, is the property of being an *enduring subject of non-momentary interests*” (Tooley, 1983:304).

As Harris writes:

“The reason it is wrong to kill a person is that to do so robs that individual of something they value. Creatures that cannot value their own existence cannot be wronged in this way, for their death deprives them of nothing that they can value” (Harris, 1985:17).

The *consciousness requirement* for sentience is of a “very basic” type; the *self-consciousness requirement* for personhood is much more complex, and forms the basis of the argument in the next section, for Harris and Singer at least, but not, as is evident in the above quote, for Tooley. This is why sentientism is regarded as a “bad” argument in proving prenatal moral value; at most, a sentient being can have a preference not to continue with an unpleasant experience, but it has no conception of life, or is not “an *enduring subject of non-momentary interests*”, and thus cannot have a desire that its life or its interests be continued. In the language of the kitten-analogy: it can conceptually

desire not to suffer, but not to keep on living, and therefore may have a right not to be subjected to suffering, but not a right to life.

The utilitarian therefore implies in the above strategy that the intrinsic or inherent moral value of sentient beings (including prenatal human beings) is not absolute; in fact, it is quite limited and may be secondary to external factors.

Now that we have an understanding of the utilitarian position on sentience, two issues are evident:

Firstly, Singer does not state that sentience is equal to moral worth; he states that sentience is a “minimal characteristic” (1995 reprint; 2002:197), or *threshold* characteristic, not an imperative. Without sentience, there can be no moral worth; with sentience, there *may be* moral worth.

Secondly, this introduces the importance of finding some “threshold” gestational age beyond which sentience, i.e. possible moral worth, may be argued for. As utilitarians invariably argue, the practical – and abstract philosophical – applicability of this argument is limited due to the notorious difficulty, if not final impossibility, and inherent subjectivity of *defining and confirming meaningful sentience*. The prerequisites for sentience are anatomical-physiological possibility and experiential-psychological ability. Even if the former is present, this does not guarantee sentience. Secondly, as Stuart W G Derbyshire points out, even though there is other data to indicate “sophisticated and localized behavioural response to noxious stimuli” (2001:78), we have no way of knowing whether these responses correlate with increased conscious appreciation, i.e., *to determine the nature of the experiential-psychological ability of the fetus*, and whether it can actually *experience* pain (see also Willem Landman [1985:243-5] for a discussion of the possible psychological requirements and meaning of sentience, and Derbyshire 1999:1-31). Contemporary empirical literature indicates that meaningful sentience is unlikely before at least 30 week’s gestation. David and Michael Benatar recently (2001:57-73) presented both empirical and philosophical evidence to support a widely held view that human sentience dates from about the 28<sup>th</sup> to 30<sup>th</sup> week of gestation. Derbyshire (2001:74-89) finds little such evidence from essentially the same data, in effect arguing for a later advent of sentience. Louis-Jacques Van Bogaert supports this view in general in a recent neuro-philosophical appraisal. (Van Bogaert 2002:3). Earlier views set the



minimum gestational age at which sentience seemed neuro-anatomically possible, much earlier. For example, Peter Singer wrote in 1979 that sentience seemed implausible before 18 weeks (Singer, 1979:118). It is interesting that scientific developments – inexact and ambiguous, even now – constantly seem to support a view that sentience appears later rather than earlier in fetal development. This question will be fully discussed in the next chapter. Note that at 30 weeks, the fetus is generally regarded as viable (see footnote 85, 174, and endnote iv, p. 229).

I am, however, not convinced that a philosophical enquiry requires a precise demarcation of when prenatal sentience commences; it seems sufficient to accept that it *does* commence (even this is not without dispute!), i.e., that at some stage of its development the prenatal being becomes a *sentient* being. The philosophical argument remains the same: to investigate and understand how sentientism affects our view of the moral nature of prenatal life, or what is the moral meaning of this acquired characteristic. However, if the purpose is to argue for the moral acceptability of a specific action vis-à-vis the fetus (e.g., to use it for research, or to legitimise abortion) it may become significant if one could argue for a specific threshold.

But the utilitarian argues that sentientism is of little use in *debating the moral legitimacy of abortion* because most terminations are performed in the first trimester when sentience is highly unlikely. Nevertheless, since there are countries that allow “late” abortions, almost certainly upon sentient, certainly upon viable beings, sentientism could be a significant argument. But in general, the utilitarian makes a clear distinction between sentient beings and persons, which I shall shortly discuss.

For the sake of understanding the utilitarian argument – our purpose at this point – it may suffice to refer to the quote at the outset of this section: that the human embryo does not, and has never had, any interests, and, consequently, cannot, in any morally relevant sense, be harmed by *anything* we can do to it. This part of the utilitarian argument is an example of *classical utilitarianism* with its attendant problematic of disregard of individuals and lack of distributive justice. It relies on the

- *Hedonistic* perception of the good;
- The *egalitarian* principle of inclusivity;
- The *collectivist* concept of the aggregate good;



- And the *Millsian* principle of maximizing enjoyment directly or indirectly (Landman, 1990:160).

The utilitarian position on sentientism is therefore that the capacity for suffering is the *minimal threshold characteristic* for prenatal (in fact, *any*) moral value. Without this capacity, there can be no question of interests, desires and consequently, moral value. This characteristic does not, however, *guarantee* moral value, or a serious claim to a “right to life”; sentience is merely by way of a *prerequisite* and at most can legitimate a claim that is limited to a right not to be exposed to (unnecessary) suffering, and a right to the fulfilment of the sentient being’s modest desires (see also later). Sentience is a *necessary*, though not *sufficient* condition for moral status. Merely being a member of *Homo sapiens sapiens* does not guarantee moral value either; such a conception is prejudicial and *speciesist*. Membership of a species does not imply any special moral value; the interests of all sentient beings demand equal consideration.

## 2.2 Conceptual differentiation between human beings and persons

The question that arises is what, if any, acquired characteristic(s) need to be added to or replace membership of *Homo sapiens sapiens* to convincingly argue for moral worth? Many philosophers have responded to this question. The positions of Michael Tooley, John Harris and Peter Singer are representative of the most cogent utilitarian arguments on *personhood*, a predominant claim to a right to life and (in denial of prenatal) moral value. This *rational account* is an interesting reaffirmation of a very old conception, famously expressed by Boethius in the sixth century: “A person is an individual substance of rational nature” (Singer 1995, reprinted 2002:134). This conception, it seems, enjoys wide acceptance among contemporary philosophers as a concept of “rational self-conscious personhood”. Peter Singer and John Harris subscribe to this conception. In 1972, it seems, so did, Michael Tooley. The *moral principle* that Tooley suggested for a serious right to life reads as follows:

“An organism possesses a serious right to life only if it possesses a concept of a self as *a continuing subject of experience and other mental states*, and *believes that it is itself such a continuing entity*.”



Tooley called this *the self-consciousness requirement*. Yet, if we carefully follow Tooley in his 1983 account, his support of rationality and self-consciousness is not at all self-evident. What he supports, as we shall see in examining his argument, is the following conception of personhood (Tooley 1983:304):

“The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual’s value, is the property of being an *enduring subject of non-momentary interests*. It is not the possession of, or the exercise of, any of the following: the capacity for rational thought; the capacity for free action; the capacity for self-consciousness.”

The essence of Tooley’s argument here is to argue for a conception that comes very close to encompassing these capacities, or for capacities that come close to these. Let us first examine the distinction between *human beings* and *persons*, and the importance thereof.

The definition of “human being” seems to be self-evident:

“(The expression) ‘human being’ is usually, though not invariably, used in such a way that something is not classified as a human being unless it belongs to a specific species – *Homo sapiens sapiens* – with the species, in turn, being characterized in terms of certain physical properties” related to genetics or physiology in terms of form and function. (Michael Tooley, 1983:50)

Tooley advances two reasons why the expression “human being” and *Homo sapiens sapiens* coincide: Firstly, this is the *usual* interpretation. Secondly, Tooley is concerned with the moral relevance of biological characteristics, and it is convenient to use “human being” descriptively to attribute those traits. This is supported by Tooley’s contention that species membership is not morally significant in itself, only by virtue of its relation to other properties (Tooley 1983:76).

Many philosophers attach more than just a “speciesist” meaning to the word “human”. This is especially apparent in the often-heated debate on the moral value of



fetal and even embryonic life; proponents of a “fetal right to life” often argue that to be human implies significant moral value. Opponents, for instance utilitarians, tend to argue that this is not self-evident. Their essential endeavour is to differentiate between biologically definable human beings, and morally significant beings, which they call persons. Whilst most persons are human, their definition does not exclude other beings, for instance certain non-human animals, and even other as yet unknown species with similar characteristics (the example of the possibility of extra-terrestrial persons is often quoted). Not all proponents of free access to abortion make the same distinction between the two concepts. A prominent example is Judith Jarvis Thomson (reprint 1999:36), although her well-known article, *A defence of abortion* was first published in 1971 when the debate was in its infancy and the meaning of these terms less charged, refined and defined. In the current debate, the utilitarian makes a clear conceptual distinction between *human beings* and *persons*. There is a debate on whether all human pre-persons, including pre-embryos and embryos, should be called *human beings*, irrespective of their being sentient or not. Most utilitarians are prepared to concede the humanity of these beings, as long as this does not imply significant moral value, as in the case of persons. Most proponents of non-consequentialist “pro-life” positions do not share this view.

In his 1972 article, Tooley finds this inaccurate and confusing use of the term “person” as interchangeable for “human” unfortunate for two reasons:

Firstly, it tends to promote the acceptance of an unargued moral worth, or a right to life. Secondly, it steers the dispute on prenatal moral value in the direction of a dispute of *facts*; i.e., is the being in question human or not; if it is adjudged human, it must have moral value and a right to life. If one restates the dispute to question whether the fetus is a “person” or not, the dispute may still be factual (*does* the fetus *possess* the properties of personhood?), but not necessarily. The question that may now be asked is *what are these characteristics* – and this, says Tooley, is an essentially *moral* question because the characteristics required are of a moral nature – we are examining the *moral requirements of personhood, not the physical requirements* (Tooley 1972; reprint 1999:23).

The term “person” is used purely descriptively, but Tooley suggests that moral considerations should guide the connotations of the term “person” so that it can be used



in moral discussion. These connotations should denote the properties of a *right to life*, which is in essence what is required to support a thesis denoting moral value. These properties need to be defined, and then *potentialities* (generally not regarded as legitimate person-defining characteristics) have to be differentiated from “*person-making*” characteristics. “Person” is defined descriptively as possessing at least one of these person-making characteristics (*Ibid.* 51). The term is close to the common-usage term, yet is useful in moral discussion. However, it has drawbacks: the guiding moral consideration involves the concept of a right and not all moral theories (e.g. utilitarianism) are comfortable with this notion, nor is our understanding of “rights” self-evident.

In 1972, Tooley’s approach was to discuss what properties something should possess in order to have a serious claim to a right to life based on moral worth; he sought a *moral principle*:

“My approach will be to set out and defend a basic moral principle specifying a condition an organism must satisfy if it is to have a serious right to life.”

None of the cut-off points commonly argued to indicate the advent of prenatal moral value (that is, a *right to life*) are morally relevant or significant (*Ibid.* 21). What is required is that one has to “get very clear about what makes something a person”.

The guiding moral principles to being a person are the *non-potential properties* that make its destruction intrinsically wrong (*Ibid.* 53), *but also wrong the person* when it is destroyed. Consequently, the descriptive content of personhood is not argued as a right (obligation to the individual) to obviate the difficulty of having to give an account of the latter. Explained “in terms of the concept of an individual’s interest, it seems one is no longer putting forward a morally neutral account of the considerations that are to guide the determination of the descriptive content of the term ‘person’” (Tooley, 1983:56). These interests should not only be long-term and enduring, but also less permanent factors:

“The descriptive content of the term “person” is to be determined by those relatively permanent, non-potential properties of an entity that, possibly in conjunction with other, less permanent features, make it intrinsically wrong to

destroy something, and that do so independently of its intrinsic value” (Tooley 1983:57).

The *b* section of this definition – that the intrinsic wrongness of destruction is independent of intrinsic properties – is critical to Tooley’s conception. There are therefore two options:

- Asking what non-potential properties suffice to *give something a right to life*, and to define a person in terms of possession of one or more of these properties.
- Secondly, asking what properties make it *wrong to destroy* an entity independently of intrinsic value, and defining a person in terms thereof.

### 2.3 The utilitarian concept of personhood

The moral arguments of predominantly three utilitarian ethicists – Michael Tooley, John Harris and Peter Singer – coincide to present an argument for *personhood*. There are interesting and important nuance and conceptual differences around a central theme of *acquired person-making characteristics*:

- Tooley’s conception of personhood is summed up in the following quote that I have earlier used:

“The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual’s value, is the property of being an *enduring subject of non-momentary interests*. It is not the possession of, or the exercise of, any of the following: the capacity for rational thought; the capacity for free action; the capacity for self-consciousness.” (Tooley 1983:304)

- John Harris concludes that *personhood and a right to life* presuppose *self-conscious awareness and the ability to value one’s own life* – a definition less complex but perhaps for that reason, more useful:



“The wrongness of killing another person is, on this view, chiefly the wrongness of permanently depriving her of whatever it is that makes it possible for her to value her own life.” (Harris 1985:17).

- Peter Singer’s conception of personhood evolves around uniquely human traits – “*the kinds of thing which make us persons*”:

“The morally relevant differences are those based on our superior mental powers – our *self-awareness, our rationality, our moral sense, our autonomy*, or some combination of these” (Singer 1990:193).

A convenient if perhaps somewhat pejorative term to describe the view put forward by Tooley, Singer and Harris is *personism*, and the appropriate adjective is *personist* (Oderberg 2000:32). Let us now examine each of these positions individually before trying to coalesce them.

**Michael Tooley** developed a comprehensively argued and influential concept of “personhood”. His concepts are developed in two seminal works spanning a decade. His landmark 1972 article (reprinted 1999:21-35) was followed by the 1983 volume with the same title – *Abortion and Infanticide* – according to Jonathan Glover the “most convincingly argued” “personhood” argument, and as such, worthy of particular attention (quoted by Van Bogaert 2002:37). Although the general argument is similar in both of these important publications, there are nevertheless significant differences due to refinement and development, and comprehensive, meticulous and extensive supporting argument in the 1983 version. Consequently, in presenting Tooley’s case, I shall predominantly refer to the 1983 publication, with limited use of the earlier where it seems appropriate.

As stated above, Tooley’s objective is to “formulate a concept of a person that is itself purely descriptive, and free of all moral and evaluative elements” (Tooley 1983:87). He asks:

“What relatively permanent, non-potential properties, possibly in conjuncture with other, less permanent features of an entity, make it intrinsically wrong to destroy an entity, and do so independently of its intrinsic value?”

Note the use of the verb “to destroy” instead of the more commonly used “to kill” that we have seen others use. This is a development from Tooley’s 1972 conception, presumably because he now realises that a person so defined can be destroyed without being killed in the biological sense (i.e. personhood is a philosophical concept). This is possible in practice by debilitating central nervous system disease processes that diminish or destroy the capacity for these essentially psychological attributes (dementia, trauma, intra-cranial haemorrhage, severe infections). But it is also a theoretical possibility by reprogramming the central nervous system and replacing the content of these capacities with attributes pertaining to a different being. That being may, in itself, comply with the pre-requisites for personhood, and therefore be able to justify its continued life, but it is a different being, the former having disappeared or been destroyed.

This should not be confused with the development of a new definition of brain death pioneered by the “*Ad hoc committee of the Harvard Medical School to examine the definition of brain death*”. This became necessary subsequent to the advent of intensive care and almost unlimited possibilities of keeping patients biologically alive by means of artificial ventilation and other support. However, the more pressing reasons that necessitated this development are found in Harvard bio-ethicist Henry Beecher’s letter to the Dean (of Harvard medical school) highlighting the need for a new definition in order to reap a much-required human organ harvest for transplantation. As Singer sheds some light: “What is not so well known is the link between the work of this committee and Dr Christiaan Barnard’s famous first transplantation of a human heart, in December 1967. Work such as Beecher’s paved the way for Barnard and others” (Singer 1995, reprint 2002:249-250). What Tooley is referring to is the gradual ebb of life as central nervous system activity diminishes through disease, debility and senility. The utilitarian conception of personhood rests upon developmental characteristics that are as impermanent as life itself, diminishing and eventually disappearing towards but before the biological end of life.

The first step in Tooley’s case is to define a concept of *consciousness*.

*Consciousness* is a characteristic that is central to the utilitarian argument. But, states Tooley, the definition of consciousness is in itself problematic. It can be defined in three ways:



- At the very least consciousness is defined as a more general capacity to acquire knowledge about events, both external and internal.
- Secondly, a more narrow meaning refers to the individual's capacity to acquire information about her own present mental states.
- In contrast, "a dualist ... will be inclined to offer an analysis of consciousness according to which states of consciousness are private and non-physical in nature" (Tooley 1983:89).

Tooley offers a very complex definition for what others would simply define as "being aware".

Next, Tooley discusses what in addition to consciousness is required to denote that destruction of a conscious being is morally wrong. There is wide disagreement on the nature of this additional requirement, if in fact anything is required. For instance, oriental philosophers deny that anything is required; from existing literature, Tooley lists 15 suggestions including sentience, desires, memory, self-consciousness, rationality, capacity for problem solving, autonomy, language and social interaction. The most popular of these attributes are *rationality, autonomy or self-consciousness*, but says Tooley, their proponents seldom present adequate arguments in support (*Ibid.* 91). In an attempt to determine what properties should be linked to personhood, Tooley then examines *rights, interests and capacities*.

The most promising avenue to explore *rights* is defended by Joel Feinberg in the form of the *interest principle*; beings that have rights are limited to those that can have interests (*Ibid.* 96), and if persons have a right not to be destroyed, they also have corresponding interests in a continued life (*Ibid.* 97). It is self-evident that zygotes and embryos cannot even have the *capacity* for interests, let alone have interests, and therefore cannot be persons. But even when development has progressed to where human organisms *can* have interests, the interest principle does not *guarantee* them rights.

To link a particular right to a particular interest, which seems the logical route to take, Tooley develops the concept of *particular interest principles*: particular rights are unrealistic unless they advance particular interests. This can explain why killing an adult is morally more wrong than torturing her, while doing the same to a newborn kitten leads to an opposite conclusion. The particular right of the kitten not to be



tortured is linked to its particular interest not to feel pain, but it has no particular right to a continued life because it has no interest therein. The human adult, on the contrary, has rights in both respects because it has interests in *both*, but her interest in a future predominates, therefore her right to have a future predominates.

Rights are usually analysed with reference to particular *conditional* obligations; a moral right obligates a moral obligation depending (conditional) upon a person's preference. A has a right to X can be rewritten: A is *capable of wanting* X, and if so, others are morally obliged not to prevent its obtaining X (*Ibid.* 101). This introduces a further development: a *modified particular interest principle* (*Ibid.* 102). Applied to a right to continue to exist, this implies that such a right is unrealistic without the capacity of having a desire thereof. This in turn implies experiences, consciousness and an understanding of the underlying proposition that presupposes possession of the concepts involved. To have a

“... desire for one's own continued existence presupposes that one possesses the concept of a continuing subject of experiences, and that one is aware of oneself as a continuing subject of experiences” (*Ibid.* 105).

From the foregoing, it seems apparent that being aware of oneself as a “subject of experiences” is a pre-requisite to self-consciousness. The conclusion would then be that something could not have a “desire to continue to exist unless it possesses self-consciousness”. This approximates what many utilitarians mean when they use the term “self-consciousness” as a description of persons. But as will be seen later, it comes rather as a surprise that Tooley thinks it neither a necessary nor a sufficient criterion (*Ibid.* 144, 146), although *some form of the concept of a continuing mental substance* is.

Before we proceed, it may be desirable to recapitulate Tooley's argument for the connection between *rights*, *desires* and *continued existence*:

A *right* is defined in terms of the interest principle that connects rights to corresponding *interests*. A person can only have a right if she has a corresponding *desire*. She can only have the *capacity* for desire if she possesses the *concepts* involved in the proposition. A desire for continued existence involves “a subject of experiences, the concept of a temporal order, and the concept of identity over time” without which a right to continued existence is untenable. The proposition desired true must be true for



this individual, who must be identifiable in some way or another, which implies (some form of) self-awareness as a subject of experiences (*Ibid.* 108). The most problematic premise is the first, and Tooley justifies this with the *modified particular interest principle* argued previously.

For the sake of clarity and following Tooley's argument, I shall omit his discussion of objections to this proposal. The upshot is that he introduces the notion of *time* into the argument: all the above has to be true at time *t*, or at some other time, in which case the concept of a *continuing self* becomes essential (*Ibid.* 121).

I indicated earlier that zygotes and embryos cannot have the *capacity* for interests, let alone have interests, and they therefore cannot be persons. At this point the crucial further deduction is that at least some human beings do not have a right to continued existence, i.e. substantive moral value (*Ibid.* 122): without a desire for continued existence involving "a subject of experiences, the concept of a temporal order, and the concept of identity over time", a right to continued existence is untenable. In support, Tooley has made a case for the conceptual connection of specific rights, capacities and desires, but not that the individual should possess a concept of continued self. He now suggests four approaches that simultaneously attempt to answer the underlying question: *how to define the term "person"*: **interests, rationality, agency and self-consciousness** (*Ibid.* 123).

Proposition One: A person is a subject of non-momentary interests:

Broadly defined, this speaks of a variety of unified desires now and at other times, which, to have moral importance, relate to consciousness and experiences. But how are desires over time to be morally significantly interrelated? Tooley suggests that they belong "to an enduring mental substance that exhibits a certain psychological continuity in the alteration of its properties over time", where memory (including memory beliefs) of causal dependence and psychological continuity link earlier and later stages (*Ibid.* 132-134).

Proposition Two: A person can be defined as a rational being:

Tooley defines *rationality* as the possession of a consciousness that implies the capability of enjoying thought processes; the latter is defined as structured states of consciousness "involving the representation of some proposition" (*Ibid.* 135).



But thought processes *alone* do not imply rationality. Tooley presents three views on what needs to be *added* to produce rationality:

Firstly, there is the view that “interpretation connects rationality with various reasoning capacities”. Some interpretations hold the capacity for deductive thought as sufficient; others additionally require non-deductive reasoning.

Secondly, in his book *Rationality*, Jonathan Bennett presents a conception based on the capacity to conceive of a *past* and a *future*, together with thoughts that involve *generalizations*<sup>5</sup>.

Thirdly, *agency*: the capacity for action based on reasons. Integral to this capacity is the ability to deliberate and evaluate competing considerations.

As to the first interpretation, Tooley suggests that these reasoning capacities are neither necessary nor sufficient criteria for personhood. He offers a reason by way of example for each of these statements. Firstly, imagine the limited capacity for reasoning exhibited by grazing cows (in selecting acceptable grass, for instance). Imagine further their limited ability includes a vague conception of a future in which the same cow can (vaguely) project itself as eating of the same grass at another time. Such a capacity may not include the ability for deductive, let alone inductive reasoning, yet the animal’s behaviour does exhibit desires of a limited nature that may be sufficient to vouch for personhood. This sort of limited mental life, reasons Tooley, should be sufficient to ensure personhood (Tooley 1983:136). From this example it seems apparent that Tooley does not wish to place insurmountable obstacles to a being’s acceptance as a person; in other words, his conception of personhood is very basic and perhaps minimalist.

Secondly, and on the other end of the spectrum, imagine a theoretical entity that possesses (only) the capacity for solving complex mathematical problems. Tooley suggests such a being may have intrinsic value that precludes destruction either purely instrumentally, or for its inherent value. Yet there are no reasons *independent of this capacity* for a claim to a right to life. The being in question cannot be a person; to be a person requires such independent reasons. But what if such an entity were to be sentient as well? The addition of *sentience* to the capacities of the entity complicates matters.

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<sup>5</sup> Bennett 1964:87, as quoted by Tooley.



The answer to the question of its personhood is then less evident. Tooley implies that (even) such a being (a rational-reasoning conscious being with rudimentary desires) is not a person (*Ibid.* 137).

As far as rationality in the second sense – the ability to have thoughts about the past and future, and of generalizations – is concerned, Tooley thinks some concept of *time* is necessary, but he finds no reasons why thoughts on generalizations should be necessary (*Ibid.* 138). In fact, he suggests that the concept of time as encapsulated in some notion of a continued self – a notion of a future rather than of a past – is necessary, although of course the notion of *continuation* is impossible without also a concept of past. Again, in order to make his conception as minimalist as possible, Tooley suggests that perhaps only a *belief that one is a continued self* is sufficient, not precise knowledge that this is so. But even when limited to this, having that belief must at least imply knowledge of the *meaning* of the belief. Tooley returns later to what he regards as the significant moral implication of limiting the notion of continuation to a belief.

Proposition Three: Personhood may be defined as the capacity for agency:

Stanley Benn and John McCloskey support a concept of *agency* defined as the capability that a continuing mental substance has of “acting on the basis of reasons, arrived at by a process of deliberation in which competing considerations are weighed against one another” (*Ibid.* 139). This entails a capacity for *self-determination*. Tooley regards agency as defined above, as a *sufficient* criterion for personhood. But as to being also *necessary*, Tooley is less prescriptive. To have non-momentary interests, a notion of a future is necessary, and if “the notion of a person is interpreted in a somewhat attenuated sense, according to which an agent is anything that possesses a non-momentary interest” (*Ibid.* 142), then in that sense agency is probably necessary. In the sense that Benn and McCloskey define agency, however, Tooley implies that such a definition places too great a barrier on being a person. As stated earlier, it seems that Tooley is careful not to present too great a hurdle to his concept of personhood.<sup>6</sup>

Proposition Four: Self-consciousness makes something a person:

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<sup>6</sup> If, at first glance it seems fallacious that something can be sufficient, yet not necessary, consider e.g. that being a woman – or man – is sufficient for being a human being, yet not necessary.



Tooley attempts to convince us that self-consciousness is neither a *necessary*, nor a *sufficient* condition for personhood. This is notwithstanding his earlier view that at least *some form of the concept of a continuing mental substance* is necessary (*Ibid.* 144, 146).

First of all, it is essential to define *self-consciousness*. One's assessment of the position of self-consciousness in the personhood-argument depends on how one defines it. Analysis of the meaning of the two words making up the composite is helpful (*Ibid.* 142):

The concept of "self" can be construed in three main ways around three central conceptions of a *being*, *experiences* and *various mental states*, and of the *relationship* between those three:

Firstly, there is the *pure ego* interpretation; in this instance, the self is an entity standing behind experiences and is not defined in terms of any specific single or collection of mental states.

Secondly, the "*logical construction analysis*"; the relationship is such that the self is constituted by a unified relationship between a collection of experiences instead of being in a sense "behind" the experiences.

Thirdly, the "*neutral analysis*"; self-statements are non-committal, i.e. this view of the self does not subscribe to either of the above.

"Consciousness" may be interpreted as a number of possible descriptions, related in class but of decreasing strength:

It may be seen as direct awareness, or "knowledge by acquaintance", or;

As knowledge, direct or indirect, or;

As justified, true belief, or;

As justified belief, or;

As belief, whether justified or not.

Tooley proceeds to evaluate various re-combinations of the possible different interpretations of the terms *self*, and *consciousness*, and discredits almost any conception of self-consciousness (except the most minimalist) as either necessary or sufficient for personhood. As an example, he evaluates the description of self-consciousness as "direct awareness of ego". This, he suggests, is not a realistic description. But he concedes that there *are* philosophers who disagree, and for whom consciousness is just this. Final judgement of the legitimacy of this description is not



given. Tooley suggests that only a “reductionist view” of self-consciousness that uses combinations of meanings from the lower end of the range (reducing as it were, either the meaning of “self” or of “consciousness”), has a realistic chance of legitimacy as being necessary for personhood (*Ibid.* 144) (combining e.g. ego and belief, or direct knowledge and a neutral analysis).

Notwithstanding the concession that combinations as set out above may be realistic, Tooley is nevertheless hesitant to concede that *any* form of self-consciousness is *essential*. In support he uses as example a hypothetical being that merely *believes* he has a past, but does not *know* this to be a fact. Such a person “is aware of a continuing mental substance, but is not aware of it *qua* continuing mental substance” (*Ibid.* 144). The difference is subtle, but it exists. He “believes, and hopes, that that is what he (*sic*) is, but does not know that is the case”. If self-consciousness is epistemically described as “knowledge of a continuing self”, says Tooley, then this *person* has non-momentary interests, even though it lacks self-consciousness. Self-consciousness therefore cannot be a necessary condition for personhood.

If self-consciousness is not necessary, can it nevertheless, when present, be a *sufficient* characteristic of personhood? Tooley attempts to disprove this notion by way of an example. He contends that it is, at least theoretically, possible to conceptualise a “continuing mental substance that has memory knowledge of past experiences as experience belonging to the same mental substance”, and can conceptualise future mental experiences if it were not destroyed (*Ibid.* 145). Such a self-conscious being may have no desires or a capacity for desires, but if self-consciousness were regarded as sufficient for personhood, then it would be a person. But there is a serious objection to this contention, and it has to do with the central role that *interests* play in contemporary moral theory.

“Most present day moral theories” (*Ibid.* 145), attempt to “relate the content of correct moral rules to the interests of individuals” owing “in large part ... to the fact that establishing some connection between morality and interests appears to be one of the most promising ways of attempting to make sense of morality, of showing that the institution of morality is, after all, a rational one” (*Ibid.* 146). The absence of interests therefore precludes a being from being seen as a person.

If the non-epistemic approach to the justification of morality is correct, then self-consciousness alone is not a sufficient characteristic for personhood.



This part of Tooley's concept of personhood can now be summarized as follows:

- Having non-momentary interests is sufficient for personhood.
- Rationality alone is not sufficient for personhood.
- Unless argued in a weak sense (of having thoughts, or making judgements), rationality is not necessary either.
- Agency implies having non-momentary interests; therefore agency is sufficient for personhood, though not necessary.
- A "libertarian free will" or capacity for "deliberation and rational choice" does not seem to be necessary to be a person.
- Self-consciousness is not necessary, but some limited capacity to exercise the concept of a continuing self is.
- As to the sufficiency of self-consciousness, that would depend on the approach to the justification of moral principles. A non-epistemic approach (that morality does not proceed from knowledge) supports Tooley's contention that self-consciousness is not sufficient (as Tooley has attempted to show in his example).

In summary Tooley's argued theses are (*Ibid.* 304):

1. "One cannot, in general, decide the issue of the permissibility of abortion without tackling the question of the moral status of the fetus."
2. The undeniable species-membership of the fetus has no intrinsic moral value.
3. "The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual's value, is the property of being an *enduring subject of non-momentary interests*. It is not the possession of, or the exercise of, any of the following: the capacity for rational thought; the capacity for free action; the capacity for self-consciousness." As pointed out earlier, this is a significant deviation from his 1972 position where the corresponding *moral principle* that Tooley suggested for a serious right to life reads as follows: "An organism possesses a serious right to life only if it possesses a concept of a self as a continuing subject of experience and other mental states, and believes that it is itself such a continuing entity." (Tooley 1972, reprint 1999:24). This *self-consciousness requirement* is excluded in the 1983 formulation, although *some form of the concept*



*of a continuing mental substance* is necessary. I explained earlier that in practice there is a logical connection between the two positions. I have pointed out above that there are objections to this aspect of Tooley's position.

4. Only those properties related to personhood make the destruction of something intrinsically wrong independently of the entity's value.
5. The property that denotes personhood may admit of degrees, and the wrongness of destroying something may be related to the degree to which the property is possessed.

The question of what in Tooley's conception denotes moral value, a legitimate claim to continued life, therefore a right to life has now been answered. But Tooley leaves three additional questions unanswered (*Ibid.* 305):

1. Now that personhood has been defined, at what point of development does the human organism comply with this definition, i.e. become a person? This is a question to which Tooley returns in the *Infanticide* section of his book (*Ibid.* 358). Tooley prefers this to be an empirical question, but one, he suggests, with which philosophers are "somewhat reluctant to grapple". His strategy is to argue for personhood as a philosophical concept, and to steer away from getting embroiled in arguments about facts. Tooley prefers to settle the philosophical argument but to leave the factual questions to the "experts". Philosophers may disagree with him when he describes this as a purely empirical question; this is as much a philosophical question as it is an empirical one, and subdividing or deconstructing it is unrealistic and disregards the complex interrelatedness of both issues. Secondly, it may have been true in 1983 that philosophers were wary to grapple with the second part of the question. In recent years, however, this has changed, philosophers do grapple with that aspect of the problem, and excellent work to this end has seen the light – I refer e.g. to the articles of Derbyshire (Derbyshire 2001) and the Benatars (Benatar, D., and M.: 2001) and the work of Van Bogaert (2002). Yet "the question of the morality of abortion can never be satisfactorily resolved until one comes to terms with" this question. Tooley is of opinion that this is one area where philosophers who wish to speak out need to have "a sound and thorough understanding of the relevant scientific information" (personhood requirements are psychological, therefore he speaks of the science of human psychological



development). A second reason for this requirement is that Tooley's utilitarian arguments on personhood, if accepted, tend to lead to a very radical view on the value of prenatal life and to legitimate abortion, and even infanticide. He may welcome independent support of his views by science, or at least that his views not be opposed by the contrary views of science.

2. If five above applies, and the essential property of personhood and the wrongness of destroying "persons" are matters of degree, exactly when does destruction become morally wrong?
3. Thirdly, even if abortion is not intrinsically wrong, are there perhaps other unrelated undesirable consequences of abortion?

*John Harris'* conception of personhood differs somewhat from Tooley's on two important matters: the conception of *rationality* and *self-consciousness* as inherent to personhood that, as such, is denied by Tooley. His argument is not as meticulously worked out as Tooley's. He concludes that personhood and a right to life imply *self-conscious awareness* and the *ability to value one's own life* – a definition less complex but perhaps for that reason, more useful. However, careful analysis finds correspondence between the two positions.

Harris sets out to define "when life begins to matter morally" (Harris 1985:8), in contradistinction to merely asking, "when does human life begin". The latter is a question more of biological than of philosophical importance. For many, as indicated earlier, the answers to these two questions coincide, but Harris seeks to find the answer through examining "the features that have moral relevance, which justify our preference for ourselves":

"When we ask what makes human life valuable we are trying to identify those features, which both incline us and entitle us to value ourselves and one another, and which license our belief that we are more valuable (...) than animals, fish or plants" (*Ibid.* 9).

He reserves the term "person" for "any being who has what it takes to be valuable" in the above sense, and intends for the term to be species-neutral and non-anthropocentric.



In order to define morally significant life, he converges two strategies:

Harris' first strategy is to *define a person*. He starts by quoting John Locke's account, written in the second half of the 17<sup>th</sup> century:

A person is a "thinking intelligent being, that has reason and reflection, and can consider itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking" (*Ibid.* 15).

The two elements essential to this definition are *rationality* and *self-consciousness*. Harris regards the rationality required "of a fairly low order, just sufficient" to allow the person to conceptualise herself as the "same thinking thing in different times and places", leaving the impression of a minimal, or threshold concept which makes the process of valuing things at all possible. These are characteristics of the person that we would value. To value something is both a conscious process and a self-conscious knowledge that we are able to and do value. This account is sufficient to distinguish persons from other creatures, and any rival account would have to isolate similar valuable features.

Secondly, Harris examines *what makes existence valuable*. This is difficult to answer because of an abundance of possible legitimate answers, depending on individual life views, plans and circumstances. Definitive answers are less important than the meta-realization of "a way of knowing when we are confronted with valuable lives" (*Ibid.* 16). We hear an echo from Tooley when we read: "What matters is not the *content* of each account, but rather that the individual in question has the capacity to give such an account." Each person's own reasons for valuing her own life are adequate. From this flows Harris' conception of why killing a person is wrong; it is wrong to kill persons – or creatures – that possess that capacity:

"They are people because they are capable of valuing life, and it's wrong to kill them because they do value life. The wrongness of killing another person is, on this view, chiefly the wrongness of permanently depriving her of whatever it is that makes it possible for her to value her own life. So that although each person

may find different and unique value in their own life, each is equally wronged by being deprived of a life, the continuation of which they value.” (*Ibid.* 17)

Therefore, the convergence of Harris’ strategies are evident: in order to value its life a being would need to be personally aware that “it has a life to value”; this involves some form of self-consciousness, involving the ability to “consider itself as itself in different times and places”. A person is therefore any being capable of valuing its own existence (*Ibid.* 18). This concept is value and species-neutral, and it both defines and recognizes persons.

Two publications of *Peter Singer* summarize both his views on personhood and consequent moral value, and how his conception of personhood developed over a span of about a decade.

The first of these publications is a book entitled *Practical Ethics* (Cambridge University Press, 1979), in which the first steps of what seems to be his ethical theme – Unsantifying Human Life (also the title of a 2002 anthology of his writings on the subject) – are taken. Here he introduced the term “*person*” for the type of moral being described above, in contrast to the description “member of the species *Homo sapiens sapiens*” for human beings who are not persons (Singer 1979:75). It was, according to Singer, the religious philosopher Joseph Fletcher who first compiled a list of “Indicators for Humanhood” including “self-awareness, self-control, a sense of the future, a sense of the past, a capacity to relate to others, concern for others, communication, and curiosity”. *Humanhood*, in this description, equals personhood in contemporary language. Such a *person*, says Singer, need not be a human being. John Locke’s famous definition of a person as “A thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places” encapsulates many of the characteristics that Singer argue for (*Ibid.* 76): a form of self-consciousness, and an awareness of its history and its future. From all of Fletcher’s characteristics, the crucial or core characteristics, from which all others stem, says Singer, are *rationality* and *self-consciousness*.

But is there any “special value” in the life of persons, other than the limited value placed on membership of *Homo sapiens sapiens*, and if so based on what? Singer advances four arguments in support of a contention that the lives of persons are more



valuable than the lives of merely sentient beings. The first three are utilitarian arguments.

The first argument concerns the indirect affects that killing persons may have on the happiness of other persons. Self-consciousness, which includes a concept of self, a past and a future, implies the capacity for having desires about the future. Depriving persons of a future means that their desires are thwarted. But terminating a person's existence also means that her consciousness ceases so that she is no longer aware that her desires are thwarted, unlike a thirsty person who continues to desire water even if his desire is not satisfied. The harm to the deceased is therefore not continued beyond her death. This, concedes Singer (1979:79) is the position with the classical hedonistic utilitarianism of Bentham, Mill and Sidgwick, according to whom

“there is no direct significance in the fact that desires for the future go unfulfilled when people die ... If you die instantaneously, whether you have desires for the future makes no difference to the amount of pleasure or pain you experience. Thus for the classical utilitarian the status of ‘person’ is not *directly* related to the wrongness of killing.” (1979:79)

However, *indirectly*, the fear of being killed may influence the happiness of persons other than the one who has been killed. Again, Singer concedes that “one has to be a tough-minded classical utilitarian” not to be troubled by this odd indirect objection to murder. The utilitarian would obviously also object to the general decrease in happiness if a happy person is murdered, but that objection is immaterial to being a person (1979:79).

The second argument has to do with the thwarting of personal preferences and desires. The particular wrongness of killing persons is what differentiates it from the killing of non-persons, which include infants and fetuses. Thus far, Singer has not advanced a compelling argument in support of any particular wrongness. A more significant argument is found in his conception of *preference utilitarianism* (to which I shall return in the section on *Replaceability* later in this chapter).

If, as we should, we take the fulfilment of a person's interests and desires seriously, preference utilitarianism (called “economic utilitarianism” by some welfare

economists) presents a more compelling argument against killing persons. Actions that contravene the preferences of persons are morally wrong in the absence of more weighty contrary preferences. Killing persons who have a preference for the future in terms of specific desires, is therefore also wrong (*Ibid.* 81).

In the third argument, Singer calls on the work of Michael Tooley that I have earlier reviewed, and in particular, that which links specific rights to particular desires, or at least to a capacity to have those desires. He summarizes Tooley as follows:

“... if the right to life is the right to continue existing as a distinct entity, then the desire relevant to possessing a right to life is the desire to continue existing as a distinct entity (*Ibid.* 82)”

Only a “being capable of conceiving itself as a distinct entity existing over time” – a *person* – can have this ability, and is entitled to a corresponding right to life.

Singer’s fourth argument is, unlike the preceding arguments, not utilitarian in conception. It refers to Kantian and principlist conceptions of respect for personal autonomy and the consequent right to choose (*Ibid.* 83).

Peter Singer’s landmark article “Individuals, Humans and Persons: The Issue of Moral Status” appeared in 1990, 18 years after Michael Tooley’s “*Abortion and infanticide*”, and continues the moral argument of *Practical Ethics*. The aim is to argue against the premise that *every human being has a right to life*, and secondly, in support of the notion that only *persons* may have such a right. The section in the article that is applicable to our argument commences in II, on p. 192 of the reprint:

“Many people believe that it is wrong to use human embryos in research because these embryos are human beings, and *all human beings have a right to life.*”

Schematically the argument would be:

P1 Every human being has a right to life.

P2 A human embryo is a human being.



C Therefore, the human embryo has a right to life.

C can be rewritten: Every human being has a right to life based on inherent moral value.

Singer primarily targets P1, which is very vulnerable once we cease to take it as an unquestionable moral axiom, and instead focus on the moral basis for our objection to killing human beings (or on the moral basis for the being's "right to life" claim). We generally regard the killing of humans as much more serious than the killing of animals; the obvious reasons why this is so, argues Singer, can only lie in the *inherent differences between humans and animals*, to wit:

"The morally relevant differences are those based on our superior mental powers – our *self-awareness*, *our rationality*, *our moral sense*, *our autonomy*, or some combination of these" (Singer 1990:193).

These are uniquely human traits – "*the kinds of thing which make us persons*". But the argument can be expanded: characteristics like being able to enjoy life, having an expectation of the future, being part of a relational network, and free choice in terms of our life plan are also important. The essence of the argument here is that a human right to life is based on the possession of the mental qualities noted above. The extended or developed meaning of "human being" here refers to "those beings who have the mental qualities which generally distinguish members of our species from members of other species". P1 applies only to those types of human beings.

It immediately follows that the meaning of "human" that makes P1 plausible, applied to P2, will make P2 false:

"The embryo, especially the early embryo, is obviously not a being with the mental qualities that generally distinguish members of our species from members of other species" (*Ibid.* 194).

So, from this argument, Singer deduces that the only realistic defence of P2 must be based on *speciesism*, an approach he regards as morally unjustified: the *characteristics* of life forms matter, not the species they belong to. Secondly, the above quote applies also to the characteristics of the fetus – they are not those of persons. The only factor,

“the minimal characteristic to give the embryo (or fetus) a claim to consideration is sentience” (*Ibid.* 197).

From Tooley, Harris and Singer’s accounts, we can now summarize the utilitarian argument concerning the acquired psychological characteristic, or characteristics, that can be used to argue for a right to continued existence based on intrinsic moral value: *personhood*.

As shown in the previous section, sentience as such is but a *threshold capacity* for limited moral consideration. Beings should at least be sentient before any conception of moral value can be realistic. All sentient beings have a right to equal consideration of their interests – limited to a right not to be exposed to suffering, not a right to life.

On the other hand, *persons* who possess the acquired psychological characteristic(s) argued for in the foregoing do have a legitimate claim to a right to continued existence. As Tooley described it, this is based on a non-potential characteristic, i.e., it must be an extant characteristic, not something that a being might or might not develop or acquire in future. The property makes destruction of the being intrinsically morally wrong, i.e. we are not assessing the value of the individual, only its possession of the property. That property is not the agency, self-consciousness or rationality of the individual, but the fact that it is capable of having interests of an enduring nature (Tooley 1983:304) – “the sort of unification of consciousness over time that makes something a subject of non-momentary interests” (*Ibid.* 408) and at least “having some thoughts” (*Ibid.* 368).

How does this compare to John Harris’ conception? Harris narrows the type of interest down to *the ability to value its own life*, and to do this self-consciously (Harris 1985:17). The possession of this ability gives the individual moral value. It is the removal of this capacity – to value its own life – that makes killing it wrong.

Peter Singer’s conception differs from those of Tooley and Harris in that it is more formal. He seeks uniquely human traits – “*the kinds of thing which make us persons*” such as “*self-awareness, our rationality, our moral sense, our autonomy*, or



some combination of these” (Singer 1990:193). The first two of these characteristics he regards as central to his conception. Singer describes himself as a preference utilitarian, and for him the wrongness of depriving a being of a continuation of her life lies predominantly in the frustration of her specific preferences. In order to have preferences, a being requires the capacity of having desires, and this implies awareness of itself as a continuing being (self-awareness) with a past history and a future. Only persons exhibit the necessary characteristics.

It may now be clear why I considered Tooley’s conceptualisation as most cogent and developed. It may be equally clear that there is nevertheless confluence in the three conceptualisations, and that the differences, from a practical point of view, i.e., how to apply them in practice, what their practical meaning is and how they can help us in identifying persons, are not all that remarkable. Most people would consider a being a person, says Tooley (Tooley 1985:349), if he possesses, or can exercise “all of the following capacities ... the capacity for self-consciousness; the capacity to think; the capacity for rational thought; the capacity to arrive at decisions by deliberation; the capacity to envisage a future for oneself; the capacity to remember a past involving oneself; the capacity for being a subject of non-momentary interests; the capacity for language”. These relevant features are all *psychological* in nature; it is the sort of *mental life* that one leads that makes one a person (*Ibid.* 347).

The answer to the question about fetal personhood, right to life and moral value is self-evident, from this conception at least. In this, there is no disagreement between Tooley, Harris and Singer. The prenatal being does not have any of the person-making characteristics, and therefore does not have a legitimate claim of a right to life based on inherent moral value. However, the sentient prenatal being does have limited moral value, it may have momentary interests, it may be able to suffer and feel pain, and therefore, has at least the right not to be exposed to suffering. Yet the extent of its moral value does not include a legitimate claim to a right to continued life, the conception of which it cannot have. It is *prima facie* wrong to terminate the lives of persons; without additional argument or reasons, this does not apply to sentient non-persons.



## 2.4 Personhood is not restricted to human beings

The utilitarian application of the concept of *sentientism* introduced the principle that in certain respects, the characteristics of human and non-human animals coincide. The *moral implication* is that *qua* sentient beings, human and non-human beings have equal “rights” because they have equal interests. Although sentience does not justify a “right to life”, the utilitarian feels justified – in fact, *obliged* – to treat all sentient beings with equal respect. The essence of this conception is that all sentient beings have a right to equal consideration. The utilitarian develops this position from a fundamental *non-speciesist* notion.

The utilitarian further develops the species-neutral definition of *personhood* to justify the inclusion of other beings that share the same personhood-characteristics. The beings so included are, *firstly*, certain primates. In his dualistic strategy, John Harris describes the capacity to *value one’s own life* through *self-awareness* as the central characteristic that denotes personhood. Self-consciousness is the essential pre-requisite to a capacity to value one’s own life (Harris 1985:18). But how are *we* to judge whether some other being can value its own life? The obvious answer is to ask them, but that presupposes language as the “hallmark of self-consciousness” (*Ibid.* 19). Certain primates – chimpanzees, orang-utans and gorillas – exhibit “rudimentary” self-consciousness, for example when exposed to mirrors. As to a rudimentary type of “language”, research indicates that some primates can learn – and use, sometimes with surprising “insight” and apparent understanding – sign language concepts intelligently. Harris contends that Washoe (a famous chimpanzee used in such experiments by Allen and Gardner) “clearly can (speak through sign language) and is therefore equally clearly a person” (*Ibid.* 20), even if of a rather primitive sort. Harris concedes that this primitive form of personhood may make the recognition of such beings as persons difficult or contentious, but suggests that when unsure of the personhood of a being, we should err on the safe side. How this is to be related to justify a claim to a right to life is also contentious.

Peter Singer describes how Washoe recognizes herself in a mirror, and imparts this knowledge. When asked “Who is that?” she signs: “Me, Washoe”. She also uses



signs to indicate future intentions. But how prevalent is this capacity, and what is the role of language? Does language simply enable chimpanzees and other primates to exhibit a characteristic that is more common among other animal species, but through lack of communication skills, cannot be made understandable to us? (Singer 1979:94) This has profound implications. Stuart Hampshire has for instance written that it is not only an absence of communication skills that we observe; it refers to an underlying inability to “reflect upon, or to announce to itself or to others, its own future behaviour” (Singer 1979:95). If this is correct, then the ability to use language in some form or another is essential for personhood, and the only animals, apart from some primates that may exhibit this essential characteristic are whales and dolphins. Infants are also excluded. I should add that the views expressed here exaggerate the significance of this very limited and rudimentary use of “language”.<sup>7</sup>

Secondly, a concept of personhood can help us to distinguish between “people on other planets” (Harris means *persons*) who – if indeed they exist – may in a speciesist sense be completely different from “us”, and non-persons (strange plants, animals and machines found in the same worlds) (Harris 1985:9-10).

The inclusion of both of the two preceding types of *non-human persons* is almost obligatory in the utilitarian conception. The extension to non-human “persons” is necessary to complete the description of personhood in a unified, consistent manner. It would have been untenable to ignore this obvious implication of the utilitarian argument.

## 2.5 Justified infanticide

Discussing infanticide is not central to the theme of this work, yet, as will be apparent in the following short discussion, it is central to the utilitarian argument on the importance of personhood in determining the moral value of all beings, including prenatal human beings. As such, it cannot be ignored. I shall not meticulously follow the utilitarian argument because that would be too great a diversion. Instead I shall restrict myself to the essentials of the argument and especially point out its central

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<sup>7</sup> See also section 3.3 on *responsible speciesism*, in the next chapter, for a description of the significance of language for human self-realization, and Karl Popper’s description of the four levels on which language is used by humans in contrast to animals, whose use of language is restricted to the “lower” levels of self-expression and the supply of “information”.



importance to the utilitarian position. There is in the utilitarian conception no morally significant and logical distinction between infants and prenatal beings (Singer 1979:188). Most of us, be it for intuitive or other reasons, are not prepared to consider the sacrifice of neonates, especially when they are normal, or to think of their lives as morally valueless, and any philosophy that legitimates infanticide is generally viewed with great suspicion. If, as Tooley, Harris and Singer admit, the underlying moral philosophy of infanticide and abortion are linked in an obligatory fashion – I tend to agree that in the utilitarian conception, it is<sup>8</sup> – then a logical locus to commence any enquiry into abortion (or conceptions of prenatal value) is the value of infant life. Tooley, at least, realizes this, and therefore feels that infanticide should be supported by separate argument (as should opposition to it), but of course this does not remove the link between the two (Tooley 1983:314).

Now, it is a necessary deduction that the statement of the utilitarian qualification for personhood does not apply to prenatal beings only. In fact, Tooley admits it is impossible to differentiate morally between infants and fetuses, and the second part of his 1983 book<sup>9</sup> is devoted to the subject of infanticide. It is clear that he appreciates the logical link between prenatal beings and infants up to some undefined and perhaps indefinable age. Moreover, Tooley regards examination of the moral permissibility of infanticide as important for three reasons, as set out in his 1972 publication (reprint 1999:22):

- Theoretically, it forces one to be clear about what makes a being a person;
- On a practical *classical utilitarian* level, it would increase happiness if parents could be spared the hardship of raising children who are grossly deformed (note that Tooley adds an argument for the absence of moral value to the standard classical utilitarian argument of maximization of happiness);
- The intuitive response against infanticide is visceral and emotional, dealing with a taboo rather than a well-founded philosophical position – something philosophers should question.

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<sup>8</sup> Jim Stone agrees with this view, but adds a deduction usually overlooked by supporters of this position. Not only do psychological requirements support infanticide, or at least neonaticide, it also problematizes claims that infants may make on a right to our protection and care – including access to health care – since infants cannot take an interest in their future.

<sup>9</sup> *Abortion and Infanticide*, Michael Tooley, Clarendon Press, Oxford, 1983



As Tooley writes:

“One reason the question of the morality of infanticide is worth examining is that it seems very difficult to formulate a completely satisfactory liberal position on abortion without coming to grips with the infanticide issue. The problem the liberal encounters is essentially that of specifying a cutoff point which is not arbitrary: at what stage in the development of a human being does it cease to be morally permissible to destroy it.” (*Ibid.* 21)

Later, in his 1983 book, Tooley realizes that the link between the moral value of fetal and neonatal lives is *obligatory*. There is no logical distinction between fetus and infant, so from a moral point of view, no good reason to treat them differently. Because the neonate is not a person (Tooley 1983:407), nor even a “quasi-person” – a being in possession of a person-making property, but not in sufficient degree to make it a person – (*Ibid.* 408), the liberal (read: utilitarian) simply *has to* accept, if she wishes to be rational, the equality of their moral value. Therefore, Tooley warns that:

- Firstly, “there is grave danger that, if one discusses the question of the morality of abortion in isolation from the question of the morality of infanticide and of the killing of nonhuman animals, one will wind up with a combination of views that is not rationally tenable.”
- Secondly, “the interrelationship of these three questions provides another reason why the liberal on abortion should not dismiss infanticide on the ground that it conflicts with his or her moral feelings. The juxtapositions of abortion, infanticide, and the killing of non-human animals strongly suggests that the liberal is going to have to undertake serious revision of his or her moral views in one area or another. Either abortion is morally suspect, or infanticide is morally permissible, or the killing of at least some non-human animals is seriously wrong.” (*Ibid.* 422, 423)

For the purposes of this discussion I shall ignore the third issue raised above. With respect to fetal and infant life, Tooley’s free admission to the immediate and inevitable conclusion of this account is equally applicable to conceptions of moral value. The above statement can be rephrased as follows: In terms of moral value, or a

consequent right to continued existence, it is very difficult to differentiate between the fetus and the infant other than by means of an arbitrary cut-off point. Yet, in reading Tooley's 1983, it is apparent that he argues for infanticide *separately* from the abortion issue and seeks to find a separate reasons in support thereof. This is significant for reasons alluded to earlier: the most obvious and self-evident line of attack of the utilitarian personhood conception is precisely at the logical connection between abortion and infanticide. Notwithstanding the above conclusions, Tooley forestalls this attack by presenting separate arguments for infanticide. But it seems that Tooley goes beyond this; he suggests that there is no apparent and obvious intuition that infanticide is *prima facie* wrong, and that

“one is justified in concluding that if it is to be shown that infanticide is wrong, this will have to be done by means of an *argument*, and one, moreover, that involves both moral principles, and non-moral, factual claims” (*Ibid.* 314).

As he puts it, this argument would also have to show that abortion is wrong: fetal and infant lives have equal value, and if infants have a right to life, so do fetuses. This, contends Singer, strengthens the “conservative position”: the absence of “a morally significant distinction between a fetus and a newborn baby” (Singer 1979:122).

Peter Singer presents his case in the following words:

“We have suggested that the death of a new-born infant or a fetus *does not have the same moral significance as the death of an older child or adult because the infant is not a continuing self, capable of valuing its own continued existence.*”

And, in support of his contention that the infant is like the fetus: *merely* sentient:

“Infants are not continuing selves and hence have no interest in their continued existence. They do have other interests though – momentary interests that merely require the presence of a conscious or sentient being, not the self-awareness of a person.” (Singer 2002:240); and, in support of his contention that based on morally significant characteristics, there is no realistic cut-off line *at birth* between “replaceability” and “non-replaceability”:



“... birth does not mark a morally significant dividing line. I cannot see how one could defend the view that fetuses may be “replaced” before birth, but newborn infants may not be. Nor is there any other point, such as viability, that does a better job of dividing the fetus from the infant. Self-consciousness, which could provide a basis for holding that it is wrong to kill one being and replace it with another, is not to be found in either the fetus or the newborn infant. Neither the fetus nor the newborn infant is an individual capable of regarding itself as a distinct entity with a life of its own to lead, and it is only for newborn infants, or for still earlier stages of human life, that replaceability should be considered to be an ethically acceptable option” (Singer 1993:188)

But when are human beings irreplaceable persons, and is destroying them morally wrong? Certainly, says Tooley, not at or after birth: “Are new-born humans persons? ... the answer must be no – unless one is prepared to defend an account of person-making characteristics that differs radically” from that which is generally accepted by utilitarians (Tooley 1983:407); they are not even “quasi-persons” (*Ibid.* 408). In order to be in compliance with science on the matter, he supports this contention with a comprehensive scientific evaluation of behavioural, neuro-physiological and bioelectrical (EEG) evidence (*Ibid.* 407). The person-making characteristics only *gradually* appear in the first months as the infant develops, but are not fully present before perhaps 18 months, or even later, depending on one’s criterion. For present purposes, one need not divert into an in-depth discussion of exactly when personhood appears, although this is critical in the utilitarian conception. It suffices to acknowledge the utilitarian position of moral equality of infant and fetus, and that both are replaceable.

If the fetus has no inherent value that precludes its destruction, are there other utilitarian objections? Indirect reasons – the affect of its demise on aggregate happiness of others – are relevant only inasmuch as we erroneously regard infants as cuddly little beings, or are influenced by their helplessness (Singer 1979:123). Killing infants should not decrease human happiness in the sense that adults are threatened by infanticide. Furthermore, when infanticide is a private matter performed by parents who have no wish to retain the infant, there can be no harmful effects on society. As far as Singer’s preference utilitarian views go, a newborn is not a person, is not self-conscious, cannot have interests beyond those applying to sentience, and cannot have preferences. It



cannot desire a continuation of its life, and therefore has no realistic claim to a right to life.

Singer, like Tooley and Harris, therefore recognizes the essential correspondence between the prenatal and immediate post-natal human being in this conception. They agree that the infant is not a person as defined in their utilitarian conception, its moral value is no more than that of the fetus, it has no claims on a right to a continuation of its life, it is replaceable by a similar being, destroying it is not morally wrong, and therefore infanticide of even normal human neonates is morally permissible. This is at odds with our most profound intuitions.

### 3.6 Replaceability

The last quotation at the end of the previous section introduces my sixth theme: *replaceability*, which in turn will lead us to Singer's *preference utilitarian* development as a necessary additional reason why adults should not be killed; additional to the two insufficient classical utilitarian reasons (side effects and decreased aggregate happiness). Utilitarian theory has to be persuasive on two grounds:

- Firstly, it has to give a rational account of morally significant differences between valuable lives and non-valuable lives. This is found in their "personhood" account, as opposed to the (mere) consciousness requirement of sentientism.
- Secondly, it has to justify why it is *at all* wrong to kill persons when killing non-persons is morally acceptable (in certain circumstances). Such persons, argues Singer, should not be killed because they are not *replaceable*.

A *replaceability thesis* therefore supports the *classical utilitarian* response to the killing of sentient beings. Sentient non-persons are replaceable, and the only reasons why they should not be killed *and replaced* is because of possible side effects and the possible decrease of aggregate happiness. Legitimate "*replacement*" here implies a lack of moral uniqueness or morally argued personhood, and substitution of a present being by a later one, which in classical utilitarianism, as long as net happiness is not diminished, is morally acceptable within a "total" view: aggregate happiness includes also the happiness of individuals that come into existence specifically to increase total



happiness. According to this conception, it can be argued that we may even have a duty to create new individuals with one proviso: that they be happy and so contribute to aggregate happiness, or replace happiness lost. Persons, on the other hand, are unique and non-replaceable. In fact, non-replaceability is a critical distinguishing characteristic of persons, and preference utilitarians do not treat “subjects-of-a-life” as replaceable. The following encapsulates the distinction:

“Rational, self-conscious beings are individuals, leading lives of their own, not mere receptacles for containing a certain quantity of happiness. Beings that are conscious, but not self-conscious, on the other hand, can properly be regarded as receptacles for experiences of pleasure and pain, rather than as individuals leading lives of their own” (Singer 1987:9).

In terms of prenatal human beings as sentient beings, Singer accepts the “*total view*”: all sentient beings, including possible human beings, are replaceable. Therefore, they are all subject to the classical utilitarian calculations. They are not morally significant for their own sakes or as individuals, but only in terms of contribution to or detraction from aggregate happiness. They are replaceable since they are not “self-conscious” persons.

Opposed to the total view is the preference-utilitarian “*prior existence*” view: that there is no value in increasing aggregate happiness by the creation of additional individuals. An equally happy new one to offset the loss cannot replace the happiness inherent in any lost life.

The “replaceability”-argument is used by Singer for two purposes:

- Firstly, to distinguish between persons who have personal preferences in their continued lives, and non-persons, who cannot have such capacity. Such persons are “non-replaceable”.
- Secondly, in order to argue for the moral wrongness of killing persons, the two classical utilitarian considerations are insufficient: those from side effects, and from decreased aggregate happiness; more is required.



This additional development is called *preference utilitarianism*, the utilitarian basis of which is that it is morally wrong to frustrate the desires of persons to go on living. The aim of preference utilitarianism is a far cry from the aim of classical utilitarianism: the maximization not of aggregate happiness but of the satisfaction of *personal preferences*, irrespective of whether “this produces ‘satisfaction’ in the individual”; this is in fact an important deviation from the classical or hedonistic utilitarian position: “What the preference utilitarian seeks to maximize is not an experience of satisfaction, but the bringing about of what is preferred” (Singer 1987:9). Singer describes himself as a preference utilitarian.

Robert Elliot (1987:83) describes Singer’s utilization of the “utility function” as “in some way composite. Singer urges the maximization of *objective preference satisfaction* and the *maximization of pleasure*.” In the first preference utilitarian norm, “all creatures who have preference or desires are covered. The second classical hedonistic norm includes all those creatures with the capacity to experience pleasure.” Species membership is not important in this classification: “The treatment of individuals is determined solely by reference to the utility function.” (*Ibid.*) Elliot points to both the *unifying* and *dividing* aspects of Singer’s dualistic conception.

Merely sentient i.e. “non-self-conscious” beings, including prenatal beings and neonates (and many animal species), have none of these long-term desires or preferences that project into the future. Their desires, like the desire for food, are limited in scope and to the immediate present, and can logically only be frustrated by the non-satisfaction of those desires – and by death only if death is the cause of the frustration of desire (Lockwood 1979:159). The utilitarian classifies infants in this grouping. To quote Singer again:

“Infants ... have no interest in their continued existence. They do have other ... momentary interests that merely require the presence of a conscious or sentient being, not the self-awareness of a person.” (Singer 2002:240)

Lockwood’s reading of Singer does of course not mean that killing non-self-conscious, or more accurately, non-personal sentient beings including fetuses and infants, cannot be immoral. Killing them while they are awake (especially, e.g. when feeding) would both frustrate a limited preference and in the total utilitarian conception, decrease aggregate happiness, and this is morally wrong. But killing them while asleep or



anaesthetized cannot be morally *very* wrong (in the classical sense, their limited sentience does mean that this diminishes aggregate happiness – but not excessively). Killing them in any way is still considerably *less* wrong than killing beings who have the ability to have long-term preferences: self-conscious persons who cannot be replaced (Landman 1990:163). There is a vast difference between the very limited moral value of the lives of sentient non-persons and the almost absolute value of persons – absolute and limited only by their own desires and preferences.

Both R M Hare and Peter Singer suggest that replaceability almost invariably features in our reproductive choices; as Singer puts it “an explicit or implicit choice between different individuals” that are in the morally relevant sense, equivalent or replaceable. What Singer seems to support is a contention that in a moral sense, the fact that we effectively have these reproductive choices that are supported by a thesis of replaceability – “when and with whom to have intercourse, without contraception, to have the two or three children we are going to have” – and exercise them, results in other choices about prenatal beings, especially embryos, being seen as but a logical extension of these choices (Singer 1990; reprint 2002:196).

Hare’s general argument is from a conception of the pre-Christian Golden Rule: that I am “glad that I was born” places a responsibility upon me “not to stop others being born” (Hare 1975; reprint 1999:63). Yet, there is always, in effect, a choice between “having this child now and having another child later.” Nevertheless, most opponents of abortion “make a great deal of the wrongness of stopping the birth of this child but say nothing about the morality of stopping the birth of the later child” which is effectively what results if this child is retained or not replaced. Hare argues that if the first child turns out to be severely handicapped and would lead a miserable life, and a possible “replacement” would have had a happy life, the choice should be to terminate for this reason; the replaced fetus presumably has less moral value than the future one. This would fall within a total utilitarian conception of maximizing hedonistic happiness, through replacement if that is what it takes, although Hare’s argument contains, at the outset at least, elements of principlism. However, the point I wish to make is that Hare does not find it necessary to refer to the possibility that “the present fetus will turn into a person who will be utterly miserable; only that that person’s *expectation* of happiness is much less than the expectation of the later possible person”. What Hare is in effect doing in a classical utilitarian sense, is balancing the moral value



of the life of the present fetus with that of the potential fetus that might replace it. He bases his conception of moral value on capacities that will only develop in future – akin to personhood as argued before.

Hare's argument is supported by interesting empirical data; that the chances of parents having "another" child instead of "this" child are only about 20% lower than the chances of "this" child to grow into an adult. So the chances of effective replacement and the increase of aggregate happiness if "this" child is severely handicapped and the "replacement" is normal, therefore more likely to be happy, seem to be considerable, far in excess of 80%. Hare therefore makes a distinction between normal fetuses who can be expected to lead happy lives, and abnormal present fetuses; the latter, it seems, may from his utilitarian perspective, be replaced; the former not. They are probably also more likely to be replaced than unwanted normal fetuses. I hasten to add that this article was written in 1975; societal norms, values and practices have changed radically; termination of pregnancy is very common; it is legal in most countries; it has become an embedded social custom in many countries, and effective contraception is widely available. It is unlikely that "replacement" is that probable in many of the 45 million or so terminations that are performed annually worldwide. Most of those terminations are in normal pregnancies with normal fetuses and replacement would only render a better result if the replacement were born at a later time, when circumstances for the mother have drastically changed.

## 2.7 Rule-utilitarian positions on the value of fetal life

There are, as I argued on p. 13, particular problems with the formulation of so-called *classical utilitarianism*:

- Firstly, *hedonism* as ethical principle confuses the nature of the "type" of happiness that the utilitarian seeks (Wellman 1975:39). It should not be conceived of as a type of happiness that is essentially a response to the attainment of things that we from previous experience recognize as goods (Rachels 1995:105), that is, the satisfaction of existing desires. (That is the aim of preference utilitarianism.) The predominant non-hedonistic aim of maximum utility does in itself provide an adequate response to this accusation.



- Secondly, in fields of morality, consequences cannot be “all that matters” since consequentialist decisions may contravene *individual human rights*, conflict with the principle of individual *justice* and do not allow for reciprocity based on *previous events* that should affect current decisions and serve to define “special interest groups”. Utilitarianism “is at odds with the idea that people have *rights* that may not be trampled on merely because one anticipates good results” (*Ibid.* 108). Utilitarianism, says Rachels, looks only to the future (*Ibid.* 108, 109). Retrospective considerations are important; we cannot ignore previous acts and promises.
- Thirdly, in practice, moral agents need to decide real and pressing issues concerning specific persons. Act-utilitarianism is inherently arbitrary unless the utility of each individual act is evaluated, and this is virtually impossible. Even if it were possible, final decisions are likely to be, at least in part, subjective.
- Fourthly, a just, functional and functioning society requires non-arbitrary moral rules. Not all agents are capable of moral reasoning and decision-making. In essentially similar circumstances, justice implies a measure of predictability, which may be difficult without accepted moral rules; rules *are* important. But *why* are moral rules so important, given the fact that the criticism of modernity is precisely its reliance on moral rules? There are various reasons for this. Moral decisions cannot be left to the arbitrariness described above. Not all agents share an equal capacity for moral reasoning and are able to make decisions that can stand up to moral scrutiny. In essentially similar circumstances, justice implies that substantially similar decisions be made, which may be difficult without recourse to accepted moral rules. Even if one should be careful of equating adherence to rules with morality, rules *are* important.

One method to respond to the above criticisms would be to use moral rules in such a way that they are legitimised by the underlying principle of greatest utility, and in turn can act as ready reference with respect to individual moral acts. Such rules obviate the need to agonize over individual acts to determine greatest utility (yet some postmodern moralists, e.g. Zygmunt Baumann would say agonizing is exactly what is required of moral deliberation!). All that is required is to determine which rule may be applicable, and decide accordingly. Individual acts are evaluated against these clear and accepted rules. Individual human rights, individual justice, previous events and even exceptions



can be accommodated by these rules, thereby addressing the problems explained above (exceptions should, for practical reasons, be limited to prevent introducing excessive complexity that may limit realistic application of the rule, thereby neutralizing its advantages). Of course, rules do not answer all of the above criticisms, particularly the first.

The moral theory described here is called *rule-utilitarianism* (Rachels 1995:112; Wellman 1975:41). It is a development based on the work of J O Urmson, and particularly of Richard B Brand and his disciple R I Sikora. It claims that the establishment of moral rules with reference to the principle of greatest utility against which individual acts are judged may provide an adequate defence in response to these indictments (Rachels 1995:112; Wellman 1975:41). Rachels describes rule-utilitarianism as follows:

“Therefore, the new version of Utilitarianism modifies the theory so that individual actions will no longer be judged by the Principle of Utility. Instead, *rules* will be established by reference to the principle, and individual acts will then be judged right or wrong by reference to the rules” (Rachels 1995:112).

Wellman quotes a simple example of how act-utilitarianism alters the appearance of morality: in act-utilitarianism, the moral wrongness of an individual act (e.g. of lying) is adjudged with reference to greatest utility. Certain acts of lying may pass the test of utility and be morally acceptable, others not. This introduces a measure of subjectivity and arbitrariness into the particular decision. In rule-utilitarianism, a general rule is interspersed between the individual act and the evaluation of its moral acceptability. All acts classified as of a certain nature (e.g. all acts of lying) are regarded as similar, and as morally wrong, unless allowances have been built into the rule to allow for exceptions (e.g. lying to save a life) (Wellman 1975:41). Exceptions of this nature may also act to “soften” or humanize the theory.

In short, rule utilitarianism is the position that takes recourse to moral rules when adjudging the moral status of acts. The rules themselves, however, are not justified by appealing to constructions such as the “will of God”, “laws of nature” or the dictates of society. When called upon to justify *which* rules he accepts, the rule



utilitarian will only accept those rules that can be justified by drawing on the principle of greatest utility.

How is the rule-utilitarian position developed? With reference to Brandt's position (and indirectly, to his own), R I Sikora voices a concern felt by many applied ethicists at some time or other:

“While there is no lack of stylish literature, there is a dire need for a rationale to adjudicate between a scatter of conflicting intuitions” (Sikora 1993:87).

He then proceeds by suggesting that Brandt's form of rule-utilitarianism may provide such a rationale:

“For Brandt an action is right in a given society if and only if it is in accord with the most beneficial morality for members of the society to subscribe to, in a sense of following it as well as one could expect those people to do.” (*Ibid.* 87)

This contrasts “with act-utilitarianism which holds that an action is right ... only if it is in accord with the morality that would be most beneficial if it were followed perfectly”. By this I presume Sikora means meticulously evaluating the utility of all acts. As Brandt sees it, in act-utilitarianism the interests of society are not considered. He rejects act-utilitarianism because “...our actions would not be sufficiently predictable and we would have too much room for rationalization” because of the inherent subjectivity and arbitrariness. For these reasons, rules of some sort are required.

What is Sikora's position? He “defends a version of rule utilitarianism that resembles Brandt's” with three distinct developments that he describes as follows:

- He has a wider, more encompassing and more responsible focus: he “is concerned with the welfare of all sentient beings, not just with the welfare of the society that would subscribe to it”;
- He explicitly allows for rights as well as obligations as exceptions to his rules;

- He recognizes that “actual social circumstance may make it wrong to follow the morality to which it may be most beneficial for a society to subscribe” thereby taking care of some of the objections to act-utilitarianism (*Ibid.* 88).

Sikora calls his brand of utilitarianism *rule-utilitarianism* (it is, of course, but one version). This more culturally sensitive form of rule-utilitarianism aims to soften and humanize an otherwise harsh and inflexible rule-based approach. Utility is judged by moral rules set against the backdrop of particular societal needs, wants and requirements. What matters, to a certain extent at least, is what this particular society requires. The concept of utility (and Sikora means it in a hedonistic way – maximizing happiness) is restricted to the society in question. However, this introduces a notion of cultural relativism. Sikora thinks it is not (or perhaps, need not be) excessive and the accusation of “rule-ism” is unrealistic (presumably this would depend on particular rules, circumstances and how they are applied). The goal – “maximizing happiness” or greatest utility – as foundation of the rule clearly remains the same in all societies (*Ibid.* 88) allowing for criticism of actual moralities (but this would probably imply a reversion to act-utilitarianism). Brandt regards this as a positive and preferable *pluralistic* code – in allowing sufficiently though not excessively for exceptions, morality loses its otherwise rigid appearance and gains in practicality and usefulness, two important requirements in contemporary conceptions.

Despite the risk of cultural relativism, Sikora supports Brandt’s contention that rule-utilitarianism is “naturalistic”: the hedonistic goal of maximizing happiness is what all fully rational persons would desire. Secondly, unlike deontologists, there is no need to appeal to “non-natural, distinctively ethical qualities” implicitly or explicitly. Unlike act-utilitarians, or indeed Brandt’s version of rule utilitarianism, Sikora’s brand is holistic, yet at the same time personal in recognizing that particular circumstances may affect moral decisions. Nevertheless, it is a form of rule utilitarianism, therefore all circumstances cannot be considered. This limits its “bottom-upwards” or contextual applicability.

To return now to the object of our interest in Sikora: his rule utilitarian argument on the moral value of prenatal life.

Sikora regards it essential in a defence of abortion to present the familiar arguments that killing fetuses is morally permissible even though killing innocent,



rational individuals is wrong (*Ibid.* 94). Our interest here is not primarily abortion but to understand what Sikora intimates about pre-personal moral value. We can therefore rephrase Sikora's claim to capture the underlying question upon which he bases his argument, even if he does not clearly state it in those terms: he needs to prove that fetuses lack inherent moral value which precludes them from being killed, whereas rational persons do not. He needs to show that:

- “there is sufficient reason for forbidding the killing of persons that does not apply to fetuses,” and
- “there is not some other (utilitarian) reason sufficient for banning abortion.”

He dispenses with the first in a very rapid manner by stating – not arguing – that “*allowing the killing of persons ... would have disastrous consequences that would be fatal to civilization, while this is not true of abortion on demand*” (his emphasis). The reasoning behind this statement is not clear; presumably he means it in a classical utilitarian sense and reasons from the possible indirect affects of abortion. The *moral rule* of this statement is clear, and could be stated in three variations or steps:

- It is morally acceptable to allow abortion on demand because
- It is morally acceptable to kill fetuses because
- Fetuses have no inherent moral value (whereas *persons* have).

The *utilitarian nature* of the statement would read: because civilization is not put at risk, happiness is not diminished, and abortion on demand is morally acceptable.

For the second part of his argument, Sikora returns to the *hedonistic conception* of utilitarianism (*Ibid.* 94). Based upon this, he believes it to be wrong to prevent the existence of any individual person who has good prospects of a happy life, and conversely, that one should prevent the existence of an individual person whose life is bound to be miserable. These arguments are apparently based on the general aim of classical utilitarianism: promoting happiness directly or indirectly. A “total” utilitarian view (Singer 1979:87, 100) would have it that aggregate happiness is increased if all potential persons are actuated, and it turns out that more happy than unhappy persons come into being. This appears to be self-defeating if Sikora's aim is to support abortion,



and seems to challenge the utilitarian view on abortion, and even challenge contraception and non-actuation of all possible beings – including fetuses.

But Sikora does not agree with this position. His attempt to answer this objection is to contend, “the world is now so dangerously overcrowded that allowing abortion tends to increase rather than decrease the total amount of happiness” (Sikora 1993:95). This would be true even if all persons had average expectations of happiness. He suggests that the prospects of happiness are far below average due to the poor prospects of unwanted children, children born to the impoverished, fatherless children, and children born to alcohol and drug abusers. One is reminded of the notion of *replacement* (see earlier in this chapter): that, for instance, pregnant teenagers may abort now and subsequently have children who may have happy lives to replace otherwise unhappy children born now. Back street abortions – often the alternative to legal and clinical abortions – also diminish happiness because of inherent dangers and social stigmatisation.

Overpopulation causes unhappiness on a grand scale (defined as suffering, deprivation, famine) and diminishes human happiness. Sikora’s object is to maximize human happiness. His rule is that *abortion is morally permissible because it works towards that goal* – actions are good and right if and when they work towards this end. Actions that limit overpopulation can diminish suffering and maximize happiness. This makes such actions both good and right.

How does Sikora’s rule-utilitarianism answer the conservative challenge that like infants and children, fetuses have a “right to life”, and denying that this is inconsistent? Sikora regards the classical utilitarian argument of “indirect considerations” as sufficient justification to differentiate between infants and children on the one hand, and fetuses on the other: the demise of infants, children and adults can negatively affect the aggregate happiness of others. In an overcrowded world, fetuses would probably when born, have unhappy lives; therefore the same consideration cannot be given them. Sikora regards arguments from side effects such as his view on the affect on civilization as consistent justification for moral value for infants and children – and even for persons who do not have lives worth living.

So precisely where and how is moral value adjudged? If a being’s life contributes to the utilitarian aim, it has moral value, not inherently but almost “instrumentally” because of this contribution. The converse is also applicable. Moral



value in therefore not a central argument in this or for that matter, in any variation of utilitarianism. It is always of secondary concern.

Sikora introduces an inclusive or holistic view that all sentient beings should be considered, and not only the interests of human beings, i.e. the issue of unwarranted speciesism that he regards as a “self-oriented prejudice”. But he has a somewhat different motivation. Singer and others introduce speciesism to point to inconsistencies in our treatment of animals, to indicate the limits of sentience and to argue for better treatment of animals. Sikora argues that the pain of animals should not count less than our pain. Yet, he does not quite do the obvious: tighten the argument by actually suggesting that the “happiness” of animals be aggregated to human happiness. The inference is nevertheless that at least it should not be ignored. This is an argument not found in the other utilitarian ethicists whose work was earlier reviewed.

It is significant that Sikora’s argument is not absolute because he applies it only to overpopulated worlds. Secondly, it would only apply in the case of fetuses who would have miserable lives, in circumstances such as described earlier. However, he does contend without argument that there is no “adequate *utilitarian* reason for barring abortion” (*Ibid.* 94).

## 2.8 Summary of utilitarian position

The utilitarian argument contends that there is no inherent moral value in human or non-human life. Value must be argued for on the basis of sound moral reasons. The most basic or *threshold* reason to argue for moral value is that of *sentience*. All beings, including non-human animals that exhibit sentience (the *capacity for suffering* (Singer 1999:83), have a moral right to equal consideration of their interests. Their interests do not project into the future, but have to do with the satisfaction of momentary desires. They are conscious, but not self-conscious. Because they can form no *concept* of the future, and cannot project themselves as part of a future, they can have no *desire* for a future. Without a desire for a future they can have no right to a future, or to a continuation of their lives. They can have no right to life.

To have a realistic claim to a right to life, beings – whether human or not – require the acquired characteristics denoted above as absent in the merely sentient being. Such beings are called *persons*. Persons may have a right to life *if they so desire*.



Personhood is not restricted to human beings or even terrestrial beings, as long as those beings exhibit the characteristics of personhood, albeit in some more basic form. The ability of self-expression in the use of language seems to be a necessary criterion.

The human zygote and embryo are not sentient and therefore have no inherent moral value irrespective of the fact that they may be human beings. Terminating their existence can consequently not be seen as morally wrong. For a significant part of its existence, the human fetus is not sentient either. The arguments on sentience are inconclusive, but, in all probability, sentience is not realistic before the 28<sup>th</sup> or 30<sup>th</sup> weeks of gestation. Termination of life up to that point has no inherent moral significance. Beyond that point, and until the advent of personhood, the human being as sentient being has a limited measure of inherent moral value, but it has no right to life. Its rights are restricted to the level of its desires that are momentary and limited to the experience of pain and pleasure. As long as these desires are not thwarted, and it is not subjected to suffering, there is no sound moral reason why it should not be killed.

The advent of human personhood is not self-evident. The characteristics that the utilitarian requires develop gradually, so that no clear cut-off point can be argued. Whatever this point, it is unlikely that it would manifest within the first months of life, and for more stringent observers and criteria, perhaps not within at least the first year of life. Up to this point, all human beings are merely sentient with commensurately minimal inherent moral value. They can have no right to continued life, only a right not to be subjected to suffering. Not only is abortion morally justified, but so too is infanticide – even of normal fetuses. The killing of human beings who may be conscious but have permanently lost the attributes of personhood is morally equally justified. Indirect reasons are not adequate to protect the infant.



### **Chapter 3: Evaluation of the utilitarian concept of personhood**

In this chapter, I propose to evaluate the utilitarian position critically in the light of six key arguments that I intend to develop in what follows. The gist of my argument is (1) that the utilitarian arguments about the status of prenatal life are not only incoherent, but (2) that they justify a general moral orientation, which, if it actually is to pervade our culture, will have severely detrimental effects. (3) In addition, I argue that the utilitarian position in this regard is out of step with some of our most fundamental moral intuitions on the value of life. I develop an argument to the effect that human life is inherently valuable, and base this argument on the notions of (4) responsible speciesism as well as (5) the significance of the potential personhood that resides in the embryo and fetus. (6) I also argue that, as moral beings, we have particular duties and responsibilities to other human beings, including pre-persons. The duty to protect the weak and vulnerable is of paramount importance.

The six issues that have just been identified are the themes of the six sections of this chapter that now follow.

#### **3.1 The theoretical coherence of utilitarianism**

In this first paragraph of the chapter in which I submit the utilitarian position to a rigorous (and hopefully persuasive) critique, I shall deal with the general theoretical and philosophical inconsistencies and deficiencies of the utilitarian approach. There are two reasons why I shall not belabour these points too much. The first reason is the fact that nothing that I shall claim in this paragraph is new; the general theoretical problems that can and must be raised against a utilitarian approach to ethics are well known and occur repeatedly in the literature that both attacks and defends utilitarianism. The second reason is that not all of the points raised in this section are equally relevant to my critique of utilitarianism's valuation of the status of prenatal and pre-personal life. On the other hand, some of these points of criticism will crop up and will be relevant for arguments that I raise later on. It will, nevertheless, be useful to, for the sake of clarity and completeness, briefly state the general points of criticism that have haunted the utilitarian doctrine since its inception as a respectful approach to moral reasoning.



I shall concentrate on *four arguments*. The *first* deals with the question: are the consequences of acts, and thus that which our actions bring about in the future, the only important consideration when assessing the moral status of acts? The *second* argument deals with the apparent tension between utilitarian theory and the moral claims contained in the notion of human rights. The *third* argument relates to the vexing question of how utilitarianism can be reconciled with the claims of justice in certain situations where utility and justice seem to be conflicting values. The *fourth* and last argument deals with the issue of the reconcilability of utilitarianism and special obligations that we (intuitively seem to) have to certain groups. Since this last issue is of direct importance for the argument that I develop in the last section of this chapter, I shall settle for briefly stating the problem that it suggests, and leaving the more prolonged critical discussion of the argument until the last section of the chapter.

*First then, are the consequences of our acts, and thus what implications our acts have for the future, the only issue that is of significance when assessing the moral status of acts?* I would strongly deny this, in line with a host of critics that have done so before (Bernard Williams being a well-known example; cf. his 1973: *A critique of utilitarianism* in Smart & Williams: *Utilitarianism for and against* (1973:77-150). The point in this regard is a simple one. If consequences are “all that matter morally”, as utilitarians across the board argue, it implies that commitments that people made to one another, or even to themselves, in the past have no real moral bearing on decisions about what to do now and henceforth. The category of promises that we make to one another is a particular case in point. Promises are not the expression of light-hearted, not to be taken seriously, intentions. In her book *The human condition* (1958; this ed. 1989:243-247), Hannah Arendt has made a profound analysis of the meaning and moral significance of promise making. She writes, amongst others, “Man’s inability to rely upon himself or to have complete faith in himself...is the price human beings pay for freedom; and the impossibility of remaining unique masters of what they do, of knowing its consequences and relying upon the future, is the price they pay for plurality and reality, for the joy of inhabiting together with others a world whose reality is guaranteed for each by the presence of all.” Promises, for Arendt, are necessary because of the unpredictability of the world in which we live. Promises are therefore “islands of predictability...in an ocean of uncertainty (which the future is) (that we are) thrown and in which certain guideposts of reliability are erected” (*Ibid.* 244). The point



is that promises are “guideposts” in the past that direct human action in the present, and that to negate them is to profoundly compromise a fundamental aspect of moral behaviour.

Utilitarians deny that promises have any hold on us if it can be shown that the aggregate good derived from promise breaking exceeds that of promise keeping. Thereby they are not only invoking the crude logic of the utilitarian calculus. They are in fact claiming that only the future matters when making moral decisions. That is a deeply problematic claim. What we do now, and what makes our actions moral now, often has as much to do with the past as with the future. If, for example, “only the future matters”, the whole enterprise of a “Truth and Reconciliation Commission” in South Africa will have been, morally speaking, a complete waste of time. Morally we would then simply be called upon to “close the book of the past” and start afresh, guided by the precept that the only thing that matters morally is the aggregate consequences of what we do from now on. Yet, some of our most sincere moral actions – that of either punishing, blaming or forgiving – have everything to do with the past and not so much with the future. (“Forgiveness”, incidentally, is another category profoundly analysed by Arendt [1958:236-243]. Forgiveness is exactly the category that problematizes the idea that past actions are “irreversible”, or, better stated, that enable us to find a *modus vivendi* with the “irreversibility of the past”).

The simple point is, that on this score – the need to deal with the past, sometimes to honour commitments, to survive the dead inertia of the past that haunts us through our days – consequences cannot be “all that matter morally”. In this sense, a point of departure of the utilitarian approach is, morally speaking, deeply flawed.

Another way of making the same point is that of Bernard Williams who, in a well known critical discussion of utilitarianism (Smart & Williams 1973:93-100), having discussed some examples of counter-intuitive claims of utilitarianism (e.g. the situation of Jim who is requested by a gangster leader, Pedro, to kill one Indian held captive in order to let all the others go, and who, if he argues in a utilitarian manner, has no other choice!) (*Ibid.* 98), comes to the conclusion that the biggest flaw with utilitarianism is its hesitance to admit that moral actions are sometimes actions that require us to *exert our integrity, irrespective of consequences*. In Williams’ own words:



“A feature of utilitarianism is that it cuts out a kind of consideration which for some others make a difference to what they feel about such cases: a consideration involving the idea, as we might first and very simply put it, that each of us is specially responsible for what *he* does, rather than for what other people do. This is an idea closely connected with the value of integrity. It is often suspected that utilitarianism, at least in its direct forms, makes integrity as a value more or less unintelligible” (*Ibid.* 99). Whatever else might be said of integrity, it is a value in terms of which we acknowledge that we act in accordance with *what we are and to what we have committed to in the past*. To act with integrity is to acknowledge an appeal from the past, which, with sustained moral force, compels me to act in a certain way, irrespective of the consequences. It is the kind of action that makes Luther say, in the face of great personal risk and danger, “Here I stand, I cannot do otherwise, so help me God”! To not so act, is to act immorally. Consequences cannot, therefore be “all that is important”!

That brings me to the *second* argument: the apparent tension between utilitarian theory and the moral claims contained in the notion of *human rights*. This is such a well-known criticism of utilitarianism that it hardly requires prolonged motivation, but let us briefly remind ourselves of its validity.

Utilitarianism “does not take into account the existence of individual rights in deciding on moral issues”; individual human rights are not readily accommodated in and reconcilable with this conception; e.g. a “right to life”, the right to bodily integrity, and the right to privacy. “Traditional morality” holds that, generally, “others may not infringe upon an individual’s rights” even if some social gain might be generated. Utilitarianism “is at odds with the idea that people have *rights* that may not be trampled on merely because one anticipates good results” (Rachels 1995:108). Harm to the *individual* unjustly treated is a serious shortcoming of utilitarian theory.

A simple example will illustrate why utilitarianism is at odds with the idea of fundamental human rights. There is a serious housing shortage in South Africa. If this is to be addressed by means of a public housing policy to the effect that all persons who own and live in brick houses, and who have vacant rooms, should immediately accommodate an extra homeless family, the housing crisis might well be significantly



ameliorated. This would be in accordance with the utilitarian calculus: a greater good would befall a greater number of people than if the status quo is maintained.

Why are most of us nevertheless thoroughly uncomfortable with such an idea? The answer is that we who own houses will experience such a utilitarian policy as directly at odds with a constitutionally recognised right to private ownership of property, and hence to autonomy of decision-making about who shall occupy our property. That right, we believe, “trumps” any effort of outsiders – even if the outsider is the government of the day – to meddle in our private affairs and to dare to dictate whom we shall invite to share our home. However, if you are a dedicated utilitarian, and, for the sake of morality, seek “the greatest good for the highest number”, it would be inconsistent to base your argument against this housing policy on the entitlement provided by the phenomenon of basic human rights.

The denial of individual “rights” is a fundamental problem with utilitarian philosophy. Willem Landman writes that the utilitarian denial of individual human rights and autonomy clashes with the fundamental moral intuition that “somehow individuals count morally for more” than e.g. Peter Singer allows (Landman 1990:167). The concept of the “individual” as a unique, irreplaceable, moral entity, valuable in itself, opposes the utilitarian calculus. Even Singer’s preference utilitarianism is introduced “with respect to a select group of individuals, namely persons, precisely in order to capture the importance of individual persons as distinct from non-personal individuals”. But Singer fails “to render even persons non-replaceable against the relentless demands of utilitarianism”; as the above example illustrates, even the interests of persons are subject to utility. Individuals count for little, individual “rights” and fair distribution are not guaranteed (*Ibid.*). Neither can the appeasement of preferences, to which Singer turns in response to criticism of this nature, satisfy individual human rights, particularly in biomedicine; subjective preferences depend on the possession of information and insight, and are relative to, and reflect individual socio-economic standing, education, intelligence and general development. For example, the indigent has vastly different preferences than has a university professor; it seems inherently unjust and discriminatory to limit the treatment of the former substantially to the level of her preferences, moreover, to construct a theory of morality based on such discrimination, although that is apparently what the utilitarian believes.



As Landman writes, “retro-spective” (“backward-looking”) historical considerations are equally important in guaranteeing for example civil rights (*Ibid.*). Utilitarian principles clash with fundamental principles in contemporary society that are based on the recognition of the Kantian principle of the significance of the individual by recognising his “rights”<sup>10</sup> and treating him always as an end, not only a means. We have seen how individuals are treated when this sound moral principle is disregarded.<sup>11</sup>

That brings me to the *third* general theoretical argument often levied against utilitarianism: the question of how utilitarianism can be reconciled with the claims of justice in certain situations where utility and justice seem to be conflicting values.

The problem in this regard can be illustrated in the following example: an important manuscript disappears from a university library and the culprit cannot be identified. The university authorities decide to, unless the guilty culprit comes forward and admits the theft, expel all 20 students who, according to an available attendance record, were the only ones in the building at the time of the disappearance. Nineteen of those 20 are (in all probability) innocent, and their punishment seems unjust. Yet the utilitarian might well argue that the harm done to them is by far outweighed by the potential benefit of the general student body of (say) 22 000 students: although some innocents were punished, it was assured that the guilty was also punished, and the negative consequences for the few do not weigh up to the positive consequences for the many!

What is the *prima facie* objection to what has occurred here? It’s a simple consideration of justice: people were not treated according to desert, but merely for the sake of utility. Utility and justice clearly seems to be at loggerheads. The utilitarian might respond that the idea of justice entails nothing more than maximum utility, but that response will clearly not do, as the example illustrates. Even if it cannot be denied that the interests of the many are well served by the certainty that the culprit has been expelled, the price, in the sense of a clear practice of injustice towards the innocent, does nevertheless not seem to justify what has been done. It seems undeniable that

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<sup>10</sup> In considering our “duties towards others”, Kant said: “The chief of these duties is to respect the rights of others. It is our duty to regard them as sacred and to respect and maintain them as such. ... They are inviolable” (Kant 1779, this ed. 1930:193).

<sup>11</sup> The infamous Steve Biko case is a frightening example (McLean and Jenkins 2003:77-95).



consistent utilitarianism can only pay lip service to justice. This is also clear from the well-known examples in the literature about situations in which a person would have to be innocently shot in order to save a number of others. A fictitious example that illustrates this point particularly well is that of H. J. McCloskey, as quoted by James Rachels (1995:106). Suppose, he writes, that a utilitarian visits an area where there had been racial strife. During the visit an Afro-American rapes a white woman. This leads to race riots and lynching of blacks, with the connivance of the police. The utilitarian knows how to stop the riots: by bearing false witness against an innocent black whose subsequent conviction would settle the unrest. The utilitarian would see perjury and the punishment of an innocent man as his moral duty, given the circumstances. Notwithstanding the serious injustice with respect to the innocent individual who might be sentenced to death, the impartial utilitarian moral calculus would simply rule that the best consequences are those achieved by lying. Comments Rachels: “this argument illustrates one of the theory’s most serious shortcomings: namely that it is incompatible with the ideal of justice” – the ideal that requires that we “treat people fairly, according to their individual needs and merits.” Clearly, utility cannot be the whole story. J J C Smart, a “dedicated utilitarian”, responds to McCloskey’s case by writing that even if he feels uncomfortable with McCloskey’s conclusion, he is not “happy with the anti-utilitarian conclusion” either, namely that “in some circumstances one must choose the greater misery, the *very much* greater misery, such as that of hundreds of people suffering painful deaths” (Smart in Smart & Williams 1973:71-2).

This brings us to the fourth and last general theoretical argument against utilitarianism often encountered in the literature. This is the argument as regards *people’s special moral obligations* – obligations towards special groups of people that prohibit us, in everyday moral practice, to treat “everybody equally”, as utilitarianism so eloquently and repeatedly insists. It has been pointed out earlier that, according to utilitarianism, the calculus in terms of which harm and benefit to people is determined makes no exceptions; “everybody counts the same, and counts for one”! That implies that the special appeal which certain (groups of) people have on me to devote special attention and care for them – with the implication that that care and attention must be more than that which I could bestow on others – is morally unjustified.



For example: we live with the *prima facie* idea that my children (as a “special group”) require special attention and care from me; I therefore, so it is generally believed, have a “special moral obligation” towards them – an obligation that claims considerably more from me in terms of devoted attention and care than could possibly be made on me by, for example, all the other children living in my home town (including the destitute amongst them!). We would, *prima facie*, frown seriously on any father who devotes as much attention to his own children, or a professor to his own students, as he does to all other children/students he encounters. Yet, in terms of the strict expectations that a consistent utilitarian position evokes, the latter type of person is, in fact, acting in a superior moral fashion to that of the father who gives precedence to his own children. The utilitarian calculus cannot adequately explain the special obligations that a moral agent has to people belonging to groups that have a special relationship to that agent – his children/students/patients/clients, etc. In a moral approach where “everyone is equal and counts the same”, these special obligations have no force. But can we ever settle for such a conclusion when assessing the moral status of acts? Could the actions of a father who “neglects” (the word is not quite right, because the argument could be made that he does not “neglect”, but treats equally!) his own children in order to, allegedly bestow the benefit of his attentions equally on whomsoever he encounters, ever be seriously considered to be a “moral person?! In fact, are we not rather inclined to look upon such a person, not as the epitome of morality, but indeed rather of immorality?

This argument concerning special obligations is very closely linked to another objection to utilitarianism that one often encounters in the literature. This objection claims that “utilitarianism expects too much” and that, concomitantly, a life guided or directed by a strict utilitarian ethos would in fact be an impossible or overly burdensome life. Think of it: if I really have an absolute commitment to the equal well-being of all other people, resp. if, as utilitarianism often seems to imply, a moral agent should always seek “the greatest benefit for the most people” and should therefore find all forms of inequality in the world intolerable, what are the practical implications for that agent? Would I be obliged to also find it intolerable that I may ever own or know or enjoy anything, since the very act of doing thus continues and endorses the insufferable inequalities in the world? A moral theory that prescribes an approach to moral living that is so utopian that nobody can ever seriously try to live according to its prescriptions, is hardly worth taking seriously.



### 3.2 The consequences of utilitarianism

In this section I wish to evaluate two arguments. Firstly, the concept of utilitarian personhood justifies new forms of legitimate discrimination; secondly, in relying on an argument that legitimises infanticide, it introduces a “slippery slope”.

It seems that the utilitarian bases moral differentiation on quantitative differences in the possession of person-making characteristics. The difference between a (utilitarian) person and non-person “consist(s) only in the fact that, while both have some features, one has more of it than the other. A mere *quantitative* difference (having more or less of the same feature, such as the development of a natural capacity) cannot by itself be the basis for why we should treat different entities in *radically* different ways” (Lee 2004:254). The “accidental” i.e. developmental nature of the attributes of utilitarian personhood “come in varying degrees” which implies that “basic rights would be possessed by human beings in varying degrees”, fostering discrimination (*Ibid.*). Although Lee is guilty of generalization – the conditions he sketches do not invariably apply, as he seems to suggest, for instance, the difference between a pre-embryo and an adult is not just a matter of “degree” – the question that the utilitarian nevertheless finds difficult to address, and, in fact, apparently ignores, is to what degree these attributes are to be possessed to justify personhood. It seems that Lee raises two legitimate concerns: firstly, that if person-making attributes come in degrees, there is bound to be some subjectivity in one’s assessment of when a being becomes a person; and, consequently, it might be totally legitimate to conceive of different “moral classes” of persons, depending on the quantum of person-making attributes that a being actually possesses. A ready example of what I mean is when one applies these ideas to, for instance, the mentally infirm, or even neonates. In fact, Joseph Fletcher has even suggested that moral significance might be related to IQ, introducing the possibility of discrimination based on intelligence.<sup>12</sup> It is clear that there would at least have to be some protective measures to address these concerns, and in that case, the moral basis of utilitarianism is eroded.

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<sup>12</sup> Fletcher argued that human individuals with an IQ of less than 20 should not be adjudged as “persons”. Perhaps his suggestion does not seem to be unreasonable, until one considers the question: why 20? Why not 40, or 60? This question exposes the dangerous inherent subjectivity of this argument (Fletcher 1972:2 Hastings Center Report, as quoted by Lee 2004:255).



The aim of utilitarianism is not to promote discrimination; the 19<sup>th</sup> century British utilitarian movement improved social conditions and the treatment of prison inmates, and promoted universal suffrage. However, the mechanism was through the promotion of good ends, not of individual rights, and, as such, potentially subjective and arbitrary. The just, objective and non-arbitrary (therefore more “reliable”) mechanism to the *same ends* is to recognise that each human being has certain non-negotiable “human rights” that preclude discrimination, an idea unheard of in the 1800’s. The psychological attributes of personhood *are* a matter of degree since they are developmental in nature. Therefore Lee’s concerns have to be taken seriously; moreover, these potential dangers are inherent in the utilitarian moral calculus. In the way it calculates utility utilitarianism readily *accommodates* discrimination. But does this place society at risk? In general, one should be distrustful of any system of morality that denies the recognition of individual rights. For example, the suggested treatment of infants for the sake of utility introduces a “slippery slope” argument: the utilitarian legitimisation of infanticide, also as far as normal fetuses are concerned, inevitably extends the moral legitimisation of the practice to other “fragile” groups: severely handicapped, senile elderly, and “undesirables” of whatever description.

I have made several references to the “slippery slope argument”. But what is a “slippery slope” argument? The term, as Govert den Hartogh (2001:280) critically points out, is used loosely; many types of arguments that point to negative consequences, especially “when the causal train leading to these consequences consists of several links”, are typified as slippery slopes, not always accurately. Therefore it is essential that we define the concept clearly. Generally, the term “slippery slope argument” refers to the concern that a certain action (e.g. an abortion) or omission (e.g. not to protest to every racist joke one hears) which, in itself, might appear morally in order or, at least, morally neutral, might give rise to adverse consequences, the undesirability of which is beyond question. Thus, for example, adherents of this kind of argument will typically argue that embryonic stem cell research, although it holds the promise of remarkable new therapies for previously untreatable ailments, ought not to occur since it will, in the long run, thoroughly devalue the moral status of not only embryos, but of all human life (I should point out that I do not subscribe to this argument).



Den Hartogh (*Ibid.* 281) provides, in six steps, a more formalised version of exactly what this kind of argument entails:

1. The discussion concerns the question whether a certain class of actions – call them A – is morally acceptable;
2. A status quo within which A is prohibited is presupposed;
3. The proposal is to move from the status quo to a new position, the “top of the slope”, in which A is acceptable;
4. Opponents do not question the acceptability of the new position directly, or propose that type A actions as such are offensive, or are to be avoided because of their negative consequences;
5. They argue that accepting A will not stop the movement; the causal mechanism that justifies A, will convince us to accept also the slide to N;
6. The causal mechanism is like a chain reaction; acceptance of A predicts acceptance of B and C, and eventually N. In a philosophical argument, the nature of the links is *reason*: once A is accepted, we have no reason to reject B; as reasonable persons, we are bound to recognize this eventually. (Den Hartogh 2001:280-2)

A modification is the *appeal to pernicious precedent*, which might be applicable in the present argument: A, apparently innocent, leads to B, on the face of it similar, but not acceptable. A *slope of reason* (*Ibid.* 282) might also be applicable to the present argument, based on the absence of a clear moral cut-off point in pre-personal development. Acceptance of A – the termination of a zygote – leads to B, the killing of a 14-day old embryo, etc., until we get to N: the killing of an infant or a disabled child or adult. This argument is similar to the previous: the appeal to reason is repeated until a pernicious precedent is found. But there is a problem, similar to the *sorites* argument: where to draw the moral line (the loss of how many hairs constitutes baldness); consequently, such decisions are often arbitrary. *Slopes of unreason* (*Ibid.* 285) imply that proponents accept a chain reaction even though there is no reasonable progression; this, too, occurs frequently in so called “slippery slope” arguments on abortion. A sound slippery slope argument requires that the plausibility of the causal mechanism be well established in argument.

Let us then evaluate some of the so-called “slippery slope” arguments that, seemingly, develop from the insistence on infanticide. The first possibility is that the



utilitarian argument about the value of pre-personal life, in legitimising abortion, is a slippery slope since its acceptance might well lead to infanticide. Postulate as status quo that abortion is totally prohibited. Then serial arguments are presented to justify the new position, A: termination before, say, the 13<sup>th</sup> week. But having accepted the significance of utilitarian personhood, the causal mechanism is established, since we cannot reasonably withstand the ultimate conclusion of N, which, argue the proponents of the slippery slope argument, is wrong. Based on this slope of reason, the utilitarian justifies infanticide - in fact, argues independently for it.<sup>13</sup> Now, how to evaluate this argument? Den Hartogh (*Ibid.* 290) suggests a three-point plan:

1. In order to have merit, slippery slope arguments should be “independent from loyalty to the status quo”. What Den Hartogh means, is that their aim should not be just to maintain the status quo, which is seldom the case; slippery slopes are invariably employed to defend a particular, mostly conservative (for example, anti-abortion) position, not as independent philosophically sustainable arguments that emanate from a neutral position. But, in the unlikely event that the slope is not linked to a particular position, the next step in the analysis would be to discuss the moral merits of the status quo and the new position independently.
2. If the slippery slope is indeed argued independently of loyalty to the status quo, the argument can mostly be shown to be untenable.
3. Only if the argument is tenable, do we enter into a discussion of the plausibility of the slippery slope.

Let us apply these qualifications to the above argument. I concede that the purpose is usually to maintain the status quo (the prohibition of abortion), thereby failing the first qualification. But this need not be; I can make an independent enquiry from a neutral position (I hope that this work is so judged!). Thus, we need to examine the soundness of the argument. It is sound provided we accept that there is little moral difference between succeeding phases of pre-personal development, making the extension of the way fetuses are treated, to include also infants logically acceptable. Now, finally, how credible is the argument; how likely are we to start practising

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<sup>13</sup> Both Michael Tooley and Peter Singer concede that their argument on abortion stands or falls on the moral acceptance of infanticide. Both infants and sentient prenatal beings are “replaceable”; they are not morally unique, and have little more than instrumental value (Singer, 1979:188).



infanticide? Not very likely; firstly, due to strict and effective legal and moral prohibitions; infanticide is in most countries illegal, and also morally frowned upon (even if there are some ways in which fetus and infant are similar, they are not similar in all respects, e.g. in relational capacities); secondly, we tend to respect viable fetuses, though indirectly, and usually based on gestational age, not viability. So on a practical level the slippery slope is unlikely: N will not become a generally accepted practice.

But there are, nevertheless, two possible problems: Firstly, actions preceding N – say, abortion at 20 or 36 weeks – are likely to, and have, become legitimised. And, secondly, is there not perhaps a theoretical risk of a slippery slope in the *mere consideration* of the theoretical possibility of infanticide, a particular danger in a developing country like South Africa? There might be; any philosophy that diminishes the value of infant life is, for most people, unacceptable: it might imply that abuse of an infant, and infanticide somehow carries less moral culpability than abuse and murder of a “person”, a position perfectly consistent with the utilitarian argument; were Tooley to prevail, there could rationally not be a crime called “infanticide”.<sup>14</sup>

A second slippery slope risk to society is an expansion of the slope argument described above: the extension of discrimination to other vulnerable groups and minorities, e.g. to “street orphans”. They do not have decent, happy lives or contribute positively to society, drain society’s resources, and make the lives of other persons unhappy because of their begging presence, and even possibly their propensity to crime. Would it not promote “utilitarian happiness” without the risk of negative indirect effects if they were to be killed painlessly without society’s knowledge? Another vulnerable group is the aged; might not similar treatment starting with those without

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<sup>14</sup> It is argued that Tooley and Singer do not intend its practice; it is an inevitable theoretical consequence of their theory. Chronologically, Singer’s published position shifts to the eventual concession that for “practical” reasons infanticide, if morally justifiable, is restricted to the private killing of unwanted, perhaps abnormal neonates. Tooley is more consistent: one cannot come to grips with the abortion issue without accepting infanticide (1983:423). In *Abortion and Infanticide* (1983) he rejects arguments against infanticide, and concludes that it is not morally wrong. Even theoretical detriment will be “short-term” and “significantly outweighed by the positive consequences” (1983:415-6). “Either abortion is morally suspect, or infanticide is morally permissible...” The choice is ours. But our legal institutions reflect the fundamental conception of (normal) infants “more closely approximating the moral status of persons than of non-persons” (Buchanan and Brock 1990:265). “Consequently, any theoretical view which utterly denies the rights of moral personhood to normal human infants, no matter how strong its philosophical arguments, is in our society at present and for the foreseeable future not likely to be adopted.” A second “pragmatic” argument against infanticide concerns the difficulties in sustaining an institutional framework for the painless termination of normal infants, while simultaneously “scrupulously protecting the development and experiential interests of those infants who are allowed to live”.



living relatives and friends, and “post-persons” with severe mental impairment who drain the state’s budget, benefit society?<sup>15</sup>

I acknowledge that “conservatives” often attack “liberals” with exactly this type of slippery slope argument, frequently containing more rhetoric than substance, lacking a reasonable chain of events. I do not. The point is simply that, far-fetched as it might seem, there are historical precedents; firstly, this is precisely what transpired in Nazi Germany when social “misfits” like homosexuals, the mentally and physically impaired, and in some cases, even the aged were subjected to “euthanasia”. Even if this does not implicate utilitarianism, or supports an argument that legitimising abortion at twelve or 20 weeks holds the risk of infanticide, it serves to illustrate the levels to which “decent” societies can stoop. A second, perhaps more harrowing example is found in the work of Ezekiel J Emanuel (2001:213) who, in a discussion of the arguments against euthanasia, describes a slippery slope argument that might legalise the extension of euthanasia from competent to “incompetent patients, the comatose, children, and the mentally defective. Almost all medical interventions begin with a small, defined target population and then, once physicians are experienced and comfortable with the intervention, extend to other patient populations. Euthanasia, it is claimed, will be just the same.” Arguments for the new position, the recognition that death might be more beneficial than a “life of pain and suffering”, could cause an inevitable slide to the extension of these ideas to include N: it is morally justified to terminate against its will “a life devoid of consciousness or higher mental functioning”. Emanuel writes that there are already philosophers who make such arguments to “justify euthanasia for competent patients”, which might be “only the thin end of a very big wedge”. Of course this does not imply that A *shall* inevitably slide to N, but underscores a belief that in the real world there exists such slides, and that there are philosophers who, nonetheless, are prepared to utilize such arguments. The theoretical risk of a slippery slope is therefore not as far-fetched as opponents might argue.

But there is a third argument that may alert us to the possibility of utilitarian “slope” arguments; one I alluded to on p. 48. None other than Peter Singer made this

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<sup>15</sup> Society is aware of these concerns; the 70’s movie *Soylent Green* describes a society that promotes voluntary euthanasia of its aged, and surreptitiously turns them into *Soylent Green* – the only available nutrition. The plot of the 80’s movie *Coma* is about a hospital that produces comatose subjects (in fact, murders its patients) who are kept in a form of “suspended animation” for organ donation.



argument in 1979; he argues that it is not so much direct effects upon the subject that denotes the wrongness of killing unjustly. It is commonly argued by utilitarians (and others) that the wrongness of killing is subjective, lying in the deprivation of a future with attendant desires. Not so, writes Singer; a person's consciousness ceases at death, and with it, her awareness. At death, desire ceases, as does any concept of harm to the deceased. This is in line with classic hedonistic utilitarianism (Singer 1979:79); "there is no direct significance in the fact that desires for the future go unfulfilled when people die ... If you die instantaneously, whether you have desires for the future makes no difference to the amount of pleasure or pain you experience." For the classical utilitarian "the status of 'person' is not *directly* related to the wrongness of killing." (*Ibid.*) Singer writes that "one has to be a tough-minded classical utilitarian" not to be troubled by this odd indirect objection to murder! Now, of course this does not imply that utilitarians justify murdering persons; but it removes a very significant reason not to kill unjustly, and although I shall desist from making too much of this argument, the fact remains that Singer, a dedicated utilitarian, has given it some thought; this type of reasoning might conceivably be the "first step" in the direction of a slope.

To return to the evaluation of the slope argument referred to earlier: the third question that Den Hartogh has us ask, is this: is the argument tenable? That depends on what might be the argued result of accepting A. We are not likely to start eliminating these vulnerable groups since other protective mechanisms, both legal and moral, exist, and there are bound to be significant indirect negative consequences. But other forms of discrimination are more likely. For example, abuse of human rights, civil liberties, and recognition as moral persons, perhaps not due to a slope argument (more likely because they are vulnerable and society simply does not care), but certainly justifiable from that point of view.

The slippery slope might be subtle. Let me give an example. I shall in Chapter 4 argue that notwithstanding inherent moral value, abortion might be a more acceptable choice (A) than the status quo of children born into unfortunate socio-economic circumstances. I justify this by arguing that realistic potentiality implies both favourable intrinsic and extrinsic potentiality, and that such fetuses have very poor extrinsic or contingent potentiality. This position is an example of a slope. There is a reasonable chain of events: if it is justifiable to kill a fetus at the gestational age of 14



days because of unfavourable contingency, one has no justification for withholding it at say 12 weeks, or 20 since contingent potentiality is equally poor. If I leave the argument at that, I risk a slide to N, free access to abortion at any gestational age: the subjectivity of evaluating contingency makes it difficult to resist demands to lower the barriers that limit access, thereby creating a slide of reason which could lead to a much more adverse situation, one which we would normally regard as morally wrong. I therefore require additional arguments to resist N. Examples of what could prevent a “slide” are for instance to argue that intrinsic potentiality, speciesism and viability are morally significant. But a slope argument would be legitimate *only* if one is prepared to recognize a special moral responsibility to materially support these mothers who are a vulnerable special interest group. In the absence of this form of support, the slope does not apply; termination may be the best *moral* solution in the circumstances.

A third slippery slope possibility is Dave Wendler’s argument. The status quo is a prohibition of interference with a “natural process” that shapes the structure of our lives and leads to normal live birth. A is legitimising interference, i.e. abortion simply for convenience (utility). The slope leads to N: *unlimited further interferences* in the natural process (like genetic manipulation; Wendler 1999:53).<sup>16</sup> Let us evaluate this argument. Firstly, it is unlikely that it is used to sustain the status quo since the “natural process” position is controversial. Secondly, soundness: intervention in the natural process might lead to the legitimation of other forms of interference, since denial of the absolute sanctity of human life in all developmental phases invites the exploration of other forms of research (e.g. human stem cell research, gene therapy and germ-line intervention). But I offer three reasons against the legitimacy of this slope argument: firstly, the risk of a slope is no reason to invoke maintenance of the status quo. “Mistakes” are best prevented by controlling research, not prohibiting or restricting it to clandestine operations (Den Hartogh 2001:288). Secondly, there is a moral cost to prohibition of research: denial of possible eventual goods in the form of treatment. Thirdly, the principle of gene therapy is generally accepted, but germ line intervention will most likely be restricted to uncontrollable maverick scientists.

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<sup>16</sup> In *Redesigning Humans*, (Profile Books, 2002), Gregory Stock argues that our present biological research is “taking control of evolution and beginning to manipulate it” (2002:17). Marc Lappé argues that the inherent problem of germ line manipulation lies “in using a person solely as a vehicle for creating uncertain genetic change in his descendants” (reprint 1999:155).



There appears to be some risk of a slippery slope inherent to the utilitarian personhood argument. The sure method of negating these risks is the unequivocal rejection of the utilitarian argument about the value of life, at least as it pertains to neonates, infants and viable pre-persons. There are alternative arguments to justify early abortion without necessarily accepting free access. I conclude this section with Michael Gross' poignant summary:

“Practically, the slippery slope is ever present. Denying moral personhood at birth not only makes it difficult to define a similarly unambiguous alternative but creates an uncertain, unstable and unpredictable social climate wherein the newborn is afforded only limited legal standing and protection that may impinge on the rights and perhaps lives, of others as well” (Gross 2002:214).

My third argument in this section concerns the consequences of accepting and promoting practices legitimised by utilitarian philosophy, its effect on the fundamental moral fibre, self-understanding and self-esteem of society, and on the image, self-understanding and self-esteem of medical practice, which is instrumental to these practices.

More than 45 million terminations are performed annually worldwide; in South Africa, some 300 000 to 400 000 legal terminations have been done since 1997. Are we as individuals and society immured to the effects of termination on this scale? The debate on infanticide has been restricted to philosophical publications, but philosophical debate shapes public opinion, as Gernot Böhme eloquently emphasizes vis-à-vis abortion, racism and sexism (2001:16).<sup>17</sup> Support of the utilitarian personhood and infanticide arguments is very likely to sway public opinion to accept infanticide, even precipitate appropriate legislation.

To evaluate alleged effects on the “moral fibre” and self-understanding of society, we need to (at least approximately) define a moral society. For the utilitarian, this is a society that aims to promote aggregate utility, focussing on common rather than individual good. I would disagree with this explication, although in biomedicine, meeting the ends of utility is often necessary when dealing with restricted budgets and choices in the allocation of scarce resources. But measuring out the goods of health care exclusively in this way contradicts certain constitutional rights as, for instance, set out

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<sup>17</sup> Utilitarian denial of full pre-personal moral significance has been influential in forming public opinion and promoting wide acceptance of Act 92.



in the South African National Patients Rights Charter.<sup>18</sup> It also limits access to expensive and unusual treatments like cancer chemotherapy, joint replacements, open-heart surgery and kidney transplantation.

My conception of a moral society is not based on a particular theory of applied ethics, but on the notion that, as individuals and society, we have certain wide ranging, sometimes clearly definable, and sometimes almost indefinable responsibilities to each other and to society (what I mean would become more lucid after reading my application of the work of Zygmunt Bauman, Hans Jonas and others with reference to an *ethics of responsibility*, pp.156-62). This implies a delicate balance between individual and special interest (group) rights. For instance, society should support my personal right to self-determination, but carefully and justly qualify that right to prevent the moral detriment of other agents. But a moral society, secondly, also upholds certain moral principles and goods, such as justice and fairness, charity and compassion. Caring for the needy, vulnerable, weak, immature and destitute is a paradigm responsibility; it legitimates particular moral demands of special interest groups, and works towards meeting those needs. This description of a moral society opposes the utilitarian description in just about every aspect. Weak, vulnerable and immature human beings are a special interest group that demands particular care, and this interrogates and tests the very fibre of the moral society; the “need to be the kinds of persons who can protect and nurture those infants who do become persons” (Buchanan and Brock 1990:265). Society is often judged by the way it attends to the weak and vulnerable. It seems incoherent to plan and execute the demise of countless of these vulnerable beings, to regard this as moral, and yet at the same time to be able to enter into other loving relations.<sup>19</sup>

But since most pro-abortionists probably would not justify infanticide, and the available evidence seems to indicate that enthusiasm for abortion decreases with gestational age (Norup 1997:439; Gross 2002:203), the more contentious question is obviously how should a “moral” society treat the *fetus*? I shall later argue that a

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<sup>18</sup> National Patients’ Rights Charter, booklet 13 of the Health Professions Council of South Africa (Medical and Dental Professions Board) *Guidelines for good practice medicine*, July 2002.

<sup>19</sup> Abortion and infanticide – of especially female babies – was, according to Richard Starke, the order of the day in Rome (*The Rise Of Christianity*, Harper Collins, San Francisco). Jurgens Hendriks (2003) argues that on the one hand, this was characteristic of the moral decay of the empire. Opposition to these deeds, and respect for life as part of the Christian ethos, on the other hand, differentiated Christians, and was instrumental in the phenomenal growth of Christianity.



significant moral distinction can be made between viable and non-viable fetuses. Viability is a significant moral characteristic that fetuses have in common with neonates, implies equal inherent moral value and, in the absence of convincing reasons to the contrary, equal moral treatment. Viable fetuses should at least be conferred the *benefit* of societal protection, even if we find according them a “right to life” too presumptuous a claim; terminating the lives of viable fetuses without very convincing reasons holds the same societal risks that infanticide implies. In South Africa, there are legal restrictions on the termination of viable fetuses, though these restrictions are not absolute. As Michael Gross concluded, late-termination policy varies in different countries; it is unrestricted in Israel, partially restricted in the UK and Denmark, and restricted in the USA (there are inter-state differences) (Gross 2002:203-5).

But when it comes to “pre-viable” (i.e. earlier and less developed) fetuses and embryos, I am, based on an *ethics of responsibility* that I shall explain in Chapter 4, less inclined to hold such strong views. Other factors gain in importance; society and the individual have responsibilities to consider all arguments. From individuation onwards, the human fetus has some intrinsic moral value, but I am unconvinced that society is necessarily morally at risk simply in virtue of legitimising termination on early, non-viable, non-sentient beings, particularly when this is done in a responsible way; at least not while the only morally acceptable alternative – to provide those would-be mothers with adequate alternative postnatal support and means to provide for their infants – remains unreachable. Fetal moral value has to be balanced against many other relevant considerations. This, predominantly, is respect for female reproductive autonomy. Since (South African) society can offer so little - not even proper *antenatal* care for the needy – it would be immoral to force women who have little control over their lives and reproduction to have unwanted children whom they are bound to neglect, and who will grow up in abject poverty and destitution. A moral society would focus much more of its resources on the *prevention* of unwanted pregnancy with effective contraceptive programmes, the alleviation of suffering and deprivation, improved access to health care and general female empowerment.

Society is not necessarily morally at risk just because it allows abortion; but it may be at risk in the way it does so, and in the arguments it uses as justification; for example, the nature, wording and sentiments of the current Choice on Termination of Pregnancy Act (Act 92 of 1996). This act *promotes* free access to abortion and totally denies – ignores – fetal moral value, totally ignores the significance of fetal existence;



moreover, totally ignores that abortion, fundamentally, is a *moral matter*. Allowing and even legitimising abortion in circumstances described above is one matter; actively promoting it, which is what the Act appears to do, intentionally or not, another. The Preamble to the Act states that it aims to “promote(s) reproductive rights” by affording a “right to choose whether to have an early, safe and legal termination of pregnancy”.

The question that I address here is whether this can have a *morally detrimental effect on society*. I would like to argue that it does; let me give an example. In the current state of affairs, it is perfectly acceptable to have unprotected sex, to become pregnant – to cause pregnancy – and to be morally unconcerned about it since there is an “escape” mechanism: free and unfettered access to termination at public cost. I then use termination as my method of birth control, as was quite common in the former USSR. This is morally questionable for the non-utilitarian; yet this is precisely what Act 92 legitimises, and since no questions may be asked about the morality of such action, it in fact promotes immorality. This erodes the fibre of personal and societal morality. I am particularly concerned about the effect it might have on the emotionally immature, teenagers and young children; the act has no age restriction, nor does it demand parental guidance (it calls for counselling, but this is only realistic when available).

But there are two other ways in which the Act affects all of us. Firstly, in subtle ways: it negates some of our strongest intuitions about the preservation of life and human responsibility. Whilst the process of termination is not legally wrong, and may be argued in some cases not to be morally wrong, or, given the complexities of life, not *intolerably* wrong, it is certainly not *desirable*. I question whether in its present form, the Act is adequate for our complex society.<sup>20</sup> Secondly, we are not immune to the indirect effects ensuing from the extent to which termination takes place; we are simply ignorant. I am concerned that the authorities seem to think that TOP has absolved them of responsibility for effective birth control and sex education. I am concerned that this places vulnerable persons at greater risk of contracting HIV/Aids; the only sure way of protection, apart from abstinence and dedicated monogamy, is a physical barrier (even

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<sup>20</sup> Act 92 prescribes that pregnancy may be terminated “upon request of a woman during the first 12 weeks of the gestation period” (clause 2. (1) (a), Government Gazette no. 17602, 22 November 1966); and from the 13<sup>th</sup> to the 20<sup>th</sup> week, if “a medical practitioner, after consultation with the pregnant woman, is of the opinion that – “(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman”.



that may fail). The failure of sexual education is evidenced in the question most commonly asked by the youth in discussions on HIV/Aids: how can I contract it?

Let us consider the effects on the image, self-understanding and self-esteem of medical practice. Even if it is argued that the Act forces nobody to actually perform an abortion, it requires that medical personnel who are conscientious objectors refer patients to centres or personnel who do not have objections. Nursing personnel are not forced to perform termination, but are obliged to assist in operating rooms when termination is performed. Moreover, recent changes in the Act intended to extend the availability of termination, do not adequately protect conscientious objectors (*Die Burger* 14 October 2004). Act 92 reads: “10. (1) Any person who- (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 10 years.” This has two effects: referring personnel effectively become accomplices to an event that they do not morally support, since the chain of events leads to termination. Secondly, it places an unrealistic workload upon compliant personnel who often spend a disproportionate amount of their time actually performing terminations. But there is the additional risk that personal moral convictions of non-compliant personnel may be eroded since they may have fears of losing their jobs and chances of promotion. Legislation accepted in the final days of the 2004 parliamentary sitting, aims to enhance access to termination in two ways: all hospitals and clinics that offer a 24-hour are now obliged to perform terminations (at the moment, an institute voluntarily applies), and ordinary registered nurses will be allowed to perform terminations (currently it is limited to those with midwifery training). Concerns have been expressed in the daily press that the nursing profession might be changed into one vast “killing machine”, the extent of which becomes apparent if one compares the incidence of live births to terminations. At the moment about one in three pregnancies is terminated, and with these new measures it might increase to 50%.

The primary aim of medicine is to heal, to treat disease, to alleviate suffering, to correct congenital defects, and to do this with compassion and sensitivity to the rights, interests and dignity of individual patients. There is a risk that these high ideals might be eroded by the demands of termination at these rates and for these reasons (or absence of reasons). There have been newspaper reports about black midwives who perform terminations in State clinics that have been culturally excommunicated, physically and



emotionally abused, and forced to seek alternative employment. Prof Cheryl-Ann Potgieter, Head: Gender-coordination, HSRC, recently wrote that health care workers in state hospitals who perform abortions, are shunned by some colleagues and even by hospital management, and have been branded “serial killers” and “baby murderers”<sup>21</sup>. They are stigmatised at work, home and in their communities. Consequently, fewer undergo training to perform abortions. Of the 90 who started training in 2000, only 45 completed training, and only 31 were still practising at the end of the year. By the end of 2001, less than 50% of designated institutions were still performing terminations due to shortage of staff. A newspaper report (*Die Burger*, 12 August 2004) reported that Denosa – the Democratic Nurses Organization of SA – were upset at the official denial of the problems that nursing personnel encounter in this respect. Other reports in the same publication wrote about pressure upon nurses to perform terminations (10 August 2004), and behavioural problems like nightmares experienced by personnel who are faced with conflicting duties and demands (27 February 2004). According to Dr Loyisa Mpunsa, Director: Female Health and Genetics, Department of Health, 10% of personnel trained in performing abortion had conscientious objections. However, since acknowledging that these objections would impinge on patients’ constitutional rights, they are mostly ignored. Mr Moeketsi Motrapi, Director: Legal Services declared that objectors would be “redeployed”, which could affect career opportunities. Communities oppose abortion and victimise staff that perform abortion. However, a shortage of staff – particularly in country areas – means that they generally have no choice (*Die Burger*, 14 October 2004).

### **3.3 The argument from moral intuitions**

Utilitarians argue that pre-persons, until they develop personhood, defined in terms of some form of self-awareness and self-conscious interest in their own continued existence, have little intrinsic moral significance, and may therefore legitimately be killed, if it is done painlessly. I would like to argue that this claim is in conflict with some of our most fundamental, and culturally deeply entrenched moral intuitions. The concomitant justification of instances of infanticide by some utilitarians is, moreover,

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<sup>21</sup> HSRC Review Vol. 2, No. 3, September 2004.



also in conflict with the laws of most countries. Being concerned with the future, the utilitarian rejects the legitimacy of “backward looking” moral intuitions. Yet the point is not just that utilitarian viewpoints are at odds with our moral intuitions and laws. There is more profound criticism: the *level* to which some of their positions are contra-intuitive is apparent in their obvious justification of illegal practices. Moreover, we cannot deny that our intuitions on these matters are to a significant extent formed and informed by pervading legislation and common law, since, as “good” citizens, we tend to want to – and should – honour and uphold the law.

In this section, I evaluate the role of intuitions in moral decision-making with reference to pre-personal and particularly prenatal life. I argue that our moral intuitions, though insufficient as definitive moral justifications, are quite significant in the moral decision making process. Some of our strongest intuitions concern the value and preservation of human life, especially the lives of immature and vulnerable beings, of which pre-persons are exemplars.

At this point, we need to answer two questions: what do we understand by intuitions, and why are they to be taken seriously? In answering these questions, I shall firstly evaluate the work of three influential moral philosophers spanning a period of some two hundred years. Then I shall evaluate the applicability of Paul Ricoeur’s seminal work on ideology in the positive sense, and Gernot Böhme’s work on “moral custom”, to my conception. I shall then examine some concerns about the contemporary applicability of moral intuitions before I present a summary of my own conception.

To start with, my notion of intuitions and their role in the formation of moral knowledge/consciousness is supported by the arguments of three influential moral philosophers.

*Thomas Reid* was an influential 18th century proponent of “common sense”<sup>22</sup>. Common sense, which “makes man capable of acting with common prudence in the conduct of life” enables him to discern self-evident truths from untruths (Reid this ed.

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<sup>22</sup> “Common sense is that degree of judgement which is common to men with whom we can converse and transact business”; “sense” implies some form of “judgement” (Reid 1785, this ed. 1863:421). William Hamilton, editor, wrote in his *Supplementary Dissertations*: “Our cognitions, it is evident, are not all at second hand. Consequents cannot, by an infinite regress, be evolved out of antecedents, which are themselves only consequents. Demonstration, if proof be possible, behoves to repose at last on propositions, which, carrying their own evidence, necessitate their own admission...” (1863:742).



1863:422). “One of the most important distinctions of our judgements is, that some of them are intuitive, others grounded on argument” (*Ibid.* 434). He argued that from witnessed or observed actions, we form conceptions individually based on our particular moral education. Moral faculty – a unique and original capability, similar for all – enables moral responses. But experience teaches that moral responses, judgements and actions vary in a spectrum of agents, not due to differences in our moral faculties, but in *conceptions originally formed*. And this is based on moral education. Given the same conceptions, moral responses would *intuitively* be similar (*Ibid.* 389-489).

*Richard Price's* conception of moral intuitionism evolved from an *understanding* of the particular situation, followed by immediate *perception* of simple, objective moral qualities of actions. This results in *intuitive knowledge* of moral truths, accompanied by emotive responses of *approval or disapproval* to form the basis of moral motivation: “It is undeniable that many of our ideas are derived from our INTUITION of truth, or the discernment of the nature of things by the understanding. This therefore *may* be the source of our moral ideas. It is at least *possible*, that *right* and *wrong* may denote what we *understand* and *know* concerning certain objects”, i.e., some sort of intuitional knowledge. “’Tis a very necessary previous observation, that our ideas of *right* and *wrong* are simple ideas, and must therefore be ascribed to some power of *immediate* perception in the human mind” (Price 1758; this edition 1974:40-2).<sup>23</sup>

Finally, the Aristotelian scholar *William Ross* also developed and defended a brand of intuitionism; he argued that mature and educated agents recognize the objective properties of “morally good” and “right” (he distinguishes between these concepts; Ross 1930:3) intuitively, first in particular instances and then generalized by “intuitive induction”. The notion of rightness is irreducible; the *prima facie*<sup>24</sup> “rightness” “of certain types of act is self-evident” to mature, developed minds (*Ibid.* 12).

I wish to argue that intuitions are often the “final common pathway” of a general moral expression, akin to Paul Ricoeur’s *positive* use of *ideology* based on the work of Mannheim (Ricoeur 1984:134-164; Van Niekerk 1987:25, 28-29) as a *generally accepted societal “directive”*. This justifies some explanation.

<sup>23</sup> Price is refuting Hutcheson, Hume and Locke.

<sup>24</sup> *Prima facie* means conditional, based upon pre-existing e.g. father-child relations (*Ibid.* 19-20).



Ideology, in Ricoeur's conception, supplies a framework of interpretation for a continuous orientation of a life code or policy, thereby institutionalising a simple rhetoric to assist in daily decision-making. This "interpretive code" does not deny a capacity for self-conscious critical thought, but supplies the resource for general moral decisions that are required by contemporary life, and that are not always the outcome of prolonged and sophisticated intellectual reflection. In this sense ideology is positive and worthy of support (*Ibid.* 29). This conception of ideology coincides with my notion of intuitions; yet there is also significant disparity. Intuitions are notwithstanding their societal relatedness, primarily *personal expressions* of morality, whereas ideology functions in collective group needs and desires for optimal happiness.

I argue that we often rely on and trust our intuitions in the above sense for everyday moral guidance, usually unwittingly. We do not engage in profound moral deliberation at each moral crossroads; we usually have sufficient moral experience to make decisions almost immediately, almost instinctively: *intuitively*. Moral experience stems from previous exposure to similar or comparable situations, from moral deliberation that may have preceded or followed previous decisions, from the results that may have flowed from those decisions, and from reflecting on those decisions and results – in short, we learn about morality as we learn about life. We need go no further than Aristotle for support and explanation of the role of education in day-to-day moral decisions, and of the role of society in this education. Without the acquired ability to make moral decisions in this manner, moral life would have been difficult and trying; we would be unsure, insecure and tentative beings. Moreover, postmodern ethicists suggest that most inter-subjective exchanges and interactions have moral components, constantly requiring guidance; hence the interest in Ricoeur's "interpretive code". Our only tool in these situations is our moral intuitions.

Some form of "sensory and introspective experience", or cognitive input derived from characteristics or experience of the real world is *necessary* to form and inform the underlying concepts on which moral judgement is based, even if actual, individual moral decisions can be made without further recourse to experience and/or introspection. Gernot Böhme supports this contention; so does a strong body of traditional intuitionists (I have quoted but three). Böhme argues that moral reasoning takes place at the level where information is analysed and evaluated, related to former experience and existing moral knowledge, and only then utilized in forthcoming decisions. Moral intuitions that are so formed ("custom") "regulate our ordinary



conduct and relieve us of the need for decisions and justifications of our everyday lives” (Böhme 2001:16); note the overlap with Ricoeur. *Past experience* informs *moral deliberation* that precipitates *fundamental concepts* that precede *intuitions* that precede particular *everyday intuitional moral decisions*. Conscious reasoning is thus not necessarily *apparent* in everyday moral decisions; customary behaviour, moral intuitions and moral conscience inform these decisions. Note that Böhme’s focus is on the individual, not so much the group.

*A priori* justification and the “process” of intuitive decision-making consists of two necessarily correlated components:

- Firstly, the formation of cognitive concepts through the collection of experiences and other input from particulars of the real world which form the basic concepts upon which moral decision-making is founded;
- Secondly, moral decision-making as such does not always require additional sensory input or deductive reasoning; it often rests on the intuitive recognition of right and wrong as soon as a situation is comprehended.

But it is evident that all of the agent’s accumulated moral experience and knowledge, however gained, is necessarily utilized in this process; the memory of moral experience and knowledge operates non-reflectively at all times. Moral intuitions are therefore continuously formed and informed by the general and specific moral experiences of the agent throughout her life. This resource of moral information is utilized in later moral decisions. So even if intuitions appear to be instinctive and immediate, they are not necessarily *uninformed*. There is, along with increased moral knowledge, education and experience, constant expansion of moral capacity and capacity for intuitive moral decision making.

Although moral intuitions are quite important, their importance and impact must nevertheless not be over-emphasized. I do not imply that nothing more than intuitions is required, that our well-informed intuitions invariably hold the key to all moral decisions, or that we can have trustworthy moral intuitions if we are immured from moral education. What I do wish to argue is that often, in many day-to-day moral interactions that characterize human life, moral intuitions may be sufficient; but even



when not, even in novel situations, they do provide a framework of rudimentary moral convictions that does serve as a supportive background for moral deliberation.

The agent who (theoretically) grows up in societal isolation may still possess moral intuitions. But her moral capacity is limited, her decisions poorly informed and not well founded (I am tempted to use the word “shallow”); these decisions are indeed the products of a limited *growth and evolution of moral capacity*. This explains why not all moral agents possess the same moral capabilities, why not all intuitions have equal moral value or soundness; moral education differs. Moral intuitions are based on particular moral experiences and education, and the question arises whether there might not be an element of *moral subjectivity* in some or perhaps all intuitions. I concede that there might be; yet some of our most fundamental intuitions are rarely questioned and seem to be, for most people, universal. For instance, we have powerful intuitions on the value of human life, caring for our loved ones and children, and protecting the weak, innocent and vulnerable.

There are two general concerns regarding the argument from moral intuitions. I shall deal with these two objections in turn; in response I shall evaluate two arguments on why we should take pre-personal life seriously, and thereafter refine the argument from moral intuitions that I personally defend.

*Firstly*, concerning the nature of intuitions: are these so-called *moral intuitions* not merely generally, uncritically accepted *social convictions* that do not necessarily reflect any a priori dictates of our universal social conscience, but merely a contingent historical consensus that might easily change in future in accordance with the results of a more advanced level of moral argumentation? The nature and development of intuitions as set out earlier mitigate a defence against this question. They clearly are not; they are the result of the complex process described earlier.

The *second* concern addresses the legitimacy of intuitions: why should we trust our moral intuitions, assuming that civilized societies do share such intuitions? History shows that it can be a serious moral mistake to trust alleged moral intuitions. Two extreme examples come to mind. In Nazi Germany, the “intuition” was fostered that Jews are an inferior race, legitimising anti-Semitism and discrimination. In apartheid South Africa the majority of whites grew up with the “intuitions” that black people are inferior and that interracial social relations are undesirable. Two questions come to



mind. Firstly, do these examples of clearly false convictions that seemingly attained the status of “intuitions” imply that *all* intuitions are untrustworthy? And secondly: why should *some* intuitions – those on the value of pre-personal life – be sound, if others – in support of apartheid and Nazism – are dubious? The answer is that intuitions are not guaranteed laws or inspirational visions of correct moral conduct; they can be as fallible as the best moral theory or idea. They express our formed moral opinion. If we are responsible, sensitive, receptive and open, our intuitions are constantly formed, reformed and, probably, trustworthy. Secondly, moral intuitions should stand up to the same scrutiny that responsible people (should) apply to all moral ideas: *the test of rationality*. For example, there are many sound arguments to oppose discrimination, xenophobia, racism and sexism, but no cogent arguments in support of these practices. Furthermore, Nazi Germany was a totalitarian state and, especially in the war years, allowed no opposition. Apartheid South Africa had legalised its racial policies, with the tacit and often open support of influential church leaders and the majority of the white ruling society. This, together with a repressive political, legal and social code, made opposition difficult (note, for instance, the fate of two famous Afrikaner dissidents, Beyers Naude and Bram Fischer) and in many ways silenced the critical voice of reason, thereby supporting the development of these false “intuitions”, if, indeed, one should at all legitimise these unacceptable and illegitimate (though “legalised”) social practices by calling them “intuitions”, of which I am not convinced.<sup>25</sup>

Do our intuitions on the value of pre-personal life stand up to the test of rationality? I have said that we have powerful fundamental intuitions on the value of human life in general, and that these intuitions are well founded and may be trustworthy. The more probing question is why these intuitions should apply to pre-personal life. I shall evaluate two particular arguments in favour of taking the moral intuitions against disrespect for pre-personal life seriously.

Firstly, the *need for respect for pre- and post-natal life* seems to reflect a *fundamental moral intuition of our culture*. I have argued that the prohibition of infanticide prevails in either legislation or common law in just about all countries, (the same applies to feticide, though to a lesser extent), deeply problematizing utilitarian

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<sup>25</sup> Of course most South Africans whites actively or passively supported the fundamentally immoral basis of apartheid since the disadvantage of others was seen to foster their own advantage.



claims on the status of pre-personal life.<sup>26</sup> Moreover, third trimester fetuses can be viable, may be born alive (aborted fetuses are often) and would then have to be resuscitated and treated, neglected or actively killed. Since at birth the neonate becomes a legal person, the possessor of legal rights, including a “right to life”, neonaticide is a criminal offence.<sup>27</sup> Non-treatment might be a criminal offence or ethical unjustifiable, or both, if it amounts to neglect. Feticide therefore challenges basic principles that should guide medical practice, such as non-maleficence and beneficence, justice and even respect for (potential) autonomy that legally recognized human individuals are entitled to, as well as accepted clinical and ethical practice.

*A second argument relates to the way in which respect for pre-personal life is almost invariably cherished in the world religions. I shall examine two particular arguments: Firstly, that religion is a vehicle to the enhancement of societal morality; and, secondly, the agreement in most religions on the moral significance of pre-personal life implies that their views merit respect.*

Firstly, then, I argue that religion is an effective tool to enhance the morality of society. There are several reasons why this is so. Firstly, in South Africa in particular, there is a relatively large core of Christian followers who by and large share a specific worldview, as evidenced by attendance of church services, especially of charismatic and Pentecostal denominations, and particularly of so-called “independent” or “indigenous black” religions. It is estimated that there are about 390 million Christians in Africa, up from some ten million in 1900; by 2050, the figure is expected to rise to about 400 million in sub-Saharan Africa alone; these figures are particularly significant in the light of the ravages of HIV/aids (Jenkins, 2002). In the two decades preceding 1980, membership of independent black churches grew from some 2,3 million to

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<sup>26</sup> Our Act 92 of 1996 – the Termination of Pregnancy Act – whilst being very liberal on first trimester abortion up to the end of the twelfth week, is extremely prohibitive as far as third trimester abortion is concerned.

<sup>27</sup> Several Statutes of the Children’s Act, No. 33 of 1960, and the Child Care Act, No. 74 of 1983, as modified, render protection to infants, including neonates. Act 33, Statutes 10&11 refers to “protected infants” (infants at risk). Statute 18 makes ill treatment and neglect of children an offence. “Child” is not defined, and one presumes neonates are included. Statute 26 describes the removal of affected children to places of safety; 27 particularly refers to infants. Statute 59 empowers the transferral of parental powers in certain conditions. Act 74, Statute 50 prohibits ill treatment of children. There are no particular laws concerning neonatal status, at least not in this country, and inferences have to be drawn from the Children’s Act and other legislation (Prof. Sonia Human, Law Faculty, University of Stellenbosch, personal communication, 2004)



almost 6 million, making up almost 30% of all Christians in South Africa (Lategan 1985:26-7, tables 2.4 and 2.6). The 2001 population census indicated that this figure had increased to about 28 million, and the proportion to almost 33% (Hendriks 2003). About 14% of South African Christians belong to the Zionist Christian Church; this amounts to about 5 million members. A significantly higher proportion of urban as opposed to rural blacks are members of Christian religions (83,7% v. 68,1%; *Ibid.* 26, table 2.5). The 2001 census reported that about 80% of blacks were Christians. The HSRC source reported that “77,0% of South Africans claim at least nominally to be Christian” (*Ibid.* 19). When asked if they rate religion as important, the proportion of affirmative answers in that study were, respectively: Coloureds: 68,6%; Indians: 62,6%; Blacks: 59,5%; Whites: 50,4%. But the significance of religious movements as such was rated correspondingly much higher: Coloured: 75,9%; Indians: 70,5%; Blacks: 61,5%; Whites: 79,5%. The importance of these findings lies in the respect that religion seems to command, even in these times, especially amongst black South Africans.<sup>28</sup> Islam, too, has grown remarkably in Africa, as, indeed, it has in the Western world. A recent *Time* study reported that there were in excess of one billion believers worldwide, and 12,5 million in Western Europe. Northern Africa is predominantly Islamic.<sup>29</sup> In 2001, about 1,5% of the South African population were members of the Muslim faith, and about 1,2% Hindu (Hendriks 2003:7).<sup>30</sup> There is, moreover, at least some exposure to the ethical ideas intrinsic to most religions, and this is bound to inform morality, and to be transmitted to following generations. This seems to be particularly true of Islam.

Secondly, most formal religions uphold a set of moral rules such as the last six Commandments (the second “table”) of the Old Testament (Exodus 20:2-17), based on conceptions of morality that usually coincide (there are exceptions; e.g. Rastafarians). There seems to be a “factor which, in a broad sense, runs through” all religions; it “places life as a whole into some sort of perspective: it gives ‘meaning’ to life” (*Ibid.* 9). The ethical “value” of religion lies therein that “all the major religious traditions teach a social ethic that transcends particular group interests” (*Ibid.* 15). Religion

<sup>28</sup> Umberto Eco commented “the fact that frequenting the sacraments was becoming less popular never meant that the sense of the sacred was threatened.” There is a rebirth of personal religiosity, fed by a conception of God as ineffable, but bypassing institutionalised churches (Eco 1995:92-3).

<sup>29</sup> *Time*, 20 September 2004, pp.29-44.

<sup>30</sup> Professorial inaugural lecture, University of Stellenbosch; the figures are based on the 2001 National Census.



informs human relations: “In terms of the ideal functions of religion, institutional religions ought to be the main guide as to the social values which determine any society’s structure” by placing persons in a social context relative to everything else (*Ibid.* 11).<sup>31</sup> The scale of this phenomenon underlines, indeed creates, its importance; the significance of religion as ethical guidance is perhaps self-fulfilling, but it is nevertheless real. The wide acceptance of this phenomenon, especially in developing countries like South Africa with large, poorly educated, illiterate rural populations in the process of rapid urbanization, makes religion an important – arguably the only practicable – delivery mechanism of moral guidance and justification, and makes of religious leaders important role models. Religion has distinct, though perhaps not all that apparent, instrumental ethical value: a ready method and mechanism to spread moral education, to monitor, advance and almost guarantee acquiescence, with built-in sanctions and corrections.<sup>32</sup> In many Islamic countries, the system of “checks and balances” is much more restrictive, since Islamic Law, or *Shari’a* – based on the Koran (Qur’an) and, where it does not contradict the Koran, the Sunna (oral statements of the Prophet Muhammad) – is, at the very least, a major source for legislation (Asman 2004:75-77). For example, even an apparently progressive state such as Egypt, amended its constitution to read (Clause 2, 1980): “Islam is the state’s religion, Arabic is its formal language and the major source for legislation are the principles of the Muslim *Shari’a*” (*Ibid.* 81). The significance of these Islamic positions is underscored by a view that, generally, pervading law significantly informs and forms social norms and intuitions, and, moreover, allow little leeway.

To conceptualise the importance of religion, one need only consider the hiatus that would form if religion were suddenly to lose its importance as ethical guideline in present-day South Africa. For the time being at least, religion, and in South Africa, Christianity in particular, is critically important in shaping morals and moral intuitions.

Of course religious intuitions may be particularly dangerous for precisely the reasons set out above. History has many examples: the persecution of Jews by

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<sup>31</sup> I quote selectively from a very comprehensive report; the authors do not imply that the ideals of religion are apparent in South African society; the social divisions of the 80’s meant that religion both promoted and resisted social change (*Ibid.* 16).

<sup>32</sup> How pervading this might be, can be seen in the 2004 American Presidential Election when the Roman Catholic Church made a statement that abortion was fundamentally morally wrong since the moral significance of life is settled at conception. One can argue that many Catholics were therefore more inclined to vote for the incumbent who campaigned on a conservative anti-abortion platform.



Christians, the Inquisition, the Crusades, various suicidal apocalyptic movements and the current spate of radical Muslim fundamentalist terrorism.

Since religions by and large agree on the moral significance of pre-personal life, their views merit respect and are powerful in informing moral intuitions. In Christian doctrine, for instance, the concept of sanctified life is supported by three arguments: the divine nature of humankind created in “God’s image”; the predetermined nature of life; and the incarnation of Christ.<sup>33</sup> There is consequently a commonly held belief that human life is sanctified, should be respected, and not be terminated unnecessarily – we should not kill other human beings. However, the Sixth Commandment: “You shall not murder” (Exodus 20:13) is probably not directly applicable to prenatal life. The Koran also admonishes respect for life.<sup>34</sup> Muslim law (“Sharī’a”) on the value of pre-personal life and the legitimacy of abortion is based on this principle. Generally, three positions regarding prenatal moral worth, reflected in the legitimacy of abortion, can be identified in the Muslim world. While all are “conservative”, they range from a total ban to acceptance in cases of rape. For example, in Egypt, termination is permissible only to save the life of the mother (*Ibid.* 83). Kuwaiti law, enacted in 1981, holds a “moderate” position: termination is permissible in the event of serious risk to the mother, or of serious malformation of the fetus – but only before the gestational age of

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<sup>33</sup> 1. “Imago dei”: Genesis 1:26: “Then God said: “Let us make man in Our image, according to Our likeness”; and 1:27: So God created man in His own image; in the image of God He created him; male and female He created them” (Spirit Filled Life Bible, 5). Humankind was created in the image of God. The conception imparts a certain level of intrinsic godliness to humankind as a representative figure of the deity in whose image and in whose honour or for whose glorification he was created. The dignity and respect inherent in this conception would impart intrinsic, intuitive moral value to humanity (Du Toit, 1991:20).

2. Pre-determination: Jeremiah 1:5: The Lord said: “ Before I formed you in the womb I knew you; Before you were born I sanctified you; I ordained you a prophet to the nation.” (Spirit Filled Life Bible: 1055). The standard deduction is that God predetermines the value and life of each person. Because he does this even before birth, it must follow that each life should be regarded as valuable, as having been ordained and inherently valuable. Jeremiah lived and prophesied (circa 626-586 BC) in times of great turmoil (Rachels 1995:58). Perhaps this was his way of legitimising his calling and unpopular message. The implication that it necessarily would apply to the lives of all people is not self-evident. Exodus 21:22, referring to the punishment of violence, contradicts the above: “If men fight and hurt a woman with child, so that she gives birth prematurely, yet no harm follows (to her), he shall surely be punished accordingly as the woman’s husband imposes on him”; 23: “But if any harm follows (to the mother), then you shall give life for life.” (Spirit Filled Bible: 113) The discrepancy is self-evident.

3. Incarnation: In traditional Christian view, God incarnated Himself in Christ as human in all respects apart from his immaculate conception – Christ was conceived by the Holy Ghost. Christians often deduce – on equivocal grounds – that consequently some form of sanctity might also be present in every human fetus, especially if humankind is created in the image of God.

<sup>34</sup> 5:30: “That is why We laid it down for the Israelites that whoever killed a human being, except as punishment for murder or other villainy in the land, shall be regarded as having killed all mankind; and that whoever saved a human life shall be regarded as having saved all mankind.”



120 days when, according to Muslim teachings, “ensoulment” takes place (*Ibid.* 84). Tunisia has an unusually (for a Muslim country) “liberal” approach: abortion on request in the first trimester, and thereafter if a “serious” risk of affecting the mother’s health, or of fetal abnormality, exists (*Ibid.* 86). These intuitions pertain also to pre-personal life, though they are apparently not absolute; killing in self-defence, in just war, and even justified execution is widely accepted. Infanticide is generally condemned because of the general injunction against homicide.

Intuitions on the value of infant life are, moreover, soundly based in common and penal law, coincide with our commonly held intuitions against killing, find general support in most societies, have strong support from almost all major religions, and form a cornerstone of decent societal morality; extending at least to the life of the viable fetus. These well-founded intuitions are directly opposed by the utilitarian personhood argument.

The utilitarian regards the infant as “replaceable”, meaning that it possesses very limited moral significance and may be killed as a matter of utility. But this is not generally supported by society; in fact even those who support liberal positions on early abortion usually reject the “radical position” that infants, too, are non-persons. Society seems to accept that notwithstanding utilitarian arguments to the contrary, the infant is a “person” in its own right, or at least more of a person than a non-person (Buchanan and Brock 1990:265). She certainly is a legal person before the law and this affords significant legal protection. Yet some societies permit late termination or feticide, albeit against strong opposition. Until recently, the practice of “partial birth abortion”<sup>35</sup> was legal in some American States, but has since been prohibited by Pres. George W. Bush. Israeli abortion law of 1977 legitimises feticide, against current societal consensus, based on ambivalent Jewish law on fetal status (Gross 2002:215). One can argue that killing a fetus minutes before it becomes a legal person has the moral implications of infanticide, since passing through the birth canal does not significantly alter a being’s moral significance, at least not as far as its intrinsic characteristics are concerned. The

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<sup>35</sup> The term refers to the practice of terminating the life of the fetus in the process of birth, usually by introducing strong suction into the cranium as soon as the head is “crowned” – becomes visible. It is ostensibly legal since technically the fetus is not yet a person whose legal and human rights are respected and can be upheld in a court of law.



main reason for this assumption is that the birth process does not alter the intrinsic properties of an individual. Robert Card argues along similar lines (Card 2000:349). Michael Gross suggests that: “In general, the status of the late-term fetus and newborn infant converges. To a great extent a late-term fetus is similar to a newborn and both should be treated equally.” But this position is not unanimous. For instance, Gross adds that the momentous impact of birth, which makes the neonate his own master and self-owner of his body, cannot be ignored (Gross 2002:216-7). Mary Ann Warren argues that the locality of the entity alone implies a change in moral status based on the possibility of affecting the mother’s well-being (I would suppose the reverse too: changes in the mother’s body can affect the fetus) (Warren 2000:355).

Infanticide is prohibited in just about all legal systems; moral intuitions on infanticide, and, indirectly, late term (partial birth) feticide seem to reflect contemporary legislation. But there seem to be ambiguities in the treatment of malformed fetuses and infants, as Gross found in studying policy on abnormal late-term fetuses and infants in four countries, the results of which are summarized in the following table:

<b>Late-term abortion policy</b>	<b>Neonatal treatment policy</b>	<b>Nation</b>
Restricted	Initiate and re-evaluate/ Treat until certainty	USA
Partially restricted	Modified statistical threshold	Denmark
Partially restricted	Initiate and re-evaluate	UK
Unrestricted	Treat until certainty	Israel

The column on the left summarizes policy with respect to late abortions; the central column summarizes policy with respect to the treatment of malformed neonates who survive birth. Israeli policy, for instance, allows unrestricted access to late termination, but requires that, should the fetus survive birth, it be treated until outcome is certain. Denmark partially restricts access to late termination but allows that treatment of abnormal neonates be withheld if there is sound statistical knowledge of poor outcome. Should the same neonate be born in the UK, local legislation would require that it be treated and outcome re-evaluated later.

But Gross also found that *policy* does not always translate into *practice*, suggesting inconsistencies between intuitions and the law; intuitions seem to be more conservative (Gross 2002). In an earlier study, Michael Norup investigated attitudes towards abortion in Denmark (Norup 1997:439-449). For all conditions, “there was a decline in the number who would permit abortion with increasing gestational age”



(*Ibid.* 443). Respondents to his questionnaire were even less supportive of late abortions for social or less serious medical indications, and less likely to personally request abortion than to support a request by a third person. Both studies indicate that respondents' intuitions morally distinguish between early and late fetuses, and were less concerned with "pre-personal rights" than intrinsic moral value, which seems to increase roughly in parallel with fetal development, a "gradualistic view" on the morality of abortion (*Ibid.* 444); *viability therefore seemed to be a concern for respondents*. Finally, a recent Human Sciences Research Council publication by Stephen Rule on attitudes on abortion in the various population groups in South Africa, indicate quite strong opposition to abortion in general. "Almost two-thirds (64%) of black Africans oppose birth defect-related abortion"; corresponding figures among other groups were coloured: 41%; Indian: 37%; white: 23%. There is even more opposition to abortion for socio-economic indications; 70% see this as "always wrong", and only 10% as "not wrong at all" (Rule 2004:4, and personal communication). In contrast, a recent Associated Press USA poll quoted in *Time* (22 November 2004:12), found that Americans were much more liberal: "only 9% oppose abortion in all circumstances".

These studies suggest that feticide is an extreme position. Yet, this is what Michael Tooley and Peter Singer advocate; "pre-persons" have limited moral significance and it is morally justifiable to kill them *painlessly*.

It therefore seems to be a widely held intuition that the ability to survive birth is a significant consideration. There is significant philosophical support for the notion that third trimester fetuses, in virtue of their viability might be regarded as "persons" in their own right,<sup>36</sup> of course not as persons in exactly the same way as older children or adults; but we cherish them since they possess the potential to grow and develop, within a reasonably short time, into persons like us. We intuitively treat them as we were treated as fetuses and infants; this seems to determine the nature of the relation between adult, infant and fetus, and of our core intuitions about personal status and dignity: I could not have become what I am without once having been a fetus and an infant, without having been cared for in the way I care for present fetuses and infants. The

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<sup>36</sup> "Moral personhood is conferred relatively late in a pregnancy as the developing fetus achieves a measure of viability, sentience and human cognitive developmental capacity thereby affording limited rights" (Gross 2002:214; also Chervenak et al., 1995:434-5, Steinbock, 1992 and Warren 1997).



principle that our care of viable fetuses should resemble the care and nurturing that we experienced is, for instance, supported by R M Hare's "Golden Rule" perspective (1999:58-68).<sup>37</sup> The asymmetry inherent to the relation between infant and adult and the implied vulnerability of the former enhance the moral nature of the relationship.<sup>38</sup>

In conclusion I would like to summarize my own position.

Firstly, intuitions are to be taken seriously, not because they are infallible, fully universal, a priori and ingrained human convictions that establish the gist of what we call "conscience". If it is "infallibility" of moral intuitions, or "guarantees" as to their moral soundness, now and forever, that we seek, then, as critics of the project of modernity point out, our search is in vain. Indeed, as I shall argue in Chapter 4, an *ethics of responsibility*, possibly the "*only sustainably-defensible basis for morality*" (Van Niekerk 2002:35-43), implies what Bauman calls the "unbearable silence" (1993:78-9), which means that I forsake the moral security of convention, rules and appearances – that is, moral certainty. My understanding of the nature of society and of morality develops from the critical importance of context and circumstance in moral thought. When, within some difficult to define boundaries, circumstance changes, our views should at least be revisited. The biomedical field is especially exposed to radical change. Rapid and un-thought-of developments compel concomitant ethical development to face novel problems. Two examples have lately caused much soul-searching and ethical turmoil: *in vitro* fertilization and human pre-embryo experimentation and research, and forms of assistance with suicide for terminally ill persons. Therefore, even if our moral intuitions are momentarily sound, there is a constant call upon them to evolve in accordance with these changing conditions to maintain their power and value, and to help us deal with daily moral decisions.

But society too is dynamic, and this has a marked effect on societal morality. An example close to the present discussion is the development of respect for personal

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<sup>37</sup> Hare suggests that the basis of our responsibility to care for infants and protect fetuses stems from our gratitude at having been cared for in the same way when we were fetuses and infants. Nevertheless, Hare's arguments are not absolutist anti-abortionist.

<sup>38</sup> "Asymmetry" is an essential characteristic of moral relations. Zygmunt Bauman contends that when a relation is symmetrical, there is no vulnerability of the "other" and contractuality can suffice to ensure justice (Bauman 1993:58-61; 85).



autonomy as applied to bioethics in the last decades of the previous century. This has greatly impacted on society in general, on the practice of medicine, the development of informed consent and the limitation of paternalism in medicine. Our moral intuitions require revision following these ongoing changes. Therefore, our ethical ideas should not be cast in stone. We should be open to re-evaluate and investigate our concepts and ideas without prejudice; as Socrates teaches, the only way to find “moral truth” is by constant, sceptic re-examination of existing “truth”. So the question is not whether our moral ideas are infallible and eternal, but whether they stand up to the demands and questions of our time.

Secondly, intuitions do not demand respect because they are merely the outcome of a societal agreement or whim that might change any time; moral intuitions are the outcome of a dialectic of innate convictions and personal historical memory/experience. By “innate” I mean instinctive or inherent, not naturally inborn but, in an Aristotelian sense, developed as part of my formative moral education, as I have earlier described. But this is continuously shaped, revised and adjusted in an interactive internal dialogue. There are several levels on which this conversation between what I believe and experience can take place.<sup>39</sup> The preceding suggests that this dialectic is confined to the individual, and in the final analysis it has to be since it is I, and no one else, nor any group of persons or body that finally make my personal moral decisions. This dialectic can only take place if I am open and receptive to it, and if my moral intuitions are not cast in stone.

But, thirdly, we hold these intuitions, partly because we seemingly cannot help to hold them, and, in that sense, seem to be morally and socially “programmed” to abhor the killing of innocent and vulnerable human beings; programmed by the sum total of our experiences and exposure as human beings. These absolutely fundamental intuitions are the outcome of sustained historical experience; we “have seen” societies where life has been devalued (Nazi Germany is a prime example), and were repulsed by it; we, as a society, have grown into a consensus that such is not the kind of society that we desire or cherish.

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<sup>39</sup> As to the basis of beliefs, I support the existential phenomenological view that my moral beliefs can only be based upon, and are secondary to my experiences – existence. If this is so, then it follows that my continued and changing experiences affect my beliefs, and this is an alternative explanation of how my moral intuitions are constantly being revised.



My final point thus is that moral intuitions that are repelled by the indiscriminate killing of fetuses and infants are important moral action guides that cannot be ignored simply because they hold the danger of sometimes being wrong or not well enough thought through. They function normatively and prescriptively in most people's lives, and they have a hugely significant impact on how moral convictions arise and function. There is little wisdom for ethics to fly in the face of these intuitive moral convictions. The "ethics" propounded by utilitarianism in respect of the status of prenatal life is an ethics that encourages us to do just that. There is wisdom in the consensus of the "fathers" and the "brothers", i.e. the received wisdom of tradition and the acquired consensus of decent peoples in the international context. This is a wisdom that we can only ignore at the peril of destabilising the entire moral fabric upon which respectful, peace loving, caring and progressive societies are built.

### **3.4 The inevitability of speciesism**

One of the main reasons why utilitarian thinkers reject the kind of position on the moral status of prenatal life that I defend in this dissertation is the fact that such a position, according to them, reeks of speciesism. Speciesism is the view according to which members of our species (*Homo sapiens sapiens*) are entitled to privileged treatment and protection solely on the basis of membership of the species. What confers value on moral agents, according to these utilitarians, is not membership of a species, but *personhood*, defined in terms of capacities such as rationality and a conscious interest in the continuance of one's own life. These characteristics are not limited to members of the human species – utilitarians argue that certain animals share these traits – and, in addition, these characteristics are absent from certain members of the human species, such as fetuses, neonates ("pre-persons") and people in PVS; it is therefore morally defensible to kill them, special considerations apart (other things being equal). It might be quite acceptable to, for example, confer personhood on non-human species such as chimps or whales, whereas there is no justification to confer personhood on not-yet-rational members of the human species (e.g. fetuses and neonates) or not-any-longer rational members (such as people in PVS). The utilitarian thinkers that I



discussed earlier (such as Singer and Tooley) regard speciesism as a variant of racism and therefore reject it with comparable moral disdain; for them, speciesism is the prejudicial theory and practice to accord members of the human species moral rights and privileges simply because we have the *power* to do so (Tooley 1972, reprint 1999). Tooley writes: "... principles involving reference to membership in a particular biological species *cannot be basic moral principles*" (1983:324).

I argue against this rejection of speciesism on which much of the utilitarian arguments concerning the status of prenatal life are based. The protection of human life and the promotion of human interests based on membership of the human species are *morally defensible* and *desirable*. The particular *moral significance* of human life is founded on the unique human capacities and capabilities of self-understanding and consequent self-esteem, and the very *possibility* of sense-making and sense constitution in and of the world:<sup>40</sup> "Man is the sole creator of meaning and value in the world" (Macquarrie 1972:14). Knowledge has no meaning without humankind; *truths* about the world are radically human (Luijpen 1963:42-3).<sup>41</sup> A world without humankind is simply unthinkable ("eenvoudig niet te denken") since it would imply a mode of thinking without the thinking presence of an existing subject (*Ibid.* 40) in a world that can in no way be confirmed.<sup>42</sup> Through inter-subjective and trans-subjective dynamics, humankind both *defines* and in fact *creates* her self and her world; their inextricable interwovenness implies that the one cannot exist without the other.

Sartre summarizes the reciprocity between self and world as follows: "... without the person, there is no world" (as quoted by Macquarrie 1972:58). This line of reasoning implies that conceptions of *value* can only make sense relative to humankind; in fact presuppose human existence; consequently, so too does any conception of eventual morality. And since there is no alternative way of constituting the world, as we know it, I argue that human speciesism is not only justifiable and desirable; it is also *inevitable* in and for the world – that is, if we regard the possibility of self-constitution,

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<sup>40</sup> "World" here means human environment. Etymologically, "world" in Old English means "era of man". There is a human factor in this concept of world: "we see the world from a definitely human point of view"; "there is no world apart from man" (Macquarrie 1972:57).

<sup>41</sup> "Zonder de subjectiviteit van de mens heft geen enkele werkelijkheidsaffirmatie zin en zonder werkelijkheidsaffirmatie zijn alle woorden en formules lege doppe." (Luijpen 1963:42) "Maar als men eenmaal heft ingezien dat de wereld en de waarheid omtrent de wereld radical menselijk zijn, dan is tevens de mogelijkheid geopend om te begrijpen dat er zeer vele menselijke werelden en zeer vele menselijke waarheden omtrent de wereld zijn." (Luijpen 1963:43)

<sup>42</sup> "... zonder mens is er voor de mens geen wereld" (Luijpen 1963:41).



sense-making and sense-constitution in and of the world is at all significant, which, I argue, we as humans are obliged to; the mere fact that we are entering into this discussion, and that we do so in terms of a human frame of reference, implies that we do regard the issue as significant.

Drawing on the insights of existential phenomenology, I wish to develop three particular arguments:

- Speciesism expresses a fundamental aspect of human self-understanding and consequent self-esteem;
- Speciesism legitimises fundamental aspects of human well being;
- The human species is essential for the possibility of sense-making and sense constitution in the world.

Firstly, speciesism is *fundamental to human self-understanding*, fundamental also to raising the issue of understanding the phenomenon of understanding! There is a dynamic between self-knowledge and self-understanding; the former determines the latter. And self-knowledge, and knowledge of what it is to be a human being, can only be developed in the dynamics of inter-subjective relations. Therefore, speciesism is critically significant for self-knowledge and understanding; after all, it draws our ultimate social boundaries. Moreover, the type of inter-subjective relations referred to above are possible only with other members of our species. The moral significance of these unique defining characteristics is twofold; it places an imperative on the survival of the human species *qua* species. Secondly, it is *personally significant* in determining who I am. I can only learn what being human entails, and fulfil my human “role” through my interactions with human fellow-actors.

Personal self-esteem forms consequent to personal judgement of the attainment of my concept of the “ideal”. Reflective self-knowledge and self-understanding are fundamental to my development of this concept. My subjective perception of self in relation to this ideal, determines my self-esteem. Like self-knowledge and self-understanding, self-esteem develops in my dynamic relations with others. Development takes place within a particular human paradigm, but is not determinist since we have the capacity to develop as uniquely free and autonomous individuals. We are all members of a paradigm group of beings, the species *Homo sapiens sapiens*. Species



membership therefore fundamentally determines not only self-knowledge and self-understanding, but also self-esteem.

This analysis has a critical consequence vis-à-vis the development of morality; self-esteem is a fundamental building block of morality. All concepts of morality are based on my judgement of the moral significance of what I wish to preserve, protect and promote in society. I can promote only those personally significant moral values that determine my self-esteem. I recognize morally valuable traits in others, even the abstract value of nature, on this basis. So speciesism is fundamental not only to self-knowledge, self-understanding and self-esteem, but also to moral capacity.<sup>43</sup>

I have said earlier that as human beings we are “obliged” to accept the significance of the uniquely human characteristic of making sense of the world and ourselves. Moreover, that human subjectivity is a pre-requisite for the possibility of this type of sense making. I have implied that speciesism is consequently justified. But the question is whether it might not be possible to concede the significance of human subjectivity without necessarily conceding that this automatically implies that humans have a right to “preferential treatment”. This is, after all, what the utilitarian does when she argues that “personhood” is a critical moral attribute, since only “persons” can realistically be argued to possess these attributes. What precisely makes speciesism morally significant vis-à-vis humans? This is, admittedly, a crucial question.

My response is to argue that I would agree with the utilitarian that only persons could have these valuable attributes. But the argument then tends to become circular since all of these persons, the possessors of the person-making traits, are, simultaneously, also human beings (the converse – that all human beings are simultaneously also persons – if of course *not* true). Only human beings have the possibility of developing these attributes (I shall argue later that the “personhood” of animals is restricted to a very basic level); this is, after all, a species characteristic. As to the question of why we should accord humans preferential treatment, my initial

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<sup>43</sup> Moreover, the concern of the “actual, striving person whose thought is embedded in his life, (and who) is indeed part of the process of living” with his precarious human situation, his imminent problems and mortality, forces him to “round off his life here and now, give it meaning while he still has the opportunity, for tomorrow may well be too late”. He grapples with knowledge on this immediate basis, and is less concerned with “knowledge that will accumulate through the ages.” This is “ethical through and through” (Allen 1953:10). Kierkegaard severely criticized the inconsistency of Christian moral beliefs and actions. The nature of his existential moral thought is defined in his statement that only that upon which we are prepared to act, is “really true for us” (*Ibid.* 9).



response is that whatever our arguments are, in practice all of us act in accordance with the principle that human interests supersede those of animals. For instance, even the utilitarian would attempt to save the drowning man before she saves his dog. But, secondly, I would also argue that members of a species have a moral duty to ensure the survival of that species, and, as Hans Jonas argues, this extends and expands the meaning of morality in his practical setting (see discussion on p. 156). Of course this has to be done in a responsible way, as I shall explain later. But the utilitarian might then argue that pre-persons should be excluded from my argument since they do not possess the required characteristics. I concede that they do not *yet* possess those characteristics. But this is where the argument from potentiality comes to the rescue; as I shall argue in a forthcoming section, it is in the potentiality of developing these morally significant characteristics, that the moral promise of speciesism is fulfilled.

Secondly, without speciesism, *fundamental aspects of human well-being are problematized*, e.g. the use of animals as beasts of burden, as guinea pigs in biomedical research, as pets, and, more profoundly moral, the consumption of animal flesh. The latter is particularly significant since it may have been essential in human evolution. Steven Pinker addressed the question *Why us?* – Why were *our* ancestors first to enter “the cognitive niche”? (1997:191) – in a discussion of four significant traits that particularly predisposed the development of our ancestors into the species, with its remarkable traits of intelligence and rationality that we currently constitute. These traits present a case for the particular development of humankind and provide experiential support for speciesism; these traits were essential for the development of the human species. I shall now briefly discuss these four traits:

#### 1. Visual acuity and colour perception:

Stereoscopic vision allowed depth perception that “defines a three-dimensional space filled with movable solid objects” and makes the abstract perception of complex geometric shapes and designs possible – e.g. an axle with wheels. Fine manual movements (e.g., the catching of insects) became possible. Colour perception was important in the development of fruit-foraging species.



## 2. Group living:

Group living offered the advantage of safety, and the possibilities of expediting food gathering, e.g. hunting, food sharing, and bartering food for other favours. But it also predisposed to the development and valuing of intelligence; in a community, value is soon placed on the possession of information. But an individual also faced cognitive and existential challenges: since there may be negatives to societal living,<sup>44</sup> there is pressure to make the right survival choices. Societal living therefore presupposes advanced intelligence and brain development. Societal life also requires improved communication skills – the development of language, particular development of the brain and fine muscle movement in the larynx, pharynx, neck, chest and face.

## 3. The development of the hand:

The fact that we “hung on branches of trees” played a major role in the development of the hand, since it resulted in an erect spine and posture, and the resultant freeing of the hands from support to walk, for which delicate hands were both wasted unsuited, so an erect posture and bi-pedality developed. Fine movements of the evolved hand make it a “lever(s) of influence on the world that makes intelligence worth having” (*Ibid.* 194). Hands were freed for carrying and assembling tools from material sourced from different locations. The erect posture protected against the sun and improved visibility in the newly developed savannahs. Dexterity required significant brain bulk and activity; in humans, a unduly high share of cortical area is dedicated to the hand.

## 4. Hunting:

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<sup>44</sup> Pinker quotes a line from the Jean Paul Sartre play *In Camera*: “Hell is ... other people”. The introduction of third parties into relations causes difficulties; three characters try to enhance their personal prestige by exposing the deceptions of the other two. “Pitiless conflict ensues, with shifting alliances of any two against the third, till the grim conclusion is drawn: Hell is.... All such attempts to defend ourselves against our rivals thus breaks down sooner or later.” (Allen 1973:65-6) Nevertheless, even though the “crowd” or “herd” can annihilate the “self” in humankind, societal living is essential both in constituting humankind and for her existence. (Luijpen 1963:53) But, writes Heidegger, it is only once man is prepared to face the certainty of his death as a personal matter, and Being is reflected against the alternative, Nothing, that he can awake to an individuality distinct from the mass, and ultimately a genuine fellowship can develop between him and others – the advent of a personal ethical responsibility (Allen 1953:34-40).



The point is not so much that the brain developed in response to particular needs of hunters (cunning and agility), but that the consumption of meat also predisposed us as species to rapid brain development: “The key is to ask not what the mind can do for hunting, but what hunting can do for the mind” (*Ibid.* 195)”. Concentrated protein nutrients – animal flesh is the “best natural material for building animal flesh” – providing the complete diet that caused carnivores to develop larger brains than herbivores, predisposing to the development of hunting skill. But meat eating also influenced social life, behaviour and sexual politics.

Of course, these four characteristics also occur in other species; why did these other species not evolve similarly to us? Pinker’s point is that only in *Homo sapiens sapiens* did they occur in the specific combination and configuration that eventually constituted our species.

These arguments make a case that the consumption of meat was critically important in our evolutionary development. The utilitarian condemnation of speciesism questions these evolutionary coincidences on our road to becoming what we are, and imply that it might now be morally wrong to do something that was vital to making us what we are. Utilitarian theory takes the coincidence in the interests of human and non-human sentient beings as an essential moral directive in treating animals. An apparent consequence is to problematize the consumption of animal flesh. Michael Tooley is silent on *moral vegetarianism*; Peter Singer is an active advocate.<sup>45</sup> Of course not all vegetarians are utilitarians, or indeed *moral* vegetarians. Our apparent evolutionary evidence notwithstanding, we need not resign ourselves to being carnivores, just as we have renounced many other activities characteristics of early human development.

Thirdly, a powerful argument in favour of speciesism is that the possibility of *constituting and making sense* in the world is entirely dependent on the human species. The essential human characteristic or capacity in this process is the intelligible use of a

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<sup>45</sup> In *A Vegetarian Philosophy*, reprinted 2002 (297-305) Singer makes his case for vegetarianism, quoting amongst others the longest trial in British legal history: *McDonald’s Corporation and McDonald’s Restaurants Limited v. Steel and Morris* (*Ibid.* 297). Justice Bell found that chickens, laying hens and sows used in McDonald’s products were exposed to “cruel practice” for which McDonald’s were “culpably responsible”, yet refused to similarly label the raising and slaughtering of McDonald’s beef, arguing that McDonald’s could not change those practices. Singer writes that “University teachers of philosophy” should discourage this “disastrous meat diet” (*Ibid.* 304).



highly developed and sophisticated communication tool, *language*. I shall present two arguments on the significance of language.

Firstly, Karl Popper differentiates four functions of language (Popper 1972:119). The “lower” functions, self-expression and signalling, are common to all “animal languages and all linguistic phenomena”. “Self-expression” is “symptomatic of the state of some organism”, and signalling releases a response in another organism. But human language has, among others, two unique “higher” functions: the descriptive function, and the critical function. The descriptive function is the ability to use linguistic expressions to describe a world in such a way that we need not observe it in order to understand it. This, in turn, generates the regulative idea of “truth” – defined as “a description which fits the facts” – content, truth content and verisimilitude.

This brings us to the critical or argumentative function of language – the function that is utterly unique to humans. “The argumentative function of human language presupposes the descriptive function; arguments are, fundamentally, about descriptions from the point of view of the regulative ideas of truth; content; and verisimilitude” (*Ibid.* 120). “Exosomatic” descriptive language presents the object of critical discussion. From descriptive, and written, language, emerges a “linguistic third world” wherein rational criticism develops. To “this development of the higher functions of language (that) we owe our humanity, our reason, for our powers of reasoning are nothing but powers of critical argument” (*Ibid.* 121). The significance is that the argumentative function of language becomes the “main instrument of further growth” of objective knowledge through systematic error-elimination.<sup>46</sup>

Secondly, language allows us to become acquainted with other “things” of our world (Van Niekerk 1986:10). Language enables inter-subjective communication. Language is fundamentally social, denoting those aspects of the human condition. Without language, we cannot experience “that inter-subjectivity” which is “as necessary for our subjective references and therefore for our self-knowledge as persons as it is for objective references”. But the ability to use language in this way, along with other characteristics that differentiate *Homo sapiens sapiens* from other animals, has

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<sup>46</sup>“Scientists try to eliminate their false theories, they try to let them die in their stead. The believer – whether animal or man – perishes with his false beliefs” (Popper 1972:122).



other implications; the capacity and intelligible use of language marks the commencement of the constitution of persons through inter-subjective communicability that provides the linguistic building blocks through which the human subject relates also to objects around him. The final phase of this development is subjectivity, a “peculiar and inalienable personal awareness of self” totally distinct from our knowledge of others and of things (*Ibid.* 12).

But what are the pre-requisites of the *possibility* of sense constituting and -making in and of our world? What is the role of language therein? This is, in effect, a search into the “nature and knowledge of persons” (the title of Van Niekerk’s 1986 article). I shall use this article to outline an understanding of the role of language in constituting and making sense.

We constitute knowledge on three *primordial levels*. Firstly, there is the interactive, *inter-subjective* experience of other selves, correlated in the knowledge of others. Both subjective knowledge and the knowledge of things presuppose this form of knowledge: “As a consequence, the concept of person cannot be understood apart from the conditioning influence which human inter-subjectivity exerts on the identity and quality of personal experience” (*Ibid.* 9). The interactive nature of this relation sets it aside from our unidirectional knowledge of things. We gain practical knowledge – *behavioural familiarity* – essential to our survival in the world in our interactive relations with others<sup>47</sup> through the use of language. Language is consequently *central to sensible human existence*: “Our constitution of a meaningful world is essentially a linguistic act; our existence as persons is a linguistic existence” (*Ibid.* 10). But human existence is essentially social; therefore language is essentially social, not “private”. Knowledge of other selves is constituted in interactive linguistic societal intercourse; simultaneously also knowledge of self and of things.

In describing the second primordial expression, *trans-subjectivity* (the relation between person or self and things) Van Niekerk develops the ideas of P F Strawson and Maurice Merleau-Ponty. Strawson opposes “traditional” Cartesian dualism; “mind” existing apart from “body” (of the person whose mind it is); “from Plato to Descartes,

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<sup>47</sup> John Macquarrie (1972:14) calls call this “knowledge by participation”.



and modern idealism, the belief has been that the true self or the real man is somehow within, and that the body is an appendage, or a framework of some sort” (Macquarrie 1972:68).

Not all existentialists have voiced opinions about the “body” by which we are in the world; Kierkegaard tended towards asceticism, Heidegger was simply silent, unlike others such as Marcel, Sartre and Merleau-Ponty. Strawson wrote that the concept of “mind” only makes sense if conceived of as “secondary to, or derivative from that of an individual person” (Van Niekerk 1986:11). Van Niekerk added that whereas “the concept of mind is dependent on the concept of person, the concept of person is on its part dependent on the concept of *body*”; persons are *materially incarnated* in the world, a position supported by Marcel (Macquarrie 1972:67).

This leads on to the work of Maurice Merleau-Ponty, and the identification of subjectivity with bodiliness. Whereas traditionally in Western conceptions, subjectivity is associated with “consciousness, freedom and morality”, Merleau-Ponty sets out to “de-spiritualise” subjectivity, and contends that at its most basic level, subjective human personhood as bodiliness is “*not yet or pre-conscious*” i.e. “not yet conscious of itself as subject”. Humankind as subject is constituted by means of its pre-conscious, trans-subjective relationship, that is, with the world surrounding it. Simultaneously, the conceivable world surrounding the so-constituted subject is pre-consciously ordered or structured: “By simply being body-in-the-world, man (pre-consciously) lets the world appear in a certain way or with a certain structure”.

A person is therefore both *creator* and *creation*; meaning is constituted in the way he “lets the world appear” (*Ibid.* 13)<sup>48</sup>: “He is co-responsible for creating that which he himself desperately needs to survive.” Jean Paul Sartre says that man’s existence precedes his essence: “... man first of all exists, encounters himself, surges up into the world – and defines himself afterwards. If man, as the existentialist sees him, is not definable, it is because to begin with he is nothing. He will not be anything until later” (Macquarrie 1972:3).<sup>49</sup> Mankind is inextricably entwined with the world;

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<sup>48</sup> This reminds of the “closed” type of humanism of Roger Shinn (Macquarrie 1972:14).

<sup>49</sup> Just as the existent’s relation with the world can become problematic in unbridled instrumentalism, so too can the body distort existence. There is an ambiguity in our double relation with body; we both have



without it, he cannot exist, neither can the world without him.<sup>50</sup> (I append an endnote-discussion of an alternative conception of inter-active self-realization argued from complexity theory<sup>i</sup>.)

Van Niekerk's third "primordial intuition" is *subjectivity*. The knowledge of others and of things are *necessary* though not sufficient preconditions of self-knowledge and subjectivity: "As a person's image of self grows, co-influenced by inter-subjective communication, his self-awareness soon attains a level of uniqueness which cannot, in any conceivable sense, be *reduced* to information provided by the senses" (Van Niekerk 1986:12). As Sartre puts it: mankind "will be what he makes of himself" (Macquarrie 1972:3); indeed, man has the freedom and responsibility to choose "to gain existence in the full sense or to let it slip away" (*Ibid.* 55); to be or not to be in the full *human* sense; Heidegger's *Dasein* in her *Existenz*, Sartre's *pour-soi* or "for-itself" (*Ibid.* 47; Luijpen 1963:118; Allen 1953:51-55). Existential phenomenologists have this particular concept in mind when using the word "existence" as referring to the type of being characteristic of humankind.<sup>51</sup>

What are the characteristics of this species-defining human subjectivity, to which man grows, and in terms of which his authenticity may be judged? Firstly, humankind's *transcendence* is a fundamentally dynamic, self-aware, emergent elusiveness. The ability to move beyond, to question, to investigate, to invent "... distinguishes man's 'existing' from biological evolution ... man does not transcend his given situation in terms of 'laws of nature' operating from outside, but in terms of images of himself which he seeks consciously to realize – he considers 'the kind of being he is, and what it is that he wants to do and to become'" (*Ibid.* 49). Man does not have a "fixed" nature, and is defined in terms of "what is distinctive to his humanity rather than ... of what he shares with animals". Mankind's self-transcendence, wrote Heidegger, is revealed through his active participation in life; thus he becomes aware

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and are bodies, as Gabriel Marcel points out. We can become alienated from our bodies, which may react by attempting to destroy us, e.g. in drug addiction. This may explain mankind's history of "distrust of the body" (*Ibid.* 70).

<sup>50</sup> "Indien de mens aan de wereld vastkleeft, kleeft ook de wereld aan de mens vast, zó dat het voortaan onmogelijk is over een wereld-zonder-mens te spreken. (Luijpen 1963:37) "... het ontwerp dat de mens is, is een zelf-ontwerp. (*Ibid.* 52)

<sup>51</sup> Sartre's description of inevitable, creative, ultimate, Godlike but dreadful "human freedom" "for-itself" conveys something of the type of ethical existence of *Dasein*. In this I am one "unfolding" of freedom: "each of us is indeed the centre of reference and meaning for his world" (Allen 1953:59).



that “he is never merely what he is, but must always *do something* about what he is” (Allen 1953:24). For Sartre, “consciousness” is an expression of man’s “self-transcendence”; it is “process and self-creation, continual improvisation based on the rejection of what it has been up to this moment” (Allen 1953:54).

The second characteristic is the *uniqueness* of the individual existent who refers to himself as “I”, and whom Jaspers described as “irreplaceable” and “non-interchangeable” (*Ibid.* 51). This goes beyond the genetic: “No animal, no crystal, no manufactured thing says ‘I’” (*Ibid.* 52).

The third characteristic is *self-relatedness*, in the sense of “becoming at one with oneself, of fulfilling oneself”. This poses the question of authenticity in choice; in terms of what is authentic fulfilment to be defined? I favour Sartre’s idea that we create values by our choices, provided we consider the interests of others.

As described earlier, our ability to constitute and make sense of ourselves, of life and of the world, is first and foremost dependent on our ability through the medium of language to interact as subjects with other subjects. In this way we learn both how to act, and the lines, and – in as far as it exists – the plot of the play. We start learning this as babies and toddlers, and simultaneously learn the language through which we are taught. Through our inter-subjective relations, we secondly learn of the nature of “things” around us, knowledge essential for our survival. Armed with these two primordial experiences, the third is added – knowledge of self; this constitutes us as human persons. Underlying this “process” is a strong sense of belonging – in this respect, to the human species.

This, to my mind, constitutes a powerful argument in support of the idea that we cannot avoid bestowing “favour” on or precedence to our own species. If we were to, also on a moral level, regard the value of (albeit only certain) animals as simply equal to ourselves, a fundamental aspect of our self-understanding, and consequent moral worth as human beings would be lost. The very phenomenon of *valuation*, in terms of which ethics and morality as both a problem, a phenomenon and an activity occurs in our world, is a function of the mode of being of that being, as Heidegger claims, whose being is for her-/himself an issue (“die synde vir wie sy syn gaan om sy syn”!), and



whose being/existence is therefore, essentially, (self-) interpretation. It is inevitable that we, who value whatever else, will first and foremost value ourselves. For this very reason, speciesism, also in ethics, seems to me to be inevitable. It would be very hard to construct and develop a consistent moral argument without ever relating the moral considerations in it to some form of valuation that is the product of human intellectual endeavour and achievement.<sup>52</sup> The world as we know it is indeed “our world”; it is a space in which we are “at home” with inevitable reference to who we are and what we regard as “of value”. “Our” values may well be corrupted or insufficient. We may well be a quite disposable intruder, living for a very short time (relative to geological time) on an insignificant planet in a universe where moral value will some day be revealed in dimensions that are unthinkable and inconceivable to us. Yet, this world is, inevitably and unavoidably, for all of us, “our world”: defined, understood and valued by us as a species. It is to my mind wishful thinking to flirt with the idea that we are able to value whatever in the world in such a way that, what is called for, is a devaluation of ourselves.

I recognize three possible rejoinders to my position on speciesism:

- Firstly, speciesism relegates non-human life and nature as instrumental to human interests, and elevates all biological forms of human life above all forms of non-human animal life;
- Secondly, speciesism justifies “unnecessary” cruelty to animals;
- Thirdly, speciesism implies that human life is always sacrosanct and should not be taken.

Firstly the challenge of instrumentalism: I argue that a moderate form of instrumentalism is inevitable in terms of the Darwinian imperative of human survival. Steven Pinker, whom I quoted earlier, argues that becoming carnivorous was very significant in the evolution of the human species: the ready supply of amino acids was

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<sup>52</sup> In a recent doctoral dissertation at the University of Stellenbosch, Donna Knapp van Bogaert addressed the moral problematic of the phenomenon of global drug resistance. In spite of arguing quite strongly and persuasively against the human irresponsibility that gave rise to this phenomenon, and in spite of eloquently pointing out the shortcomings of anthropocentrism in environmental ethics, she eventually defends a position called “weak” or “enlightened” anthropocentrism, which is again a concession that anthropocentrism/specieism in some or other disguise is inevitable when arguing morally. Cf. Van Bogaert 2004.



critical in the development of the human brain (Pinker 1997:195). The human consumption of animal flesh is morally justifiable only if a form of speciesism, and consequently the limited “exploitation” of animals is also morally justifiable.

But some form of “instrumentalism” is further justified in an examination of the peculiar relation of man with his world. Man’s obsession with the “things” of the practical, everyday world leads to the development of the objective and impersonal world of science (Macquarrie 1972:61-62, 64). There is a unique and slightly mysterious side to humanity: the world of the arts. His artistic expression is arguably mankind’s highest, most unique achievement. Man utilizes “things”, turns them into instruments to his service, constantly expanding his world and making it more complex. He learns to work, and to organize his labour, produces in abundance, which gives him the liberty of delving into science and art; to call it, also, “work” (Luijpen 1963:56). Instruments become extensions of man; even the world as a system may be so described. Instrumentalism is inevitably integrated into human life; it reflects a human frame of understanding upon phenomena (*Ibid.* 98). Instrumentalism defines an aspect of humankind that sets him aside, lets him stand out: his ability to create and use increasingly complex technology.<sup>53</sup> I argue that humankind uses his world instrumentally, and the way he does so defines a significant aspect of humanity. But I do not suggest that animal life in particular has only instrumental value. Sentient animal life also has inherent value; all species are valuable since they contribute to biodiversity without which the world is diminished. What is unreasonable is to expect humans to value that life more than they value themselves.

I concede that anthropocentrism – or speciesism – cannot be a final and absolute moral justification, yet we cannot deny its importance. All knowledge, all

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<sup>53</sup> But it would be foolish not to recognize the inherent dangers in such a mode of being. The danger for humankind is the reciprocity between himself and the world: “if man shapes his world, the world also shapes man” (*Ibid.* 63). Mankind is in danger of being enslaved by his instrumental world, i.e., of ceasing to exist. As Gabriel Marcel has put it: “To have something is not just to stand in an external relationship to it. The very having of something affects the person who has it. He become anxious about it and instead of having it, it begins, so to speak, to have him. ... Deprivation dehumanises just as surely as a surfeit of possessions” (*Ibid.*).

This can develop into what Heidegger and Luijpen describe the as “scientism” – a monistic materialistic view of human existence. No other reality than the measurable and quantifiable, as described by the technocratic natural sciences is considered, diminishing humankind to a “thing” (1963:27), and stifling her dialogue with the world (49).<sup>53</sup>



understanding, all ideas of value and conceptions of morality presuppose human existence and operate through human existence. Truth about the world is radically human (Luijpen 1963:43).<sup>54</sup>

The second riposte is that speciesism justifies cruelty to animals. If animals are but instruments to satisfy human interests, there is a risk that unnecessary killing, for example hunting and blood sports, may seem justified. Responsible speciesism denies that animals are *purely* instruments to serve human “interests”. Cruelty to animals and unnecessary killing (i.e. when not required for human consumption), hunting and other “blood sports” are as a matter of moral principle wrong for three reasons:

- Such actions deny that sentient animals also have interests;
- Cruelty is in itself morally despicable;
- In the Kantian idiom: cruelty to animals is wrong not because we have particular duties towards animals, but because of what cruelty to animals might do to us (i.e. foster cruelty in us towards one another) (Kant 1779, reprint 1930:191, 239).

I argue that there are legitimate qualifications that determine human behaviour towards animals: actions essential to human survival, or to improve the “quality” of human life (using animal flesh as food, or animals in justified biomedical research). But if animals are to be killed, it should always be done in a sensitive way. I do not advocate animal cruelty; the treatment of all animals should be humane and in accordance with their interests, recognising that some animals are sentient beings. I am as concerned with the welfare of animals as the utilitarian, but for different reasons. Generally, however, human interests override the interests of animals, and to take the radical stance that, for example, J M Coetzee takes in *Elizabeth Costello*,<sup>55</sup> is unrealistic.

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<sup>54</sup> But surely the world will still be there without me? Yes, of course; the point we have to make is that it is knowledge about the world that is decidedly human. In other words: of course the world is there, but what is the sense of it for me if I am not also there?

<sup>55</sup> In the book, *Elizabeth*, like Coetzee, a laureate author, argues the case for moral vegetarianism by comparing the slaughtering of animals to the Holocaust, a position that generates considerable criticism from other characters (Coetzee 2003: 63-6).



Thirdly, my position on speciesism does not imply that human life is absolutely sacrosanct and should necessarily be preserved at all costs, or that the taking of prenatal human life is always and necessarily morally wrong. I accept that in order to be morally significant, human life needs to comply with either of the following:

- It has to be in some way meaningful; I accept that the capacities and characteristics that denote moral significance in this respect can be summed up in what the utilitarian describes as “personhood”. Now it might at first glance seem that I am conceding to the utilitarian argument on personhood. But I do not since I argue that moral significance might derive from a second characteristic; this is an argument that the utilitarian *does not* support;
- The possession of a genetically determined potentiality *and* the contingent possibilities to *develop* the characteristics described above.

It follows that mere biological human life forms that can never attain, or have irretrievably lost these capacities cannot make the same demands upon us. An expression of the second qualification is found in Don Marquis’ “future like ours” account; the “reasonable” possibility of having an expectation of a “future like ours” (Marquis 1999:46-56) is morally significant. The conception of such a future presupposes the possession of the type of potentiality to become the type of being described above, which is the subject matter of the next section.

I have argued that species membership is a significant characteristic in defining moral value by way of an *entrance* characteristic, similar to the utilitarian utilization of sentience, i.e. that it is a *necessary* but not *sufficient* moral characteristic. But it is obvious that there are significant differences between the two notions, the most significant of which is that sentience is an inter-species, unifying concept, whereas speciesism, as argued here, is an intra-species, differentiating concept. However, if we were to return to exclusively biological definitions of humanity, and regard membership of *Homo sapiens sapiens* as a sufficient, indeed finally defining moral characteristic, and were to apply such a view in the biomedical treatment terrain, it would create unimaginable difficulties, e.g. in the practical allocation of limited resources when deciding who should be treated and to what extent and level. It would for instance problematize the discontinuation of artificial ventilation in those humans



who are irreversibly brain dead. We would be obliged to resuscitate the unsalvageable. The legitimacy of a “living will” or advance directive would become inconceivable, as would the involvement of medical personnel in organ harvesting for transplantation, and even the most passive forms of “assisted euthanasia”. I argue that whilst we accept the legitimacy and moral significance of *species* membership, we must see this in relation to other factors that may influence *individual* moral value. *Responsible speciesism* does not imply that human prenatal life should be preserved at all costs; it does, however, imply that unless there are good reasons to the contrary, it should be.

I conclude that responsible speciesism is an inevitable ingredient of human self-understanding and self-esteem. The existence of the human species as an existential phenomenon attains value since it is from this view that humankind conducts his search for eventual existential meaning.

“Responsible speciesism” implies a firm denial of instrumentalism as final justification of the way we treat animals. Humankind has an immense collective and individual responsibility to utilize, to exploit, develop and above all procreate wisely and responsibly. It *does not* follow that all human organisms have (equal) moral status, or that animal pain should have the same moral significance as human pain.

### **3.5 The argument from potentiality**

In this section I shall firstly present the traditional or classical argument from potentiality (AFP) as regards the value of pre-personal life. The utilitarian thinkers, to whom I have been reacting in this dissertation, unanimously reject the argument from potentiality; for instance, Michael Tooley summarizes his concept of personhood, that is, of moral significance, in the following words: “The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual’s value, is the property of being an enduring subject of non-momentary interests” (1983:304). The argument from potentiality, however, to my mind has enough merit to be taken seriously. I shall therefore explore and defend it in this section. This defence



will, secondly, include an evaluation of the significant objections and ripostes to it. Thirdly, I shall present my own version of the argument. Fourthly, I shall close this section with a summary and final conclusions.

The AFP in its classical formulation states that the inherent potentiality of the pre-personal human being to become a person in the way that we are persons some time in the future, whose attributes will, upon full development, denote future moral value, somehow implies *present* moral significance. In other words, the argument claims that the lives of fetuses and embryos (let alone neonates) have significant moral status because these entities have the potential to become full-fledged persons, even if they are, as fetuses and embryos, not yet persons. According to this argument, we often confer value on entities, not merely on the basis of what they are at present, but on the basis of what they may become in future. The seedling in the nursery is not yet a fully-grown hydrangea bush with all its splendour of unabashed colour. Yet, in order to have the colour at Christmas time, we nurture the seedling; we handle it with care and respect on the basis of what it may become; so much more in the case of humans. Whatever value we may bestow on any single adult individual (think of the great ones: Shakespeare, Churchill, Ghandi, Mandela), nothing can change the fact that each one of them, like each one of us, once was an embryo and a fetus. They – and we, all of us, alike – become/became what we are, for better or for worse, as a result of an elongated and protracted process of caring and nurturing. We respect the fetus exactly because we so much respect its potential. The tragedy of the death of a child, the tragedy of any termination of pregnancy, is exactly the fact that with it a significant possibility for the future is destroyed.

Persons do not come into the world as adults with a set of ready-made attributes that immediately operate in their dealings with the rest of us. Persons *become* what they are. *In order to become, we have to start somewhere.* If the process of becoming is to lead to any good, the potential good that it might yield is a value that cannot be appreciated only or merely when it attains full fruition. For example: Nelson Mandela's value for the South African nation was not complete when he was sent to prison as an adult in 1964. That value was still in a process of becoming; to execute him at that time would have terminated the immense (though at the time still potential) contribution that he made later on. Mandela is, however, not only a person with value on the basis of



what he achieved towards the end of his life, i.e. in the last decade of the 20<sup>th</sup> century. He – and all of us, exactly on the basis of potential that all of us might have (albeit lesser than such a grand example!) – has and had value through all the stages of his/our development as humans – including the embryonic and fetal phase. Thus, the essence of the AFP is that human beings have value because of their potential. It is therefore mostly wrong to kill such beings at any stage of their becoming, i.e. at any stage of their development towards fulfilling the potential that they possess.

This is a powerful anti-abortion argument, and is therefore generally refuted by pro-abortionist utilitarians.<sup>56</sup>

R M Hare explicates the “potentiality principle” as follows in a slightly more formal manner than I have just done:

“... if there are properties which are possessed by adult human beings and which endow any organism possessing them with a serious right to life, then at least one of those properties will be such that any organism potentially possessing that property has a serious right to life even now, simply by virtue of that potentiality, where an organism possesses a property potentially if it will come to have that property in the normal course of its development”. And, consequently:

“... if it would be wrong to kill an adult human being because he has a certain property, it is wrong to kill an organism which will come to have that property if it develops normally”(Hare 1999:62).

Patrick Lee’s version of AFP is:

“The human embryo has within herself all the positive reality needed to actively develop herself to the point where she will perform higher mental functions,

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<sup>56</sup> The argument also finds support from the perspective of existential phenomenology: in describing self-constitution, humankind may be defined as “a potentiality rather than an actuality” (Allen 1953:34). Life is potentiality and the question is not who I am but who or what I am to become.



given only a suitable environment and nutrition, and so she now has the natural capacity for 'such mental function' (Lee 2004:253).

Massimo Reichlin restates and expands the classical formulation of AFP into four principles:

1. A human person is a human being who possesses the capacity to exercise the operations that are characteristic of the human species (i.e., consciousness, thought, language).
2. The human embryo does not have this capacity, nor has it the physiological structures that support the capacity;
3. However, it has the potential for them, that is, it will develop them in the future;
4. The human embryo is a potential person and therefore has the rights of a person (Reichlin 1997:1).

A "strong" reading of potentiality requires all four of the premises.

I shall now discuss a number of themes that (re-) occur in the debate about AFP. Note that I do not imply that I support these at times over-simplified and over-conservative ideas exactly as the proponents of classical AFP present them. My argued position on potentiality follows later in the section, after I have fully set out, and evaluated, classical AFP. Nevertheless, these ideas do form the bedrock of any argument from potentiality.

Firstly, I shall explore the notion of "continuity of development": The argument is that the prenatal being is, from individuation<sup>57</sup> onwards, the same human being who continues to develop into personhood. The absence of a "metaphysically significant dividing line in embryonic and fetal development separating something that is a human being from something that is not" (Oderberg 2000:8) implies a continuity of

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<sup>57</sup> (In) divisibility as such does not determine moral value, or is not in itself morally significant, but rather that "facts about divisibility are claimed to have strong bearing on the question of whether the (alleged) morally relevant potentiality is present or not", as Christian Munthie writes in an analysis of divisibility and embryonic moral value (Munthie 2001:389). I argue that a human being begins as "a living individual with the inherent active potential to develop towards human adulthood without ceasing to be the same ontological individual" (Ford 1988:85). Yet, individuals that cease to be at subdivision, or at recombination, cannot be devoid of value; they are the direct precursors of other beings who have moral value. This does not seriously impact on my argument; these early human beings do not have abundant moral value, in so far as they can claim a right to continue to exist.



development, or “strict numerical identity between zygote, embryo, fetus, baby, child and adult” (Hare 1999:10); something that Massimo Reichlin calls “ontological persistence” (Reichlin 1997:20). One cannot strip properties from the neonate to eventually be left with a being that is not human (Hare 1999:12). From the time in embryonic development at which individuation took place, the human being grows, and matures, developing and actualising its inherent potential to acquire the psychological characteristics of personhood. Withholding moral recognition may be unjustified discrimination based on mere quantitative differences (Lee 2004:253), i.e., the quantum of properties possessed at that time.

Secondly, through their potentiality, human beings, including pre-persons, possess sufficient moral value to legitimately claim a “right to life”. But immature prenatal beings do not possess the characteristics exhibited by mature beings, upon which a “right to life” may be justifiable: the “mental and physical capacities of a human fetus are inferior to those of, even, adult creatures who are generally thought to lack a serious right to life (e.g., adult chickens).” Consequently, nothing but an “appeal to the fetus’ potentiality” can justify fetal protection (Stone 1987:815).

Inherent potentiality is determined by species membership (Oderberg 40); in other words, it is genetically determined. Thus, the potentiality of the human pre-person is to develop into a human person. Reichlin analyses two notions in the Aristotelian concept of potentiality; first, that “in which the principle of becoming is internal”, or “active potentiality”, and, second, that which is contingent, called “passive” potentiality. Classical AFP is concerned with active potentiality (Reichlin 1997:14), i.e., that which is genetically intrinsic to the being.<sup>58</sup> I shall later argue that whilst an argument from potentiality is fundamentally based on the possession of intrinsic potentiality, without which the notion of potentiality has no meaning, one cannot, in the argument, ignore the significance of extrinsic or contingent potentiality, Aristotle’s “passive” potentiality, since, if this is not favourable, intrinsic potentiality has no chance of developing. This is a significant deviation from classical AFP.

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<sup>58</sup> Reichlin prefers the “correct” translation of the Greek *dynamis* as potency, and this type of inherent potentiality Reichlin calls active potency. There are extrinsic requirements for development that do not determine inherent capabilities of the fetus; these can be called, with reference to Aristotle, passive.



Thirdly, we need to examine the moral nature of the harm that is done when potentiality is thwarted, since, without the notion of harm, preventing potentiality from developing cannot be deemed morally wrong. But the question is, who, or which being, is harmed? And does harm constitute itself in a subject or in a process? There are several notions of harm within classical AFP:

Firstly, Michael Tooley, in evaluating AFP, recognizes two distinct notions of harm: the destruction of the (future) potential person and the (present) prevention of the actuation of its potential (1983:165). I see them as conceptually one and the same; destroying (future) potential persons is brought about by the prevention of the actuation of (present) potential, and prevention of actuation has the inevitable consequence of the destruction of the potential person (this need not mean total physical destruction). A detailed study of Tooley makes it clear why he needs to differentiate; he argues independently against both notions. R M Hare argues in favour of the first: harm rests not on the suffering of prenatal beings, but on harm to the “interests of the person into whom the fetus would normally develop” (Hare 1999:60). Something we may do today – to terminate a fetal life – is morally contentious not because of a contemporaneous effect, but in virtue of the prevention of a future outcome. This is the most prevalent notion of harm in AFP, but is, according to critics like Dean Stretton, contentious due to the difficulty of arguing for some sort of psychological continuity or connectedness between, for instance, an embryo and a neonate. Biological persistence is self-evident; however, one has to show some sort of psychological connection between embryos and infants if one means to argue that harming an embryo harms an infant (Stretton 2004:172). The burden of proof becomes particularly onerous if one argues that once the embryo is killed, there is no question of the development of a fetus, therefore of the possibility of “psychological connectedness”, in which case the notion that such a fetus can be harmed at the embryonic stage does not seem to make sense.

Secondly, AFP is enhanced if we argue, like Jim Stone does, that pre-personal beings can have interests not related to present or future desires, aims and purposes. Stone’s argument can be summarized in three key words: nature, good and identity:



“An animal’s nature<sup>59</sup> determines a developmental path which guarantees identity, a path that produces the animal’s adult stage. In human animals, that stage involves the attainment of conscious goods, which are produced by the nature as it actualises itself along an identity-preserving path that evolved because it produced those goods. What the fetus is finally, is something that makes itself self-aware; that good is the fetus’ good – this is its nature” (Stone 1987:821).

Moral value of present beings is not constituted in the future attainment of personhood but in present natural capabilities to develop; thwarting this implies harm.<sup>60</sup> A development of this argument is that the moral significance of potentiality lies not in the being or her nature but in the *process* that creates this being. When we think of the normal development of any particular “entity belonging to a biological kind”, we presuppose the “existence of a developmental path determined primarily by the biological natures” of the particular species (*Ibid.*). Essential to a being’s “nature” is her genetic makeup that determines intrinsic potentiality, but much more is required for normal continued development. Stone hints at, and Dave Wendler develops the idea into its logical conclusion: the moral significance of fetal development lies in the fact that it “is a natural process that shapes the fundamental structure of our lives” (Wendler 1999:44) – a process based on the developmental path described above.

Significant, therefore, in the animal’s nature is the natural process that is initiated and upheld. The moral significance of fetal development is not subjective, but lies in the type of process its development implies, a process that shapes the structure of our lives: “Therefore, given that we have a moral obligation to accept the fundamental structure of our lives, it follows that we have a moral obligation not to interrupt token instances of fetal development” (*Ibid.* 39). The morally dubious action is therefore not

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<sup>59</sup> “Nature” and “identity” conceptually here mean genetically determined; Stone’s argument applies to post-individuated beings. “Development results from genetic plans contained in the chromosomes” (Keith Moore 1982:76). Molecular genetics explains in detail how these plans and codes work (Stone 1994:293).

<sup>60</sup> Reichlin grounds potentiality in the ontological continuity of identity in a conception he calls “personalistic anthropology”, which, when examined, corresponds to the existential description of human existence described in the previous section. In this sense, we conceive of humans not as the Boethian *rationalis naturae individua substantia*, but rather as *rationalis naturae individua existentia* (Reichlin 1997:20-21); existence, not substance, is morally significant. The nature of a human embryo and fetus is to produce this type of existence; its prevention is immoral.



based on what we do to the fetus, but upon the infringement of a particular conception of the “nature” of the animal, i.e. the interruption of this “natural process”.

Wendler’s “natural process” argument is open to criticism. Firstly, he can be accused of operationalism, since his argument denies intrinsic moral value in favour of value coupled to a process. Secondly, his argument seems to imply moral determinism since it does not propose limits; apparently, we are never allowed to interrupt this process, irrespective of circumstances. Its merit is its attempt at a realistic analysis of how anti-abortionists really think.<sup>61</sup> <sup>62</sup> In this account, the contentious issues of the continuity and moral significance of subjects as such can be ignored.

The utilitarian objects to three premises of AFP:

- Firstly, utilitarians deny that biological continuity is morally significant;
- Secondly, utilitarians deny that potentiality should necessarily be actuated;
- Thirdly, utilitarians deny that future or potential beings can be harmed.

I shall discuss these in turn.

Firstly, then, let us look at the utilitarian argument that asserts that “biological” continuity is not morally significant. The argument is that a positive connection between present and future being is required to justify equal moral treatment; for instance, Dean Stretton’s argument for psychological connectedness to which I have referred above (Stretton 2004:172)<sup>63</sup>. Stretton asserts that the degree of connectedness determines the degree of possible harm. There might be some connectedness between myself as I am now, and as I was ten year ago (see the footnote example); or between the late fetus/infant, and the person that it might in due course become. But for Stretton, it seems unrealistic that an embryo without any psychological life can be

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<sup>61</sup> Wendler argues that what is at stake is fundamental to many bioethical debates: to what extent should we attempt to alter the “naturally defined fundamental structure of our lives”; should we accept “naturally defined limits on the extent to which we control our lives” (Wendler 1999: 51 -5).

<sup>62</sup> Ronald Dworkin’s is a variation of the “natural process” account: “The life of a single human organism commands respect... because of the complex creative investment it represents and our wonder at the divine or evolutionary processes that produce new lives from old ones” (Dworkin 1993:84). Abortion thwarts the natural investment that has gone into the fetus’ development.

<sup>63</sup> Rather like I now have a memory of myself of say ten years ago, and ten years ago could have envisaged myself as living in 2004. I am in part constituted by the memory of experiences of 1994, just as I was then partly constituted by expectations and projections for the future.



“psychologically connected” to such a person. In other words, Stretton essentially questions the nature of the continuity between present and future beings – the one actually harmed and the one capable of appreciating the goods it will be denied. This criticism exposes a “weak link” in AFP. For instance, Mary Ann Warren argues that the future, self-aware person is constituted only later, when self-awareness develops (1981:264), so that there is no continuous psychological connection between the fetus and the “eventual” person.

This view presents us with somewhat of a dilemma; the problem with Warren’s explication is that the biological continuity between fetus and self-conscious person cannot be questioned. If the eventual psychological being is distinct from this biological being, the counter-intuitive conclusion is that we then have two beings: one biological, one psychological. This is untenable, since there is only one; the “psychological being” is a consequence of the development of the biological being (Stone 1987:823-8). AFP is based on the inherent characteristics of embryo and fetus to develop and become this psychological person.<sup>64</sup> Classical AFP argues that the continuity of development provides a “moral connectedness” between earlier and later phases of the being.

The second objection of the utilitarians is their questioning of the notion that it is a moral requirement that the potential of the embryo or fetus, even if acknowledged, should necessarily be encouraged or promoted. Their argument is based on three claims:

- *Firstly, they claim that* any alleged claim to moral respect on the basis of potentiality cannot be absolute; we are not always morally obliged to allow or promote its actuation;

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<sup>64</sup> “Circularity” in the utilitarian rejection of potentiality: If the prevention of actuation of potentiality forestalls the eventual settling of personhood and moral significance, we fall into a circularity trap. By preventing actuation now, settling of personhood can never occur, making right what we have done. It seems problematic to have the power to make our action right, our argument true, and to deny moral significance at will. As Richard Hare argues, “it would be strange if there were an act whose very performance made it impossible for it to be wrong”; and perhaps more significantly: “preventing the existence of the object of the wrongdoing ... would remove its wrongness” (1999:66); I determine the moral acceptability of my actions. I have not seen a realistic utilitarian response to this rejoinder.



- *Secondly*, they claim that potentiality does not justify a right to be treated as if it has been actuated, which is what protagonists of the AFP actually imply (Harris, 1983:223);
- *Thirdly*, they claim that, through the vagaries of fate, there is no guarantee that inherent potential will necessarily be fulfilled (Van Niekerk & Van Zyl 1996:139-40).

Massimo Reichlin supports classical AFP, and argues that the above erroneous claims are based on understanding potentiality as either a possibility or a probability when it is neither; potentiality, in the classical AFP argument, implies an absolute, undeniable and enforceable injunction to allow its development. If we conceptualise it as a possibility, writes Reichlin, like when the claim is made that a tree might possibly become a table, we deny this absolute nature of the claims of potentiality (a tree does not have to be turned into a table). Classical AFP argues that we should allow the fetus to grow and develop, since its “moral nature” is that it inherently has all that it takes to develop into a person; metaphorically, our tree has some sort of destiny to become a table. Conceptualising potentiality as a probability suggests a statistical calculation of the likelihood of development, rather like calculating the probability that a specific tree would end up being someone’s table. I shall later motivate why this contingent form of potentiality, Aristotle’s “passive” potentiality, should form part of our concept of potentiality; when it is unfavourable, the development of intrinsic potentiality cannot take place. But the point here is that classical AFP, as argued by most supporters of the principle, and particularly by its most “conservative” followers, denies the moral significance of contingency, even if this stand seems to be counter-intuitive. They argue that intrinsic potentiality is significant not in virtue of any possibility or probability, but of the inherent genetic characteristics peculiar to the pre-person (Reichlin 1997 3-12), and present quite early in its existence. AFP holds that potential should be actuated; after conception, moral value remains equal throughout development (Oderberg 2000:38-40; Reichlin 1997). Moreover, classical AFP holds that exceptions are inherently inconsistent, undermining AFP. Thus, there is no room for termination, even with fetal or maternal risk; the tree *has to* become a table.



I do not support these unrealistic absolutist stands; I agree with the utilitarian that we can have no guarantee of actuation of potentiality of the embryo/fetus. But of course, this is no reason to argue that in any given “normal” embryo/fetus, potentiality shall not be actuated in the “normal” course of development. We should not, just because *some* embryos/fetuses might not actuate their potential, treat *all* of them as if they have no potentiality, or deny that their potentiality is morally relevant. Yet we need to take care lest what we regard as “normal development” becomes the ethical norm; the presence of fetal potential is morally significant, but in itself does not justify a right to the promotion of its actuation, or to treatment as the possessors of actuated potentiality, as the conservative supporters of AFP require. The most sensible suggestion is probably that it be treated as a potential person to “enable it to fulfil its potential” (Van Niekerk & Van Zyl 1996:140) if it has a reasonable chance of fulfilling its promise, as normal *in vivo* embryos and fetuses usually have. This qualification concedes the significance of contingency.

But the conservative is on firmer ground when we consider infants; potentiality has now become probability. The probability that infants shall develop into persons is a powerful argument for a “right to the continuation of life” and the actuation of residual potentiality, resulting in the development of a “person”.<sup>65</sup> Of course the infant is not a complete person, but the fact that it has by now actuated so much of its potentiality, does justify its claim to a right to be treated as a young and immature human being, which is exactly how society and the law expects us to treat infants. Very little can prevent its further development: infant mortality is low and conditions that can prevent maturation are rare. Some infants may not develop into persons, but again this does not morally justify withholding recognition from all infants. Infants have a very strong, almost absolute potentiality and right of further development.<sup>66</sup> But severely deformed infants without a realistic chance of significant psychological existence have no such a right.

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<sup>65</sup> Steven Pinker (1997:193) argues that especially our intelligence, but also physical characteristics such as manual dexterity and speech predispose to lengthy intra- and post-partum development in comparison to other animals. We are relatively immature and underdeveloped when we are born simply because we have the potentiality to develop such remarkably sophisticated intelligence and other mental capabilities.

<sup>66</sup> Whilst the utilitarian dependence on infanticide fatally flaws both arguments, all infants do not share an equal right to consideration. I refer to “normal” infants, excluding seriously handicapped infants without hope of meaningful mentation.



Thirdly, the utilitarian argues that we cannot harm future or potential beings. This claim is based on two suppositions:

- Future beings are not actual and identifiable;
- There is no real connection between present and future beings.

I have argued that there are three possible notions of harm; they are:

1. That it constitutes in a future being;
2. That present beings have interests that may be thwarted, including the potentiality to develop to a certain end;
3. That the interruption of a vitally important natural process.

AFP holds that, through the persistence of being, present and future beings are one; preventing present beings from developing into persons, harms future beings. Richard Hare asks a relevant question: can “potential persons” exist (Hare 1999:66)? If one reads AFP to mean that moral significance lies in the process that brings about the development of personhood, Hare’s question is irrelevant; not so in traditional AFP. In the persistence-of-being-conception, potential beings do exist, and are *actual* in their present bodiliness without which potentiality has no meaning. They are not *actual* in the sense that we are actual, developed adults. But their actuality is conditional on possessing a realistic chance of further growth and development, to become fully-fledged persons. This takes care of the Stuart Rachel’s problematic notion that it is “good to create happy people”, and that their “potentiality” holds moral significance equal to that of existing persons (1998:109-110),<sup>67</sup> this is not what AFP has in mind.

But, in addition to these utilitarian objections, there is also a rejoinder from the conservative position: if potentiality is such a persuasive characteristic, why does it not imply *absolute* moral value? Well, for the dedicated supporter of classical AFP, it does. But there are at least three reasons why I do *not* see potentiality as an absolute argument: Firstly, as responsible agents we need to balance fetal interests with other interests, for instance, when there is significant maternal risk. Secondly, morally

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<sup>67</sup> Michael Tooley argues in response that there exists an asymmetry between the “moral wrongness” of creating persons whose lives would not be worth living and “rightness” of creating individuals whose lives might be (Tooley 1998 118-123). He denies any relation between “good-making” and “bad-making”, and “right-making” and “wrong-making” propositions. Both Rachels and Tooley miss the point that one cannot conceive of potentiality until there is bodily existence (McKie 2001:146).



significant potentiality is based on a definitive moral exemplar: the normal adult human being. What can be the moral sense in arguing that the potential of an anencephalic fetus or of an *in vitro* pre-embryo not intended for “gifting” be actuated? Circumstances that might contribute to, or detract from the eventual development of this exemplar are morally significant, including genetic potentiality and the level to which actuation has progressed; but more of this in the next section. Thirdly, as I discuss earlier, a purely biological view of life presents untenable difficulties with reference to the treatment of certain categories of patients.

In concluding this section, I shall present my own suggested *modification* of AFP: a notion of *qualified potentiality* that rejects the basic charges of utilitarianism, responds to the earlier utilitarian rejoinders, defines a specific conception of potentiality, and describes the type of being that possesses potentiality, the nature of its potentiality and the circumstances wherein it might apply. I argue that classical AFP is inconsistent with the demands of the real world. My notion is based on the following suppositions:

Firstly, there are two reasons to deny that (for example) a ten-day pre-embryo has the same moral value as a viable 36-week fetus; firstly, the latter has a far greater probability of becoming a person; secondly, its moral value is enhanced in line with the development of its morally significant characteristics (for example, survivability).

Secondly, a purely *biological* definition of potentiality is unrealistic.<sup>68</sup> To be persons, we need human bodies; but we are much more; as Dean Stretton points out, we are fundamentally “embodied minds” (Stretton 2004:165), with an indivisible unity between body and mind. The moral significance of the pre-person is enhanced by the continuous development of both.

Thirdly, sentience and particularly viability *are* morally significant; I shall later argue that viability might even be a moral cut-off point.

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<sup>68</sup> Predominantly biological conceptions of humanness problematize applied bioethics; we cannot conceptualise valuable human life as somehow determined by biological definitions alone, since we are obliged to treat patients accordingly. Biological conceptions make it impossible to differentiate between patients when facilities are limited, and to prevent the initiation of futile treatment. It makes definitions of brain death and outcome-based medicine senseless, and promotes wastage.



I wish to develop three themes that I have raised above.

*Firstly*, the critical *moral* aspects of potentiality are twofold: it is *human potentiality*; its specific end is to develop into a person with *moral capacities*. The *moral nature* of this type of potentiality firstly differentiates it from other forms of potentiality, like the potentiality of a canine fetus to become a dog. It secondly answers the important question of why *all* potentiality should not be actuated, for instance the conundrum of why pickpocket potentiality should not also be developed, and hopefully takes care of the *reductio ad absurdum* that the potentiality of ova and spermatozoa equals that of embryo or fetus.

The model for potentiality is the “normal” person; we cannot evaluate potentiality in the presence of “abnormality” without particular knowledge of the details of the abnormality involved. For instance, an anencephalic fetus does not possess morally significant potentiality; less severe abnormalities may be problematic to evaluate. *Theoretically* potentiality cannot co-exist with deficiencies that preclude eventual personhood. Since personhood may be a matter of degree, there is bound to be some subjectivity in these decisions.

Does this mean that decisions regarding what/whose potentiality should be developed, lies totally in our hands, and, if so, is this not precisely what the utilitarian argues? Not quite; in the utilitarian calculus, utility is all that matters, and the moral relevance of the principle of potentiality is denied. The utilitarian argues from the position that all pre-persons are subject to her utility calculus, are replaceable, and we are under no obligation at all to consider them morally, let alone to let a particular pre-person develop to personhood. They – including infants up to a certain point – may be killed almost indiscriminately. In fact, in the utilitarian argument, decisions about the future of pre-persons are not moral decisions since pre-persons are not morally relevant beings. Certainly, there are times when we have to make decisions based on what we regard as the “best” outcome, and such decisions might be to terminate; but this is a moral matter, and our decision is morally justifiable only in the face of deficient intrinsic or contingent potentiality. In the next chapter, I shall expand this argument; for me, the crux of the matter lies in conceiving of the bounds or limits to particularly contingent potentiality. Decisions about what/whose potentiality should be allowed to develop, therefore, do not lie totally in our hands, as the utilitarian holds. Those



decisions are ours only in certain circumscribed circumstances. For the utilitarian, contingency – utility – is all that matters; I argue that intrinsic potentiality *and* contingency matter.

Secondly, we can we conceive of morally significant potentiality only once the individual has been individuated, its genetic “uniqueness” settled, and one can refer to specific identifiable beings. Early, pluri-potential cells can part to form multiple beings in a process of twinning. Twinned individuals can later recombine into a single individual or chimera, with combined genetic material. At twinning, the original being ceases to exist and two or more identical new ones form. Those that combine cease to exist and a single third being eventuates. This possibility ceases at around day fourteen. One can only conceive of a specific, identifiable individual once its identity is determined; it then remains the same human entity, and “becomes” the “same” infant and adult, should it develop that far (Oderberg 2000:12).

This leads to the question of whether divisibility influences moral standing. Classical AFP has a problem; if indivisibility is essential to argue for uninterrupted existence – the basis of moral significance – the moral status of beings that have the potential to subdivide, or have in fact subdivided or recombined and ceased to exist is questioned (Munthe 2001:382-397). This is why individuation (beyond which the possibility of divisibility ceases, and the continuity of existence has commenced) is morally significant. A human being is not without moral significance prior to division, but once individuated, its significance is more since it has surpassed or survived another “milestone” of development.

Thirdly, potentiality is conditional; Reichlin, drawing on Aristotle, described potentiality as exclusively internal, or “active”. (Reichlin 1997:14). I argue that intrinsic capacities are necessary, but do not sufficiently describe a realistic conception of potentiality; potentiality is also contingent or “passive” since certain *extrinsic* requirements have to be met before potentiality can be actuated. Intrinsic capacities reflect the nature of the being: species membership and genetic potential to become a human person (Oderberg 2000:13); contingency reflects the realistic possibility of actuation of intrinsic potentiality. The power of both intrinsic and contingent potentiality increases as potentiality is actuated, since the likelihood of further actuation



is enhanced; as term approaches, potentiality converts to (almost) certainty. This “sliding scale” notion departs significantly from the classical AFP view.

Let us evaluate three examples of extrinsic conditions that can affect the actuation of potentiality: Firstly, I note the contentious potential of an in vitro pre-embryo. One can speak of potentiality, i.e. moral value only if it is “gifted”, if it has a reasonable chance of further development. Without such intention, it has no potentiality. In terms of this argument, it has no moral value. This point is well put by Van Niekerk and Van Zyl: “The mere fact that something has the potential to become something else does not imply that this potential should be actuated” (Van Niekerk and Van Zyl 1996:140). Without significant intervention, the in vitro embryo has no realistic potential or moral significance, nor can there be any moral compulsion to actuate its potential.

A second self-evident example of dubious extrinsic potentiality is when the mother, through disease or anatomical defect, is unable to carry the fetus to term. In these circumstances, intrinsic potentiality exists, but can have no convincing authority.

A third, more debatable, example is the prevalence of poor socio-economic circumstances that significantly moderate the actuation of potentiality. This might negate moral value, depending on the severity and nature of the limitation. It is problematic due to the inherent subjectivity of the evaluation. Yet watered-down versions of this type of argument are often the sole justification for termination; Act 92 of 1996 allows abortion up to week 20 on this justification. Of course I do not imply that only children born in sound socio-economic circumstances have a right to have their potentiality fulfilled; what I am discussing is the question of to what extent a woman’s socio-economic circumstances may be seen as legitimate arguments to justify termination.

I conclude that ontological continuity and progression of development are self-evident, and add moral significance to the embryo and fetus. Classical AFP argues for absolute moral value and a “right to life”; I argue that moral value increases as the fetus grows and develops, attains more of its potentiality while simultaneously making a greater claim on the actuation of its undeveloped potentiality. Potentiality is a powerful



argument and should not as readily be discarded as is done by the utilitarians. The human embryo/fetus lacks the developmental characteristics of moral personhood, but is likely at some point in future to acquire those characteristics. Its moral value lies in the promise of the fulfilment of development, although I accept that this can be conceived of in different ways. Pre-personal potentiality to become a moral person is morally significant.

I argue that potentiality is contingent and contextual, a matter of degree. Potentiality is an essential, but not sufficient argument for pre-personal moral value. This leads to the following critical questions:

1. What, precisely, makes this type of potentiality “moral”, and places a moral obligation upon us to promote its actuation, or, at least, not to prevent it?
2. What, precisely, renders “moral status” to the embryo/fetus?

I address these questions in the next chapter, where I shall explicate my alternative conception of pre-personal moral significance, and its impact on matters such as abortion. The position that I defend develops from a position that I describe as respectfulness of pre-personal human life based upon its humanity, potentiality and separation-viability.

### **3.6 The responsibility to protect the vulnerable of society**

In the nature of the utilitarian moral calculus, two concepts that many non-utilitarians regard as fundamental in determining morality, have no significance: duty and vulnerability. The vulnerability of pre-personal beings is limited to their capacity to suffer, but our moral obligation not to cause suffering depends on the outcome of the utility-based moral calculus. Utilitarian theory denies the notion that human beings may have certain fundamental moral responsibilities or duties, particularly vis-à-vis special interest groups. Rule-utilitarianism – the interposition of rules to justify all acts of a certain nature – might validate the “evasion” of utilitarian morality, but if rules are applied too widely, it undermines the theory. Furthermore, the utilitarian denies that the humanity of pre-personal beings has moral significance, or that human beings constitute a special interest group; “speciesism” amounts to unwarranted self-oriented



discrimination. Therefore non-personal human beings, even if considered to be vulnerable, cannot make any special claims to protection in virtue of their humanity; even the interests of weak and defenceless *persons* are subject to the utilitarian calculus. The apparent negation of responsibility and duty is inconsistent with some of our most basic moral principles that are fundamental to the creation and functioning of a just and morally responsible human society.

I disagree with the utilitarian scepticism of responsibility and duty, in particular the denial of special moral duties to particular interest groups, and the denial of a specific moral duty to protect weak, innocent and vulnerable human beings of which pre-personal beings are exemplars. I have argued that utilitarianism is, in principle, an unjust system since it cannot guarantee respect for individuals, without which an important motivation for their protection falls by the wayside; I shall here attend to the denial of the moral principle of duty and responsibility vis-à-vis special groups. I shall argue that we have a particular moral duty and responsibility to care for the weak, defenceless and vulnerable in society; in fact that such a special duty is one of the foundations of any decent society. I shall also argue that this duty generally extends to pre-personal human beings, although this is a qualified position. Finally, I shall respond to some rejoinders to this position.

Firstly, then, a special moral duty implies a special moral relation; conceptually, we can argue a principle of special duties from either perspective. Groups or individuals may have particular rights that impose obligations on other groups or individuals; or groups or individuals may have specific obligations that apply to whomsoever enters into a particular relation with them. Examples are the rights of a child to parental care, and obligations of parenthood. A second example is the bioethical relation: patients have certain rights such as those described in the South African National Patients Rights Charter; and can anticipate that these rights shall bind any doctor who enters into a relation with them. But doctors have certain *a priori* obligations, such as honouring the principles argued by Tom Beauchamp and James Childress (1994); respect for patient autonomy, justice, beneficence and non-maleficence. In both instances special interest groups or individuals can be identified, as well as special groups or individuals who have particular obligations; these constitute special moral relations.



But the principle of special duties to special groups extends beyond the immediate relation, and is widely applicable in society. For example, a teacher has certain moral obligations to a special interest group: her pupils (she does not have similar obligations to the learners attending other schools). The state has certain moral obligations to its citizens. Inmates of a prison form a particularly vulnerable special interest group, and so forth. It is contra-intuitive to deny these special interest groups, relations and obligations. Moreover, society would function very poorly in the absence of these special moral relations.

As far as infants are concerned, the moral nature of the special relation, and the nature of rights and obligations entertained by this relation are evidently the same as those between parent and older child. These moral rights, amongst others, entail a right not to be killed, but to be wanted and loved, and to be nourished and cared for in a manner at least commensurate with the socio-economic standing of parents.

Now, this conception of rights is at odds with utilitarian philosophy. Utilitarian justifications of abortion and infanticide provide, so it is claimed, the “most utility”; indirect detriment is likely to be limited and short-lived. But the utilitarian argument is vulnerable to counter-examples. Let us consider for a moment a society where infanticide is practiced. Could this be “best utility”? How does it serve society? A policy that self-defeats, in working towards self-extinction cannot be to the advantage of society, or, if practised generally, of a country or humanity. I expect that utilitarians would have to admit that when taken to this extreme, the policy is unrealistic; yet it is perfectly legitimate in virtue of its theory. Any qualification would have two effects: firstly, erosion of the basis of the argument, and, secondly, the introduction of even more discrimination than the argument holds even now.

But infants are a special group for a second reason: they are a group of weak, defenceless and vulnerable human beings. We should not, just because they cannot resist, conceive of a right to dispose of infants at will. I have said that society places special value on the weak and vulnerable, and respects their interests and cares for them in a very special way. Society does this since the weak and defenceless are vulnerable,



and incapable of taking care of themselves. Society judges itself, and is judged in the special way it takes care of the weak, defenceless and infirm.

The human infant is rather unique in its vulnerability and need of protection. Though viable, it is not ready to face the world independently; unlike some animals it cannot even feed itself. “Mindless” natural selection has entrusted a frail creature to the care of its parents – as if the societal strictures under which this evolved predisposed to precisely such a structure. The initial period of postnatal life can be seen as “extended ante-natal development”; the very complexity of the human organism means that there is insufficient intra-uterine developmental time, and the neonate is the result of a fine balance between gestational duration and adequate development to ensure survival. Without a reasonable chance of post-partum survival, the whole exercise is futile. This conception defines human infants as a special interest group, and might explain societal demands of care and protection along the lines of Hans Jonas’ arguments about the need for responsibility for the ultimate survival of the human race; the promise of sustainability and perpetuation of society through the continuous addition of new members.

Can the weak claim a corresponding “*right to protection*”, based on their weakness? If so, the injunction to protection might become very powerful. Well, vis-à-vis the infant, this is not problematic; the infant has certain clearly defined legal and moral rights that determine how we should treat it. Firstly, it is a *legal* person with *legal rights* that can be upheld in a court of law, albeit by representation or proxy. It is true that there is no legislation that focuses on the particular protection of the neonate or infant, and inferences have to be drawn from general legislation and common law. Nevertheless, the law seems to be particularly sensitive to the needs of the neonate and infant. For example, perpetrators of child abuse and sexual offences against children usually receive severe sentences in South African courts of law. Secondly, the infant has *potential rights* based on the reasonable potential of future participation in rights-relations (Van Niekerk & Van Zyl 1996:140). The infant’s potential to become a person is virtually settled; infants by their nature are bound to develop into persons, and the goods this will entail make it imperative that we do not deny their interests (Stone 1987:820-1). Thirdly, it has a legal and moral *right to continue its existence*, i.e., not to be killed. Fourthly, it has a *moral right to be wanted and loved*, and to a certain level of



care (including medical care), protection and nourishment, commensurate with parental social and economic situation, relative to societal norms and mores, and the laws of the country; subject to certain standards.<sup>69</sup> These moral and legal rights seriously problematize utilitarian support of infanticide. Given certain qualifications our infants *can* claim a right to protection; the corresponding obligation to protect them is powerful.

But can these moral rights of protection be extended to other pre-persons? All viable (“separation survivable”) pre-persons are conceptually the subjects of the same moral rights as infants, since, as I shall argue in the next chapter, their moral characteristics coincide, and they are as weak and defenceless. But I introduce two qualifications: firstly, these rights are not absolute, and, secondly, they are particularly not absolute in the case of pre-viable fetuses. Viable fetuses may claim a “right to life”; but pre-viable fetuses are on less sure ground. Nevertheless, pre-viable pre-persons can have other legitimate interests – argued from speciesism or potentiality – to support a *moral injunction* of care based on the assumption that they possess moral value. I argue that the force of this injunction is commensurate with the level of moral value that a prenatal being possesses. Therefore, the injunction is powerful in the case of the *viable fetus*. But since all pre-personal human beings have moral value, although pre-viable pre-persons have no absolute claims, decisions about their future are always *moral* decisions, not exclusively legal decisions as envisaged by Act 92 of 1996. The *qualification* is that responsibilities should be evaluated contextually and balanced with other moral demands made on us.

Are these moral injunctions to care for the weak reflected in law? I have shown the relatively firm legal position of infants; but does the *fetus* have any protection? The answer is: very little.

There is firstly very limited indirect recognition in South African law for the *interests* of the fetus, referred to as the “nasciturus doctrine”<sup>70</sup>, limited to instances of possible inheritance, insurance claims and intra-uterine injury. The legitimacy of a

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<sup>69</sup> Kant says of the obligation of parenthood that “the production of children is an *actus obligatorius*: by it the parents take on an Obligation towards their children” (1779, this ed. 1930:21). That this applies to infants is apparent. The question is whether this also applies to prenatal beings. It seems that an argument in favour of such support can be made, but I shall not here pursue the matter.

<sup>70</sup> “Nasciturus pro iam natu habetur quotiens de commodo eius agitur”: the unborn is taken to have been born if it would be to its advantage (Du Plessis 1993:45).



claim hereunder presupposes an eventual live birth, i.e. in order for these claims to settle, the subject should become a legal person. Fetal rights are, in a sense, retrospective. There is no injunction that the fetus should be protected, only that if it survives, its interests retrospectively may become subject to legislation (Du Plessis 1993:45).

Secondly, Act 92 of 1996, the Right to Choice in Termination of Pregnancy Act, offers very little protection. It legislates for absolutely free access to termination for all females up to the twelfth week of gestation. Thereafter, to the 20th week, the barrier is raised, but not insurmountably: it requires only a joint decision by both mother and doctor that her social and financial position shall be significantly affected by the continuation of the pregnancy; Clause 2. (1): "A pregnancy may be terminated- (b) from the 13<sup>th</sup> up to and including the 20<sup>th</sup> week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that- (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman". Thereafter, separation survivable fetuses are accorded significant protection; justification of late termination requires that "the continued pregnancy- (i) would endanger the woman's life; (ii) would result in severe malformation of the fetus; or (iii) would pose a risk of injury to the fetus." The act does not stipulate exactly what constitutes grounds, especially in (iii), but leaves the decision in medical hands. There is nevertheless an inevitable risk of subjectivity.

At the opposite end of the scale, legislators in some countries have gone overboard in their zeal to protect the interests of the fetus. For example, in some states of the USA, pregnant females may be *legally sanctioned* if their life styles are considered detrimental to fetal well-being, even to the point of preventive incarceration and enforced Caesarean section, implying a more precise conception of "rights" and the injunction of protection. The moral basis is that whereas a woman has free choice in deciding to undergo abortion, should she "decide" to have the child, she is morally bound to do nothing that is to the detriment of the unborn child, if not exactly to do everything that is to its advantage. However, most societies see this as a moral issue



best left to the individual, and restricts itself to verbal sanction.<sup>71</sup> In the section on intuitions, I gave a short explication of fetal protection in Islamic states, where abortion is usually prohibited. But these are other countries where abortion is illegal, for instance African countries like Kenya. The inference is that where abortion is illegal, or severely restricted, there is a commensurate measure of legal fetal protection.

Since the injunction to protection at the pre-viable level is predominantly moral, not legal, a useful conception of protection might be as a *benefit*, and not a *right* (Van Niekerk and Van Zyl 1996:140). Benefits do not require formal rights-obligations relations, and are not enforceable; in fact, they are eminently moral in nature. Secondly, benefits conceptually operate in asymmetrical relations; the relation with a pre-viable pre-person is precisely that. Emmanuel Lévinàs and Zygmunt Bauman argue that morality *pre-supposes* an asymmetrical relationship between the moral agent and the “moral other” (Bauman 1993:58-61; 85).

Before responding to some rejoinders and criticisms, I wish to discuss an obligation that emanates from Hans Jonas’ “alternative” notion of ethics (long-range, distant, spanning time): could we, possibly, in our efforts to ensure the survival of human society, have a *duty* to protect pre-persons (Jonas 1984:38-41)? There can be two responses to this question. Firstly, I expect that the general response might be that there is no direct, compelling and general duty towards protection, at least not in the current “overpopulated” state of the world. Very special circumstances – humankind facing extinction – would have to exist before such desperate measures would justifiably be called for. But this leads on to the second response: is the world really “overpopulated”? Certainly countries like China and India seem to be, and in those countries, governments have in the past taking harsh steps to limit population growth.

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<sup>71</sup> This is an extremely complex issue; one of our most fundamental moral principles – self-determination – is questioned when particular identifiable and definable third parties are at risk. In the Western Cape Province, e.g., a significantly large number of neonates are born with clinical signs of fetal alcohol syndrome due to maternal alcohol abuse. Recent reports indicate that the incidence of FAS in children is about 10% in the country town of De Aar. The second highest figure is in Upington, while the average figure for the Western Cape Province is about 2%. It appears that this may be the most prevalent co-natal condition to affect children. It is a gross injustice to harm identifiable future beings when this is totally preventable, but for the present there is no practical prevention since it would imply unacceptable paternalism or interference with private aspects of one’s life. I argue that societal complacency is based on a misconception of personal autonomy. This is a view that Samantha Vice recently endorsed in an unpublished paper presented at the inaugural ESSA Conference. Her view is that a “right” to personal autonomy should perhaps only be conceived of as realistic if autonomous choices contribute to a “positive” life (Vice 2004).



But, as *Time* recently reported<sup>72</sup>, in some countries, including most of “Western” Europe, fertility rates have dropped to below the figure of 2,1 children per woman that is generally seen as required to maintain the population at current levels. Italy’s 1,29 – the lowest figure – might surprise, since Italy is a strongly Catholic country. The implications for Europe are self-evident; it is, for example, expected that Germany’s population might decrease from the current 84 to only 24 million by the end of the 21<sup>st</sup> century, and the proportion of the aged will increase disproportionately. Spiralling pension and health care costs will severely impact on European budgets and the way Europeans live. Europe, in fact, needs “more babies” to sustain the sort of human societal existence we have become accustomed to, and many European countries are actively promoting birth rates through a variety of methods (e.g., child support systems and financial aid). Some sort of “duty” seems apparent, though one would have difficulty in extending this notion to the level of individual pre-persons, other than to argue that groups are made up of individuals, and the sort of “collective” duty argued by Jonas.

How does utilitarianism respond to this position? The legitimacy of a *moral duty*, e.g. the fundamental duty to care for the weak, challenges the utilitarian conception. Utilitarian morality (outside of the unconvincing principles of rules, preferences or side effects) does not question obligations; it does not preconceive ideas of good and right. It does not define a “decent” society; the word holds no moral meaning. It denies dictums about God, goodness, right, principles and morality unless they contribute to the utilitarian calculus; therefore, it cannot prescribe or recognise as fundamentally good or necessary a duty to uphold, preserve or protect them. In pure form it addresses *maximum utility*, and judges morality on that basis.

It therefore is not surprising that utilitarians do not recognize the moral legitimacy of special interest groups, special moral relations and consequent special obligations; accommodation of these interests would undermine the coherence of utilitarian theory. I argue that this is a serious breach since it does not account for special obligations vis-à-vis special interest groups like “family and friends, individuals to whom we have made promises, those who have helped us in the past and to whom

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<sup>72</sup> November 29, 2004, p 38-40.



we are grateful” (Brody 1983:19); it “fails to take into account our special moral obligations to people with whom we have a special relation” since it is concerned with consequences, and looks only to the future (Rachels 1995:108-9). However, we do have “backward looking” responsibilities with regard to previous acts, historical relations and promises.

Our fundamental moral intuitions tend to uphold conceptions of “decency” and “goodness” that somehow inform, or can be used as a mirror to judge the morality of our actions. *Moral duty* must somehow, where applicable, enter the moral calculus. Our involvement in human society implies certain duties and obligations primarily to members of our society, but also to other special interest groups depending on our particular relations with them. We cannot be members of a particular society if we do not honour these obligations. The utilitarian denial of particular moral duties to special interest groups poses a particular problem, since it questions the underlying morality of these special relations

But what are these special duties? Firstly, a fundamental societal duty is to recognize the inherent vulnerability of the poor and destitute, consequently to recognize them as a special interest group to which we have a particular responsibility. Secondly, we should regard viable fetuses as a special interest group who have a right to life and to grow and develop optimally, and, fourthly, we should recognize pre-viable pre-persons as a special interest group, in a more restricted sense, with moral significance and interests commensurate with the level of attained potentiality.

Let us examine the consequences of not recognizing these duties. Firstly, we ignore the plight of the poor, destitute and homeless; secondly, contemplate the legitimate elimination of fetuses; thirdly, condone late abortion; and fourthly, promulgate laws such as Act 92 of 1996 that totally ignore the moral significance of pre-viable pre-persons.

I argue that we have particular moral obligations vis-à-vis special interest groups based on the special moral nature of our relations with them; particularly, the immature, vulnerable and weak in society. I base this on two arguments. There is firstly



a more general moral obligation: this is a basic indicator of moral civilization, the undeniable desideratum of any decent society. To reach out, to share, and to attend to the plight of the less fortunate, to be compassionate, is to show one's social commitment and acceptance of humanity, is to be a moral person. I append, as an endnote at the end of this work, a discussion of some of the arguments that I would use if called to defend my position.<sup>ii</sup>

But, secondly, there are, apart from our more general moral obligations, specific moral obligations based on a biomedical *ethics of responsibility* to protect the particular interests of the immature, weak and vulnerable. This, in turn, can be argued from two perspectives. Firstly, medical personnel have a very special relation with their patients. I do not argue that pre-viable pre-persons are patients, although they may be. Secondly, arguing that they are patients may contradict maternal interests; the mother is, after all, the primary patient. But certain obligations are not restricted to *bona fide* patients, for example to treat emergencies; secondly, conflict of this nature is not unknown in biomedicine; for example, when a mother refuses essential vaccination or life-saving surgery for her child, the responsible physician can obtain a court order. Of course we have no legal and little moral grounds to interfere with decisions made by a pregnant person that may profoundly affect the future of unborn children. But interfering with decisions is one thing; active involvement to the detriment of pre-persons another. And doctors are actively involved in the process of abortion; a doctor and the pregnant female jointly make decisions on termination between weeks 13 and 20. Actively involved, too, are nursing personnel who perform most terminations. A perpetrator of an illegal or immoral deed cannot be excused because it was done at someone's request; every person who is involved with the performance of terminations must realise that there is a moral issue at stake, and he or she as the active instrument has a responsibility to evaluate the moral implications of each termination. If the term "guilt" is to be used (I do not suggest it should) the nurse and doctor are more to blame than the pregnant woman who can at least argue that she was influenced by her emotions. It seems bizarre that persons who should be the protectors of pre-persons are the thoughtless killers.

A provocative question is whether pre-persons may claim a "right to protection" in virtue of their bodiliness. Utilitarian philosophy does not credit pre-viable fetuses



(not yet sentient since viability precedes sentience) with inherent moral value. But the argument from existential phenomenology suggests otherwise, since the “concept of *body*” precedes the concept of mind (Van Niekerk 1986:11). John Macquarrie puts it thus: persons are *materially incarnated* in the world (Macquarrie 1972:67). There consequently seems to be moral significance in body preceding the existence of mind.<sup>73</sup> The question is obviously *how much*? Is this value absolute? Can other arguments neutralize it? Even if the answers are *not much, no and yes* – which I suggest they are – this does not eradicate the principle that bodiliness might imply moral significance, interests and a right to moral consideration, including some sort of “right” to protection, enhanced by its vulnerability and the asymmetry inherent to any relation with a pre-person (Bauman 1993:58-61; 85).

Two particular rejoinders to my position require answers: firstly, concerning the nature of the relation between person and pre-person: *can I have a moral relation with a pre-personal being*? If the answer is no, my argument about special rights, obligations and relations fails. This question is based on two interconnected premises: one, the utilitarian denies the moral importance of pre-personal beings, and, two, moral relationships can only take place between moral agents, which the prenatal being is not (or not much of). The conclusion is that such a relationship can therefore be called a moral relation.

I disagree with the first premise by arguing that this *is* a moral relation; in my conception, the pre-personal being *is* a moral being, not in exactly the same sense that an adult human being is, but nevertheless a moral being. Pre-personal human beings *possess intrinsic moral value* based on a qualified speciesistic notion and the presence of an undeniable potentiality to become persons. This position counteracts the second premise in the argument.

Secondly, can “weak and defenceless pre-personal beings” be *harmed* in any way? If not, I have no case, since the purpose of protection is to prevent harm. What is the nature of their vulnerability? In Section 3.5, p. 125: *The argument from potentiality*, I presented arguments as to why the concept of harm is realistic. To these arguments, I

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<sup>73</sup> For a more comprehensive discussion see Section 3.4, p. 109.



add two points: Firstly, the concept of harm does not apply only to self-conscious beings. A being, or even an abstract interest, can conceptually be harmed even though she, or it, cannot self-consciously (or even just consciously) be aware of that harm, as I am in the following examples: withholding goods that are my due, such as an inheritance, a right to vote, or any other moral right or interest that society generally bestows upon its citizens, or vaccination, or essential treatment; or actively doing something that is to my detriment, like slandering me. But one might ask what sense does it make if there is no self-conscious awareness of the harm that has befallen one? Does it have any moral significance? Well, there has to be some awareness if we want to make sense of this concept, and this might either be through other moral agents who are aware of the harm, or through the eventual awareness thereof by the agent in question at a later stage; the assessment of harm is subjective. An example of the first is the murder of a person while she is asleep; she cannot be aware of her own death, so the only subjective evaluation of any harm that has befallen the victim (say, the loss of a future filled with incumbent goods) is through the awareness of it by other agents. Peter Singer has made the point that a dedicated utilitarian has to seek elsewhere than subjective harm to argue cogently against murder (Singer 1979:79). Examples of the second instance are those that I have quoted above.

Secondly, “future, not-yet-existing persons” can be harmed by present actions and/or omissions, since there is a continuity of being from individuation onwards, as I have argued in 3.5. Based on this explication of harm, it is self-evident that we can indeed also harm *pre-personal* beings. They can obviously also be physically harmed by way of direct intervention; such as in attempts to terminate pregnancy. They may be harmed in several indirect ways, for example when the female exposes herself, and consequently her embryo or fetus, to a variety of substances known to be detrimental to fetal survival, thriving and general well being, as I argued earlier. But the ultimate harm that may befall a pre-person is similar to the ultimate harm that may befall a person: the deprivation of a future. A pre-person, too, has a future, a future that will in all likelihood transpire because of its inherent potentiality to have *a normal human life*. (For a critical discussion of Don Marquis’ *Value of a future like ours* account see endnote<sup>iii</sup> at the end of this work.) For harm to be established, they need not ever be aware that they have been deprived of such a future, just as a murder victim is not aware of the deprivation; *we*, who deprive them of that future, are aware of it.



I conclude that it is possible to harm pre-personal beings by killing them, primarily through depriving them of a future and of the ability to attain their potentiality; deprivation of a future is in fact what is essentially wrong with terminating pre-personal beings. The obligation to protect the weak and alleviate suffering is a fundamental moral principle in society. But it is also apparent that an ethics of responsibility that underlies the obligation is a potent anti-utilitarian argument since it directly challenges the utilitarian theory that morality is the product of her moral calculus. There is a strong and legitimate injunction in society to protect and care for the weak. This responsibility extends to neonates because they are moral “persons” with a definite future, but also to all viable fetuses whose moral value approximates that of neonates, based on the principle of *respectfulness of viability* that I shall develop in the next chapter. The principle of protection is *prima facie* also applicable to most pre-viable fetuses because they are morally significant beings, based on respectfulness of humanity and potentiality. There are of course limitations to this principle of protection in line with conceptions of moral value, and a responsibility to take other contextual circumstances into consideration, as I shall argue in the next chapter.



## CHAPTER 4: The moral status of prenatal (and pre-personal) life

In this chapter, I present my conception of the moral status and significance of prenatal life as well as the ethical implications of this view, also drawing on the guidelines developed in the previous chapter. In many respects, this holds equally well for pre-personal life, although that is not my prime focus<sup>74</sup>.

In the first section, I introduce, set out and evaluate a two-phased position on the moral significance of pre-personal human life, a position of *respectfulness of prenatal and pre-personal human life based upon its humanity, potentiality and separation-viability*. This leads, firstly, to the inevitable conclusion of a graded, sliding scale conception of human pre-personal moral significance in line with the level of development and with the actuation of potentiality. Secondly, it leads to the conclusion that the advent of separation-survivability (viability) is a morally significant cut-off point beyond which the human fetus may “normally” have a justifiable right to the continuation of its life.

In the second section, I discuss the moral consequences of my argument, which may be described as a “moderate” position, with particular reference to the following:

- The abortion debate;
- The application of my ideas in the debate on the moral significance of the unimplanted *in vitro* human pre-embryo;
- Research on human embryonic tissue.

But what do I mean by “moderate”? Susanne Gibson explains (2004:228): “moderate” here usually means that a position is neither absolutely “pro-choice”, nor absolutely “pro-life”, but somewhere in-between. “Conservatives” are usually “pro-life”, and value the “humanness” of the fetus. They argue that nothing needs, or, indeed, can be added to the humanness of the fetus by way of acquired characteristics to argue for moral significance or a “right to life”. It has such an intrinsic right in virtue of its

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<sup>74</sup> I am hesitant to call this my conception of pre-personal “personhood”, since in virtue of the work of Singer, Tooley and others, personhood has come to have a very specific meaning, a position that most of us endorse. My use of the term “pre-personal” also precludes me from doing so. Yet, if “personhood” is construed to mean “moral significance”, then of course I am describing my conception of pre-personal “personhood”, self-contradictory, as that might seem.



humanness, and it possesses this from conception, or soon after. This position presents a number of practical difficulties, which will be discussed later. “Liberals”, on the other hand, are “pro-choice” (meaning that the woman has total autonomy and freedom of choice in all matters concerning her reproduction). This choice includes the right to undergo abortion should she so wish, without the need to justify her position. “Free choice” is, furthermore, supported by the utilitarian personhood argument that only personhood “guarantees” a “right to life”. However, the acquired characteristics of personhood develop only some time after birth, therefore the fetus is only entitled to be treated in accordance with its sentience (and infanticide is, in principle at least, justifiable). The fetus may be killed as long as it is not subjected to suffering. The “moderate” position argues that even if there might be moral significance at conception, or individuation, this can be overridden by other contextual arguments. Furthermore, moral value develops in line with fetal development throughout pregnancy, and a moral “cut-off point” may even be reached sometime during pregnancy. This would preclude termination of pregnancy beyond this critical developmental point (Gibson 2004:228).

In the third section, I present a short summary of my position.

## **4.1 The argument of respectfulness**

### **4.1.1 Respectfulness of prenatal human life**

The position that I wish to defend in the *first section* is a two-fold argument. In the first subdivision, I argue that the moral significance of *human life* is based on a speciesist notion of *respectfulness of human life*. How does this notion extend to pre-personal human life? The answer is found in a specific application of the *argument from potentiality*. Prenatal humans possess the potentiality to grow, develop and actuate their species-specific or genetically determined characteristics, eventually to become full-fledged human beings, that is, beings capable not only of the “normal” activities that characterise their species, but in particular of uniquely human attributes – for instance, the capacity for a moral sense and moral actions.

In the second subdivision, I argue that the development of viability, that is, the ability to survive outside of the uterus, should the fetus/baby be delivered at that point



(also called separation survivability) is a significant developmental fetal milestone. Furthermore, I shall develop the argument that this is the only developmental characteristic that can realistically be used as a “moral cut-off point”; once viability is reached, termination is, usually, not justified.

I draw on, and argue from an ethical approach essentially corresponding to Zygmunt Bauman (cf 1993) and Hans Jonas’s (cf 1984) *ethics of responsibility*. This approach attempts to go beyond the strict divisions of deontological and utilitarian approaches, arguing that in applied ethics, and particularly in the complexities of bioethics, both types of considerations are inevitable. Moreover, these polarized moral approaches have inherent difficulties that make their exclusive application, particularly in bioethics, problematic. For instance, strict and unyielding deontology does not recognize the complexity of real moral dilemmas. The requirement for responsible action vis-à-vis the moral other can be subjugated by hiding behind rigid rules. A problem that both of these approaches – and principlism – shares, is what Blum has called “impartialism”: “ethics is based on impartiality, impersonality, universal principle, and formal rationality” (Allmark 1995:19). In contrast, an ethic of responsibility ruthlessly underwrites contextuality, i.e., “situationally based responses” (*Ibid.* 20).<sup>75</sup>

On the other hand, an ethic of responsibility is equally uncomfortable with the utilitarian challenge of some of our most basic moral intuitions, e.g. by justifying the killing of defenceless, young, undeveloped human beings because they lack the

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<sup>75</sup> Bauman derives and develops many of his central ideas from the work of the Lithuanian born French philosopher Emmanuel Lévinàs, especially as far as the “awakening to moral responsibility” is concerned. The intimacy of this initial awakening has to be extended to the moral plurality of society, through “comprehensive thematization and systematic objectification, (though this holds the danger of) reducing all otherness (yet it has a) subordinate truth (...) with regard to the economic and political conditions of universal justice towards all individuals whom I cannot encounter personally. With and through the other I meet all humans.” Herein lies the origin of equality and human rights. (Audi 1999:498). Bauman’s position on the nature of moral responsibility can be summed in the following excerpt (Bauman 1993:73-74):

“The other is a face in as far as I lead the way, spearhead her command, anticipate it and provoke; as I command her: to command me. The Other is an authority since I am willing to listen to the command before the command has been spoken, and to follow the command before I know what it commands me to do.” “...the other is weak, and it is precisely that weakness that makes my positioning her as the Face a moral act: I am fully and truly for the other, since it is I who give her the right to command, make the weak strong, make the silence speak, make the non-being into being through offering it the right to command me. “I am for the other” means I give myself to the other as hostage. I take responsibility for the Other. But I take that responsibility not in the way one signs a contract and takes upon himself the obligations that the contract stipulates. It is I who take the responsibility, and I may take that responsibility...as if it was mine without ever being taken by me. My responsibility, which constitutes, simultaneously, the Other as the Face and me as the moral self, is unconditional.”



developmental traits of “personhood”, and the inherent conflict between utilitarianism and basic human rights.

The ethic of responsibility ruthlessly demands justification and responsibility for our moral actions, even if this is not moulded in conventional moral argumentation. In demanding that we contextualise moral problems, it recognizes the import of contextual social, political and cultural factors in moral deliberation.

Responsibility can be analysed in terms of responsibility for consequences, responsibility for omissions and responsibility for character (Watson 2001:374) – taken together, indeed an awesome responsibility! We are guided in our quest for moral responsibility (*Ibid.* 375) by responsiveness to reasons. *Responsibility* is then equal to rationality, which in this context has two ingredients: to accept reasons *and* to respond to them.

I shall shortly analyse Bauman and Jonas’ notions of responsibility, and then present Van Niekerk’s development of their views.

An ethic of responsibility implies, amongst others, taking a broad, inclusive view of ethics. The “postmodern” ethicist Zygmunt Bauman argues that I am constituted as a moral agent by the recognition of my unqualified and almost limitless responsibility towards the “other” (Bauman 1993:52). There are no strings attached; I should not expect reward or return or reciprocity of any nature (the relationship is, therefore, *not contractual*; contractuality neutralizes any thoughts of morality; *Ibid.* 58). To illustrate the awesome implications of this notion of ultimate responsibility, Bauman recounts the history of Wladyslaw Bartoszewski, a very active and dedicated rescuer of Polish Nazi victims, who said of his attempts: “Only those who died bringing help can say that they have done enough” (*Ibid.* 80). Another characteristic of “responsibility”: is its “unbearable silence” (*Ibid.* 78-9). What does this mean? The ambivalent “for” the Other – if I accept it, which, to constitute me as a moral agent, I should – means that I forsake the moral security of convention, rules and appearances. Moral responsibility is much more fundamental, troubling, and a powerless authority that disarms. It is troubling because it is “vague” in the sense of an absence of directing rules to guarantee correctness. It is fundamentally contextual (*Ibid.* 80). This moral uncertainty – anxiety – is the only foundation of morality. The yearning to moral action, not moral action as such, constitutes the moral self (though the agent would be inauthentic if morality remains totally theoretical). The moral self is constantly bombarded by uncertainty; have I done enough? What is enough? (*Ibid.* 81)



The question that arises is: is this notion of responsibility, as Bauman argues, restricted to the immediate, here-and-now of “traditional” morality? The work of Hans Jonas provides an answer. In explicating his *Theory of responsibility* (1984:90), Jonas argues that there are three necessary conditions to any concept of responsibility:

- Causality: “Causal power, that is, that acting makes an impact on the world”;
- Agency: “That such acting is under the agent’s control”;
- Foresight: The agent “can foresee its consequences to some extent”.

His notion of responsibility may be conceived of in two widely different senses: that of “accountability ‘for’ one’s deeds” and “‘for’ particular objects”. The first, or *formal* responsibility implies a direct, causal responsibility and legal liability that might be of a civil or criminal (which can be purely legal, but also moral) nature. This sort of accountability “independent of the agent’s consent” is the “precondition of morality but not yet itself morality” (*Ibid.* 92). To illustrate the moral limitations of formal responsibility, Jonas uses the example of Mozart’s *Don Giovanni*. Giovanni defiantly avowed his sexual “misdeeds” with literally hundreds of women, but refused to repent, thereby condemning himself to hell in a rather grandiose style. He affirmed formal responsibility for his deeds, but it is clear that this was “not a sufficient principle of morality”. Lacking, also, is the emotive element of ethical theory, the “joy that taking responsibility” can generate. In other words: simply accepting responsibility is not necessarily a moral deed; it is not “enough”.

Secondly, *substantive responsibility*, (*Ibid.* 92-3) has a significantly different nature. I feel responsible not for past conduct and its consequences, but “for the *matter* that has a claim on my acting”. My responsibility vis-à-vis others does not merely cause me to “screen” actions for moral acceptability, but pro-actively “contemplates to actions not otherwise contemplated”. I am obliged to act since I have the power to do so. It is as if – and this is a notion also argued by Bauman – the dependence of the “moral other” commands my action. I “feel responsible” since I perceive a “right-plus-need” in the object. “Moral responsibility” for the future implies not an empty “formal” sense of responsibility, but the conjoining of “need” and “power” (to act).

What, then does it mean to “act irresponsibly”? Bauman seems to say: to disregard rules, conventions and appearance (if this is what is morally required), to look



the “Moral Other” or “Face” – an apt description – in the eye, to make myself aware of and accountable for her needs without any hint of contractual reciprocity, is to act *responsibly*. Jonas uses the example of a gambler who recklessly loses the family fortune to illustrate that “*only one who has responsibility can act irresponsibly*”. When circumstances place the fate of others in my care, my control over their fate implies a distinct moral obligation. If I disregard this, I act irresponsibly. Jonas argues that responsibility of this nature can never exist between moral equals, since it is by nature non-contractual. “Horizontal” responsibilities tend to be contractual, and “vertical” responsibilities are more inclined to be moral.

There are responsibilities that “nature” bestows upon us, such as parental obligations. Society is built upon the “loyalty of relations in general” and the *good* that is implied also implies a responsibility “as unconditional and irrevocable as any posited by nature can be (*Ibid.* 95). “Other human subjects” are therefore the primary objects of responsibility (*Ibid.* 98). For Jonas, to act in a generally responsible way means to consider the interests of other human beings; “responsibility is first and foremost of men to men”. Since it is only man (*sic*) who can have responsibility, it means also that he “*must* have it for others of his like”; it is “concretely given with the very existence of man” (*Ibid.* 99). Responsibility, for Jonas, spans both time and space (see below).

Anton van Niekerk distilled his conception of an ethic of responsibility, drawing on Jonas, Bauman, Lévinàs and others, in the following five points (Van Niekerk 2002:35-43):

- An ethics of responsibility makes all people “accept responsibility for the world in which we live and which we create by means of science and technology. It is an ethics that no longer allows us to accept the idea that morality is exclusively determined by rules, codes and laws behind which people can comfortably hide when justifying the morality of actions in morally complex situations. It is an ethics of responsibility because it demands that we be accountable for everything that we invent and design in our attempts to construct, apply and evaluate our life ethos – i.e., the value system according to which we live”.
- To whom are we accountable? “I would like to answer: accountable to the unconditional claim that other people make on me in space and time to be available



to them and to have their interests at heart, irrespective of the question whether they, in their conduct towards me, act reciprocally, i.e. whether they always act morally and take care of my interests”, including accountability “towards the environment within which the other and I must survive”. In his opinion - and I agree – this is the “only sustainably-defensible basis for morality”.

- I am responsible to “everyone who shares the planet with us”, including future generations. Predicting the consequences of actions is uncertain because “the scale of possible consequences of human actions has significantly overtaken the moral imagination of agents in our time”. “Traditional morality” is, according to Jonas, a “morality of proximity”, yet significant actions include those that have an affect spanning time and space. *“An ethics of responsibility is therefore also an ethics of futurity.* In this respect there is an important overlap between an ethics of responsibility and utilitarianism which, unlike the more traditional rule-based approaches to moral decision-making (such as Kantianism), is concerned with the future and reveals a flexibility in view of the challenges of morally perplexing situations that Kantianism hardly ever allows.”
- An ethics of responsibility grapples “with the ambivalence and ambiguity that confront us in the quagmire of new, unprecedented challenges springing from technological innovation”, which is especially true in bioethics. This is not a recipe for infallible moral decisions. An ethics of responsibility is an attempt to guide us between, on the one hand, the extremes of “intellectual impotence” and total trust in science and medicine, and, on the other, “arrogance of intellectual imperialism” of the presumption of moral infallibility. An ethics of responsibility “recognizes the fallibility of human insight”, yet is not scientifically anti-intellectual. It acknowledges the role of science as an instrument of “social progress rather than ... short-sighted and eventually dehumanising power-broking”. It recognizes that future generations in a way make a claim to present generations to be accountable for the wide range of possible future effects of present actions; “future generations have a moral claim to a habitable world”.



- Finally, Van Niekerk underlines the critical importance of empowerment with the moral “tools” required for this type of moral debate, because the moral debate is no longer restricted to the realm of “ethics specialists”. In biomedicine in particular this means, to start with, empowerment of all involved in patient care and decision-making. Empowerment should extend to the general public since they are, in the final instance, the decision makers.

The question that arises is what is the ultimate “purpose” of this “responsibility”? Jonas’ answer is that the “dignity of man can only be spoken of as potential”. Man, therefore, first has to exist, and continue to exist to keep open this “ever-transcendent *possibility*”. Bauman also writes about morality as a “transcendence” of being; “more precisely, of the *chance* of such transcendence” (Bauman 1993:72). The “first commandment” is therefore that there live men on earth; “that they live well is the second commandment” (Jonas 1983:99). Jonas’ premise is that “Care for the future of mankind is the overruling duty of collective human action” as a response to the “almighty” destructive powers of humankind that have developed in the age of “technical civilization”.

The essence of Jonas’ response to this question (posed above) is to argue that through her advanced intellectual abilities, and the “magnitude of our powers”, humankind has “taken control” of “nature”. But the future of humankind is inextricably entwined with the future of nature. Humankind therefore has a “kind of metaphysical responsibility beyond self-interest” (1984:136), or custodial responsibility, intensified by the fact that the long-term interests of man coincide with those of “nature”. Secondly, he argues that there is a simple rule: the self-interest or “egoism” of each species takes precedence. Humankind’s “superior powers” presupposes a “natural right” that legitimates its use. According to this self-fulfilling (and, it should be said, questionable) argument, the mere possession of such immense power legitimates its use (*Ibid.* 137). Thirdly, the dangers that the superiority of mind and technical powers of humankind (“power and peril”) hold vis-à-vis the eventual survival of the world, nature, and of humankind, imply a particular moral responsibility (*Ibid.* 138).<sup>76</sup> Fourthly, the consequent “first commandment” that “man must survive”; the dangers that humankind have wrought on the world imply that the world, previously taken for

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<sup>76</sup> “Nature could not have incurred a greater hazard than to produce man” (*Ibid.* 138)



granted, is now at risk, and this implies a human responsibility that only humankind can respond to; man has to say “no” to “not-being” (*Ibid.* 139). So Jonas says that not only should humankind survive for her own sake – this, it seems, he does not question – but what she has done to “nature” implies an *additional* imperative to continued survival; only humankind can clear up the mess she has made through ecological intervention and the often unintended consequences of scientific and technological developments! (The question of course is whether she is in fact doing so).

The inferences drawn from the notion of an ethics of responsibility, as set out above, will act as my “moral guidance”, or terms of reference, in the deliberations that follow. Even if I do not repeatedly refer back to these ethical guidelines, my discussion should be seen – and, I concede, judged – against their content. The reader should, in this respect, bear in mind the argument that was developed in the previous chapter, about the necessity of speciesism on the basis of insights gleaned from existential phenomenology. I shall not repeat those arguments here.

An ethics of responsibility sustains one of the most fundamental speciesist notions: respectfulness of human life. What does this notion imply? Just what it says: we should, where possible, preserve and protect human life, including the qualitative component thereof (Jonas’ second commandment). We should, given a choice, place a higher priority on the prevention of unnecessary human death than on the prevention of non-human animal death. We should not intentionally terminate human life without very compelling reasons. Yet, in doing all of this, we should unwaveringly accommodate context; we should, as Bauman argues, “Face” the “Other” in her particular circumstances.

A critical question is whether “respect for human life” and an ethics of responsibility mean that *all* biological forms of human life are equally worthy of protection, that we should, indeed, feel responsible for and to all such beings? I wish to argue that such an ultra-conservative position is unrealistic. One of the root causes of this position is that the definition of “human being” is often too loose to be useful in a moral argument. This may be consequent to the contemporary acceptance that all beings that are genetically members of the human species may be called “human beings”, and the consequent confusion between two “classes” of “human beings”. I



suggest that a more constrained definition be applied (one that Bauman and Jonas would probably support). In order to apply a moral meaning to the term “human being”, it should, to my mind, be restricted to the class of beings who comply with the following requirements:

- P1: They are obviously members of the species *Homo sapiens sapiens*;
- P2: If not already human persons capable of moral thoughts and deeds, they have the inherent genetic potential to develop and grow into such persons;
- P3: Given favourable contingent conditions and environment, they are likely to develop into adults of their species, that is, capable of moral thoughts and deeds.

They are, consequently, *moral beings*. As such they are worthy of protection.

My position – one that I argue is in compliance with the notion of *ethical responsibility* argued earlier – on the question posed above can be deduced from the three premises set out above: “humanity”, that is, membership of a the human species, persuasive as it might seem, *alone* does not justify any specific, let alone absolute, conception of moral value, or a “right to life” claim. I thus part ways with the “conservative”<sup>77</sup> “pro-life” positions, both religious and sectarian, which claim that human life is intrinsically valuable in virtue *solely* of its humanity, which imparts “absolute” moral value and justifies an absolute claim to a “right to life”. Supporters of these ultra-conservative, and, I should add, *irresponsible* positions are not required to present *additional* arguments for moral significance; confirmation of humanity guarantees moral significance. The conservative can hide behind her moral rule that “human beings” should never be killed. The conservative has little choice but to hold such an absolute position; to a certain extent, counter-intuitive as it might seem at first, it is a similar reason that persuades the liberal also to hold an absolute but opposite

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<sup>77</sup> The adjectives “conservative” and “liberal” as used here and hereafter do not imply any pejorative meaning. In the debate on pre-personal moral significance, and hence abortion, the term “conservative” is generally taken to mean that pre-personal moral significance is settled at conception, or shortly thereafter. The “liberal” view holds that something has to be added to mere humanity to impart moral significance, and that this does not take place at any time during pregnancy. Pre-personal moral value is consequently only “settled” when the pre-person becomes a person some time after birth. The prenatal pre-person has negligible moral significance. The intermediate or “moderate” position holds that at some time during pregnancy, the pre-person develops a characteristic that just about settles its moral significance. The corresponding positions in the abortion debate hold that termination is almost never justifiable, does not require moral justification, and may be permissible – depending on circumstances.



view. The problem both have is the difficulty of arguing for a “moral cut-off point”, that is, a significant event or developmental characteristic that is readily definable and identifiable, and that demarcates moral significance. In this debate, moral cut-off point usually means a point beyond which termination is morally unjustifiable, or characteristics the possession of which makes termination morally unjustifiable. The precise meaning is elucidated in the following examples. To illustrate the conservative’s dilemma, let us examine some cut-off point markers that have been suggested.

Firstly, many conservatives regard conception as the moral cut-off point. Of course conception is a significant event. Nevertheless, as for example David Oderberg (2000:17) and Christian Munthe (2001:382-397) have argued, the problem the conservative has in using conception as her cut-off point is one of divisibility; not all beings can trace the commencement of their individual and unique existence to conception. Some pre-embryos may subdivide to bring about the existence of two or more identical new beings.<sup>78</sup> As I explained on p.139, all the cells resulting from the earliest divisions of the zygote are pluri-potential, i.e., each one has the ability to develop into a normal human individual, if it should split off from the morula. Some of these subdivisions may subsequently reunite to form a single new being called a chimera. The problem should be obvious: if the conservative ascribes full moral significance to the result of conception, how should we conceive of the moral significance of these “interim” beings, and what sort of moral being is a chimera? Clearly, this is an almost insurmountable difficulty for the conservative, and we cannot accept conception as the moral cut-off point.

Secondly, much is made of sentience as a moral cut-off point. The difficulties with this notion are twofold; firstly, the advent of sentience is notoriously difficult to quantify. The range of suggestions – and they are often little less than thumb-suck suggestions – vary from seven weeks (Oderberg 2000:6) (Oderberg actually suggests that “as a matter of empirical fact, evidence is mounting that the fetus can feel pain as

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<sup>78</sup> Instead of seeing this as the termination of one life and the commencement of two or more, one can of course conceptualise the continuation of one being from conception onwards, and the “splitting off” of another a short time later, if say one cell splits off from four or eight. Conservatives like Patrick Lee (2004) prefer this view since it allows them the leeway to hold that conception remains the critical point at which a particular life commences. Lee is silent on the forming of chimeras.



early as the *seventh week*!) to 30 or more weeks (Derbyshire 2001:77-89). Secondly, recent publications by Benatar and Benatar (2001), and Derbyshire (*Ibid.*), have highlighted the even greater difficulty of trying to ascertain the psychological (and moral) meaning of sentience for the fetus. Without repeating the arguments that have been made earlier in this work, the difficulty is that even if there are apparently “sophisticated and localized behavioural response to noxious stimuli” (Derbyshire 2001:78), it remains impossible to *determine the nature of the experiential-psychological ability of the fetus*. How might this apparent experience of pain – if indeed that is what it experiences – affect its future, especially as we have no understanding of its memory?<sup>79</sup> At best we can argue, surmise and infer – but not with any reasonable amount of certainty. The conservative is on shaky foundations if she rests her case on sentience.

But the conservative has an even greater difficulty. She aims to argue against abortion, yet if she does *not* accept conception as the moral cut-off point, she has taken the first step onto a slope that is difficult to resist, since fetal development progresses in a continuum without halts or breaks, or obvious morally significant cut-off points. The conservative, therefore, is obliged to take what seems to her the “safest” option, that is, she chooses conception as cut-off point, notwithstanding the inconsistencies argued above. The utilitarian liberal, on the other hand, wants free access to abortion, and therefore chooses a cut-off point that allows her that, and is, in a sense, irrelevant to the debate: personhood, a set of developmental characteristics that only appear sometime after birth. But the “price” the utilitarian has to pay for this position is that she has difficulty to deny the legitimacy of infanticide, as for instance Peter Singer and Michael Tooley readily concede.

My argument from speciesism implies moral significance of both individual and species; the species is made up of individuals, and is valuable since individuals are valuable; individuals are valuable in virtue of the characteristics argued above (and of course for their own sakes as well!). Where she does not have them fully developed, the

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<sup>79</sup> It is impossible to judge sentience objectively, and in the nature of things, equally impossible to obtain subjective information about fetal sentience. Furthermore, the meaning of experiences a fetus might have cannot be evaluated, and we cannot exclude the possibility that noxious stimuli might influence cell growth and development. Therefore, even if a being is not “sentient” in the way we generally conceive of the meaning of the word, this does not mean that experiences that fall outside of its consciousness have no moral relevance. See also discussion on Sentience in Chapter 2, Section 1.



individual has the *potentiality* to develop them. This particular conception of *speciesism* is therefore a cornerstone premise in my argument. But the arguments from speciesism and potentiality are, in fact, mutually supportive. I have earlier argued that potentiality complements the speciesism argument. The point, with reference to the foregoing, is that the reverse is also true; speciesism comes to the rescue of the potentiality argument.

However, before I turn to the *second* part of my argument, that is, the significance of potentiality, I shall firstly respond to some rejoinders that might be raised by the utilitarian.

Firstly, I recognize that there might be reservations about this conception of speciesism, upon which much of my argument is based. These reservations might particularly come from the utilitarian, since much of *her* argument on the value of life is based on the converse: *denial* of the moral significance of speciesism. It is, for instance, Peter Singer's quest to "unsanctify" human life, to denounce speciesism as an "unwarranted form of discrimination"; we are not justified to accord particular *a priori* moral significance to human life simply by virtue of its humanity. Note, however, that this is not what I am doing, as I have already intimated, and shall shortly argue. Yet the generally accepted intuition that we "respect" human life needs no justification; it is based on a deep-seated notion of speciesism. Of course "respect" does not mean the "right-to-life". But the argument that I have made, and the qualifications I have argued, to my mind stand up to the utilitarian challenge. In fact, I believe that a notion of speciesism is indeed inevitable for the reasons earlier set out.

In the denial of the moral significance of speciesism, the utilitarian proposes an alternative, John Stuart Mill's *principle of species equality*, or sentientism. The consequence of this "unifying" concept is to equate the like interests of all sentient animals. But there is a significant difference between sentience and speciesism; the latter is a divisive characteristic, based as it is on the inherent, arguable and indeed self-evident *differences* that exist in the characteristics of different species. I think where the utilitarian goes wrong is to take the common developmental traits of all animals as a unifying moral indicator. The point is (as engineers have been quick to point out) that genetic survival, the driving-force of evolution, has found similar solutions to similar



problems; to hold these similarities as morally significant is unfounded.<sup>80</sup> Moreover, sentience is but an “entrance” characteristic for moral significance. The only moral injunction that it poses is that sentient beings should be treated in accordance with their interests – that is, they should not be made to suffer.

Secondly, the utilitarian might interject by arguing that my suggestion supports her “personhood” account of human moral significance. This, however, is not the case; the utilitarian denies Premises 2 and 3, above. For example, Michael Tooley states the utilitarian case clearly:

“The non-potential property that makes an individual a person – that is, that makes the destruction of something intrinsically wrong, and seriously so, and that does so independently of the individual’s value, is the property of being an *enduring subject of non-momentary interests*” (Tooley 1983:304).

What I wish to emphasize here is Tooley’s first three words: *the non-potential property*. The utilitarian therefore totally denies the moral principle of potentiality.

A third rejoinder has to do with my arguments on moral cut-off points; I recognize that the response might be that all moral philosophers face this problem, and of course it is true. My own response to this rejoinder is found in the second part of this argument (the development of separation survivability).

As can be seen from P1 and P2 above, I argue both that *being human* and *having human potentiality* are morally significant characteristics. This brings us to the *second* part of my argument: how to justify that the “speciesist” notion of the value of human life extends to pre-personal human life. It is feasible to argue that human pre-persons are also morally significant, since persons can only develop after having gone through such a phase. But this is not a very convincing argument, if only because it does not justify individual moral significance, which one has to be able to do if one aims to argue against abortion.

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<sup>80</sup> A powerful anti-evolutionary argument is that the similarity seen in many different species is not due to evolution but simply because they represent the best engineering solutions to particular problems.



The argument from potentiality is to my mind, a much more convincing argument. I do not intend repeating the “standard” or “classical” AFP as I developed it in Chapter 3, p. 125. I shall not repeat my justification of the argument, but remind the reader that I have a particular conception of potentiality in mind that includes intrinsic as well as contingent potentiality. It is the latter notion that I wish to discuss here. Before doing so, I wish to emphasize the importance of a clear and precise *definition of potentiality*. Both the “liberal” pro-abortionist and the “conservative” anti-abortionist misconceive of potentiality. On the one hand, the liberal holds that potentiality is vague and ill defined; on the other, the conservative attempts to convince that potentiality and humanity somehow coalesce, imparting absolute and unqualified moral value to pre-persons, or that potentiality is reducible to “biological” humanity, without a particular end-point. These positions lead to absurd conclusions, of which I shall give some examples. For example, the liberal questions the validity of potentiality by arguing that were it morally significant, we would be inconsistent in not arguing for the actuation of all potentiality, e.g., the potentiality of ovum and sperm. Some ultra-conservative positions take up this challenge by arguing for such potentiality. The absurdity is that separate ova and sperm are not individuated beings. They have no clearly defined genetic potentiality; whatever potentiality they might, after unification, possess, still has to be determined. The chances of a particular sperm impregnating a particular ovum are, moreover, infinitesimally small. A second absurdity is that all possibilities should be promoted, bestowing a “right to life” upon beings that have neither intrinsic nor contingent potentiality. It is even argued that we should produce “extra babies” in order to maximize happiness (Rachels 1998:107) in an inclusive utilitarian conception. It is almost tragic that the Roman Catholic Church supports both of these absurdities in prohibiting almost all forms of contraception, presumably on the basis of a literal interpretation of the biblical “command” of Genesis 1:28,<sup>81</sup> and totally prohibiting termination irrespective of the motivation. Neither of these extremist conceptions is defensible from the argument for potentiality.

An important point is that, as argued in P2, realistic potentiality implies that a human person should eventually result. Pre-personal potentiality does not refer to just the actuation of *whatever* intrinsic potentiality the “being” might have, for instance to

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<sup>81</sup> “Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth” (*Spirit Filled Bible:5*)



become a two-headed freak. Neither can we conceive of potentiality exclusively “biologically”; the significance of potentiality rests in the eventual development of a being possessing psychological capacities like moral thoughts and deeds, that is, a person. My aim is, moreover, to exclude “human beings” who can never have, or have irretrievably lost, any possibility of meaningful psychological life (according to my stringent definition above, these beings should not be called “human beings” at all; they certainly are not beings with any inherent or contingent moral value or potentiality; at best there may be indirect or contingent reasons to “respect” them). The concept of potentiality is therefore *not* vague and empty; it is directed towards a very definite and specific end point.

Responsible, contextual ethics implies that more than just intrinsic or genetic potentiality is required *to justify the actuation of that inherent potentiality*. Inherent capacity is to grow and develop in a direction and towards an end that genetic composition exclusively dictates, but potentiality ought only to be (usually, *can only be*) actuated in an accommodating environment. Intrinsic or active potentiality dictates development; but contingent factors (*extrinsic or passive potentiality*<sup>82</sup>) are equally important as the *means* to development. Pre-personal potentiality can therefore be defined as *a summation of intrinsic potentiality and favourable extrinsic contingent potentiality* to grow, develop and become a human person. Intrinsic factors constitute the genetic blueprint of potentiality; extrinsic factors determine the possibility of actuation of the blueprint. Both are required if the human pre-person lays a claim to the type of “potentiality” argued here.

This notion of “contingency” has far-reaching implications. The fetus is a vulnerable being whose very development is contingent. For example, it can exist only *in utero*, at least until it reaches separation-viability, and develop normally only if its environment is suitable (until human ectogenesis becomes possible<sup>83</sup>). But even its *viability* may be dependent upon contingencies like the availability of special medical care. Therefore, the antenatal pre-person requires favourable circumstances (extrinsic to its person) to grow, develop and thrive: nutrition, protection from exposure to noxious

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<sup>82</sup> One might argue that external factors should not be termed potential, and refer to them as contingencies. I use the term extrinsic potentiality, and imply that it is also “possessed” by the being; it complements intrinsic potentiality, and is equally essential for development. A strict reading might imply that I call these extrinsic factors possibilities rather than potentiality.

<sup>83</sup> In 1997, a Japanese researcher succeeded in bringing a goat fetus, removed from its mother at a gestational age equivalent to 24 weeks in humans, to term in an artificial uterus (Gelfano 2001:144-5). See also footnote 85.



substances, that its “mother” remains alive and well at least until delivery, that she does not abuse her body (for example, abuse drugs, alcohol and cigarettes), that she is not physically abused, and does not contract severe communicable disease. Even after birth it requires care, protection and nourishment to flourish. “Potentiality” is not a realistic proposition without favourable contingent conditions. But contingent circumstances are unique to each being; therefore, the possibility of actuating potentiality varies inter-subjectively. From this argument, the rather uncomfortable conclusion seems to be that differences in moral significance are justifiable, related to each being’s unique set of circumstances.

However, extrinsic conditions are secondary, and come into play only *if* intrinsic potentiality first exists.<sup>84</sup>

But there are two questions we now need to address. Firstly, to what *extent* might “moral contingencies” be legitimate arguments in determining pre-personal moral significance? The significance of this question lies in the fact that most cases of termination of pregnancy are morally justified on contingent premises. Some contingencies present powerful arguments, and there ought to be little difficulty to accept their legitimacy; e.g., when the woman’s inherent right to say “no” was denied (rape and, often, incest). But other examples are less definitive. Is the pressure brought, in certain societies, upon a poor black African woman to have a large family, as well as her consequent pregnancy against her wishes, a legitimate contingency? Her “right” to say “no” is likewise denied. How powerful is contingency when a single woman has lost her job, has no one to turn to, no prospects of finding employment while she is pregnant, no means to live by, and is shunned by society? Should she be left to her fate, or is her contingent argument powerful enough to justify intervention? It is morally cold and irresponsible to ignore the plight of the woman and turn a blind eye to her suffering.

We can construct a series of similar examples ranging from those where contingent justification for termination can hardly be opposed cogently (for example, a

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<sup>84</sup> This brings the significance of *bodiliness* as a moral characteristic, as argued by Maurice Merleau-Ponty (Van Niekerk 1986:13), into play. There first has to exist a being that possesses the potentiality, in favourable contingencies, to develop, grow and become a normal, adult human person. That being has to be corporeal. See pp.118-9 for a comprehensive discussion of Merleau-Ponty’s notion, as developed by Anton van Niekerk.



pregnant woman is seriously ill and will die if her pregnancy is not terminated), to examples where all but the liberal might have difficulties with termination (for example, the woman who plans a pregnancy, then, for some frivolous reason – such as disgust with her body-image as a result of the pregnancy – decides not to go through with it). But where should we draw the line? The problem is that as we “water down” our indications, we reach a stage where female autonomy becomes a legitimate contingency; her “indication” for termination becomes so superficial that should we acquiesce to it, we are in fact allowing female autonomy as the final argument. Is this morally justifiable?

Perhaps the question is not whether it is justifiable, but whether we have the right to ever oppose a woman’s right to exert her autonomy and to decide what happens with and inside her body. If, like Isaiah Berlin (1969), we argue that we wish our “life and decisions to depend on myself” without outside influence, and would like to allow the same respect for autonomy in our relations with others, should this in itself not be the final legitimate contingency? Should we not allow the female, whose life is, after all, as is rightly argued, primarily affected by the pregnancy, the person most likely to suffer, to exert her autonomous authority (or, as Susanne Gibson writes, her autonomous *moral* authority) (Gibson 2002:232)? Respect for (and the promotion of) female autonomy is the motivation of Act 92, and of most liberal pro-abortion positions, held by persons who call themselves “pro-choice” because they believe that respect for female autonomy should be paramount. Well, I concede that respect for autonomy is a powerful contingent argument, and perhaps all conceptions of extrinsic potentiality are contingent upon respect for female autonomy, should they conflict. Moreover, so ingrained is the principle of respect for autonomy that rational debate on abortion is impossible without considering it; a short discussion of the moral implications of respect for female autonomy follows on pp. 196-200, 201).

Susan Gibson argues from a feminist perspective that “In societies in which women are oppressed, and in which women’s options are limited by the structures of patriarchy, abortion becomes a means of responding to the consequences of male domination as well as a means of breaking free from it” (*Ibid.* 226). Pursuing an ethics of responsibility, we are therefore obliged to consider the plight of the oppressed, subjugated and exploited woman who, as result of this domination, has become pregnant, and the liberal pro-choice supplicant as the means of her liberation. This portrayal may be accurate, and where this kind of subjugation exists, the argument has



merit. Another way of handling it might be to admit that the moral justification in most of the cases quoted above is not persuasive, but to “trump” that argument with the autonomy-argument, which, we may argue, overrides all other arguments.

But this is not the “full story”; the situation described above is seldom the case in most liberal Western societies. Feminists might argue that even in those societies women are not “equal”; that discrimination is an inherent consequence of the anatomical and physiological differences between man and woman; it is the woman who becomes pregnant when both she and the male are irresponsible. But if we argue from an ethic of responsibility, we are bound to conclude that autonomy, also, has to be balanced against other considerations. It is premature, as far as my argument has developed, to argue here exactly how this is to be done. I shall present my position later when I discuss the moral implications of my argument vis-à-vis the abortion debate.

There is, however, a second question that requires our attention: does the justification of contingency not negate intrinsic human pre-personal moral significance based on potentiality? The question here is that if we allow the argument to be dominated by contingent factors, such as I have done above, is inherent potentiality then a factor at all? Or, to look at it from a different perspective, the notion of contingency implies that the eventual actuation of potentiality is an uncertainty based on factors *extrinsic* to the being in question; this appears to neutralize any moral significance that intrinsic potentiality might have. I disagree that this is what the argument from contingency implies. I concede that the argument implies that we cannot be sure that all inherent potentiality will be actuated. But we cannot realistically use this as a generalized argument against intrinsic pre-personal moral significance. Just because *some* fetuses may not actuate their potentiality (for example, an *in vitro* pre-embryo not intended for “gifting”), does not mean that we should legitimately deny or ignore the “potentiality” of *all* pre-personal human beings such as the *in vivo* pre-embryo that has implanted itself into the uterus. The potentiality of the majority would in all probability be actuated, unless prevented by termination. Favourable contingent conditions are confirmed by continued development; potentiality cannot legitimately be denied entirely just because unfavourable contingent factors will prevent the actuation of the potential of *some* pre-persons. Responsibility in ethics dictates that arguments about the probable or possible non-actuation of potentiality due to contingency should be restricted to *specific instances and context*. The argument might be true for some



embryos and fetuses, but we should not generalize. The dispute with the liberal pro-choicer and utilitarian is not about the principle of the significance of contingency; the conundrum is rather the limits and bounds of this principle.

My task of justifying potentiality is considerably diminished if I modify the conception of potentiality so that viability attains moral cut-off-point status; I need then only argue that what is significant is the potentiality of the being to become *viable*. In this conception, there is, for example, no need to argue for psychological connectedness over time, as some critics contend.

Finally, my argument for potentiality is based also on the denial of absolutism in pre-personal moral significance. The embryo or fetus exists in particular contingent circumstances. The conservative position that species membership implies an inevitable “right to life” is problematic and subject to serious objections that extend beyond the fate of pre-persons. Such notions are incompatible with our practical management of certain conditions: pre-persons devoid of potentiality, e.g. with severe neurological deficits; and adults with permanent and severe neurological disability (e.g. persistent vegetative states), those brain-dead and kept alive biologically by artificial ventilation and so forth. Without a reasonable chance of significant psychological existence, or the potential to develop or regain such a life, a being’s existence is purely biological and devoid of inherent value. It can never be required that we promote such an existence, nor can it be “moral”, and certainly not morally responsible, to bring into the world such beings. Yet this is exactly what the “extremely conservative” position argues: that human life has to be preserved at all costs. Scarce medical resources will be squandered in this hopeless enterprise, justifiable prioritisation and rationing, a practical necessity for any health care system, would need to cease, and impossible burdens placed on public health and health care budgeting. I strongly oppose this position; responsible bioethics has to consider the realities and limitations of our world. From a *philosophical* point of view, we should refrain from futile treatment since there is no rational basis to justify the moral significance of the sort of beings I have described; their lives can never amount to much.

It seems to me that an important contribution to this unrealistic idea is the conservative’s conception of *value* that is, apparently, different from what both the utilitarians and I contend (i.e. that moral significance should be based on rational argument). For instance, Richard Dworkin (1993) argues for non-incremental, intrinsic



pre-personal moral value; life *has* “a value” rather than *is* “valuable” in virtue of certain characteristics. Govert den Hartogh (1997), though critical of Dworkin, conceives of “value” as something that at the outset is impersonal; life is not good for anybody, or for any purpose, or for any arguable reasons, but is *simply good* (*Ibid.* 66). These positions share two traits: they are not based on developmental characteristics; and they are absolute. The termination of human life is *always* wrong; we should do our utmost to preserve human life.

Now, as development, growth and actuation of potentiality proceeds, something of exceptional significance develops, this introduces the second phase of my argument: *separation-survivability*.

#### 4.1.2 Separation-survivability

At about 25 weeks gestational age, the gradual development of the pre-person reaches the stage where it can be viable, i.e., it can now survive separation from its mother, should it be born alive at that point.<sup>85iv</sup> I wish to argue that this radically alters pre-personal moral significance, and, consequently, the significance of my argument. The essential premise of my argument is that since there is no *justifiable moral basis for differentiation* between a specific (normal) neonate and a specific (normal) viable fetus in the last weeks of pregnancy, these entities, the same human being in different phases of development, should be treated equally.<sup>86</sup>

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<sup>85</sup> I shall take the position that it is generally and widely accepted that 25 weeks gestational age, and a minimum birth mass of 500g are usually taken as significant in terms of meaningful survival. A 90% survival rate, with less than 10% serious morbidity is possible with reasonable antenatal care, and neonatal ICU facilities (Kirsten 2004). To date, possibly the smallest fetus to have survived and grown up relatively healthily – she is now 15 years old – had a birth mass of 280.8 g. A fetus with a mass of 243.8 g, has, at the time of writing, survived the first three months of life (*Die Burger*, 23 December 2004). This is the closest we have come to ectogenesis – the development of the fetus outside the uterus.

<sup>86</sup> “No one can realistically maintain that there is any significant change in the intrinsic properties of an individual just because that individual has passed through the birth canal” (Card 2000:349). “In general, the status of the late-term fetus and newborn infant converges. To a great extent a late-term fetus is similar to a newborn and both should be treated equally. This should lead to certain symmetry with regard to abortion and neonatal policy... “ Nevertheless, the momentous impact of birth, making the neonate his own master and self-owner of his body cannot be ignored (Gross 2002:216-7). Mary Ann Warren makes an argument that the locality alone implies a difference in moral status between near-terminal fetuses and neonates. The infant’s biological connection to the mother creates this moral difference, based on the possibility of affecting the mother’s well-being. She argues that since the mother is clearly a person and the fetus not, when medical peril presents, the interests of the mother should predominate (Warren 2000:355). But there is significant support for moral recognition based on the development of viability; for example: “Moral personhood is conferred (*sic.*) relatively late in a



I argue that the development of pre-personal viability, the ability to survive relatively independently outside the womb, or, as Robert Card writes, “separation-survivability” (Card 2000:343), is a crucial milestone. Firstly, it confirms the actuation of a significant level of pre-personal potentiality. Secondly, it is a unique characteristic; for the first time in its existence, the pre-person can in a significant respect be compared to a neonate or an infant. It can survive separation from its mother; it can *become* an infant. Further growth and development has to, and normally will take place, but this is equally true of the (mature) infant and neonate; its immaturity alone cannot deny its moral significance. It can at least exist independently from the maternal body. We might even formerly, like Laura M Purdy, have conceived of mother and fetus as an integrated unit, of the fetus as an anatomical extension of the maternal body, like an arm or a leg, “flesh of her flesh, part of her” (approximating the *legal* conception of a pre-person) (Purdy 1999:72). Or like feminists in general; that the association between female and fetus is relational, a relation that the female is entitled to stop at any time since the particular fetus can have no relation with any other body. But no more is that the case, and no more are these conceptions possible; even Purdy has to alter her conception to accommodate this momentous development.

Conceptually, the “locked in” status of the fetus is no more. It is not dependent on, or locked into this particular physical or emotional relation, but has acquired the ability to, potentially, enter into other relations.<sup>87</sup> Of course the fetus will still be dependent upon human care and protection; but so, too, are *all* neonates, infants and toddlers. The point, however, is that it need not remain bound to the maternal figure; it can build up relations with other subjects, as it gradually becomes more of a subject. Others, even animals like wolves and gorillas can, in very exceptional circumstances, assume the caring role.<sup>88</sup>

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pregnancy as the developing fetus achieves a measure of viability, sentience and human cognitive developmental capacity thereby affording limited rights and protection” (Gross 2002:214; also Chernevak et al., 1995:434-5, Steinbock, 1992 and Warren 1997).

<sup>87</sup> Susanne Gibson writes: “However, since the only direct relationship it can have is with the woman inside of whom it is developing, and since no one else can do anything directly to the foetus without also doing something to the woman, the decision to continue or discontinue nurturing the foetus lies solely with the woman.” But I find the following significant: “Foetuses do not have absolute value because they have no existence independent of this one relationship” (Gibson 2004:227). Well, the point is that once viable, they indeed have developed a distinct possibility to develop other relations, and will do so if delivered at that point. I submit that this substantially changes their moral status.

<sup>88</sup> Romulus and Rhemus were, according to Roman mythology, brought up by wolves. Tarzan by gorillas and birds fed Semiramis.



Pre-persons now share an essential characteristic with neonates. I argue that this development has far reaching moral significance: the separation-survivable pre-person can now claim to be treated in the same way as we treat infants; we should therefore respect its viability. The moral significance of the characteristic of *viability* is retroactive to its advent; from that point onwards, pre-persons can claim equal moral treatment.

Of course, this position assumes that infanticide is morally unjustifiable and incompatible with responsible societal life. In Chapter 3 I argued that our most basic moral intuitions guard against the legitimisation of infanticide. In fact, they direct us to protect (normal) neonates and infants because of their humanity and vulnerability. This principle implies that we are obliged to treat all normal viable fetuses (those viable fetuses who possess inherent potentiality) in the same way that we treat neonates.<sup>89</sup> Consequently, if infanticide is morally unacceptable, so too is feticide (I reserve the term “feticide” to mean the killing of viable fetuses). Since killing individual viable fetuses is morally wrong, we can generalize and deduce that it is *generally* morally wrong to kill the *group* of beings known as viable fetuses. But since I generalize, I need to add the proviso that it is not *invariably* so.

I concede that there might be questions about the chronological age at which this conception become realistic. I have argued earlier that viability depends on extrinsic and intrinsic factors. A being has to have both the potentiality (and developed that potentiality to a certain level, in anatomical and physiological terms), *and* its extrinsic contingencies have to be favourable (including whatever care it might require after birth) to have a chance of survival. One is bound to feel uncomfortable that fetal survival has increasingly become a factor of technological advances subject to *specialist medical contingency*. Current clinical consensus suggests a cut-off point for aggressive intervention (in South Africa, when available, and in most of the Western world where it is more readily available) of a gestational age of 25 weeks, provided birth mass exceeds 500g. Much smaller fetuses regularly do survive, but the incidence

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<sup>89</sup> Severely abnormal fetuses may be separation-survivable. The concept of viability might be developed to mean more than simply physically surviving birth; i.e., it might qualify the type or quality of life that results. This is the reason why I add “normal” in brackets.



of abnormalities that require surgery as well as those that experience serious complications and eventual morbidity, increases as birth mass decreases.

I concede that the significance of separation-survivability may be questioned.<sup>90</sup> After all, nothing else, none of the other characteristics of the now-viable being, have changed. Am I not inconsistent in over-emphasizing one particular trait? And do I not discriminate against the almost-viable (say, 24 and three day old) pre-person? Well, this characteristic is of paramount importance, rather like personhood is for the utilitarian, in virtue of the fact that it changes our view of the pre-person. We start seeing the pre-person as an *individual*, separate from and *independent* of its mother, capable of attaining legal status, of confirming its moral status and potentiality; the advent of its unique human individuality. I argue that a human being that can survive on its own has every right to be allowed to survive; killing it might conceptually amount to homicide. As to the accusation of discrimination, I wish to make two points: firstly, clinicians tell us that at this stage, each gestational day is crucial, and one simply has to balance outcome with cost and particularly the availability of ICU beds. I concede that one has to tread carefully lest one confuses moral significance with the availability of technical sophistication; I shall attend to this concern on p. 179. Secondly, this is precisely the nature and function of a moral cut-off point.

I concede that, if born at this early age, the infant will be very premature, and the premature being has special needs and requirements. But this is not exceptional; some neonates at full term require similar special care. A viable being, premature as it might be, has a reasonable chance of survival with “normal”, that is, “non-invasive” neonatal care.<sup>91</sup> Its vulnerability does not negate its moral significance; all neonates and infants are vulnerable.

But I argue that separation-viability holds *particular* significance: *it may be the elusive moral cut-off point* to having moral significance of an order that can justify a claim to a “right to life”. Moreover, it is the only realistic and justifiable moral cut-off point. I argued earlier that conception, or individuation, and sentience do not have the

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<sup>90</sup> Peter Singer discusses the “moral arbitrariness” of cut-offs” in his 1979:107-110; Jonathan Glover the “implausibility of the proposed sharp boundaries” in his 1977:123-129.

<sup>91</sup> At Tygerberg Hospital, for instance, premature infants do well if they are breast-fed – this provides antibodies – and breathe with “c-pap” masks – constant positive airway pressure masks – which splint the alveoli and prevent neonatal respiratory stress syndrome (Kirsten 2004).



same power, and psychological personhood appears much later, when a “right to life” is settled, and therefore has little usefulness in the debate on pre-personal value. In the contemporary debate, separation-viability “is often taken to be the significant point” (Gibson 2002:223).

Viability as a moral cut-off point provides firm argumentative ground for “settling” – to the extent that this is possible – the abortion standoff. Since infanticide is *prima facie* wrong, and there is no moral difference between the viable fetus and the neonate, we therefore have a moral obligation to treat them equally; both should be accorded the opportunity to actuate their inherent potentiality. They should not be terminated. So we have a *relatively* (if not absolutely) fixed point before which moral significance is “much less” than thereafter; and reasonable grounds for a different approach to the termination of pregnancy before and after.

I have argued earlier that until viability is reached, we can argue that inter-subjective differences in contingency may mean that moral significance may accordingly vary inter-subjectively. But the obvious question is whether these inter-subjective contingent differences may, likewise, impact on our conception of “post-viability” moral significance; after all, would they not continue to exist into this phase of pre-personal development? Well, if I intend to be consistent in my argument – which is a firm imperative – I have to treat *all normal* viable fetuses as I would their morally equal counterparts, that is, infants. Therefore, unless contingent factors are such that fetal survival is in serious jeopardy (in which case they are not really “viable”), I have to conclude that all viable pre-persons have a “right to life” *claim*. We certainly *are* justified to expect that reasons to negate pre-personal value, i.e. to allow termination beyond this point, should be *very persuasive* to convince since they will be set up against a powerful argument.

So the “level” of significance attained by the advent of viability implies that the fetus has developed a “right” to a continuation of its life, and the further actuation of its potential. I admit that I use the word “right” here with some hesitation. After all, rights, as we have come to conceive of them, conjure up the “rights-obligation” relation. Rights should be “claimable” and enforceable. Furthermore, there is no legal protection even for viable fetuses under existing legislation, and it does not seem a likely future prospect. So one might well ask: does it make any sense to talk about “rights” in this connotation? Furthermore, there is, apart from the woman, no legitimate spokesperson or representative for the viable fetus. I admit that these are troubling thoughts.



Nevertheless, an even more troubling thought for me is the alternative. If there is little difference between the viable fetus and the baby it has the imminent potential of becoming, perhaps moments away, and we may kill the fetus, what stops us from killing the baby? I mean apart from legal considerations; I can see no direct moral reason that does not, also, apply to the viable fetus. There may be indirect reasons, but they should – or at least, *may* – apply to the viable fetus as well. The law, it has been said, “is (sometimes) an ass, a (sic) idiot”<sup>92</sup>, and perhaps this is such a time!

Now, what is the significance of the contingent availability of *medical technology* and sophisticated medical services? I recognize the difficulties inherent in allowing scientific contingency to influence philosophical discussion. Yet in applied biomedical ethics, scientific facts are particular prerequisites to sensible reflection. There are, nevertheless, several concerns about the validity of scientific contingency. *Firstly*, there is the concern that in basing moral decisions on scientific contingencies, one reduces morality to a form of instrumentalism. Well, we do this daily, perhaps unwittingly, with other moral decisions. Science has become inescapable in the concerns of our daily lives (hence, for instance, Jonas’ concerns). This is particularly true in biomedicine; a pediatric intensivist can treat premature infants only if she has access to the goods of medical science; she can be “moral” in this sense only in as far as her access to these goods allows her. *Secondly*, the concern raised earlier: am I not promoting discrimination in arguing that the availability of science can influence one’s conception of moral significance? Well, I do not intend to promote injustice; I simply describe the realities of life.

*Thirdly*, is there not inherent injustice in my supposition that even before birth, human beings are not necessarily moral equals? I agree that I need to state my case carefully; I argue that we recognize that not all viable fetuses have an equal chance of survival, and should receive an equal share of scarce medical resources. But we should be careful in arguing that once delivered, contingency remains a justifiable argument to denote moral significance, or justify different treatment. In principle, normal neonates should receive equal treatment. In principle, they are all morally equal. That this is not so in practice is a failing in societal recognition of a fundamental responsibility and is unjust. Neonatal mortality rates are lower in developed, affluent versus underdeveloped

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<sup>92</sup> Charles Dickens in *Oliver Twist*.



communities. This difference in survivability should not be an indication of unequal moral significance (which does not mean that, faced with something akin to *Sophie's Choice*<sup>93</sup> in developing countries, the clinician should *not* choose to treat those with the best chance of survival preferentially).

I conclude this section with two final comments:

- If there is little moral difference between the pre-term fetus and the neonate it becomes at birth, “partial birth” abortion (the killing of the fetus just before it is born, usually at the “crowning” of the head, by destroying its brain), legal in Israel and only recently totally outlawed in all of the U.S.A. by Pres. George W. Bush, is seriously problematized.
- The utilitarian linkage of fetal and neonatal moral significance problematizes *their* personhood argument. Utilitarians that hold a liberal view on abortion are obliged to accommodate infanticide, without which their argument is inconsistent.<sup>94</sup>

### 4.1.3 The moral significance of sentience

I now wish to attend to the significance of an alternative conception of moral significance: the question of *sentience*. Earlier, I argued that sentience has limited application as a moral marker, because of two particular problems: firstly, to determine at which stage of development does the being become sentient and its consequent significance; secondly, to determine the significance of sentience for the sentient being. I wish to make a third point here: if sentience is not present before say the 28<sup>th</sup> gestational week, then my views on the importance of viability supersede any views based on sentience alone. But the question arises: is it not possible that future research with more sophisticated tools might find sentience to be present much *earlier* than 28 weeks, even *preceding viability*? If so, sentience might then be seen in a different light. But the question would then be: does sentience *argued on its own* confer a “right to life”? In the unlikely event that significant sentience is found to be present before say

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<sup>93</sup> In the novel, *Sophie, a Jew*, has to make an impossible choice. Upon entering a concentration camp, a sadistic guard offers her a choice: she can save one of her infant children. Impossible to choose, she loses both. This haunts her until, years later she commits suicide in New York.

<sup>94</sup> Mary Anne Warren argues that it is difficult to make a persuasive case for the legalization of infanticide – but not because it is wrong in principle. She renders a utilitarian argument instead: that “there are usually alternatives that would give the child a chance to live a good life, without violating anyone else’s basic moral rights” (Warren 2000:354).



25 weeks, the type of moral value that it adds to pre-personal life may not be sufficient to guarantee the continuation of life. Sentient experiences are of an immediate nature, and imply a limited form of immediate consciousness no more than that of sentient animals, and less than that of some animals like adult primates.<sup>95</sup>

Should we then argue that sentience is devoid of moral significance? I think not; we can, at the very least, argue that the advent of sentience, itself a developmental characteristic, confirms that a certain level of development has taken place. It is, moreover, the beginning of the psychological life of the to-become person; it is the first tiny step on the road to personhood. Yet it adds nothing to the eventual ability to enter the world and start engaging with it. Survivability does. Sentience without survivability would not oblige us to look out for the interests of the being, should it be prematurely delivered, apart from not letting it suffer; the gist of my viability-argument is that the opposite applies. We are not obliged to attempt to salvage the neonate if it is not viable (that is, “salvageable”); in fact, it would be counter-intuitive to attempt it. So even if it would seem that the advent of the psychological life of the being might be more significant, it is in fact meaningless without survivability. Sentience adds *secondary* moral value to fetal life because it is a psychological marker. But sentience is not a requirement for viability, and, if we believe Derbyshire (2001) and the Benatars (2001), and Kirsten (2004), viability precedes sentience both chronologically *and* logically. It is, of course, inherent to the potentiality of the viable being that it should, at some time in the future, become sentient, and therein lies the moral significance of sentience; it is a psychological, physical and moral milestone. It is a marker for a certain level of development or actuation of potential. And for the reader who, nevertheless, argues that sentience is paramount, or, at least, morally more significant than survivability, I can offer the assurance that since survivability precedes sentience, one errs on the safe side by accepting it as a moral cut-off marker.

But there is the question of sentience and human embryonic research. There need be no reservations about continuing research on embryos if sentience is the moral concern; an *in vitro* human organism can never develop sentience. The fear that the researcher might unwittingly cause suffering in her experimentation is unfounded and unsubstantiated, and is not a legitimate argument against human embryonic or stem cell research.

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<sup>95</sup> *Roe v. Wade* used a conception of viability as the ambiguous compromise cut-off for States who wish to disallow free access to abortion – unless the mother’s life is in danger.



In summary, in my two-phased model, the moral value of human life based on its humanity and inherent potentiality increases as potential is actuated, but remains contextually balanced against extrinsic factors. A very significant position is reached at separation-viability, and moral value approximates that of the neonate that would exist should that particular fetus be born. Viability might be a moral cut-off point. The possibility of survival overrides other moral factors, just as they are, in a sense, “overridden” once the baby is born alive. The development of sentience adds moral weight to the argument, but as an only criterion, its significance is limited.

There is, now, a critical step of my argument that I have, as yet, not presented; *a graded, sliding-scale conception of prenatal and pre-personal moral significance.*

#### **4.1.4 A graded concept of moral significance**

My concept of potentiality leads me also to accept a significant consequence: the *gradual development and attainment of the moral characteristics to which potentiality is directed* through the normal physical and mental development of the being. It therefore seems inevitable that we should conceive of moral significance as increasing in line with the level of development, or actuated potentiality.

I argue as follows: if we allocate absolute moral value to a being who has acquired all the characteristics of personhood, including (for the sake of argument, let us use the accepted utilitarian characteristics) self-awareness and being the subject of non-imminent interests, it seems evident that when *some* development directed towards that ideal has taken place, and *some* potentiality has been actuated, we should accord the being in question with a commensurate level of moral significance; rather like paying a contractor for having completed part of his job.

My argument thus far has been that we have three options in assessing moral worth. The first two are absolute, though opposite: the conservative position of absolute intrinsic value based on humanity; and the utilitarian suggestion of the absence of substantial intrinsic value based on the absence of “personhood”. A third possibility, limited moral significance in virtue of humanity and potentiality, increasing as potentiality is achieved, takes cognisance of the reality of gradual development. I argue



that *intrinsic moral value* can be graded in line *firstly* with the level of development. The more potentiality that has been actuated, the more complete the being, the closer it is to becoming a person in the full sense of the word – even if that attainment lies in the future, and is subject to external contingencies – the less remains in doubt. But, *secondly*, actuated potentiality adds intrinsic value because it *extends* the characteristics of the being; it becomes more of what it is. Of course we are more concerned with the development of psychological characteristics, but, since we cannot measure the attainment of psychological attributes, our only measurement is physical development.

I have argued that viability of the fetus is a highly significant characteristic that might be the elusive “cut-off point” in moral value. Now, if this is so, then, as I have alluded to previously, all I need to argue in terms of my graded, sliding-scale conception of acquired moral significance, is that the potentiality of the pre-person is to become *viable*, since, once viable, it is (almost) inviolable. This abbreviation of my argument is less problematic; for instance, I do not have to argue for some sort of psychological connectedness between present and future beings, or what the utilitarian has to: that “absolute” moral significance is only realistic in full-fledged persons.

Appealing, as my sliding-scale notion seems to be, is it supported by other points of view? I argue that it is.

Firstly, it fits in with our *basic moral intuitions* on the subject. It seems self-evident that the moral value of a “clump of human cells” – the early, pre-implanted human embryo – cannot be similar to the moral value of a developed being, such as a sentient or a viable human fetus. This notion is supported by fundamental intuitions. In difficult practical (*Sophie’s Choice* type of) choices regarding the allocation of limited resources, e.g. neonatal intensive care, we intuitively elect to treat those who have the best statistical chance of ultimate survival. These intuitions are informed by good science and outcome-based medicine; gestational age and, to a lesser extent, birth mass are important determinants of survival, and these facts influence our practical decisions. We are in fact *grading the moral value of particular pre-persons* in relation to their chances of survival. This contention, and the role of our intuitions in the decision making process, is supported by the research of Michael Gross (2002) and Michael Norup (1997) on attitudes to early and late abortions, and why these attitudes are held.

But current notions of the gradual development and evolvment of selfhood also support our intuitions in this respect. In the section on *Speciesism* in Chapter 3, I traced



the gradual development of selfhood through inter-subjective interactions, through which we learn to relate to others and to express ourselves intelligibly through the medium of language, learn how to behave, to survive, and to describe and relate to our world (Van Niekerk 1986:10). I argued that *self-knowledge* is a *relational capability* that develops through inter-subjective contact, and contact with the world, and leads to self-understanding. Both of these are gradual processes that develop as we develop and grow.

But our intuitions are also informed by our knowledge of normal human development and growth. The principle of potential, development and growth is inherent to human life. To be a person is to grow and develop towards an undefined destination, continuously realising new possibilities. Personhood is a developing process “characterized by incompleteness” (Van Niekerk, 1991:39). Pre-personal development and growth is an integral part of this process, no less important than the development in infancy, puberty or into adulthood, without which the later development could not have taken place. The principle of gradual development in all phases and stages of life is a matter of fact.

How significant is the process of *birth* in this argument? The process of birth is a decisive event in human development. It results in the separation of mother and fetus, the conclusion of the fetal phase of existence and the commencement of the neonatal phase. This is biologically and *legally* significant. We can now see and touch the neonate. Legally it is a unique being with clearly defined and enforceable legal rights. It becomes a legally recognized *other entity* only if it is born *alive*; a beating heart and respiratory attempts indicate a live birth, irrespective of the final outcome of neonatal resuscitation. Physiologically, much changes at birth; the being has become relatively self-reliant. It now has to fend for itself, even if this is in a limited way. It has to fend off infection (although antibodies are still provided in breast milk); it has to breathe for itself; its circulation has radically changed; it has to digest its own food and excrete its own waste. It is dependent upon its own metabolism for heat production and maintenance of body temperature, without which no isothermic animal can survive. The relative independence of the neonate is something new and significant. But, on the other hand, morally speaking, there is much that has *not* changed. The live-born human being exists in ontological continuum with its prior fetal existence; it is the same continuous being. Its inherent characteristics are unchanged, though more of its potentiality has been actuated. If the newborn is a normal and morally significant being,



it was the same normal and morally significant being just before its birth. I argue that the *morally significant differences* before and after birth are predominantly contingent on external factors. Intrinsically, nothing has changed, apart from it being somewhat further on the road of development and actuation of potentiality, and having confirmed its survivability and viability<sup>96</sup>. Nothing has changed in the nature of the inherent potentiality of the being; but extrinsically much has changed. Birth does not change a being's inherent characteristics, but is a significant feature of the process of gradual development and actuation. Live birth *confirms* separation-survivability.

But apart from our *moral intuitions*, the “sliding scale” analogy also seems to fit in with our *general intuitions*. We place more instrumental value on a finished product than on its constituent raw materials (electricity v. coal; a chair v. a pile of wood; bread v. a bag of flour). The closer a product comes to finalization, the greater its value, and the esteem it commands. A contractor is generally not paid fully until he has completed his task. Of course I do not mean that we should measure human significance instrumentally, as a means only. The value that we place on the attainment of potentiality, culminating in normal personhood, is not instrumental; it is not for the sake of anyone else but the person who attains it.

I have now argued that the notion of general development ties in with our moral and general intuitions on human development. Let me now turn to a second argument that supports a graded conception. It is significant that utilitarians also accept the principle of graded development, both in their argument on sentience and on personhood. Utilitarians accept a (limited) concept of *graded* value within their paradigm in differentiating between non-sentient and possibly sentient phases of pre-personal life. Sentience is the threshold for prenatal moral value (Singer, 1990; reprint 2002:197). But this idea also applies to the argument for personhood; for example, Michael Tooley admits that the property that denotes personhood, the “sort of unification of consciousness over time that makes something a subject of non-momentary interests *does appear to admit of degrees*” (1983:408), and the wrongness of destroying something may be related to the *degree* to which the property is possessed. The principle of differential treatment based on graded moral value is

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<sup>96</sup> See pp. 104-5 for other insights on the moral significance of birth.



therefore accepted in both the utilitarian arguments on moral value – a point usually not appreciated, especially in personhood arguments.<sup>97</sup>

If we accept that a *sliding scale concept* of pre-personal moral significance is realistic, the next question is: of what *significance* might such a conception be? Am I a misguided optimist if I suggest that it might help to build a bridge between the two conceptions of pre-personal moral significance? Well, it might, and my optimism might not be misplaced. Willem Landman (1990:166) suggests that not only is a sliding scale realistic, but it might in fact be extremely useful, provided certain provisions are met:

“There seems to be some sliding scale in respect of the intrinsic moral wrongness of killing [*read: moral value of*] human beings as they develop to become fully fledged persons. What is needed is a moral theory about the intrinsic wrongness of killing, which takes these moral intuitions seriously, and attempts to accommodate them in an explanatory or theoretical framework. Could one not, after all, find some sort of morally relevant cut-off point which would allow early abortions while taking a dim view of late abortions and infanticide?”

The *first part* of Landman’s criterion can be satisfied by an argument that fits in with the concept of gradual development and graded value. If we accept in principle that pre-personal growth and development is along a progressive continuum, it is evident that to interrupt this development will deprive the future being of the goods that she would have experienced. What this means is that she is deprived of the goods likely to be inherent to her future, somewhat along the lines of Don Marquis’ argument: what is valuable is one’s future, and to be deprived of it, a harm (Marquis 1999:46-56). So

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<sup>97</sup> Dean Stretton presents a variation on this theme, though in a footnote he does express his tentativeness. His argument concludes that it is our *autonomous status* that confers on adults a “right to life”: “... newborns, infants and even perhaps very young children – who, I presume, are not yet autonomous agents – do not have a full right to life. Killing these beings without justification may be seriously wrong, both because harmful to the victim and (usually) because harmful to the parents: but such killings are never, in themselves, as wrong as killing you or me. If we accept this conclusion – as I am inclined to give the previous arguments – then the fetus (also not yet an autonomous agent) *at best* has this intermediate moral status: it lacks a full right to life” (Stretton 2004:159). Singer is sceptical about the “deprivation of a future” concept as a notion of harm or argument against homicide (Singer 1979:79).



we have justification for the *general wrongness of killing*, “deprivation of a future” explains also the fundamental wrongness of killing a pre-person: it, too, has a future.

The *second part* of Landman’s requirement can be satisfied by arguing for viability of the fetus as a morally relevant cut-off point, as I have done before. So my notion can allow early abortion, though perhaps not precisely in Landman’s idiom, which I take to be “on demand”, but nevertheless with *reasonable* argument. Yet it takes a “dim view” of “late abortion”; pre-personal viability is a cut-off point beyond which abortion should only rarely take place because viability is a highly significant moral trait; yet, even here, is not totally prohibited because extrinsic factors may so dictate.

But this form of “grading” has a significant implication: it would confirm my earlier supposition that inter-subjective evaluations of moral significance are not *of necessity* equal (although they may be), because both intrinsic potentiality and, particularly, extrinsic possibility of actuation usually differ.

But how can my sliding scale bridge the gap between the opposing camps? Well, for this to transpire, certain realistic concessions will have to be made by both sides. The conservative, on the one hand, will have to concede that even if termination is *prima facie* wrong, it is not invariably wrong. The liberal, on the other hand, will have to concede that even though there is no such thing as a pre-personal “right to life”, she will have to produce convincing contextual arguments in order to legitimate termination since it is always a moral matter. I do not mean arguments such as the utilitarian personhood argument, which is a general argument; I mean specific argument as to why a particular pregnancy should be terminated. The liberal would also have to admit the significance of viability in the debate, which should not be too much of a problem, since it is, as I have argued earlier, in line with general societal norms and intuitions.

Finally, my sliding-scale notion should not be seen to address only the intrinsic component of potentiality; one should conceive of it as reflecting the attainment of a certain level of moral value in virtue of the realization of a certain level of development. Contingency affects the actuation of inherent potential.



I recognize that my sliding scale notion is subject to criticism. I shall discuss the limitations of my notion shortly, the main being that it is *theoretical* rather than *practical* in nature, and can only be adjudicated on the basis of gestational age. I shall point out that, notwithstanding these limitations, a sliding scale notion does have some practical significance.

I identify critical questions about each premise of my argument. In so far as these criticisms address my arguments on speciesism and potentiality, on which my sliding scale notion is based, they have been answered in earlier discussions. There is, however, one critical question that I have not earlier responded to directly: does this contention not condone abortion? If it does, the follow-up question is: but is this consistent with my arguments on speciesism and potentiality, which argue in favour of prenatal moral value? What is the sense of making much of those arguments, just to disregard them when opportune? At this point I shall say only this: I concede that this is true, yet I wish to remind the reader that the object of this dissertation is to evaluate the utilitarian arguments on prenatal and pre-personal moral significance, not to argue for or against abortion. What will become apparent later in this work, when I in fact address the consequences of my respectfulness argument, especially in as far as it affects abortion, is that my position is that whilst the utilitarian arguments are not persuasive, this by no means implies that abortion is taboo, because conceptions of prenatal moral significance can never be absolute. The question is when and where abortion might be legitimate, and how should we argue for or against it. In essence, the condoning of termination is only legitimate if and when the pre-person's moral significance is such that its interests can be over-ridden by other arguments. In effect, this implies that its moral significance is significantly diminished, based on sound argumentation, which is a far cry from the utilitarian position. Since I have argued that intrinsic potentiality and extrinsic factors should be accorded equal importance, this diminished moral significance might be due to diminished *inherent potentiality* or diminished *extrinsic potentiality*. The first is less problematic; examples are conditions that will preclude the pre-person from ever developing a significant psychological existence. This ties in with our intuitions; for example, research has shown that the more severe the abnormality, the greater the number of respondents who will accept it as an indication for the termination of pregnancy (Norup, 1997:444). But the converse



is also true: the equation becomes more difficult to balance morally as the severity of abnormalities diminishes.<sup>98</sup> So the concept of a sliding scale is realistic as far as inherent potentiality is concerned (Norup refers to this as a “gradualistic view”).

But conceptions of extrinsic potentiality might be more problematic. The best example of questionable *extrinsic potentiality* is the pre-embryo in the Petri dish, which cannot have any realistic hope of actuating its intrinsic potentiality unless it is transferred to the *in vivo* environment, and is able to implant itself in the endometrium. Severe maternal risk is the second apparent example; not only does the pregnancy place the potential mother at risk, but because the mother may not survive, or her homeostasis may be significantly curtailed by the pregnancy, this indirectly diminishes the pre-person’s chance of survival. The moral “balancing act” becomes more problematic as the power of these external considerations decreases, for example the introduction of purely social factors into the moral equation. I have elsewhere argued that an ethics of responsibility charges that we throw the net quite widely as far as extrinsic contingency is concerned, which means that we cannot be too conservative when it comes to deciding which arguments are legitimate extrinsic contingencies. In a later section I shall make a proposal on how *practically* to deal with this issue. In fact, this argument provides significant support for a sliding scale conception also as far as extrinsic considerations are concerned.

I conclude that the concept of a graded appreciation of moral significance is realistic. The actuation of potentiality proceeds beyond the birth process until all potentiality is eventually actuated. My principle of ever increasing moral significance therefore holds for all phases of human development. But the *particular significance* of this conception is important only until the advent of pre-personal separation-viability. Once viable, the pre-person has attained a level of moral value and significance that precludes its destruction unless arguments of overwhelming power can be presented, and this is bound to be unusual.

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<sup>98</sup> Michael Norup compared Down syndrome and cystic fibrosis with polycystic kidney disease and Turner syndrome.



## 4.2 The moral consequences of the respectfulness argument

In the *second* section of this chapter, I wish to evaluate the moral consequences of this argument, and its effects on the abortion debate and the position of unimplanted human *in vitro* pre-embryos.

My argument on pre-personal moral significance has two noteworthy moral implications.

### 4.2.1 A justified moral cut-off point

*Firstly*, the most significant is that it provides us with sound moral justification for a moral cut-off point, even if not absolute, beyond which termination of pregnancy should hardly ever be morally permissible. This in itself has several important implications.

Earlier, I posed the question: is this perhaps the elusive cut-off point, meaning a rationally arguable point beyond which abortion should only in absolutely exceptional circumstances be morally permissible? I argued that this is the only realistic cut-off point available to us. It supersedes the utilitarian suggestion for a relative cut-off point, i.e. sentience (in itself a complex, unsure and dubious argument that affords little protection to the pre-person) since it precedes sentience by at least several weeks. It is also more “conservative” than sentience, which for some might give it added legitimacy. Viability also precedes the utilitarian “cut-off point” of personhood by many months, if not years (no utilitarian has attempted to determine exactly when, at which age, a pre-person becomes a person).

If we accept my viability argument, we should, in Landman’s terminology, take an extremely “dim view” of abortions beyond somewhere between 23-25 weeks gestational age. The retort might be: that is exactly what we do. What is *new* in this argument? I grant that; it is generally what we do in this country, and what is done in many other countries, and is also in general compliance with the Termination of Pregnancy Act, Act 92 of 1996. We do this intuitively, and our intuitions are sound. We do this due to legal sanctions. *But we do not do this because we have sound philosophical and moral backing for our actions.* We can therefore not offer any sound reasoning for actions, apart from our intuitions, and this makes our actions morally questionable, or open to revision. In this my argument is therefore significant for two reasons; *firstly*, since, for the first time, it grounds both our intuitions and this aspect of



Act 92 in sound philosophical reasoning. And *secondly*, if we for a moment divert our attention abroad, not all countries take the same “dim view” of late abortion, perhaps because of the manner in which traditional arguments that restrict abortion are argued, as a *carte blanche* against abortion. They have failed in their aim to deter termination, whereas my argument does not support an all-or-nothing conception. For instance, Israel (and, until earlier this year, some American states), allows termination on demand at any gestational age (*Roe v. Wade* nevertheless regards viability as a significant cut-off point if specific States so wish to argue). In countries where late abortions are permissible, there is, similar to the South African situation, no philosophical justification, although there is evidence of societal support for the significance of viability.

So, the *moral result* of my viability argument is that I have provided what I regard to be a sound moral argument that both satisfies our mores and justifies existing practice in terms of how to treat separation-viable pre-persons. I do not propose that we radically change our practice in this respect. This leaves the more contentious phase of pre-personal life when the human being is not yet viable; i.e., the pre-embryo, embryo and pre-sentient fetus. The vast majority of legal terminations in South Africa are performed before the end of the twelfth gestational week, i.e. long before viability is at issue. If my argument intends any real significance, this is where it has to impact. The question is, does it, and if so, how?

#### **4.2.2 A moderate position on abortion**

The second moral consequence of my position is to argue for a moderate position vis-à-vis the practical handling of pre-viable fetuses. To begin with, I do not support an absolutist view. I propose, based on my argument for intrinsic and contingent potentiality, a responsible, moderate and *rational* view, steering clear of the extremes of absolutist denial of moral significance, and an acceptance of absolute moral value, or an absolute pro-choice v. an absolute pro-life view. It seems to me that once one has accepted that absolutist views are unrealistic, and the absolute sanctity of prenatal life (*beings who are not yet viable*) is not at issue, then we have opened the door to legitimate termination, and it is merely a question of *where* and *based whereon* shall we draw the line – that is, if we elect to draw a line at all. We are then prepared to support abortion *in principle* (or at least not absolutely *deny* it in principle) because we accept that embryonic and fetal life presents no absolute moral value. Although



destroying a fetus, i.e. undergoing termination, is always an intervention of great moral import, doing so without reason, or for frivolous reasons, is *prima facie* particularly wrong. But abortion is not *absolutely and invariably* wrong. Once we have accepted this compromise, it seems to me that the great dispute has lost its edge.

This is a compromise readily accepted, surprisingly, by rather conservative groups. For instance, this was the position in South Africa prior to Act 92; the influential Dutch Reformed Church, together with most other denominations (excluding the Roman Catholic Church, who, in a lengthy papal paper dated 25 October 2004, re-affirmed their opposition to the “horrible crime of abortion”, as reported in *Die Burger*, 26 October 2004), and society in general supported the previous Abortion Act that allowed termination of pregnancy in certain specific circumstances, e.g. after rape and incest, and with severe maternal and fetal risk. The moral implication of the acceptance of these contingencies was, albeit tacitly, to support this compromise, i.e. to accept that termination is not invariably wrong. But conservatives did not take their reasoning to its logical conclusion, and did not realize that this compromise seriously undermined the moral legitimacy of their position, and their opposition to termination. So conservatives drew a very definite line at, say, incest. But the effect was to concede the preponderant power of contingent factors, since the intrinsic potentiality of the fetus was never questioned. Once this is done, what justification does one have for denying that someone else’s contingent factors are not as sound as one’s own?

So the question is if absolute positions on pre-viable pre-personal life are not tenable, *should* we at all draw a line, *at all* restrict the moral legitimisation of termination? If the pre-viable pre-person cannot invariably claim a right to the continuation of its life, why not leave particular cases to the conscience of those primarily involved, since they are best equipped to decide? The temptation to do this exists; it would bring me closer to what I perceive to be the “mainstream” of thought on the legitimacy of abortion.

Moreover, I am sensitive to the lack of reproductive autonomy amongst many (South) African women and the need to empower them. Many South African women are but vessels for reproduction and vassals for their men. It is argued that access to termination is often the only way women might regain some reproductive control, some recognition of their autonomy. To deny this possibility, to force them to have children they cannot support, which society does not want nor is prepared to support, and who have little prospect of any future is morally irresponsible and indefensible.



A third reason is that my graded view, and perhaps even also my view on viability, might be more acceptable if I do not burden it with a limitation to free access to termination of pre-viable pre-persons, i.e., if I restrict its significance purely to the realm of theory. But I withstand this temptation because I believe that we *should* draw a line. But not like the ultra-conservatives draw a line, in arguing that, for instance, when faced with severe maternal risk, it is immoral to “sacrifice” one life in order to save another (Oderberg 2000:31). This implies drawing a line at some unrealistic “biological” or metaphysical position; we simply cannot hold, as does Oderberg, that fetus and female have equal moral standing. It goes against our intuitions to sacrifice a being with a proven track record, responsibilities, interests and relations for the sake of possibly saving one who has none of these; moreover, we might defeat our own purpose since the fetus is totally dependent upon the female and might not survive if she is at risk. Secondly, Oderberg’s position denies decades of bioethical development; it does not differentiate between significant life and purely biological life, without which it is impossible to rationally treat unsalvageable terminally ill patients, those in irreversible coma and persistent vegetative states. So we cannot realistically draw such unambiguous lines. We cannot argue that human life is *invariably* sacrosanct, that we would (in the example above) choose for the fetus and not the mother. Oderberg might retort that he simply differentiates between the moral wrongness of an act on the one side, and an omission on the other. My conception of morality does not allow me to hide behind such arguments; responsible ethicists have to make choices in these cases. Moreover, Oderberg’s line is clear, even if he denies that he has drawn one: pre-personal life may never be taken, even if consequently a person’s life is lost. This is the type of line we would have to draw, if we were to argue for such a clear and unequivocal demarcation of right and wrong.

But I recognise another critical problem in the line-drawing enterprise. I argue for a graded increase in pre-personal moral significance as the being actualises its potentiality. Yet I cannot, at some magical stage or another of pre-viable human life, justify a demarcation line beyond which moral significance precludes termination. The conservative has recognized this dilemma before me, and resolves it by drawing the line at conception or individuation as the commencement of the life of this particular being. So too the utilitarian; her response is to deny that a line can at all be drawn (*in utero*; she draws one at personhood). But my argument denies both of these extreme



positions; I cannot draw a rigid line. My dilemma is: I am as uncomfortable in drawing a rigid line as I am in arguing for free and unfettered access.

But is there perhaps another way of solving this dilemma without necessarily “taking sides”, by finding some middle ground? Is there some other solution to the problem? There is, it seems to me. I say I cannot justify any *rigid line* beyond which moral value is absolute and prefer to steer clear of immovable positions. *Instead of drawing a line, my position on fetal moral value poses an argument of ever-increasing moral significance in line with pre-personal development and actuation, and “invites” opposing contextual arguments about the moral significance of specific cases in a morally responsible way.* Since I am not absolutist, I think each case should, theoretically at least, be judged on the merit of the arguments presented.

What sort of arguments can be permissible in the “moral hearing”<sup>99</sup> that I propose? Within my argument, I can only allow arguments about potentiality. Arguments about intrinsic potentiality address intrinsic genetic potentiality. Arguments about extrinsic potentiality address the contingent possibility of the actuation of intrinsic potentiality. Some extrinsic arguments are readily convincing; for instance, that a ten-week fetus might be terminated in the process of treating the mother’s cervical cancer. But if the sole contingency is that the female wants to go on a holiday, or change her job, and finds a pregnancy she planned cumbersome, she is bound to encounter less sympathy.

Since I have opened the door to contingent arguments, I am in a quandary: I cannot prescribe the type of argument, and how powerful it should be to convince. Moreover, as in the nature of the law, different courts in different countries and in different times and circumstances allow different arguments, and with the same arguments, come to different conclusions.

This conclusion might be disturbing since it obviously introduces an element of subjectivity. There is no sense to my argument if I capitulate and allow the lines to be redrawn in each argument. Well, I do not capitulate; pre-viable beings are always morally significant, but their relative significance has to be judged on the basis of evidence presented in each instance. Secondly, I hold that as potentiality is actuated, as

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<sup>99</sup> If the word “hearing” seems a strange choice, let me explain: I have in mind something like a legal hearing, but of course not as formal and, since we are discussing morality, not “binding” in the sense that the results of a legal hearing might be. Perhaps the reader should form the picture of a rather formal, rational argument, with whoever contemplating abortion presenting arguments from both sides, all very theoretical of course!



time goes by, pre-personal moral significance increases; therefore arguments to neutralize moral value need to be of increasing power, even if it is impossible to determine beforehand how powerful they should be. Moreover, as in any hearing, the validity and convincing power of evidence cannot be prejudged, since that would preclude a fair hearing. Thirdly, I hold that societal mores change over the course of time, and this has to be reflected in my “moral hearing” as it would be in any other form of legal hearing. We do not still take “an eye for an eye, a life for a life”, although, at some distant time, we did.

Therefore, in my “moral hearing”, arguments in favour of abortion, would be those arguments that oppose the fundamental notion of *respectfulness of humanity and potentiality*, and incremental moral significance as potentiality is actuated,<sup>100</sup> in a process that might protect us from “slippery slope” allegations.<sup>101</sup> My notion of a “moral hearing” is in keeping with an ethics of responsibility. We cannot hide behind fail-safe rules. We have to admit that we are morally fallible, but we are prepared to grapple with our moral dilemmas, try and make rational decisions regarding them, and accept responsibility for those actions and their consequences.

My argument on abortion has been almost entirely theoretical. My intention is not to argue “for” or “against” abortion”, or to suggest how to handle this problematic issue in the market place. I have set out to examine conceptions of pre-personal moral value, to evaluate the utilitarian stance and to respond to it with a more realistic view. This I have done. But, since I am now apparently becoming more practical, and have commented on abortion, I can be challenged: how, if at all, can my “moral calculus” or hearing be performed *in practice*? It might seem to be totally impracticable, and if so, what sense does it make to argue it at all? Well, as I have said, my aim was not to come up with a magic formula to instantly solve the problem, but to examine the theoretical tenets of concepts of pre-personal value. I am not trying to be practical. But, if I *were* to attempt a practical application, is the practical meaning of this account of increasing moral value not perhaps to be found in bestowing “rights” upon the fetus? I would not

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<sup>100</sup> “During the continued creative process of fetal development both the natural and the human investment in the fetus becomes greater and for this reason late abortions may be seen as less acceptable than earlier ones” (Norup 1997:448).

<sup>101</sup> “However, we get to that point by accepting the argument that we may alter or interrupt the natural processes that shape the structure of our lives whenever it is convenient for us to do so. Once we accept this view, we are on our way. To avoid this slippery slope, then, we will need to respect these natural processes” (Wendler 1999:53).



use the expression “rights” in this respect, although “it is in terms of rights that much of the (abortion) debate has been conducted”; the rights of the woman pitted against fetal rights (Gibson 2004:221).<sup>102</sup> The conclusion of our moral “hearing” cannot be a right; like all moral decisions, it is tentative and open to correction. But once viability is reached, we can perhaps start considering some sort of “right” in as much as it is enforceable. Once viable, in the absence of significant and realistic contra-arguments, the pre-person may have a right to the further actuation of its potentiality, a “right to life”. Such a legal right can only be recognised indirectly. For example, an Act (of Parliament) can prohibit termination of pregnancy beyond a certain point, as Act 92 of 1996 intends. But Act 92 does not argue for protection of the fetus, absolutely prohibit termination of viable fetuses, or justify its stand. I would prefer that the Act recognize reasons for limiting access to termination. Secondly, it can be recognized retroactively similar to the *nasciturus* doctrine (pre-dating legal recognition of the infant if it is live-born), though this has no practical significance in the present debate.

So, in summary, the human embryo and fetus do have some moral value. We have a moral injunction of *respectfulness* based on its humanity and inherent potentiality of developing and actuating its genetically predisposed future. Moral value may be seen as a graded development in line with the development and actuation of potentiality, balanced against contingent arguments, in the pursuance of an ethic of responsibility. The advent of viability is particularly significant, possibly powerful enough to argue for some sort of right to life.

I have in passing cited a concern significant in contemporary society, one predominant in the minds of many ethicists, particularly those that argue for free choice in termination of pregnancy: the right of the female that her autonomy be respected. I cannot conclude this section without developing that theme.

What then about the *limits of contingency*; are the plight of the female and respect for her autonomy legitimate contingencies?

Earlier, in discussing legitimate contingent factors that might override intrinsic moral significance, I evaluated two issues, one more comprehensively than the other;

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<sup>102</sup> As Susan Gibson points out, there are three basic positions vis-à-vis the moral rights of the fetus: the fetus has a right to life from conception (I would say individuation), or comes into the possession of such rights during pregnancy. The third position is that this does not take place at any time during pregnancy (2004:222); the fetus therefore never has a “right to life”.



firstly the plight of the female, and secondly concern about respect for her autonomy. I concluded that the circumstances of the pregnant female who seeks termination of pregnancy – she may be unemployed, destitute, single, the sole provider – cannot in a conception of responsible ethics be ignored, or blamed on her own doing. I argue that these might be legitimate contingencies. Therefore, in my moral calculus, such genuine concerns might override intrinsic moral significance, probably only until the advent of viability. It will be the concern of the “moral hearing” to evaluate the nature and final legitimacy of individual cases.

But secondly, might we not argue female autonomy to be a contingency? I postponed my earlier development of this point since I had not fully developed my two-phased argument for pre-personal moral significance. Having done so, I can now conclude the argument. Personal autonomy is a fundamental human right that usually can only be overridden by very powerful arguments. Respect for autonomy might be a convincing contingency until pre-personal viability develops. But viability is a powerful argument that might override respect for autonomy in my moral hearing.

One of the most fundamental moral principles, especially in bioethics, and in any conception of responsibility as an ethical guideline (if not a theory), is the principle of respect for personal autonomy. There is probably no more succinct description of autonomy than that written decades ago by Isaiah Berlin:

“I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not other men’s act of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody – a doer, deciding, not being decided for, self-directed and not acted upon by external nature or by other men” (Berlin 1969:131).

The first four lines are of particular importance in the present debate.

The utilitarian conception of personhood and respect for female autonomy are mutually supportive in the abortion debate. Respect for autonomy, as, for instance, reflected in Act 92 of 1996, can more readily be advanced if supported by arguments of diminished intrinsic fetal value. However, if we argue that the fetus possesses *some* moral value, a moral argument commences – concerning the woman’s autonomy on the



one hand, and the power of fetal moral value on the other. There is, however, a tension of a different nature inherent to the concept of autonomy. This concerns the apparent over-emphasis of respect for autonomy in the developed world (particularly in the abortion debate), opposed by an apparent need to enhance female autonomy as a means of empowering women living in the developing world. I shall shortly discuss some ideas about female autonomy in the African setting, and then conclude with an evaluation of John Harris' "proprietary" view of freedom (autonomy).

Much of what has been written on autonomy in general ethical and bioethical literature has little direct applicability to the African scenario. That is not to say that autonomy has, or should have, a different meaning in Africa. Or that Africans are not "entitled" to respect for autonomy. Nevertheless, respect for autonomy may be a problematic concept vis-à-vis the developing world, particularly in bioethics. Autonomy in bioethics presupposes *rational decision making*, "that an individual evaluate and accept each of the reasons on which the individual acts" (Beauchamp & Childress 1994:123). *Being informed* is a critical prerequisite to rational autonomous decision-making. In the state health system, the pre-abortion interviewer is an under-qualified and probably over-worked nursing sister. The system is therefore unable to comply with the most basic requirements of informed consent and respect for patient autonomy.

In terms of autonomy in an African conception, there are unique problems of tendering information and rational decision-making. There are problems with language, social context and vocabulary, and capacity to understand and to partake of a moral debate. Savulescu and Momeyer (1997) argue that the doctor has a responsibility not only of supplying information and assuring contextual understanding, but also of promoting rational deliberation; how is an understaffed, under-trained public system supposed to comply?

Capacity – to make and take decisions – is another necessary precursor to autonomy. Maclean (2000:277-288), in his discussion on the evolution of the concept of *capacity*, focuses predominantly on capacity as the central determinant of autonomy. To evaluate and judge capacity is, even in more congenial circumstances, an awesome responsibility; in the culturally diverse South-African scenario with language and communication skills, capability, expertise and enthusiasm in short supply, this is simply so much worse.



Female autonomy, and especially in the life of the *black rural* female, is severely curtailed, in terms of bioethics, in terms of reproduction, but, sadly, also in terms of her general life. Some form of autonomy may have existed in the traditional tribal system, but colonialization, disruption of traditional tribal and family value-systems, migrant labour, and the piecemeal and haphazard introduction of western values and customs have combined to erode female autonomy almost totally. It has been said that to appreciate deprivation, suffering and discrimination, one should for a day become a rural black woman in (South) Africa. Anton van Niekerk (2001:155) quotes Virginia van der Vliet to argue that her inability to refuse sex, or insist upon the use of a condom, implies that *she has no rights, no autonomy*:

“Raised in (a) strongly patriarchal society, with a tradition of polygamy, macho ideas of masculinity, and an emphasis on her duty to bear children to ratify bridewealth contracts, (the married woman’s) rights to demand fidelity or the use of condoms, or to refuse sex, are, for most women, not negotiable. Economic dependency on her partner weakens her position further.”

In a recent parliamentary debate on the (South African) HIV/Aids report (*Die Burger*, 8 November 2002), junior Cabinet Minister, Ms Nozizwe Madlala-Routledge, raised some interesting and applicable points. The preponderance of female Aids victims (55% of HIV-positives in South Africa are female) is in part due to a power-differential in favour of the male and the subordination of females in relationships.

Ruth Anne Warren (1981:127) voices similar ideas with reference to the WHO-1992 report on reproductive health as a key to a better future. Under the heading of “Arguments for Freedom” (i.e. autonomy), Warren outlines the factors that limit women in their choices (and lives). Women often do not have the freedom to choose in reproductive matters, and Warren argues that access to abortion on demand extends their options to protect their own lives and improve those of their children.

Warren’s arguments are by and large consequentialist, focusing as they do on the harmful effects of denying women’s rights to choose. Rights based autonomy arguments focus on the diminution of autonomy inherent in the prohibition of the fundamental right to control one’s own body. This is also a popular feminist and civil libertarian argument: that these infringements are incompatible with women’s own moral status as human beings. When anti-abortionists, therefore, according to this



conception, oppose abortion on the basis of fetal human rights, they limit or diminish the human rights of women. This is a significant argument in the abortion debate: even if fetal and female rights are equal (which Warren does not concede), whose rights should be preponderant? It would be difficult not to choose, in this setting, for the sake of women, or to support arguments that diminish women's rights and further disempower women – especially in Southern Africa.

Whatever autonomy and rights women in general, and black, disadvantaged women in particular have in contemporary South Africa have been hard come by, and should be protected and enhanced, not diminished.

The specific application of our views on autonomy require further evaluation in terms of application to the concept of autonomy underlying the relationship between the pregnant female and her fetus. John Harris (1994:157-164) describes a proprietary concept of one's body: "if a human being has any just prior claim at all, he (sic.) has a just prior claim to his own body".

However, proprietary claims do not necessarily equate to a right to dispose of the "property" at will. Harris illustrates this point with two examples; firstly, if I legally possess the only dose of a life-saving potion that you require to survive – do I have a right to refuse you? and, secondly, if I legally own a very famous painting, do I have a right to destroy it even though I have proprietary right to it? I certainly have some clear sort of proprietary right in both respects, but probably not the right to withhold the potion or destroy a painting that in a sense, belongs to all of humanity; I certainly do not have a *moral* right to withhold/destroy (and neither would society so adjudge). The woman's right to abort experiences the same sort of tension; from a proprietary point of view, she may have the right to choose, but it may not be *morally* right. Harris argues that the violation of proprietary rights (in this respect) would be legitimate only "if there were no independent grounds for valuing it more than as an item of property" (*Ibid.* 159).

The question of proprietary ownership, he contends *is* of importance – not to determine the *right* of terminating fetal life (which, to him at least, has been settled on the basis of the personhood argument), but to determine *who* may exercise this right, may have rights in this respect (*whose autonomy is at stake*). Harris immediately discounts the "father's" right as comparable to rape: violation to enforce birthing would



for him equate to rape. Any prior or implicit agreement between man and woman (regarding possible pregnancy) is subject to her right to change her mind. This is a very significant and questionable position, affecting as it does the very basis of any relationship, and especially a legally sanctified one. The woman may e.g. not be empowered to make unilateral decisions regarding the disposal of say communal property (neither is the man), but she may dispose of the products of her most intimate relationships at will, and without at least *consulting* with her spouse or partner. To simply shrug this off by saying: “Well, I’ve changed my mind”, seems callous and shallow. This sort of apparent inconsistency has prompted Steve Clarke (2001) to suggest that authenticity in biomedical ethics is out of kilter with authenticity in life in general. He furthermore suggested that this should not be so, and that one – either one – has to be adjusted to bring it into line with the other.

Secondly, this is a strange and unrealistic position from quite an opposing point of view. Let us suppose the woman unilaterally decides to exercise her right to *retain* the pregnancy against the wishes of her partner; would this not make her totally responsible for costs and expenses, as well as continued support? In most legal systems that empower the woman to decide on an abortion, this is not the case, and notwithstanding arguments that support the woman’s exclusive autonomy, the man is held accountable for support. There is a third anomaly that comes to mind, and this is in respect of the right to the use of one’s genetic material. Surely the man has contributed half of fetal genetic content, including its sex, and this gives him at least some small measure of authority in the disposal thereof? Or has the man, simply by his willingness to have sexual relations with his partner, signed a full release stating that he has no further rights, interests or responsibilities barring eventual liability for support? Few of us would entertain a relationship based on such a bizarre premise, and the rest of us would surely pounce (or, at least, it is logically conceivable that we *could*) upon it to, with hardly any moral qualms, turn our backs on our stricken (unintentionally pregnant) partner! This scenario is out of tune with our deepest intuitions on the matter, yet this is what Act 92 prescribes. One last point about personal autonomy; Samantha Vice recently argued that a “right” to personal autonomy should perhaps only be conceived of as realistic if autonomous choices contribute to a “positive” life (Vice 2004; see also footnote 71, p. 147). It would be out of place to evaluate her argument here; nevertheless, problematic and contentious as her notion might be, I am inclined to be



sympathetic since I, too, feel that in the context of social living, some limitation to personal autonomy is not out of place.

How do these views impact on the moral legitimacy of abortion?

It might be useful first of all to set out the two opposing arguments in the abortion debate. The legitimacy of abortion might be based on three positions: firstly the liberal view that we all have a right to bodily self-determination. Secondly, feminists argue for a “right to make a moral decision regarding the continuation of a particular relationship”, based on a concept of relational autonomy (Gibson 2004:230). Susanne Gibson develops a third position: the *right* of the female to act as a moral agent, either as a Kantian “self-legislator” or (this is Gibson’s position) to act as autonomous moral agent in a network of moral relations. She has a right to make her own moral decisions regarding termination; realising that her decision has to be justifiable. Although no one has a right to overrule her decision, we may, and are probably obliged (since we cannot overrule it), to evaluate it.<sup>103</sup> Gibson writes: “In making a judgement about the moral value of this particular fetus or this particular pregnancy, a woman must in some sense formulate or adopt (or be prepared to formulate or adopt) a more general conception of personhood, which she must be prepared to defend against alternative conceptions, at least in principle.” Women may make moral mistakes in their judgements, and conceptually this implies “a set of standards against which the judgement can be assessed external to the woman herself”; there is no such thing as a “private morality” (*Ibid.* 229).

On the other hand, fetal “right to life” conceptions are based on two arguments for fetal moral value; firstly, the “conservative” view that this is settled at conception. Hereunder fall three particular ideas: a religious conception of ensoulment, be somehow linked to humanity, or be based on a position argued from potentiality. The latter might embody three different conceptions: moral value lies in the potentiality to become something else (or develop other characteristics, e.g. personhood), the potentiality to develop an inherent “natural capacity”, or in the actuation of a “natural process”. The second argument conceives of a “moderate” position; moral value is

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<sup>103</sup> The reason we cannot overrule her decision is fundamental to the abortion standoff: that is, that fetal personhood is, based on the ideas of W B Gallie (1956) an “essentially contested concept” that therefore can never be resolved, but that we consequently are obliged to keep on debating (Gibson 2004:223).



linked to the development of certain critical capacities that appear sometime *during* pregnancy (a moral cut-off argument), like the capacity to implant (into the endometrium), the development of an audible heart beat, the advent of separation-survivability or sentience, or even the process of birth.

My position is “moderate”: I argue that separation-survivability is a justifiable moral cut-off point. But the first phase of my argument might be seen to be “conservative” in virtue of the fact that I argue for moral value from humanity and potentiality. I have also argued that there are very specific qualifications to humanity and potentiality as moral determinants; neither is absolute, in fact, nor is separation-survivability. These qualifications make my position rather unique. Even if I argue for moral value, i.e. against free choice in abortion, my positions are qualified and contingent.

So the moral consequences of my argument are firstly, that the fetus has moral worth and it is *prima facie* wrong to terminate pregnancy. However, the prohibitions of termination should not be absolute and unrealistic simply because fetal moral worth is not absolute. I concede that this position makes it problematic to explore the limits of legitimate termination. No clear demarcation lines exist, apart from possibly the advent of viability, beyond which we should not support abortion. The termination of pregnancy for purely social reasons is wrong; indications should be substantive enough to override the inherent moral value of the fetus. This implies that each case should be evaluated and reasoned; there can be no blind following of rules or laws, no “easy” decisions. Secondly, in line with the sliding scale concept, it implies that these arguments should be stronger as fetal development progresses. And thirdly, along with Susan Gibson, I argue that a responsible position is that we should *always* be prepared and able to defend our positions since we are, in effect, legislating also for others. Even if abortion is a personal matter, morality of this nature can never be posited as a private matter. We should also accept the moral right of other agents to evaluate our decisions, even if, in virtue of the fact that the abortion standoff is an example of an “essentially contested concept”, no one else has the moral right to override our decision.<sup>104</sup>

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<sup>104</sup> I find it particularly useful to regard abortion as having an “essentially contested” nature. The contested nature is based on the “essentially contested concept” (ECC) of *personhood*. This view has the potential of changing the nature of the debate. According to W B Gallie, ECC has to meet seven requirements. It refers to concepts over which there is disagreement regarding proper use; there is no “one clearly definable general use”. The participants, therefore, do not agree to disagree, and the debate



As to the inherent *wrongness* of abortion, the question is: how wrong? And is it always equally wrong, and if not, why not? In the conception set out above, wrongness is relative since pre-personal moral value is relative. Therefore:

Termination is, *prima facie*, morally wrong, but not invariably. It is not wrong to terminate the lives of pre-persons who do not possess the potentiality to become normal persons, either through the absence of intrinsic potentiality, or through unfavourable contingent factors. It is in the nature of these contingencies that most of our difficulties lie. It is *prima facie* wrong to terminate the lives of pre-viable pre-persons who do possess the potentiality to become persons, and whose extrinsic contingencies are favourable for the actuation of intrinsic potentiality but it is not invariably and always wrong. In this instance, one should conceive of pre-personal moral significance as increasing as potentiality is actuated, in line with the actuation of potentiality as evaluated relative to gestational age. This increase in intrinsic or extrinsic value must be balanced with other factors, of which the rights (including the right that her autonomy be respected) and circumstances of the female predominate. The closer to term a fetus develops, the more would our intuitions direct towards protection. To terminate the lives of viable pre-persons is *prima facie* seriously wrong, though not invariably so, and would require very powerful arguments to convince.

Termination should never be a matter of following convention, rules or laws – each case should be decided on by means of a “moral hearing”. Legitimate arguments in favour of termination in the moral hearing are those that address intrinsic potentiality (the presence or not of), and extrinsic potentiality (the contingent possibility of the actuation of potentiality).

Because prenatal moral value cannot be argued as being absolute, this approach is not only realistic and responsible, but also morally legitimate.

But now there is a final aspect of this argument that I need to attend. That is the position of the *in vitro*, human embryo that is not to be implanted, which has been the subject of much heated debate in the philosophical, religious and political arena of late.

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is just about interminable. The dispute is not about meaning but content. Conditions (I) to (III) imply that the concept is “appraisive, signifying a valued achievement of an internally complex character.” (IV) implies that it remains open to revision, (V) that all parties involved recognise the contest over the use of the terminology. (VI) To avoid confusion of different concepts, all parties must recognise that the concept derives from the same exemplar – in this case, an adult person. (VII) “requires that the competition over the use of the concept sustains or develops the achievement of the exemplar”. The application to the personhood debate is self-evident (Gibson 2004:223-4)



I suggest that my ideas might have particular application in directing this debate, and this might also be the most significant result of my work.

#### 4.2.3 Frozen pre-embryos and stem-cell research

There is currently a particularly active debate on the moral position of the unimplanted *in vitro* human pre-embryo; not surprising, since thousands of pre-embryos are stored in a frozen state, never to be implanted.<sup>105</sup> What is to become of them? In Great Britain, legislation allows their storage for up to three years, but the recent destruction of about 3 000 unused pre-embryos has led to vehement protests from the Catholic Church with emotive cries of “mass murder”. Yet, conservative mores seem to be less concerned with this form of termination than with termination of pregnancy (Wendler 1997:47). A second problem is the morally correct response to scientific advances such as cloning, human stem cell harvesting and research, and the creation of particular pre-embryos, through *in vitro* fertilization, or cloning, with particular therapeutic aims (e.g. treating leukaemia in a sibling). This was a debating point in the recent USA presidential race (there are in excess of 100 000 frozen pre-embryos in the USA; Sen. Kerry favoured and Pres. Bush opposed their use in stem cell research). I suggest that if one can clear up the moral position of *in vitro* human pre-embryos by investigating their intrinsic and contingent potentiality, finding answers to these questions follows quite logically. My ideas might contribute to clearing up this moral muddle.

The central moral issue is: what sort of moral value can an *in vitro* pre-embryo have, and based on what? When the foregoing arguments are applied to the *in vitro* human pre-embryo not intended for implantation because it is redundant or has been created for other purposes such as research or therapeutics, the conclusion is that such

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<sup>105</sup> The moral status – if any – of the non-implanted human *in vitro* fertilized pre-embryo has been a bone of contention since it has become known that not all fertilized pre-embryos are implanted, or intended for implantation. For the sake of utility, human chorionic gonadotrophin (CGT) – a hormone that stimulates ovulation – is administered to the female to hyper-stimulate her ovaries to produce up to ten ova that are harvested during laparoscopy. Selected normal ova are exposed to semen, and three to five fertilized ova are selected and implanted (“gifted”, usually into the Fallopian tube). Every ovum implanted adds a cumulative eventual success rate (a single successful implantation) of about 10%; so, if three are implanted, the chance of a single successful implantation is equal to 30%, although multiple pregnancies are not unusual. Excessive pre-embryos are frozen but not used unless the first implantation fails. Initially the problem was restricted to the issue of dealing with these thousands of unused and superfluous pre-embryos; when various research opportunities arose, the question turned to the moral acceptability of using these pre-embryos for research purposes.



“beings” have only exceedingly limited moral value based on the *humanness* of the being. Speciesism, in this context, does not contribute much more than a limited respect for human life, and human tissue, since these beings can never become species members. But the moral value of a particular “human being” has to be contextualised in virtue of its intrinsic potentiality and contextual possibility. The *in vitro* being, secondly, might possess intrinsic moral value in virtue of the intrinsic potentiality of its genetic make-up. But intrinsic potentiality has to be supported by a realistic possibility of its actuation, without which it is meaningless. Since there is no way in which *in vitro* pre-embryos can develop without implantation into the uterus, its extrinsic or contingent potentiality therefore being zero, it has no realistic moral significance. In Wendler’s “natural process argument” – that confers moral significance in virtue of the *process* of development – the position is even clearer. There is no natural process to speak of. So the opponent of research is in a quandary; the only legitimation for a conservative position is a belief that these beings, too, have immortal souls. In the nature of such beliefs, there is little argument that we can offer to oppose them, but neither can the conservative convince us rationally; consequently, the conservative is often quiet on the disposal of redundant *in vitro* embryos (*Ibid.*).

This position is in keeping with my argument that there exists no implicit inter-subjective moral equivalence between “human beings” (in keeping with my earlier argument about a more restrained definition of “human beings”, we should not call pre-embryos “human beings”). This argument is particularly relevant in comparing *in vitro* and *in vivo* beings. An *in vitro* pre-embryo that is not scheduled for or is beyond gifting, an *in vitro* pre-embryo of the same “age” that has been gifted, and an *in vivo* fertilized pre-embryo, are not moral equals. The “gifted” *in vitro* pre-embryo, and the *in vivo* embryo have enhanced moral worth because of favourable contingent potentiality; they have a distinct potentiality of further development. The first example has very little moral value (“right” to consideration); it can never develop into a human person and remains a “clump of cells”. There is no question of a developmental path determined primarily by biological nature (Stone 1987:818). Moreover, the only action that implies looking out for this pre-embryo’s interests, is implanting it into the uterus. Nothing else that we can actually do can be to its benefit. If implantation cannot be performed, it can have no interest in a life it can never experience, and it consequently can have no moral



value (*Ibid.* 822). We may still feel a need to “protect” it purely because we respect human tissue, based on societal norms; our grounds for protecting it are not substantial.

Do we, in Hans Jonas’ alternative notion, possibly have a *duty* to protect it (Jonas 1984:38-41)? I do not see a direct, compelling and general duty towards protection, at least not in the current overpopulated state of the world. Very special circumstances like humankind facing extinction would have to exist before such desperate measures would justifiably be called for.

But what is to be the fate of these redundant embryos? May they be used for research purposes, and for how long? May such embryos be created with the specific purpose of using them in research, or for therapeutic reasons?

Whether these “tissues” may be used for research purposes, and the limitations on such research applications, depends on the way society wishes to handle human tissues. The moral value of these tissues is negligible, and for the sake of consistency, there is no prime *moral reason* to withhold it for research purposes, other than respecting the wishes of gamete donors and the sensibilities and customs of society. By the same token, there should be no moral problem with the *creation* of such beings for therapeutic or even research purposes. In fact if therapeutic possibilities and the results of research on e.g. stem cell use are promising, we might even have a *duty* to engage with society to promote research of this nature.

The formation of a blastocyst characterized by the presence of a central cavity presupposes implantation. Without implantation, the *in vitro* pre-embryo can never develop beyond this phase. Nature therefore places a limit on any conception of moral value it might ever have; as to *how far* experimentation is permissible, the immediate moral answer seems clear: theoretically and ethically at least, until the being becomes viable (others have voiced sentience as a cut-off point, but both it and viability, which precedes sentience, are distant developments). In practice, research is naturally limited, although tissue cultures can be kept alive almost indefinitely.

### 4.3 Summary

I have argued a position of respectfulness of pre-personal human life based upon its humanity, potentiality and separation-viability. I have argued that from



individuation, the pre-personal being has some inherent moral value in virtue of species membership and its potentiality to grow, develop, and eventually become a moral person. *Intrinsic potentiality* is determined by its unique genetic make-up. But *extrinsic contingencies* are equally important in pre-personal development, therefore in the development of moral significance; when unfavourable, intrinsic potentiality cannot develop and is meaningless. Moral significance increases in line with development and actuation of potentiality.

Pre-personal moral significance is never absolute, since either, or both, intrinsic and extrinsic potentiality may be sub-optimal. This opens the door to legitimised termination in all but the most conservative conceptions; it is a matter of which contingency arguments are in our view legitimate to widely open the door.

I hold a two-phase view of fetal moral worth. From individuation to viability, I support a graded, sliding-scale view of increasing moral worth as potential is actuated because the chances of further and final actuation increase in tandem. But moral value is not absolute and is balanced by intrinsic and extrinsic circumstances. However, separation-survivability might be a moral cut-off point; once viable, the fetus has moral value equivalent to what it would have as a neonate. Even here (before birth), value is not absolute, and abortion may be morally acceptable in special circumstances. And not all neonates are deserving of our protection; it would be morally wrong to attempt to resuscitate an anencephalic neonate (whether we should actively assist in its death is a different matter).<sup>106</sup>

Without counter arguments, we should treat all human beings who possess this type of potentiality with respect, and protect the weak, including individuated pre-personal beings. Arguments that favour protection might include intrinsic potentiality and the protection of a common human future, along the lines of Hans Jonas' argument.

My arguments are supported by, and are in keeping with, an ethics of responsibility.

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<sup>106</sup> The observer might question my justification for termination by using the same argument that I have used against the utilitarian: that the linkage of the moral status of the viable fetus and the neonate implies that she is obliged, if she hopes to be consistent, to support also infanticide. The argument is sound, but I have been careful to present what I consider as powerful arguments to deny the legitimacy of infanticide, something the utilitarian does not usually do. Neither do I conceptualise free access to termination, not at this, or at any other stage of gestation.



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*Morals and Ethics*

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<sup>i</sup> Tanya de Villiers and Paul Cilliers (2004:34-53) approach to the idea of self-realisation through a theory of complex inter-subjective interaction (subjects, amongst others, constitute the inter-active elements). “Narrative selfhood” amends theories of Freud and Dennett (2004:34) by means of complexity theory; the self can be seen as “emergent property of a complex system, which comprises the mental apparatus, the rest of the body, the history of both the body and the environment” (*Ibid.* 48). With “environment” is meant primarily *language*. Emergence is a characteristic of complex systems and result from non-linear interactions between components of the system. As such, emergent characteristics are the result of an interactive behavioural pattern (the exchange of information) that operates without a *telos*, and is unpredictable, irregular and contingent. These components, according to Freud and Dennett, are in constant interaction: genetic predisposition, mental apparatus, the body with its memories and experiences, other people, language, etc. – an endless list (*Ibid.* 48) that comprise a system “within which one constructs a self” (*Ibid.* 49). It follows that whilst some of these ingredients are open to interactive change, others, when actualised, are fixed. The self so constructed is more than the sum total of her constituent interactions. Emergence implies “moving to a higher plane”, in a complex, adaptive fashion (Holland 1997:12). So it is not too difficult to imagine the construction of the self as emerging from the interactions of a complex system such as described above. This type of complex system is highly sophisticated and dependent, since it requires the participation of *inter alia* many subjects as elements (one might even say *components of subjects*), upon the ready availability of other selves. For the existentialist, these “others” are as primordially implied as the notion “world”; “without the others I cannot exist” (Macquarrie 1972:75). The self emerges from an inevitable *prior* “society”. Since these “selves” can only be human, this analysis again underlines the importance of speciesism in constituting the emergent self – the self emerges from the sum total of this interactivity. But that which emerges is not fixed and final – it is contingent and provisional, and subject to change.<sup>1</sup>

<sup>ii</sup> I find general support for this position from divergent ethical theories and views.

It is firstly a position with *Christian-theological* undertones. God is the god of the oppressed and vulnerable; the development of this theme into the *Status Confessionis* of the Declaration of Belhar led to the suspension of the Dutch Reformed Church from the World Council of Churches. The accusation was that the DRC had denied the basic tenets of Christianity by not recognising firstly, that it had significant social commitments, and secondly, that these social responsibilities extended also to “coloured” persons. As James Cone argues, whereas white Christians had a “spectator” approach to suffering, black religious perspective of suffering developed from intense personal human struggle against slavery and oppression (Cone 1975:183). But there are also practical examples from the New Testament; the Christian ethic of caring for the suffering and weak is evident in miraculous cures of the sick and dying, and is summarized in the parable of the Good Samaritan (Luke 10:25-37), and in the words of Christ: “Come to me all ye that are *weak and suffering* and I shall give thee rest” (Matthew 11:28). The Samaritan parable extends the meaning or application of this responsibility to include all who are in need, thereby making it a moral injunction, not an option that the Christian may wish to consider. This general Christian ethic is of course also found in most other major religions; it is e.g. an important aspect of Islam and Hinduism; the Hindu *Festival of Lights* that honours nature is held for the eventual benefit of the poor and destitute. During *Ramadan* Muslims feed the poor and destitute. Religions generally recognise a need and moral *duty* to care for the less fortunate members of society.

Secondly, the *Kantian* conception of *respect for the individual person* is a strong moral injunction, and charges us to recognise, and have respect also for the suffering of individuals. My position is in fact based on this injunction, although when I extend it to include the biomedical treatment of pre-personal humans, I do not propose acceptance of the “absolutism” of Kant’s universalizability (that any moral rule should in principle be universalizable); we should be mindful that Kant’s conception operates in an essentially rational environment. All *rational* agents, he proposes, would agree to his proposal for morality. In ethics in general, but particularly in the bioethical sphere, universality is eclipsed by a requirement to accommodate context and circumstance in caring for the *individual*.

Thirdly, I find the *golden rule* approach, either within or without religious conceptions, of particular significance in support of an ethics of care. The basis of an ethics of care is to address human suffering; we are at our most vulnerable and defenceless at the moment of suffering. Guidelines on our treatment of others should include the prevention of suffering because we respect others as individuals; the golden rule implies that our motivation is because we too do not wish to suffer, and wish to be respected. An ethics of care draws on “capacities of love, care, empathy, comparison and sensitivity”, is “relational” and seems to have self-evident importance in any realistic conception of the morality (Rachels 1995:35).



But there is a second motivation for an ethics of care; we can care for others in a truly *altruistic* sense, and this is closer to the motivation for caring that is apparent in the bioethical relation, or in basic humanitarian deeds. A purely humanitarian approach equally directs me to care for the weak, the vulnerable, the suffering.<sup>iii</sup>

But what is particularly significant about the golden rule principle is that it seems to be absolutely basic, fundamental and essential to the human condition. The rule implies *firstly* a certain *social situatedness* without which morality has no meaning, and within which I accept certain responsibilities vis-à-vis others. I am reminded here of Aristotle's description of social morality as determined by the *polis*, even if his is an advanced development of the rule applied in a contractual sense. The "contract with society" refers to my *responsibility* to repay society for my moral education by ensuring the perpetuation of that moral education in next generations. The Aristotelian duty can only be realistic if I care for society and its individual members. But we do not require Aristotle's "advanced" society in order for the rule to be operative; the rule functions as soon as society exists, and this means, in the nature of the human condition, even in the most basic or "primitive" forms of society, although it may then be modified or superseded by other rules generated in that society.

*Secondly*, for this rule to have meaning it is essential that I have existential experiences of pain and pleasure, and can relate and project these experiences to other human beings, i.e., know and understand what it means to "do unto others" (the content of the rule would obviously go beyond "pain and pleasure" to include all forms of experience). *Thirdly*, a responsibility towards other members of society prevents certain actions that can cause pain. Like Aristotle's *polis*, I am primarily concerned with "my" society.

I pointed out earlier that the parable of the Good Samaritan (Luke 10:25-37) extends the meaning and definition of society to whom I have a moral duty to include all persons who are in need, who are suffering, who are weak and who are vulnerable, and whom I encounter. Some aspects of such a description may be eminently applicable to the prenatal being. I find the almost automatic, intuitive development of morality in the above description significant. Morality is an essential ingredient to the human condition, and has been since time immemorial. The requirements to the development of this form of morality are a *sine quo non* for the human condition: some form of societal involvement and an understanding of how my actions affect others.

Fourthly, notwithstanding contemporary distrust of *emotivism*, moral emotions that inform about suffering, deprivation, harm, and injury, and protecting and helping those who are in need by addressing injustice, may be particularly applicable and legitimate in our moral calculations (Stevenson, in Rachels, 1995:40). Emotions play a significant role in all our important moral debates and action-choices. These strong emotions would direct our actions towards the prevention or alleviation of pain and suffering. Without these, morality is a cold and uncompromising expression. Analysis of emotions from an existential phenomenological view can alleviate concern about the subjective and distrustful nature of emotions, and clarify their legitimate moral role.

Emotions are "aroused by states of affairs in the world", i.e. reflect our reactions to "objectively occurring events". Moreover, we "learn to master our moods" within limits and many of our emotions are appropriate in the sense that they are characteristically human responses in a given set of circumstances. Though we may err in the way we *feel* about things, usually emotions "attune" us to the real state of affairs (Macquarrie 1972:123-124).

But, fifthly, I find support even within utilitarian philosophy in the principle of *indirect effects*, i.e. the effect that witnessing deprivation and suffering has (or should have) on others as an injunction to protect the weak. It would be reasonable to expect that decent and empathic persons would be appalled at witnessing suffering, and would at least attempt to remedy those situations. In part, this may operate through emotions and empathy, but we should probably be appalled even in the absence of any particular emotive response.

Sixthly, from principlism I take the *principles of beneficence, of non-maleficence, of distributive justice* (to argue for conditions that limit or abolish suffering). It is a fundamental principle in biomedicine, and I suggest in life in general, that when at all possible and within our power, we shall refrain from – in fact, prevent – deeds that may be argued to be harmful to others in favour of the opposite. Rawls' principle of fair – *just* – distribution, is a method blinded agents would employ to prevent suffering (primarily their own, but by extension also the suffering of others).

<sup>iii</sup> In his 1989 publication, reprinted 1999, this is the type of future that Marquis conceives of. I accept Marquis' position as long as we do not attempt an evaluation of a particular future, but leave that to the person whose future is in question, thereby also respecting each individual's autonomy. I believe that my evaluation of my future is my prerogative; it is totally subjective. With Marquis, I regard all futures as



equally valuable from the point of view of his argument. Stretton – see below – enters into a lengthy discussion and criticism of relative values of different futures, which do not apply in the way I read the argument. When we apply the argument to justify present value, we do not yet know what sort of future a person or a fetus shall have, only that he has a future constituted by all the experiences, activities, projects and enjoyments that he would have, presumably comparable to mine.

The “standard argument” – I should not be killed since that would deprive me of a future, developed by Marquis from the ideas of Jonathan Glover (1977) and Robert Young (1979) – is by no means unchallenged. It is not primarily the loss of life, argues Marquis, that makes killing wrong, but the concurrent deprivation of “all the activities, projects, experiences, and enjoyments, which would otherwise have constituted my future personal life” (Marquis 1999:49). This claim fits in with one’s intuitions, refutes the claim that it is only the killing of humans that is wrong, does not refute even active euthanasia, and “straightforwardly” entails that killing children and infants is seriously wrong since they, too, have futures. Pre-personal moral value – also of fetuses – is based on the futures they are likely to have. Marquis contends that this argument, if correct, would deny the justification of most except perhaps the earliest abortions, but this is a position that I feel can be modified when the circumstances, and external and internal qualifications of a particular future are entered into the equation (*Ibid.* 50-2). Dean Stretton, for example, argues that the deprivation of a future does not harm a present being unless there is some sort of “psychological connectedness” between the “two” (who are of course the same being at different phases of development). This represents a variation of the “personhood” account, since the psychological characteristics argued can be argued to form part of the characteristics of personhood. All the arguments I have previously employed in this respect are applicable here. A second though as yet unexamined reason not to kill is based on respect for autonomy (Stretton 2004:144-180). A second “deprivation argument” that Stretton opposes is Jim Stone’s (Stone 1987 818-9): the deprivation of a biologically determined, i.e. genetically based, future does not harm a being (*Ibid.* 63). Stretton basis his refutation on two arguments also employed to refute Marquis’ deprivation argument: Firstly, metaphysically speaking, we are “most fundamentally persons (psychological beings) or embodied minds”, rather than biological beings. This argument must be seen, I think, in relation to my discussion on speciesism, especially from the point of view of existential phenomenology. We are, admittedly, psychological beings, but we exist through our bodiliness, and both “have” and “are” bodies. We are moreover constituted through our bodiliness. Secondly, it might lead to discrimination in the wrongness of killing since not all futures are equivalent in value. But I think a revised qualified position on the value of a future, together with a view that the concept of a future should be seen as a threshold argument and not an absolute argument, can save Stone and Marquis. Stretton denies this possibility in favour of his “connectedness” theory, but accepts this argument denies moral value for infants and children. Scott Gelfano uses Judith Jarvis Thompson’s oft-quoted “plugged in violinist” thought-experiment (Thompson 1971:47-66) to deny the essential premise of Marquis’ account that it is generally wrong to kill an innocent person because one denies him a future. The violinist presumably has a future of value to him, yet unplugging him is not immoral (Gelfano 2001:138). But Gelfano offers us no alternative to Marquis’ account of the wrongness of killing, so his own argument is rather hollow. Had he thoroughly thought through his argument, he would accede that the absence of an alternative account on the wrongness of killing means that he actually infers that Thompson’s motivation to unplug the violinist can be translated into a *general* reason why it is morally acceptable to kill beings who have a future, something patently unrealistic and problematic, and consequently probably not intended. Moreover, to compare abortion with unplugging a violinist is unrealistic both on account of the unrealistic nature of the comparison as well as the disregard for what abortion usually (in the way it is performed in South Africa) or at least quite often entails – not the clean armchair action of the unplugging of an unwanted parasite, and merely walking away from it, but a messy, bloody, instrumental intervention that destroys the fetus while sucking it out of the womb. Killing it is not, as in the case of the violinist, unintentional, but is part of the procedure. And both Thompson and Marquis agree that this *is* immoral. Furthermore, what both critics miss is that Marquis argues from the premise that it is wrong to kill you or me because we have a future; he does not argue why it may be wrong to kill the plugged violinist.

Having used Marquis’ argument, I recognize two concerns. Firstly, as Dean Stretton has argued (2004:146-163), the deprivation of a future does not harm a present being unless that being is psychologically connected to the “future” being, and of course the fetus and its eventual adult counterpart are not so connected. This seems to be a variation of an argument that Peter McInerney voiced already in 1990 (McInerney 1990:284-8). Does, in fact, the fetus already have a future of which it can be deprived?



The connections between fetus and later adult are different from the connections between various phases of adult life with respect to three relations: memory, continuity of character and intention-to-action. The *memory* of the later persons either overlaps with that of the earlier, or at least contains aspects of the experiences of the earlier. The *characters* of the two “beings” are similar or explicably different. *Action earlier intended* is later executed. Whereas infants may be said to possess a limited form of these mental abilities, early fetuses do not, and there is only a measure of biological continuity between them and the adults they might become. A fetus, argues McNerney, can therefore not have a future unless we conceive of it as being separated from it by several “layers” of possibilities; it does not yet have a *personal* future, only the *potentiality* to develop a personal future.

I think Stretton’s is a variation of the utilitarian “personhood” argument, and therefore deny it on the same arguments that I have earlier employed. But McNerney is not as easily set aside. Can we rescue Marquis from this serious challenge? We can; McNerney has provided us with an answer. If we substitute Marquis’ concept of “future” with a modified concept of “potentiality to develop a future”, we not only answer McNerney effectively and adequately, but we also succeed in summarizing the potentiality argument, for a discussion of which I refer the reader to the next section.

A second question might be raised in respect of the legitimacy of moral factors that might determine a “future like ours”: to what extent are we morally permitted to apply factors extrinsic to the prenatal subject in determining its moral value? Let us take as example the circumstances of a pregnant homeless, penniless indigent mother of ten undernourished children. It is unlikely that such a potential child can be said to have a realistic possibility of “a future like ours”. Should this therefore have an effect on determination of prenatal moral value, and termination of pregnancy? The point needs to be made that the determination of prenatal moral value, and the eventual decisions about possible terminations are two different matters. If we allow these considerations to influence our determination of *moral value* we may be discriminating unjustly against this being. But having determined its moral value, a decision on termination should take into consideration a myriad of divergent factors and issues, a significant one of which is its moral value. So in this respect, we should broaden the concept of a “future like ours” to include extrinsic factors such as those discussed above.

<sup>iv</sup> Separation-survivability should be seen in context. Firstly, although I have taken 25 weeks gestational age as my “cut-off”, based on a widely held contention, I should point out that this is by no means universal. For instance, 23 weeks is taken as cut-off in Japan, and 24 weeks in the USA. There are two reasons for the difference: the availability of neonatal ICU facilities and funding (treatment is extremely costly), and a willingness to accept a higher morbidity rate (predominantly cerebral palsy and blindness) for the sake of better survival figures. Secondly, it follows that socio-economic and budgetary factors influence outcome, that is, survivability. Improved antenatal care improves outcome in several ways. For instance, maternal disease like hypertension will be treated earlier, and the incidence of prematurity is decreased. But improved post-natal care of the still premature infant at home after discharge will likewise improve outcome; in poor communities, premature infants are often re-admitted with malnourishment and gastro-enteritis.

The 25-week cut-off is a compromise between a utilitarian approach of trying to achieve the best results with a limited budget, and a non-utilitarian approach of looking out for the interests of individual infants without burdening society with the costly care of too many seriously impaired subjects. Before 25 weeks, every gestational day gained is critical. With a 25-week/500g cut-off, eventual survival of 80-90% of neonates can be achieved, with 10-15% significant morbidity. Maureen Hack, one of the most productive researchers on the subject, has shown that morbidity is often initially over-diagnosed, that is, that eventual outcome is significantly better than initially projected (Kirsten 2004). Hack and co-workers reported a survival rate of between 23-43% in ELBW – extremely low birth weight – infants of less than 750g (Hack, Friedman and Fanaroff 1996:931-937). In a previous national study, survival was as follows:

Survival rate	Gestational age	
15-18%	<23 weeks	
54%	24 weeks	
59%	25 weeks	
71%	26 weeks	(Hack, Wright, Shankanan et al. 1995:457-64)

As to eventual outcome in young adulthood, a comparison of two groups, a study group of 242 very LBW (mean 1179g) and a control of 243 normal birth weight (above 2500g) infants showed a statistically significant difference in successful high school education (74% v. 83%), IQ (87 v. 92), and



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neurological impairment (10% v. 5%). LBW subjects were much less likely to enrol in tertiary education programmes, has lower academic scores, but, surprisingly, less likely to alcohol and drug abuse, and less likely to fall pregnant (Hack, Flannary, Schluchter et al. 2002:149-157). Note that these infants were born between 1977-79, when neonatal intensive care was in its infancy and some of the most basic and significant treatment modalities used widely today, were not yet available. Possibly the smallest infant to have survived and developed apparently normally (she is now 15 years old), had a birth mass of 280.8 g; an even smaller 243.8 g, premature infant has, at the time of writing, survived the first three months of life (*Die Burger*, 23 December 2004). This is the closest we have come to ectogenesis – the development of the fetus outside the uterus.

The ethics of treating these infants, particularly those with a birth mass of less than 500 g, is worthy of independent study; apparently, very little has been published on that particular aspect.