

# The moral status of the human embryo and fetus

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The following positions constitute the political map of the debate on the moral status of the human embryo and fetus.

*'Pro-Life'*: The embryo-fetus has full moral status, equal to that of any adult human, from the moment of conception; or

*'Pro-Choice'*: The embryo-fetus has no intrinsic moral status (i.e., no moral status solely by virtue of its own characteristics).<sup>1</sup> Such status is only acquired at birth or even beyond and, when acquired, is acquired to the full extent possible. Until then, any moral status the embryo-fetus has is derived indirectly from the moral status of those with intrinsic moral status; or

*'Compromise'*: The embryo-fetus has, to begin with, a minimal intrinsic moral status, which increases with its development during gestation. Full moral status is, however, achieved only at birth or beyond.<sup>2</sup>

In this paper, I apply the moral theory of Alan Gewirth (1978) to decide which of the 'pro-life', 'pro-choice', or 'compromise' positions should be espoused. In Gewirthian theory, the supreme principle of morality is the 'Principle of Generic Consistency' (*PGC*), which requires all agents and prospective agents<sup>3</sup> to grant generic rights<sup>4</sup> to all agents. Gewirth demonstrates that the *PGC* is categorically binding on agents by showing that agents deny that they are agents if they do not accept the *PGC* and act in accordance with it.<sup>5</sup> *En route* to proving this, Gewirth proves that an agent denies that it is an agent if it does not consider the sufficient reason why it has the generic rights to be that it is an agent. Consequently, agents deny that they are agents if they do not grant the generic rights equally to all agents (regardless of any of the characteristics they or other agents might contingently possess). So, no additional or stronger generic rights can be conferred on agents by their having characteristics not necessarily possessed by all agents.

Unless agents have a compelling reason to consider the embryo-fetus to be an agent from the moment of conception as they have to consider any



adult human to be an agent, Gewirthians must reject the ‘pro-life’ position—which usually rests on the idea that human life (biologically defined) is the sufficient condition for having full moral status. But which of the ‘pro-choice’ or ‘compromise’ positions must Gewirthians espouse?

This paper has five parts. In Part One, I outline Gewirth’s argument to the *PGC*. In Part Two, I suggest some contingent and indirect ways in which the embryo-fetus might be protected by the *PGC*. In Part Three, I present Gewirth’s view (1978, pp. 142–144), which is shared by Klaus Steigleder (1998), that it is dialectically necessary for agents to accord intrinsic (i.e., direct or non-derivative) moral status to the embryo-fetus

- (i) *as a partial agent* (which has some of the characteristics needed to be an agent to at least some degree, without having sufficient of these to the degree needed to be an agent) in proportion to the degree to which it approaches being an agent;<sup>6</sup> and
- (ii) as a potential agent.

I argue that Gewirth’s use of the analytic ‘Principle of Proportionality’<sup>7</sup> to demonstrate (i) is unsound, and that (ii) cannot possibly be true. Thus, James F. Hill (1984, p. 190) is probably right that non-agents *as such* can, at most, have derivative moral status.

However, in Part Four, I argue that it does not follow that the *PGC* does not accord *the embryo-fetus* intrinsic moral status in proportion to its ability to display the characteristics of an agent. Because agents cannot know with *absolute* certainty that the embryo-fetus is not an agent, the *PGC*, in its application, requires that the embryo-fetus be regarded as possibly an agent. Furthermore, through precaution, the *PGC* requires this possibility to be taken seriously in proportion to the degree to which the embryo-fetus has characteristics relevant to empirical judgment of its status as an agent. In addition, because evidence that the embryo-fetus is a potential ostensible agent is relevant to such judgment, *under precaution*, such evidence confers a degree of moral status both on its own and when added to considerations of proportionality. Gewirth and Steigleder are right about the intrinsic moral status of the embryo-fetus, but for the wrong reasons.

In Part Five, I argue that a full picture of the moral status of the embryo-fetus requires more than adding the intrinsic moral status conferred by proportionality and potentiality under precaution to that securable by derivative considerations. Proportionality and potentiality under precaution interact with derivative considerations in mutually reinforcing or qualifying ways.

I conclude that, although individual actions affecting the embryo-fetus must be considered on a case by case basis, Gewirthian theory supports a ‘compromise’ position on the moral status of the embryo-fetus.<sup>8</sup>

## 1 Gewirth's argument to the PGC

Gewirth argues from the claim of an agent to be an agent within the first-person perspective of that agent. It is appropriate for anyone considering the argument to imagine that he or she is that agent ('I'). The argument can be summarised as follows.

By claiming to be an agent, I claim (by definition)<sup>9</sup>

- (1) 'I do (or intend to do) X voluntarily for a purpose E that I have chosen'.

Because E is my freely chosen purpose, I must accept

- (2) 'E is good',

meaning only that I attach sufficient value to E to motivate me to pursue it. If I do not accept (2) then I deny that I am an agent—which is to say that it is *dialectically necessary* for me to accept (2).<sup>10</sup>

- (3) 'There are generic features of agency'.

Therefore, I must accept<sup>11</sup>

- (4) 'My having the generic features is good *for* my achieving E *whatever E might be*'  $\equiv$  'My having the generic features is categorically instrumentally good'.

Because I value my purposes proactively, this is equivalent to my having to accept

- (5) 'I categorically instrumentally ought to pursue my having the generic features'.

Because my having the generic features is necessary for me to pursue my having the generic features, I must hold

- (6) 'Other agents categorically ought not to interfere with my having the generic features *against my will*, and ought to aid me to secure the generic features when I cannot do so by my own unaided efforts *if I so wish*'.

which is to say,

- (7) 'I have both negative and positive claim rights to have the generic features'  $\equiv$  'I have the generic rights'.

It follows (purely logically) that I must hold, not only (7), but also

- (7') 'I am an agent  $\rightarrow$  I have the generic rights'.<sup>12</sup>

Consequently, it follows (purely logically) that I must hold



(8) 'All agents have the generic rights'.

Since I deny that I am an agent by denying (8), every agent denies that it is an agent by denying (8). Thus, (8) is dialectically necessary for every agent.

## 2 Arguments for derivative status

### 2.1 Indirect vicarious protection—the embryo-fetus as part of its mother

The embryo-fetus (post-implantation until birth) is part of its mother's body. *As such*, to harm it is to harm its mother. Hence, its mother's permission is required for any procedures involving it.

However, as a part of its mother, the embryo-fetus has special features. It is different from one of its mother's arms or legs, because (at present, at any rate) her arms or legs (unlike the embryo-fetus) cannot be removed without lasting disability to her. If there were direct duties of the mother not to harm herself in Gewirthian theory,<sup>13</sup> then this would not protect the embryo-fetus, as it would her arm. *Merely* as a part of her body, the embryo-fetus is more like a tumour that spontaneously removes itself at some point.

Thus, *merely as a part of its mother*, the degree to which she values and cherishes it (or the opposite), and what she is prepared to do to or for it, will be decisive in what may or may not happen to the fetus. Of course, matters are complicated if the embryo-fetus must be granted intrinsic moral status (see Part Five), and what the mother may do with the embryo-fetus is, in any case, also limited by duties she has to other agents; but, for simplicity, such complications are, here, to be taken as read.

### 2.2 Indirect vicarious protection—the embryo-fetus as the property of its parents

Whether an agent owns parts of its body, even after they have been removed from it, is one of the most contested issues in bioethics. In my view, Gewirthian theory supports a strong 'property-in-my-body' thesis.<sup>14</sup> *On such a basis*, it might be argued that not only the mother of the embryo-fetus, but also its father, and, indeed, all its ancestral genetic relatives should, in principle, have some control over the embryo-fetus (in proportion to their contribution to its genetic makeup), and that their desires to protect it are capable of protecting it.

However, this is not so. Once a child attains full moral status, it cannot be the property of anyone. So, its genes, which were once the property of its parents must be regarded as having been gifted to it. Consequently, its



grandparents and other removed ancestors cannot claim *any* ownership of the embryo-fetus.

Once a fertilised ovum has implanted, it becomes part of its mother's body. At this point, *assuming that the embryo-fetus has no intrinsic moral status*, although its father retains his property right, its mother becomes the custodian of the embryo-fetus because her part-of-my-body claim takes precedence. Hence, any serious claim that the father has to the embryo-fetus can only apply before implantation (thus to embryos produced for *in vitro* fertilisation.)<sup>15</sup> Even then, the mother should have the greater claim, both because her genetic input to the embryo-fetus (through contributing the mitochondrial DNA) is greater and because she incurs greater risks in production of an *in vitro* embryo.

### *2.3 Indirect vicarious protection—the embryo-fetus as the beneficiary of contractual undertakings*

The generic rights are 'will claim-rights' (which is to say that agents may waive the benefits and protections guaranteed by these rights).<sup>16</sup>

This suggests that, e.g., Catholics may (even if a requirement to do so is not dialectically necessary) grant the embryo-fetus protections (equivalent in weight to generic rights, or even exceeding them), by optionally imposing the correlative duties on themselves.

An obvious difficulty with this suggestion arises if attempts are made (e.g., through legislation) to impose these duties on agents who are not willing to accept them, because no societies exist in which there is absolute consensus. It is possible to deal with this by the 'method of consent' involved in 'indirect applications of the *PGC*', by which democratic decisions may be imposed on those who do not agree with them.<sup>17</sup> However, this has limits; for it is impermissible for the *PGC* to grant the embryo-fetus (or any other being) protections that *override* the conflicting generic rights of non-consenting agents, as doing so contradicts that being an agent is sufficient for maximal moral status.

### *2.4 Indirect vicarious protection—protection of the embryo-fetus as a means to virtue*

In Gewirthian theory, the virtues must be regarded as character traits that dispose one to comply with the requirements of the *PGC*, or that inhibit one from violating them.<sup>18</sup>

It is arguable that to show disregard for the well-being of the embryo-fetus is evidence of a cruel character. Even if the embryo-fetus has no intrinsic moral status, it is similar in many outward ways to human agents. From fairly early on, it looks like a 'little person'. Thus, one might expect



(though this requires empirical evidence, which might be culturally specific) that insensitivity to the well-being of the embryo-fetus will correlate with relative insensitivity to the generic rights of human agents. Additionally (or alternatively), cultivation of sensitivity to the well-being of the embryo-fetus might be a means to maintain the virtue of being sensitive to the sufferings of human agents.

### *2.5 Indirect vicarious protection—protection of the embryo-fetus as a means to protect the sensitivities of agents*

Most human agents have strong protective feelings towards unborn children. There is an evolutionary explanation for this, as it is quite plausible that protective feelings for the young, including the unborn, confer an evolutionary advantage. Consequently, to show disregard for the well-being of the embryo-fetus is to cause great distress, even psychological damage to those who have natural, and, indeed generally beneficial emotional responses. Most importantly, to cause them this damage is to violate their generic rights. Again, the embryo-fetus is to be granted protection as a means to protect the generic rights of agents.<sup>19</sup>

### *2.6 Indirect self-connected protection—protection of the embryo-fetus as a means to protect it as a future agent*

Even if the embryo-fetus has no intrinsic moral status as a potential agent, it can, in being a potential agent, have moral status as a *future* agent. For example, it is arguable that a pregnant mother should not smoke because this will damage, not merely the embryo-fetus (putatively a potential agent), but the agent that the embryo-fetus will become if it develops normally. In this sort of argument, the embryo-fetus gains protection indirectly from the generic rights of an agent. However, this agent is a very special agent—it is the agent that the embryo-fetus itself will or might become.

Unless the embryo-fetus has intrinsic moral status, this kind of argument is strictly limited to cases where there is an intention by its mother to nurture the embryo-fetus to agent status. It will not, by itself, protect the embryo-fetus from being terminated before it reaches such status. However, where the intention to nurture the embryo-fetus to agent status is part of the intention that characterises the action being assessed, considerations of ‘futurity’ may be deployed with considerable force.<sup>20</sup>

### 3 Arguments for intrinsic moral status I

#### 3.1 *The embryo-fetus as a partial agent—the Principle of Proportionality*

Gewirth states the Principle of Proportionality as follows.

When some quality Q justifies having certain rights R, and the possession of Q varies in degree in the respect that is relevant to Q's justifying the having of R, the degree to which R is had is proportional to or varies with the degree to which Q is had. Thus, if x units of Q justify that one have x units of R, then y units of Q justify that one have y units of R. (Gewirth 1978, p. 121)

According to Gewirth, this principle is necessarily true. Given that it is dialectically necessary for agents to take being an agent as sufficient justification for having the generic rights (in full), that it is dialectically necessary for agents to grant the generic rights in part to partial agents in proportion to how close they are to being agents is to be demonstrated by substituting 'being an agent' for Q and 'the generic rights' for R in this principle.

As I have argued elsewhere, however, this principle (as stated) is not necessarily true.<sup>21</sup> While *it is* necessarily true that, when having Q justifies having R, and the possession of Q varies in degree in the respect that is relevant to having Q's justifying the having of R, the degree to which R is had is *a function* of the degree to which Q is had, it cannot be inferred (without further conditions being imposed) that having R is *such a* function of having Q that, if having x units of Q justify that one have x units of R, then having y units of Q justify that one have y units of R for *all* values of x and y.

It is also better to make explicit the conditions that must be satisfied for possession of Q to vary in degree in the respect that is relevant to having Q justify having R. Thus, with it being understood that R can be any property at all, the Principle of Proportionality should be stated as

When having some quality Q justifies having some property R, and the extent of having Q *sufficient* to justify having R in full is *not necessary* to justify having R to any extent at all, the degree to which R is had is a function of the degree to which Q is had.

By his Argument from the Sufficiency of Agency,<sup>22</sup> Gewirth has shown that being an agent (defined as having purposes that one acts for) is necessary and sufficient for having the generic rights *in full*. While having purposes that one acts for is an *invariant* relational property, to have this



relational property it is necessary to have particular capacities and properties (generic capacities of agency). While agents have all the generic capacities of agency to the degree needed to have this relational property, partial agents have the generic capacities of agency to a lesser extent. Gewirth claims that the Principle of Proportionality shows that the degree to which partial agents have the generic rights depends upon the degree to which they have the generic capacities of agency.

This may sound plausible, but it is false. This is because having the generic capacities of agency to the degree needed to be an agent is not only necessary (and sufficient) to have the generic rights in full (so that agents with the generic capacities of agency to degrees greater than that needed to be an agent cannot, thereby, acquire the generic rights to a greater extent), *it is necessary to have any generic rights at all*. This is because, as derived, the generic rights are will claim-rights; i.e., those who have them can always, by their free choice, waive the benefits that exercise of the generic rights entitles them to—provided only that they do not, thereby, neglect or violate their duties to other agents. This is not a function of an arbitrary espousal of the will theory of rights. It derives from the fact that, in the argument to the *PGC*, agents are required to claim the generic rights for themselves, not because they are required to value the generic features of agency for their own sakes, but as instrumental to their pursuit or achievement of their purposes whatever these might be. But, in order to be able to freely waive the benefits of a right, one must have the capacities needed to be an agent. Thus, partial agents cannot have any generic rights.

This objection cannot be evaded by acknowledging that partial agents cannot have any generic rights *strictly speaking*, and claiming, instead, that the Principle of Proportionality nonetheless shows that partial agents have 'quasi-generic rights' (unwaivable protections correlative to duties of agents not to harm partial agents, or to assist them in need) in proportion to their approach to being agents. The Principle of Proportionality can only license inferences about the *quantity* of predication of a quality, it cannot (by itself) license inferences that *alter the quality* of what is predicated. To claim that the Principle of Proportionality licenses inferring that, because *agents* have the generic rights in full, partial agents have quasi-generic rights to some extent, is to commit 'the fallacy of disparateness'.<sup>23</sup> To have a quasi-generic right is not to have a generic right to some extent. It is to have a different quality of protection from that granted by a generic right.

Thus, if it remains possible that it might be dialectically necessary for the embryo-fetus, *as a partial agent*, to be granted quasi-generic rights, this cannot be because the Principle of Proportionality, operating on the premise that agents are to be granted the generic rights, requires partial agents to be accorded quasi-generic rights.



### 3.2 *The embryo-fetus as a potential agent*

According to Klaus Steigleder

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

. . . It is not possible that agency can possess unsurpassing significance for the agent and in the other case [potentiality for agency] no significance at all. For the agent to judge otherwise would be inconsistent. (1998, pp. 241–242)<sup>24</sup>

But *why must* an agent see a morally relevant connection between a potential agent and itself? *Why* is an agent *necessarily* being inconsistent if it claims that it has full moral status but a potential agent has none? Steigleder does not tell us.

Now, we must remember that Steigleder is claiming that agents must (on pain of denying that they are agents) grant that potential agents, intrinsically, have at least *some* moral status (i.e., that they have at least some intrinsic moral status *for the sufficient reason that they are potential agents*).

Agents possess two kinds of properties: those they necessarily have by virtue of being agents, and those they possess only contingently.

Being an agent is sufficient for full moral status, and possession of characteristics that are necessary for agency is necessary for full moral status. Thus, properties that agents necessarily possess are undoubtedly morally relevant in being necessary for full moral status. However, we have seen that it cannot be inferred *directly* from this that such characteristics are sufficient for some intrinsic moral status.

On the other hand, if a characteristic is only contingently possessed by an agent, then it cannot be morally relevant as being either necessary or sufficient for *full* moral status. Nor can it be morally relevant as being either necessary or sufficient for *some* intrinsic moral status. It is *logically impossible* that an agent could deny that it is an agent by refusing to accept



that possession of a property that agents do not necessarily possess is sufficient for some intrinsic moral status.

Now, agents are not mere potential agents (non-agents that are possessors of the potential to become agents). They may once have been mere potential agents, but if so, they no longer are. Being a mere potential agent is not a necessary property possessed by agents. It is not even a contingent property possessed by agents. In fact, it is a property that cannot possibly be possessed by agents. If one is an agent then one is not a mere potential agent and if one is a mere potential agent then one is not an agent. *Ergo*, it cannot possibly be true that it is dialectically necessary for agents to grant that being a mere potential agent, *as such*, is sufficient for the possession of at least some intrinsic moral status.

Therefore, whatever connections might exist between being an agent and being a mere potential agent, even if some of these connections are *in some sense or senses* necessary connections,<sup>25</sup> and even if this can consequently be said to impart moral relevance *of some sort* on being a mere potential agent, it categorically cannot follow from this that *being* a mere potential agent, *as such*, is sufficient to confer at least some intrinsic moral status.

#### **4 The argument for intrinsic moral status II: the embryo-fetus as a possible agent—proportionality and potentiality under precaution<sup>26</sup>**

The position we have reached is that, while it is dialectically necessary for agents to grant full moral status to agents, it cannot be dialectically necessary for agents to grant any intrinsic moral status to potential agents *as such*, and (at the very least) it has not been shown that it is dialectically necessary for agents to grant intrinsic moral status to partial agents *as such*.

Agents, potential agents, and partial agents are, however, purely abstract categories. To apply a theory with such an ontology, it is necessary to judge which of the real world objects that we (agents) encounter are agents, potential agents, or partial agents.

How do I (any agent) know whether or not any being I encounter is an agent? Agents (by definition) actively pursue their valued purposes and, as such, have the generic capacities of agency to a particular degree. Thus, the defining characteristic of an agent is, in essential part, a mental state, and its associated capacities are mental abilities.

Since I have direct access to my mental state, I know that I am an agent directly. The problem is that I have no direct access to the mind of any being other than myself. When I infer that another being is an agent, I do so on the basis of observing that the being displays in full the characteristics and behaviour expected of an agent. However, if a being is, on such a



basis, ostensibly an agent, it remains possible that it is nothing but a programmed automaton with no mind. No amount of empirical observation can prove otherwise. The relevance of empirical evidence cited for a being's status as an agent depends irreducibly on unfalsifiable and unverifiable metaphysical assumptions.

Does it follow that I can deny that there are any agents other than myself without denying that I am an agent? I think not!

Although I must concede that it can never be known *with certainty* that an other (X), who is ostensibly an agent, is in fact an agent, the presumption 'X is an agent' and the presumption 'X is not an agent' are *not* on a par *morally*. If I mistakenly presume X to be an agent, I might have to restrict my exercise of the generic rights, but I do not deny myself (or any other agent) the status of a possessor of the generic rights. But, if I mistakenly presume X not to be an agent, then I do precisely that—I deny an agent the status of a holder of the generic rights.

Since the dialectical necessity of the *PGC* renders the *PGC* absolutely categorically binding, there can be no justification for violating the *PGC*. Thus, to risk the possibility of violating the *PGC*, *when this can be avoided*, is to violate the *PGC*.

Where X displays the characteristics and behaviour expected of an agent and is hence, an 'ostensible agent', it will (by the very nature of the case) be possible to treat X as an agent, and to avoid the risk *altogether* of mistakenly denying that X is an agent, by presuming X to be an agent and acting accordingly.

It follows that it is dialectically necessary to accept:

Where X is an ostensible agent, the metaphysical possibility that X might not be an agent, is to be wholly discounted, and X's display of the characteristics and behaviour expected of an agent is to be taken as sufficient evidence that X is an agent.

Implicit in this argument, which amounts to a moral argument for other minds, is the following Precautionary Principle:

If there is no way of knowing whether or not X has property P, then, insofar as it is possible to do so, X must be assumed *to have* property P if the consequences (as measured by the *PGC*) of erring in presuming that X *does not have* P are worse than those of erring in presuming that X *has* P (and X must be assumed *to not have* P if the consequences of erring in presuming that X *has* P are worse than those of assuming that X *does not have* P).<sup>27</sup>



Suppose, instead, that X (as far as I am able to ascertain) only exhibits characteristics and behaviour sufficient for me to infer that X is a partial agent. Although X is apparently only a partial agent, I cannot infer that X *is not* an agent. Just as I cannot *know with certainty* that X *is* an agent when X is an ostensible agent, so I cannot *know with certainty* that X *is not* an agent when X is apparently only a partial agent!

So, even though X is apparently only a partial agent, the possibility remains that if I suppose that X is not an agent, and act accordingly, X is an agent, and I will have deprived X of the protection of the *PGC* to which X is entitled. Thus, the *PGC* imposes a duty on me to do whatever I can to avoid this consequence—*provided, as always*, that my doing so does not violate more important provisions of the *PGC* (see further below).

However, where X is apparently only a partial agent, it is not possible to avoid this consequence *altogether*. I can, indeed, refrain from harming (and can assist) X in ways that would safeguard the benefits that X would receive *if* X had the generic rights and chose to exercise them. I can, indeed, recognise duties not to harm (and to assist) X in various ways. However, it must not be forgotten that if X is, in fact, an agent then the *PGC* requires X (thereby) to be accorded the generic rights, the benefits of which X may waive. But, by not displaying in full the characteristics and behaviour expected of an agent, X fails to demonstrate (even under precautionary reasoning) that X has the capacities by virtue of which it is able to waive the benefits of what it is entitled to. Thus, the duties of protection that I must recognise that I have towards X, where X is apparently only a partial agent, are unavoidably paternalistic, which is at odds with what X is strictly entitled to *qua* being an agent (should that be the case).<sup>28</sup>

*All other things being equal*, conflicts between the duties I owe under precautionary reasoning to two beings (X and Z) that are both apparently only partial agents are to be handled by a criterion of avoidance of more probable harm, according to which:

If my doing y to Z is more likely to cause harm h to Z than my doing y to X (and I cannot avoid doing y to one of Z or X) then I ought to do y to X rather than to Z.

Where y = failing to observe a particular duty of protection, and h = mistakenly denying a being the status of an agent, we can infer by this criterion that

If my failing to observe a particular duty of protection to Z is more likely to mistakenly deny Z the status of an agent than is my failing to observe this duty of protection to X (and I cannot avoid failing to



observe this duty to one of Z or X) then I ought to fail to observe my duty to X rather than to Z.

Since I am more likely to mistakenly deny that a being is an agent the more probable it is that it is an agent, it follows that (*all other things being equal*) my duties of protection to those who are more probably agents take precedence over my duties of protection to those who are less probably agents.

The moral status of a being may be measured by the weight to be given to the duties of protection owed to it by an agent. In such terms, it follows that the moral status of beings who are more probably agents is greater than that of beings who are less probably agents. In other words, the moral status of beings is *proportional* to the probability that they are agents.

Given that X's full display of the characteristics and behaviour expected of an agent must (under precautionary reasoning) be viewed as sufficient evidence that X is an agent, it follows that display of such characteristics and behaviour to a lesser degree must be viewed as less than sufficient evidence (but evidence nonetheless) that X is an agent.

Thus, we establish the following conclusion:

Apparent partial agents (which category includes the embryo-fetus) are owed duties of protection by agents in proportion to the degree to which they approach being ostensible agents—not *qua* their being partial agents—but *qua* their possibly being agents.<sup>29</sup>

However, *all things considered*, the *PGC* does not require agents to do everything they possibly can to cater for the possibility that the embryo-fetus is an agent. Such actions could have *PGC*-relevant costs for other beings with moral status. In theory, conflicts between the duties owed to the embryo-fetus and duties owed to other beings are to be adjudicated by use of a needs calculus that weighs the risk of *PGC*-relevant harm to the embryo-fetus of action to protect the *PGC*-relevant needs of conflicting parties<sup>30</sup> (taking into account the *PGC*-relevant 'utility'<sup>31</sup> of such action to the conflicting parties) against the risk of *PGC*-relevant harm to the conflicting parties of action to protect the *PGC*-relevant needs of the embryo-fetus (taking into account the *PGC*-relevant utility of such action to the embryo-fetus).

The risk of *PGC*-relevant harm to the embryo-fetus is a function of

- (i) the probability that the embryo-fetus is an agent;
- (ii) the severity of *PGC*-relevant harm to the embryo-fetus (assumed to be an agent) of action to protect the *PGC*-relevant needs of the conflicting parties (suppose, only its mother); and



(iii) the probability of such action causing this *PGC*-relevant harm to the embryo-fetus.

The risk of *PGC*-relevant harm to the mother is a function of

- (a) the probability that the mother is an agent;
- (b) the severity of *PGC*-relevant harm to the mother (assumed to be an agent) of action to meet the *PGC* relevant needs of the embryo-fetus; and
- (c) the probability of such action causing this *PGC*-relevant harm to the mother.

The *PGC*-relevant utility to a party of action to protect its *PGC*-relevant needs is a function of

- I the magnitude of *PGC*-relevant need of that party for this action;
- II the probability that this action will meet this need;
- III the severity of *PGC*-relevant-harm of this action to that party; and
- IV the probability that this action will cause this harm to that party.

Furthermore, since different actions may be taken to try to protect the *PGC*-relevant needs of the embryo-fetus and its mother, the needs calculus must be applied to the various alternatives available to decide on the right course of action in conflicts.

Suppose that we are considering the permissibility of abortion to save the life of the mother (who is an ostensible agent). To simplify matters, suppose (which is certainly an unreal scenario) that failure to abort will, with virtual certainty, lead to the death of the mother but will, with virtual certainty, save the embryo-fetus. Suppose, too, that abortion will, with virtual certainty save the life of the mother and not cause her *or any other relevant beings* any significant harms.

*Under such simplifying assumptions*, we need, in effect, only consider (i) against (a), and it is clear that we must abort the embryo-fetus (unless its mother chooses otherwise—in which case we must still consider the harm that the death of the mother might cause to other relevant beings), for the probability that the mother is an agent = 1, and whatever we think about the embryo-fetus, the probability that it is an agent is  $< 1$  (and very much so at any stage of its development).

However, it should be obvious that using the needs calculus is straightforward only when we have a one-variable conflict. Its application becomes much more difficult if the conflicting parties differ in the values to be attached to two or more of the relevant variables. This is because a one variable conflict requires only a relative ordering of the relevant probabilities or the magnitudes of *PGC*-relevant need/harm, whereas a multi-variable conflict requires the significance of a particular probability to be weighed against a particular magnitude of harm/need or a different sort of



probability. For this to be done objectively, it is necessary to put absolute commensurable values on the kinds of harm, need, and all the relevant probabilities involved.<sup>32</sup>

Whether or not this can be done, is beyond the scope of this paper. If it cannot be done, then multi-variable conflicts will only be relatively unproblematic in extreme cases. Beyond that, it will be necessary to defer resolutions of conflicts to the *PGC* derived 'method of consent',<sup>33</sup> to good faith decisions of authorised persons attempting to apply the above calculus.

What then of potentiality under precaution?

Under precautionary reasoning, the embryo-fetus is to be viewed as a possible agent that does not exhibit in full (as far as we can tell) the characteristics and behaviour expected of an agent. So viewed, if the embryo-fetus happens to be an agent, then its failure to display itself as an ostensible agent is not because it is not an agent; it is because something is preventing it from displaying the qualifying characteristics or behaviour (or from displaying them in ways that we can interpret properly).<sup>34</sup>

So, if the embryo-fetus is an agent, despite apparently being only a partial agent, then the proper story to tell is not that, as it approaches being an ostensible agent, its potential *to be* an agent is being realised, but that, as it approaches being an ostensible agent, its potential to express itself as an agent is being realised. Suppose, then, that the embryo-fetus is an agent. From this it follows that the embryo-fetus does have the generic rights in full. As such, it must be accorded additive rights to expand its capacities for purpose-pursuit. Because its development of the ability to display in full the characteristics and behaviour expected of an agent will be necessary for it to be able to extend its generic capacities for purpose-pursuit, it must be accorded the right to develop its potential to display in full the characteristics and behaviour to be expected of an agent.

Of course, because the embryo-fetus is apparently only a partial agent, we cannot treat it as having such a right. But we can protect it *qua* the presumption that it is an agent, by accepting a duty to allow its potential to display the characteristics and behaviour of an ostensible agent to develop (and to assist this development, when necessary). Furthermore, this duty will be subject to proportionality reasoning, because the more the embryo-fetus displays the characteristics and behaviour expected of an agent (to the point of being an ostensible agent) the more seriously we must take the possibility that it is an agent.

However, we cannot conclude from this that we have a duty to protect the life of a *potential agent as such* (and other conditions of its being able to develop into an agent) in proportion to the degree to which it approaches being an agent. The potential that is the basis of our duty to protect the embryo-fetus' development is not the potential of the embryo-fetus *to be*



*an agent*, but the possible potential of what is possibly an agent unable to display in full the characteristics and behaviour expected of an agent to develop the ability to do so.

Nevertheless, *because evidence that an embryo-fetus (X) is a potential ostensible<sup>35</sup> agent is evidence relevant to the probability that X is an agent*, precautionary reasoning also supports the following claims.

- (1) Evidence that X is a potential agent, *by itself*, requires agents to grant X moral status (in proportion to the strength of this evidence); and
- (2) Evidence that X is a potential agent adds to the moral status secured for X by the degree to which X exhibits the characteristics and behaviour expected of an agent. Thus, if Y is apparently only a partial agent with y moral status (by virtue of the extent to which Y displays the characteristics and behaviour expected of an agent) *but not apparently a potential agent*, and X is apparently a partial agent with y moral status *and also apparently a potential agent*, then agents must take more seriously the possibility that X is an agent than that Y is an agent, by virtue of which their duties of protection to X are greater than their similar duties to Y. (And, of course, the degree to which evidence of potential to become an agent adds to X's moral status will be proportional to the strength of this evidence.)

The weakest evidence that one can have that X is a potential agent is that X is a member of a species S (some of) whose members develop into ostensible agents under specified conditions.<sup>36</sup> To this can be added knowledge of correlations between possession of X's specific characteristics and development into ostensible agents by members of S. All factors of this kind being equal, the further X develops in the direction of becoming an ostensible agent, the more confident one can be that X will develop the whole way. Thus, considerations of evidence for potential and considerations of evidence of degree of approach to being an agent are not wholly independent.

Because the evidence that those who do not apply the *PGC* under precaution will use to identify a being as an agent is identical to that which renders it an ostensible agent, and the degree of evidence on the basis of which they will place a partial agent at a particular distance from being an agent will place it at a co-ordinate distance from being an ostensible agent, etc., the results obtained by applying proportionality and potentiality under precaution should not, in principle at least, be different from those that Gewirth or Steigleder argue for.

This, however, does not mean that there is no important difference between the two approaches. The two ways of reasoning about proportionality and potentiality differ radically in their theoretical base. The approaches of Gewirth or Steigleder, in effect, treat proportionality

reasoning and considerations of potentiality as deductive extensions of the argument *to* the *PGC*. If they are right, then the *PGC* does not merely state that agents have full moral status. *It* states that partial and potential agents have some degree of intrinsic moral status as well.

In contrast, my approach leaves the *PGC*'s ontology unaltered, for considerations of proportionality and potentiality are strictly confined to inductive *application* of the *PGC*. This switch—from attempting to ground the moral status of the embryo-fetus and other 'marginal agents' in ontological extensions of the *PGC*, to deriving it in the epistemology of empirical application of the *PGC*—is not trivial. It represents all the difference in the world—that between invalid theses and a valid one.

## **5 Interactions between intrinsic and derivative considerations**

Having established that proportionality and potentiality under precaution both require that the embryo-fetus be accorded a degree of intrinsic moral status, we need to have another look at the sources of indirect protection, for it should be clear that the moral status secured for the embryo-fetus by proportionality and potentiality considerations under precaution affects the derivative sources of status in ways that are sometimes reinforcing and at other times qualifying. For example:

- (1) The conclusion that, as a part of her body, the mother may do anything with the embryo-fetus needs qualification. In order to harm the embryo-fetus, she now requires a justification, which must take the form of applying the needs calculus outlined above in her favour. Admittedly, there are difficulties with this, which have already been alluded to. In general terms, it is possible to say only that such conflicts must be dealt with on a case by case basis taking into account all of the considerations that the *PGC* requires to be taken into account—including application of the method of consent, about which some brief comments will be made in connection with (3) below.
- (2) If the embryo-fetus is, *ex hypothesi*, an agent, then it may not be owned. Since precautionary reasoning requires agents to take this possibility seriously, the thesis that the embryo-fetus may be regarded as the property of its parents before implantation (and that of its mother after implantation) is no longer acceptable. Were the embryo-fetus known to be an agent, the relationship between parent/s and embryo-fetus would be that of guardianship rather than ownership. However, since this is not known (and the probability that the embryo-fetus is an agent is very small indeed) guardianship imposes over-strong duties on its parents. What is required is that the parents must assume 'precautionary' guardianship—guardianship unless there are coun-



tervailing circumstances. However, this means little more than that a justification using the needs calculus is required for anything harmful to be done to the embryo-fetus.

The most likely harms that might come to the embryo-fetus produced in *in vitro* fertilisation programmes are (a) that it might be used for research, or (b) that it might be discarded as surplus.

Both of these practices can be justified, *if they are necessary*, on the basis of avoidance of the harm that being childless can cause some women. If such procedures are necessary, precautionary reasoning minimally demands that any not to be implanted embryo-fetus be treated with 'dignity'. More tentatively, I suggest that it provides at least *some* basis against the practice of deliberate embryo-splitting (as this *could* be the deliberate splitting, and killing, of an agent), and also for permitting the use of surplus embryo-fetuses by women, other than the genetic mother, who are willing to host them.<sup>37</sup>

- (3) Since precautionary reasoning requires the possibility that the embryo-fetus is an agent to be taken seriously, agents must be willing to impose duties on themselves to protect the embryo-fetus in line with the needs calculus. Thus, only when they wish to impose duties on themselves stronger than the needs calculus requires are they waiving the benefits of any of their generic rights. Furthermore, since it is possible that features of this calculus will, for both practical and theoretical reasons, leave room for disagreement on how much weight should be given to, e.g., probability considerations as against severity of harm considerations, there is scope for legitimate disagreement in legal systems as to where lines are to be drawn. One of the remaining tasks for Gewirthian theory is to try to specify as precisely as possible the limits of permissible discretion.
- (4) If disregard for the well-being of the embryo-fetus evidences a generally cruel character, then it is plausible to suggest that those who are wholly insensitive to the well-being of the embryo-fetus at a later stage of its development are less likely to care fully for ostensible human agents than those who are only wholly insensitive to the well-being of the embryo-fetus at an earlier stage of its development. In other words, the cruelty or 'brutalisation' effect is likely to be in proportion to the level of development of the embryo-fetus at which an agent's total insensitivity to its well-being ceases. It is important to test this hypothesis, because, if it is confirmed, then quantification of its parameters can assist with setting the limits of permissible discretion in application of the needs calculus. For example, if it were shown (and I hasten to say that I have no reason to believe that this is the case) that those who consider abortion before 21 weeks to be permissible in all cases show no decreased regard for human ostensible agents than those



who are totally opposed to abortion, but those who consider abortion to be permissible after this time do show an increased disregard, then this would be a consideration in favour of interpreting the needs calculus so as to prohibit abortion after 21 weeks.

- (5) The argument for protection based on the sensitivities of agents does not require attention to be given to the sensitivities of those who are offended by the existence of some *agent* subgroups. The *PGC* grants full moral status to all agents as such, so does not require agents to take into account the prejudices of racists, sexists, and the like. Sensitivities of others need only be taken into account when the actions needed to protect them do not violate what is owed to those protected by the *PGC*. The effect of precautionary reasoning in this connection is to strengthen the derivative protection of the embryo-fetus. Under precaution, those who care for the embryo-fetus are not to be regarded as merely having optional (not irrational, albeit natural) preferences and psychological makeups to be protected. They are to be regarded as having rationally required views and dispositions of character protective of the *PGC* (at least insofar as these are in line with the needs calculus).
- (6) Under precautionary reasoning, the intention to nurture the embryo-fetus to agent status, upon which futurity considerations depend, is no longer wholly optional. Precautionary reasoning requires agents to accept duties to allow and assist the embryo-fetus as an apparent potential agent to develop a potential to display itself as an agent (should it be an agent), unless there is a direct conflict with protection owed to those of equal or higher moral status. Unless, there is a *PGC* based justification for not having this intention, the intention is required by the *PGC*, as are the judgments that futurity brings in its wake.

## 6 Conclusion

In some earlier writings (Beyleveld and Brownsword 1993, pp. 105–106; Beyleveld 1998, pp. 250–251), I suggested that precautionary reasoning could be used to establish moral status for ‘uncertain agents’ (e.g., dolphins and chimpanzees). At the time, I did not appreciate fully the role that precautionary reasoning has in the epistemology of empirical application of Gewirthian theory as such. However, as I have argued in this paper, such an appreciation entails that precautionary reasoning has application, not merely to beings that approach being ostensible agents closely, but to all living beings.<sup>38</sup> More specifically, whereas I have recently been sceptical (though not wholly dismissive) of the idea that proportionality and



potentiality could be shown to be valid grounds for conferring moral status on the embryo-fetus, I now believe that these considerations provide valid grounds for conferring intrinsic moral status on the embryo-fetus.

A great deal of detailed analysis of the implications of applying proportionality and potentiality reasoning under precaution (as well as extensive empirical research) needs to be done before a detailed proposal appropriate to the drawing up of a Gewirthian legislative scheme can be made. What I have done is to provide little more than an outline of principles and considerations to develop in pursuing such a goal.

However, it should be apparent that, in principle, Gewirthian theory does support the 'compromise' position on the moral status of the embryo-fetus.

## Notes

<sup>1</sup> Throughout this paper, reference to possession of a moral status is reference to a status that is correlative to moral duties being imposed on those capable of having them.

<sup>2</sup> These are extreme positions. Positions labelled 'pro-life' or 'pro-choice' in public discourse may not be quite as uncompromising as these.

<sup>3</sup> An agent acts, i.e., voluntarily pursues its freely chosen purposes. A prospective agent has the capacity and disposition to act. I use 'agent' to cover both agents and prospective agents.

<sup>4</sup> Generic rights are to the generic features of agency (those capacities an agent needs to be able to act at all or with any general chances of success, *whatever its purposes might be*). Interference with, or deprivation of, a generic feature of agency will interfere (or tend to interfere) with an agent's capacity to act or to act successfully, *regardless of what the action envisaged is*. The generic features of agency are ordered hierarchically into three categories, basic (needed for action as such; e.g., life, mental equilibrium to translate desire into action, and the necessary means to these), non-subtractive (needed to maintain capacities to act; e.g., accurate information), and additive (needed to increase capacities for successful agency in general; e.g., further education) according to the criterion of 'degrees of necessity' or 'needfulness' for action (which also determines which generic rights take precedence in case of conflict with the generic rights of others). (See Gewirth 1978, pp. 62–63; Beyleveld 1991, pp. 88–90.)

<sup>5</sup> My present purpose is not to defend Gewirth's argument but to apply it. See Beyleveld 1991 for an analysis and defence of Gewirth's argument as a whole.

<sup>5</sup> It might be thought that I am misattributing this position to Steigleder; for, while he shares Gewirth's view that beings that are less than agents can have moral status in proportion to their approach to agency, he restricts this claim to 'rudimentary agents', in which category he does not include newborns (see



ibid., pp. 243–244), and, by implication, the embryo-fetus. Indeed, he specifically states that ‘the potentiality to become an agent is the only characteristic which is directly relevant for the determination of the moral status of human embryos and fetuses’ (ibid., p. 244). It should, however, be noted that Steigleder complicates this assertion (if he does not actually contradict it) when he adds that ‘the criterion of proximity to agency is applicable to fetuses as well. But here it does not yield definitive and uncontroversial normative results’ (ibid., p. 246, fn. 4). All in all, it appears that Steigleder agrees with Gewirth (if only in theory) that proportionality grants moral status to the embryo-fetus (and the newly born); he merely does not consider this to be of any use in specifying duties correlative to this status in these cases.

<sup>7</sup> See below.

<sup>8</sup> Although my discussion will be conducted strictly within the framework of Gewirthian theory, my arguments (at least in form) are equally applicable to any other moral theory that maintains (i) that morality sets categorically binding requirements on action; and (ii) that agency is the necessary and sufficient condition for full moral status.

<sup>9</sup> That Gewirth’s method seeks to justify practical precepts to an agent (as defined) is not a function of a *value judgment* that only the views of agents matter. It follows from the fact that practical precepts can only be directed *rationally* at beings having the capacities of agents, and that only for such beings *can the question arise* of what practical precepts may legitimately be followed. To have a practical point of view, one must be an agent.

<sup>10</sup> Dialectically necessary procedures contrast with dialectically contingent ones. An argument is *dialectical* if it is propounded relative to some claim made by an interlocutor. Its conclusion is *contingent* where

- (i) the claim on which it is based can be coherently rejected by the interlocutor; *or*
- (ii) the connection between the premise (claim) and the conclusion is contingent.

Its conclusion is *necessary* where the interlocutor cannot coherently reject the claim *and* the conclusion follows necessarily from the claim.

Dialectical procedures contrast with assertoric ones, where considerations with validity independent of claims made by interlocutors are cited for acceptance of conclusions.

<sup>11</sup> By the principle, ‘Whoever pursues an end must be prepared to pursue the means necessary to achieve the end’. If I do not accept this principle, I deny that I am an agent (because agents, by definition, do things as perceived means to their chosen ends).



<sup>12</sup> This follows by the ‘Argument from the Sufficiency of Agency’ (Gewirth 1978, p. 110), which may be presented as follows.

- (a) If (7) *does not entail* (7') then I must be able to deny ‘I am an agent → I have the generic rights’ without denying that I have the generic rights.
- (b) To deny ‘I am an agent → I have the generic rights’ is to assert that my having some property D—a quality not necessarily possessed by all agents—is necessary for me to have the generic rights. To deny ‘I am an agent → I have the generic rights’ is to assert ‘I have the generic rights → I have D’.
- (c) The assertion ‘I have the generic rights → I have D’ logically requires assent to ‘I am an agent without D → I do not have the generic rights’. In other words, to be consistent with ‘I have the generic rights → I have D’, I must consider, *even though I am an agent*, that I do not have the generic rights *if I do not have D*.
- (d) However, on the basis of (7), I must, *provided only that I am an agent*, consider that I have the generic rights—which is to say that I must, *by virtue of being an agent*, consider that I have the generic rights, *whether or not I have D*.
- (e) ‘I must consider, *even though I am an agent*, that I do not have the generic rights *if I do not have D*’ contradicts ‘I must, *by virtue of being an agent*, consider that I have the generic rights, *whether or not I have D*’.
- (f) Since, ‘I have the generic rights → I have D’ contradicts what (7) entails, ‘I have the generic rights → I have D’ contradicts (7).
- (g) Since, ‘I have the generic rights → I have D’ is equivalent to denying ‘I am an agent → I have the generic rights’, to deny ‘I am an agent → I have the generic rights’, is to deny (7).
- (h) Thus, in order not to deny (7), I must affirm ‘I am an agent → I have the generic rights’.
- (i) Therefore, (7) → (7').

<sup>13</sup> Which there are not. See Beyleveld 1999.

<sup>14</sup> See Beyleveld and Brownsword 1998a and 1998b. We develop this thesis in a book we are currently writing on human dignity in bioethics and biolaw.

<sup>15</sup> Or, if the mother has died and the embryo-fetus can still be rescued.

<sup>16</sup> See further, below.

<sup>17</sup> See Gewirth 1978, pp. 319–322. The method of consent justifies obligations imposed by decisions arrived at by the use of procedures authorised directly by the *PGC* to resolve disputes on matters that the *PGC* cannot resolve (e.g., whether to have a law requiring persons to drive on the left or the right-hand side of the road), or which are so complex as to make agreement between even rational and knowledgeable persons practically impossible. The *PGC*'s formal



requirements for the method of consent are discussed extensively in Beyleveld and Brownsword 1986, Chapters 7–9.

<sup>18</sup> See Gewirth 1978, pp. 332–333.

<sup>19</sup> Once again, this rests on empirical assumptions that need testing.

<sup>20</sup> See, e.g., Beyleveld, Quarrell, and Toddington 1998a and 1998b (which is a modified version in German of 1998a).

<sup>21</sup> See Beyleveld and Pattinson 1998, where a more detailed critique of Gewirth's application of the Principle of Proportionality is given than there is space for in this paper.

<sup>22</sup> See fn. 12 *supra*.

<sup>23</sup> Which Gewirth, himself, formulated. This fallacy is committed where fields or subject-matters are compared on disparate levels or in disparate respects. (See Gewirth 1960, p. 313.)

<sup>24</sup> According to Gewirth (1978, p. 142), although the embryo-fetus lacks the generic abilities necessary to be an agent in anything but 'a remotely potential form', it nevertheless possesses the generic rights in a minimal way. Gewirth does not elaborate further.

<sup>25</sup> It could be said that being a potential agent is a necessary condition for being an agent. It most probably is, but even so it is not a necessary condition for being an agent in the same way as having some of the generic abilities of agency is. It is a necessary condition for becoming an agent in the future, whereas the generic abilities of agency are necessary conditions of being an agent as such.

<sup>26</sup> The argument in this Part is derived from Beyleveld and Pattinson 1998, which develops the argument in more detail.

<sup>27</sup> Because of its link to the *PGC*, this principle is dialectically necessary. The reasoning behind *dicta* such as 'Innocent unless proven guilty!' or 'Give the benefit of the doubt' can be subsumed under it. Precautionary reasoning, as such, need not take the *PGC* as the yardstick by which to evaluate the consequences of error.

<sup>28</sup> I have argued that Gewirth, by inferring that partial agents have quasi-generic rights, commits the fallacy of disparateness. Although I claim that apparent partial agents are to be granted just such quasi-generic rights, I do not commit the same fallacy.

Whereas Gewirth claims that the Principle of Proportionality licenses inferring quasi-generic rights of partial agents from generic rights of agents, I claim that precautionary reasoning licenses an inference to quasi-generic rights of apparent partial agents (which proportionality reasoning merely qualifies quantitatively). Gewirth requires the Principle of Proportionality, which can only license inferences concerning the degree to which a property is possessed, to license the attribution to partial agents of quasi-generic rights on the premise of a different quality (generic rights) being possessed by different



quality beings (agents). In my reasoning, on the other hand, possession of a different quality (quasi-generic rights) is being attributed to agents (the agents that apparent partial agents might be) on the ground that this attribution is required to protect their generic rights (given that if the apparent partial agents are agents, they are agents in a position where they contingently cannot exercise their generic rights). No fallacy is committed here, because both quasi-generic rights and generic rights are attributable to agents.

<sup>29</sup> The behaviour that living beings are capable of exhibiting can be classified in a number of ways. The following sort of classification is particularly relevant to our concerns.

- I Patterned organismic behaviour (displayed by all living organisms).
- II Behaviour that evidences itself as purposive (as being motivated by feeling or desire).
- III Behaviour that evidences itself as intelligent (as being susceptible to learning by experience).
- IV Behaviour that evidences itself as rational (value-guided, and characteristic of an agent).

Associated with such behavioural capacities are various biological developments, most important of which relate to the development of a nervous system and brain. Both the degree to which a being displays Categories I, II, and III (short of IV), and the extent to which it possesses structural biological features that correlate with the behavioural capacities are relevant to classifying how close a being is to being an ostensible agent.

<sup>30</sup> The most relevant conflict is always between the embryo-fetus and the possible agent at greatest risk of conflicting harm.

<sup>31</sup> The use of this term, and (more widely) the consequential thinking involved in applying the needs calculus provides no warrant for classifying Gewirthian theory as utilitarian. The values involved in calculating this 'utility' are deontological, in being dialectically necessary (not teleological—meaning, derived by consequential thinking about optional preferences and values). If Gewirthian theory can be classified as a consequentialism, then it is nonetheless a deontological consequentialism. (See Gewirth 1978, p. 216.)

<sup>32</sup> The basic problem is that the Principle of Proportionality provides only a relative ordering: it does not tell us *how much more* probable particular evidence renders it that a being is an agent. Similarly, the criterion of needfulness for action (see fn. 4 supra) does not quantify just how much more necessary for action one generic feature is than another. We also face the classic conundrum as to how, e.g., to compare probabilities of harm with severities of harm. Is a catastrophic harm of minimal probability on a par with a minimal harm that is nearly certain?

<sup>33</sup> See fn. 17 supra.



<sup>34</sup> Thus, one way of explaining why we are required to take more seriously the possibility that a fetus is an agent the closer it approaches to being an ostensible agent, is that the more it displays the necessary characteristics of an ostensible agent the less elaborate and fanciful are the metaphysical stories we have to tell to explain why, despite being an agent, it is unable to display the expected behaviour.

A fairly obvious objection to the argument I have presented is that if the embryo-fetus is an agent then why do I not remember my time in the womb? Why do I only have memories and a sense of self-identity beginning sometime after my second year? A possible answer is that the process of birth causes amnesia. After all, some persons claim to remember birth traumas and even earlier lives under hypnosis. The issue is not whether these stories and others like them are true or even plausible. They only have to be possibly true.

<sup>35</sup> For convenience I will drop the 'ostensible'. Evidence that X is a potential ostensible agent is, under precaution, to be taken as sufficient evidence that X is at least a potential agent, just as the evidence that constitutes X being an ostensible agent is to be taken as sufficient evidence that X is an agent.

<sup>36</sup> Complications, which I will not address here, are created by the fact that these conditions can be specified differently. Thus, the concept of potentiality, like that of a cause (vs. background conditions), is to a degree normative in being dependent on what is taken to be 'normal'.

<sup>37</sup> Even, *perhaps*, for permission to use surplus embryos in this way to be made a requirement of becoming a recipient of an *in vitro* fertilisation programme.

<sup>38</sup> Evelyn B. Pluhar (1995, pp. 252–253) (referring to the fetus) also appreciates that a being should be given the benefit of the doubt about its agency status even when the evidence that it is an agent is not complete. Pluhar, however, like myself earlier, does not elaborate this into a full-scale basis for proportionality reasoning. Furthermore, she presents her thesis within the framework of the mistaken assumption that Gewirth's argument to the *PGC* can operate with the notion that an agent is a being that pursues desired purposes without having the capacities for voluntary or reasoned preferences (on the basis of which the fetus is a near ostensible agent). (Her assumption is mistaken. Without the capacity for voluntary or reasoned choice, a being is not required to *value* its desired purposes, and the argument cannot take even its first step.)

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