

# APA Newsletters

NEWSLETTER ON PHILOSOPHY AND MEDICINE

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FROM THE EDITORS, MARY RORTY & MARK SHELDON

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## FROM THE EDITORS

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Our Committee's panel at Pacific division raised a prescient question: What is the responsibility of a bioethicist? Ken Kipnis, in "Bioethics and the Socratic Conception of Philosophy," invokes an older tradition of the Socratic gadfly and suggests we may be seeing the emergence of philosopher/bioethicists as public intellectuals. Leslie Francis, in "Speaking Out as an Obligation of Justice," moves from the question of whether to how. Citing the influence of conservative funding on areas of academia of relevance to bioethics, she asks whether, and if so, how, this should be countered. Laurence McCullough's presentation, "Intellectual and Moral Integrity in Bioethics," speaks to the fiduciary responsibility of bioethics as a voice for accountability in healthcare, and urges that bioethics advocacy must be accountable for its intellectual and moral integrity if the full potential of such advocacy is to be realized. He speaks of the importance of getting your facts straight before making public pronouncements—a piece of advice presidential hopefuls might well take to heart. As we go to press Steven Miles and Art Caplan have posted a reward if anyone can substantiate an irresponsible medical claim by a putative candidate for national office (<http://www.forbes.com/sites/matthewherper/2011/09/15/bioethicist-offers-10000-reward-for-proof-of-bachmann-vaccine-claims/>).

In a Committee-sponsored panel at Central Division, four participants explored the utility of the concept of potentiality in connection with ongoing debates about the beginning of (human) life and its end. In "The Unactualized Potential of the PVS Patient," Jason Eberl posits a morally relevant difference between whole and higher brain death, and criticizes panel participant John Lizza's claim (in his presentation, "On the Ethical Relevance of Active versus Passive Potentiality") that an extrinsic condition (e.g., a decision not to resuscitate a resuscitable patient) constitutes a sufficient reason for denying a person's metaphysical potential for life. David Hershenov and Bertha Manninen explore the terminology in the other end of life. Manninen's "Why Fetal Potential Matters" asks whether possessing the potential for future conscious awareness is sufficient to render the biological life worthy of preservation, and suggests that claims about persons in a coma should apply, *ceteris paribus*, to fetuses. David Hershenov's "Perdure and Murder" addresses a similar question via a critique of Four-Dimensional metaphysics: Does an animal's potential to have a temporally later thinking stage succeed in rendering that animal identical to a person? The ethical implications of the metaphysics of personal identity continue to perplex our constituency.

We welcome your suggestions, comments—and contributions!! Book reviews, anyone?

Mary Rorty and Mark Sheldon, Editors

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## FROM THE CHAIR

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The Committee on Philosophy and Medicine continues our two-pronged effort of bringing issues in the philosophy of medicine to the attention of the broader APA audience and involving philosophers with a broad spectrum of interests in the bioethics dialogue. In accordance with that broad agenda, we have organized three intriguing sessions for the 2011-2012 APA Division meetings.

Focusing on a pair of classic issues in medical ethics, we have designed a pair of sessions aimed at understanding the concepts of "health" and "disease." One's understanding of these concepts becomes critical when policy makers and theorists employ notions of health and disease to determine whether or not an individual is entitled to medical services and to delineate which services should be provided for a population.

For the 2011 Eastern Division meeting, Leonard Kahn from the USAir Force Academy chaired a session focused on defining "health" and exploring the implications of various approaches to that definition. The panelists included Anita Silvers from San Francisco State University who discussed "Health and Aging," Michael Boylan from Marymount University who discussed "Health and Self-Fulfillment," and Rosemarie Tong from the University of North Carolina, Charlotte, who addressed "Health in the Context of Care."

A parallel session is planned for the 2012 Central Division meetings. There the Committee's session will be chaired by Mark Sheldon and address the concept of "disease." The speakers will include Daniel Hausman of the University of Wisconsin, Luc Faucher of the Universite de Quebec, and Peter H. Schwartz of Indiana University School of Medicine.

We hope to make the proceedings of these sessions available to everyone who cannot attend both sessions by publishing the proceedings in future issues of the *Newsletter on Philosophy and Medicine*. We expect the collection to constitute a valuable resource for the field by expanding upon and updating some of the traditional views on these concepts.

In addition to these foundational issues, the Committee also wants our sessions to address emerging controversies. In these cases our aim is to identify the philosophical issues involved and shed some light on how they should be resolved.

For the 2012 Pacific Division session, we have decided to host a panel on "Access to Investigational Drugs Outside Clinical Trials." This session is, in part, a response to the case of *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 445 F3d 470 (DC Cir. 2006), which raises questions about the individual rights of terminally ill patients and the liberties of drug manufacturers. The Plaintiff in that case argued that access to Phase I drugs for terminally ill patients

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is a substantive due process right under the Fifth Amendment. They maintained that their proposed bill to amend the Federal Food Drug and Cosmetic Act would secure the right of seriously ill patients to access available investigational drugs, biological products, and devices (U.S. Congress: ACCESS Act 2005). This case raises a central conflict in political philosophy between individual freedom and the duty of the government to protect its citizens by assuring, in this case, the safety and efficacy of new drugs and the liberty rights of individuals. The session will be chaired by Inmaculada de Melo-Martín of Weill Cornell Medical College of Cornell University. Panelists for this session will be Heidi Malm from Loyola University Chicago, David Adams from California State Polytechnic University, and Ana Iltis from Wake Forest University.

For the future, we are considering two other controversies. One revolves around a recent case of a couple who chose to end their lives by not eating or drinking. Bernard Gert, K. Danner Clouser, and Charles Culver, as well as experts in palliative care, have long held that this approach to hastening death provides a peaceful end and avoids the controversy surrounding euthanasia and physician-assisted suicide. Nevertheless, the assisted living facility where the couple resided evicted them because of their choice. This case raises new issues of personal and corporate liberty and the limits of controls that groups may exert on individuals, particularly in the privacy of their own homes.

The other topic that we are considering involves the pressures that women are subjected to related to reproduction. The pressure to reproduce (or not) that some women experience may come from social attitudes or a partner. The pressure to undergo a Cesarean delivery or fetal surgery may come from medical professionals. The pressure to reduce a multiple pregnancy can come from a number of sources. One question that this topic raises is sorting out legitimate encouragement from coercion.

The Committee's discussions will try to crystallize the issues in these cases and consider these topics along with other suggestions so as to offer APA members philosophically valuable and thought provoking sessions at upcoming division meetings.

We hope that you will attend our sessions at the division meetings you attend, and continue to read the articles included in the *Newsletter on Philosophy and Medicine*.

We have received news of the death in December of Bernie Gert, past member and once Chair of this Committee. He was a constant supporter of the Committee's programs and attended our sessions when he was at APA meetings. His distinctive voice will be missed.

Rosamond Rhodes

Chair, Committee on Philosophy and Medicine

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## ARTICLES

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### ***Bioethics and the Socratic Conception of Philosophy***

**Kenneth Kipnis**

*University of Hawaii at Manoa*

It is arguable—or at least I will begin by arguing it—that the most consequential event in the 2,500-year history of our discipline was the transformation that took place between Socrates and Plato.

For Socrates, the craft of philosophy centered on a particular type of open-ended conversation between the philosopher and virtually any other person. Plato's dialogues, especially the early ones, are our best record of his interactions with a diverse cast of characters: a slave boy, mathematicians, a doctor, a minister, a teacher of rhetoric, and several others. Beyond the *dramatis personae*, the texts also evidence background conversations Socrates had had with politicians, poets, and artisans, including farmers, courtesans, husbandmen, generals, and so on. For Socrates, the nearer objective of this distinctively philosophical work is to move his interlocutors toward deeper reflection on issues important to them, whether or not that reflection undermines present understandings, which it often did. The further objective is somehow to provoke Athenians, both individually and collectively, into a motivating appreciation of virtue. Socrates famously takes himself to be a civic gadfly, goading others into seeing they don't know what they claim to know, urging them to pay due attention to that which is most valuable. (Too often Socrates does this with more irony than is good for him.) He publishes nothing during his career, has what might be called disciples rather than students, and, with a small number of possible exceptions, refrains from lecturing. Although well-off patrons support his efforts in various ways, he famously rejects a fee-for-service business model. Though he is far more than what we might now call a "street philosopher," his career would not be particularly attractive to anyone who aimed at having a decent livelihood as well as a virtuous life.

By his own account, Plato witnesses an Athenian jury condemn his teacher to death in 399 BCE. Whenever a prominent educator is sentenced to death by his host city, it may be an occasion to reflect on pedagogy. Plato leaves Athens after the execution, travels, and twelve years after the death of his teacher, in 387, is back in Athens, creating what we could even now identify as an embryonic academic institution. His Academy has a "head" (Plato himself, at the beginning), other scholars, and it takes on as pupils (one must suppose) the sons of the well-off. One can imagine his dialogical playlets being performed before novices, vividly replicating the formative experiences Plato had had at the feet of the master; experiences that had taught him the rudiments of the philosopher's craft. Aristotle, the son of a Macedonian physician, begins his studies at the Academy before he is 20 and well before the death of Plato. Scholarly writing and organized teaching are center stage and the general business model is quickly emulated. In the coming decades the Portico is established by the Stoics, the Garden becomes the Epicurean's school, and the Lyceum, founded by Aristotle after 20 years at the Academy, belongs to the Peripatetics. It takes only a few decades after the death of Socrates for the discipline of philosophy to become both academic and sequestered. And though the path to the present has been stormy and erratic, there is no question that philosophy now resides primarily in the colleges and universities that are the institutional descendants of Plato's Academy.

Now why is this transformation so important? Reflect that, as academic philosophers, we are primarily engaged in two types of conversation: one with students and the other with colleagues, both behind the "walls of Academe." While we may occasionally collaborate in research and teaching with professors in other disciplines, such service is rarely a core responsibility. Even less expected is direct involvement in public controversy: endeavoring to alter some social practice by challenging entrenched public consensus. In limiting our work to colleagues and students, the discipline of philosophy has largely abandoned the extra-mural Socratic role of gadfly. While we may be safer by keeping a low profile—much less likely to offend the powerful—as efforts are made to eliminate

philosophy departments, it may be that we are failing adequately to display the public value of our discipline.

It is easy, I think, to appreciate how the academic sequestration of philosophy has altered the practice of our discipline. But as I will try to show in what follows, the movement of philosophers into bioethics has, in three stages, marked a broad resurrection of the Socratic conception of philosophy. The work took shape first as a new learned society (much like the APA) and, later on, as an embryonic profession (somewhat like hospital ministry). Finally, we may be witnessing the emergence of philosopher/bioethicists as public intellectuals.

### **Stage One: Bioethics as an Interdisciplinary Learned Society**

As it began to flourish in the late 1960s, bioethics emerged primarily out of the overlapping interests of university-based scholars, including philosophers, clinicians, lawyers, theologians, and several others. The very first bioethics conference, in 1966, included one philosopher. In 1969, The Institute of Society, Ethics and the Life Science—The Hastings Center—set itself up as a miniature Academy, with a small number of resident Fellows and visiting scholars, a steady series of conferences and research projects, and a journal. Other journals subsequently appeared and interested scholars began to gather in specialized learned societies. The first, in 1969, was the Society for Health and Human Values (SHHV). The discipline of bioethics had arrived, assembling an assortment of like-minded academicians in a range of disciplines.

We philosophers who were undertaking to join and extend the gathering conversation had to make a number of adjustments. Over time these have returned a particularly vibrant sector of philosophy to something like the practices of Socrates.

**1. Extended Knowledge Base:** It became clear that philosopher-bioethicists needed to supplement their masteries of the traditional canon and contemporary philosophical writings with familiarities with law, clinical practices, moral theology, various medical specialties, nursing, medical social work, medical sociology, medical education, medical economics, emergent health care issues, hospital administration, and so on, depending on the topic under review. It is not that we needed to turn ourselves into experts in these areas. But we did need to know enough to appreciate the lay of the land and to find out what we needed to know.

**2. Enhanced Communication Skills:** While many of us kept our day jobs as scholars, continuing to teach students in colleges and universities, we began to publish written work in journals outside philosophy. Accordingly the emergent need to communicate across disciplinary boundaries required new writing and speaking skills. A Grand Rounds presentation at a teaching hospital calls for a voice and presentation quite different from those of the philosophy classroom and the APA convention. Doctors are neither undergraduates nor philosopher/colleagues. I will long remember being shocked at the reaction to my very first presentation to a group of physicians: “If you really knew what you were talking about, you wouldn’t have to read the words from a piece of paper.” That response contrasted with philosophy’s norm: “If you really cared about what you were saying, you would put every word in writing.” Accordingly, the insights and methodologies of anthropology were useful in learning to understand and to work with the many tribes of health care. Occasions to collaborate with lawyers, doctors, nurses, etc., were perhaps the most effective way to prepare publications that were accessible to those in other disciplines even as they

respected pertinent philosophical standards. The presence of incompatible professional conventions and the shared desire to disseminate important work required negotiated compromise in methodology, style, presentation, vocabulary, and so on. Over time, bioethics journals and conferences were, I believe, influential in creating a *lingua franca* or “pidgin” that facilitated cross-disciplinary communication.

### **Stage Two: Clinical Ethics Consultation as an Emerging Profession**

By the middle 1970s, a small number of philosophers were beginning to take up positions in hospital settings. Here the issues were no longer theoretical ones. Instead, a few philosophers who had already distinguished themselves in the field of bioethics, and having extended their knowledge and skills as described above, faced yet another set of challenges.

Although there were other tasks that these hospital-based philosophers took on (mediation and organizational reform) the foremost among them was participation in discussions intended to illuminate responsible approaches to an array of ethical dilemmas emerging regularly in the clinical setting. There were two versions of this work. One was service on hospital ethics committees and the other was on-the-floor clinical ethics consultation. As with bioethics scholarship, these new practitioners needed to have knowledge and skill going beyond the academic philosopher’s toolkit. But even more, there was a certain “*phronesis*” that was required.

**3. The Capacity to do Philosophical Work in Real-Time:** While the work of scholarship can easily take weeks, months, or years, the challenges of healthcare may have to be resolved in minutes. Even with knowledge of the pertinent legal and bioethics literature, even with familiarity with the professionally endorsed norms of healthcare and with the reasons broadly advanced in support of them, and even with an understanding of the shortcomings of those justifications, it has been common for philosophers to be drawn into novel situations in which clinical perplexity remained resistant to philosophical tools. And yet, as a practical matter, it was not possible for clinical philosophers to claim an exemption from contributing their best judgment. Moreover, the profound difference between setting out a mere opinion on some matter of theoretical interest only and offering a professional recommendation where the course of a human life could turn on what one had just said: that difference was transformative, a wake-up call to many of us who have been summoned to respond to residual uncertainty with an invigorating sense of professional responsibility. Much of our most valuable work came out of these consequential encounters with the limits of our understanding. Having made what seemed merely a best guess, there was a characteristic desire to be better prepared the next time the issue presented and, quite naturally, to publish both a description of the novel problem and one’s considered ruminations about what responsible engagement could look like. Even with the errors that commonly accompanied such work, there was, at least for me, a hope that colleagues would confirm my reasoning or expose shortcomings in my understanding. Such is the progress made in the dialectical process.

**4. Adherence to Professional Standards:** Once a philosopher becomes a consultant within an institution as ethically complicated as a hospital, once the work implicates normatively complex relationships with patients, patient families, attending physicians, allied healthcare professionals, hospital administrators, and an array of stakeholders beyond the hospital, the ethical dimension of such work makes an appearance. How, for example, is a clinical ethics consultant to understand the competing obligations, on one side, to keep

information confidential—*arete* (sacred) as Hippocrates put it—and, on the other side, to report such information to those entitled to have it? How are we to determine which conflicts of interest are ethically inconsequential, which ones call for recusal from the case, and which ones require disclosure, and then how much and to which parties? What permissions must clinical ethics consultants have in order to do the work? Must they, for example, have access to the medical charts and be permitted to question patients? Must they have authorization to enter chart notes? Questions like these typically call for a shared understanding by practitioners on the ethical dimensions of the work with such consensus being eventually recorded in an authoritative code of ethics. The embryonic profession of Hospital Ethics Consultation is only beginning to explore these areas and, until the authoritative professional standards appear, philosophers who venture to do practical ethics in hospitals must muddle through, deliberating about these issues themselves and perhaps negotiating shared understandings with their employers.

Today, there are philosopher/bioethicists who have severed the umbilical cord connecting them to academic philosophy departments. They work in hospitals, public agencies, and medical schools. After more than two millennia, the Socratic conception of philosophy is once again flourishing. While these new specialists retain their masteries of familiar philosophical tools, they have supplemented these with understandings and skills that are obtainable only outside of our discipline's academic headquarters.

### **Stage Three: Philosopher/Bioethicists as Public Intellectuals**

The clinical work that philosopher/bioethicists undertake may, from time to time, illuminate an issue that calls for attention beyond the field of philosophy, beyond the domain of bioethics, beyond the boundaries of the hospital, and even beyond the purview of the professions that do its critically important work.

This work can take a number of forms. In some cases, work published in scholarly journals can make the leap into the public domain. Journal articles subsequently reprinted in anthologies can establish a life of their own in a more public sphere. Expert testimony in ethics-related court cases, and before the legislature, especially if covered by the popular media, is another route. Letters to the editor and op-ed essays afford a more direct channel of communication to philosopher/bioethicists wishing to affect public opinion. Here also public statements to Federal agencies, with lists of signatories, can have an effect, as can *amicus* briefs to the courts.

For more than 30 years I have been publishing essays in bioethics—essays that drew richly from my philosophical background. In many of these pieces I have intended quite deliberately to alter standard of practice in healthcare. While these efforts can come to naught, some of the time, those to whom the papers were addressed took notice and, in small and not-so-small ways, changes could be discerned. In the late 1990s, Milton Diamond and I published “Pediatric Ethics and the Surgical Assignment of Sex,” arguing that longstanding efforts to “normalize” ambiguous genitalia in newborns was a truly bad idea. Several countries subsequently undertook to discourage these practices and, in the United States, the tide may be changing. Robert (Skip) Nelson, Nancy King, and I published two papers arguing that an Illinois company that had been testing a hemoglobin-based oxygen carrier (a blood substitute) had seriously misapplied the “exception from informed consent” provision of the Federal regulations on human research. Our concerns were picked up by the media

(the *Wall Street Journal* and the *Washington Post*) and Senator Charles Grassley summoned the head of the FDA to answer our objections. The FDA subsequently revised its understanding of EFIC and one of my two co-authors now works for that agency.

I have also challenged doctors' limiting the authority of parents to decide to abate treatment for extremely low birthweight newborns, challenged the current understanding of the limits of medical confidentiality, and argued for the excusability of euthanasia following the catastrophic collapse of healthcare institutions (as may have happened at Memorial Medical Center following Katrina).

I have two essays in press, one of which explores the ethical responsibility of a corporation when a patient dies at the hands of a surgeon who, at the time of the operation, was broadcasting the procedure as an “infomercial” to doctors attending a “telesurgery breakfast” in a distant city. While that procedure displayed the virtues of the medical device sold by the corporation that had sponsored the breakfast and paid the physician, it was not the procedure the patient needed in order to preserve her life. The other essay, related to the use of dexamethasone on fetuses, points to medicine's marred history with unborn patients (think of DES). Too often novel treatments, introduced with great hope, can impose tragic consequences years later, sometimes well after the former fetal research subjects have reached adulthood. This paper was not intended to stop such studies, but to require that parents wanting these prenatal treatments be advised that their children may have to be contacted when they reach adulthood, that clinicians may have to inform them that unforeseen adverse effects were manifested years after their prenatal exposures. Just as car makers have to retain records to contact owners if manufacturing defects appear, so should physicians and researchers retain similar records when fetuses are exposed to off-label and experimental drugs.

While I believe that these works have philosophical merit, there is no question but that they are intended (Socratically) to engage with audiences well beyond the walls of academe, to remedy shortcomings in critically important societal practices, and to sharpen the insights of experts who have allowed complacency to blur their vision.

Now I want to conclude by registering some obstacles that can be encountered in doing this work.

**1. Secrecy and noncooperation.** I think we philosophers are used to our colleagues playing with an open hand. However, once you begin to have a need to find out what professionals and organizations are actually doing, you can run into brick walls. Corporate executives fail to honor their assurances to provide you with protocols, and you may have to FOIA federal agencies to obtain critical documents. I once obtained the assistance of my Congressman to shake loose a report from the Department of Defense. Even with the best efforts, the facts one has gathered can turn out to be inaccurate and incomplete, and prudence and honesty require that one qualify one's conclusions as needed. Here one has to distinguish between the level of proof required if, having smelled smoke in a building, one calls the Fire Department to come to investigate, and the level of proof that is required if one calls someone an arsonist. Sometimes the pressing duty to raise a timely “hue and cry” can easily conflict with the punctilio of the finest scholarship.

**2. Retaliatory counter-measures.** Especially when efforts threaten to erode the status of the powerful, one's work can become the object of intemperate attacks. Harmless factual errors are painted as unprofessional wrongdoing. Having served on university panels charged with evaluating academic misconduct, it is essential to distinguish between minor or even consequential errors that can appear in written work, and

the far more serious transgressions that evidence corruption: falsifying data, plagiarism, and the failure to disclose conflicts of interest. While the distinction between the two types of shortcoming is easy enough to make, it disappoints when one sees them conflated.

Notwithstanding these and other difficulties, the twenty-first century may usher in, if not a new race of Philosopher Kings, then perhaps a new order of philosopher-professionals, professional “ethicists,” perhaps, who can somehow earn a decent livelihood outside of the Academy while practicing an honorable craft. In such a world philosophers are unlikely to ask when we should speak out. Cab drivers don’t ask themselves when they should cruise for fares. When should we speak out? When we have something important to say. Speaking out ought to be what we do.

For philosophy to reclaim its Socratic role would be, I think, something to hope for.

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## ***Intellectual and Moral Integrity in Bioethics Advocacy***

**Laurence B. McCullough**

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### **Introduction**

Public advocacy for changes in organizational and public policies and practices in clinical care, research, and health professions education has been a defining aspect of bioethics from its “founding years.” In his magisterial *The Birth of Bioethics* (1998) Albert Jonsen tells the story of how seventeen-year-old Maria Shriver (later a journalist and First Lady of this state) organized a meeting of her sister students at the National Institutes of Health (NIH) in 1973 to protest the NIH’s proposed policy to allow some forms of research on live fetuses obtained from late abortions (Jonsen 1998, 94-95). Protest demonstrations are a long-standing and celebrated component of public and political life in the United States. Ms. Shriver’s modest effort joined bioethics in its formative years to the tradition of American public advocacy.

The informal, spur-of-the-moment type of public advocacy undertaken by Ms. Shriver has had but temporary impact on organizational and public policies and practices. Scholarly advocacy has had more lasting impact. James Jones’ *Bad Blood* (1981) represents an important and very influential example of scholarly work, the effect of which is to contribute to major changes in policy and practice, in this case, regarding human subjects research.

The field of bioethics has matured considerably in the past three decades. Once a new, multi-disciplinary field, bioethics has evolved into a more interdisciplinary field. The integration of descriptive ethics, normative ethics, and metaethics in contemporary bioethics has become one of its defining characteristics, as documented persuasively by Jeremy Sugarman and Daniel Sulmasy (2010).

The integration of bioethics into clinical practice, research, and health professions education has also become one of its defining characteristics. As this integration increases, the culture of accountability that defines contemporary medicine and healthcare should also define bioethics. In a landmark article in *The Hastings Center Report* in 2009 on clinical ethics consultation, or CEC, Nancy Dubler and colleagues call for bioethics to step up to the challenges of accountability in the clinical setting. They situate their call for accountability in the

context of patient safety, the goal of which is to improve the processes of patient care and thus their outcomes.

The patient safety movement and quality movement practices in health care have changed how insurers, the federal government, and patients rate and measure excellence in health care delivery, and increasingly they will determine how care is reimbursed. CEC has remained insulated from these evaluations, however—a fact that must change if its full potential is to be realized. (Dubler et al. 2009, 24)

My central claim is that bioethics advocacy must change and become accountable for its intellectual and moral integrity, if the full potential of such advocacy is to be realized. I will provide the warrant for this claim by appealing to the ethical concept of co-fiduciary responsibility, which governs everyone seeking to influence the processes of patient care, research, or health professions education. Having explained the concept of co-fiduciary responsibility, I will explicate its requirements for the intellectual and moral integrity of bioethics advocacy. I will close with a consideration of a recent example of bioethics advocacy that failed to meet these requirements.

### **The Ethical Concepts of Fiduciary Responsibility and Co-Fiduciary Responsibility**

Many bioethicists and considerably more physicians believe that the ethical concept of fiduciary or professional responsibility to and for patients and research subjects was introduced into the history of medical ethics by the authors of the ethical texts in the Hippocratic Corpus, especially the Oath of Hippocrates. The widespread use of “Hippocratic tradition” and “Hippocratic ethic” reflects this belief. It is, unfortunately for its adherents, false, on at least two counts.

First, there was no continuous tradition of swearing the Hippocratic Oath, as Vivian Nutton (2009) has shown. Scholars such as Gálvao-Sobrinho (1996) have shown that, when the ethical writings attributed to Hippocrates were cited in medieval and Renaissance texts, the authors of those texts did so in order to valorize their own positions. These later positions, however, were not to be found in the Hippocratic texts and were even in some cases incompatible with the Hippocratic texts. This scholarship supports the use, not of “Hippocratic tradition,” but “Hippocratic imaginary” (McCullough 2011).

Second, the Hippocratic Oath, as becomes obvious in the plain meaning of the words in its opening sections, is a guild oath. Young male apprentices to the Coan School—as the Hippocratic physicians were known—could not be assumed to have the loyalty of sons, who had become in short supply. Outsiders, before they could be admitted to the trade secrets of the guild, had to swear and sign a covenant of loyalty to their teachers and colleagues (Jouanna 1999). There then follow admonitions about such matters as supervising regimen of diet and exercise, the disorders of which cause disease, not giving poisons, and not providing pregnant women with “destructive pessaries” (von Staden 1996). No rationale for these prescriptions and proscriptions is provided. Toward the end of the Oath there is a suggestion of the requisite rationale: the obligation to preserve *techné*, which is usually translated—and misunderstood—as the “art” of medicine. *Techné* names the unchanging body of knowledge of the humors, their fixed, predictable imbalances, and the very limited skills of clinical intervention to alter the course of disease. The Oath-taker swears to keep *techné* pure and holy, by staying strictly within its limits. To exceed these limits is a mistake and will bring a bad reputation. A bad reputation will result in a loss of market share. In the ancient Greek medical world of intense competition among practitioners, no uniform education and training, no

licensure, and no third-party payment there was none of the economic security that my medical students, residents, and clinical colleagues take for granted. The prescriptions and proscriptions of the Oath can be read as instructions in the prudent protection of reputation (*doxa*) as the means to economic success in an unforgiving marketplace in which failure resulted in poverty.

The ethical concept of medicine as a profession, of the physician as fiduciary of the patient, came into the history of Western medical ethics at the end of the eighteenth century in Britain. John Gregory (1724-1773), a Scottish physician, and Thomas Percival (1740-1804), an English physician, introduced the concept of fiduciary responsibility to and for patients—although neither used the word “fiduciary.” They used “professional” with the same meaning.

Both were Baconian physicians, unswervingly committed to basing medicine on what Francis Bacon (1561-1626) called “experience.” “Experience” names the results of experiments, of which there are two kinds. Natural experiments occur when a disease runs its course in an individual patient and when an individual patient’s condition responds or does not respond to clinical management. Controlled experiments are designed to test hypotheses, e.g., splitting a compound drug into its components and then testing each separately to identify which produces the desired outcome (McCullough 1998).

Gregory and Percival articulated the first of the three components of fiduciary responsibility in the Baconian discourse of experience (McCullough 2006). Physicians should become and remain scientifically and clinically competent by basing clinical judgment, decision making, and behavior on experience. Gregory argues that doing so requires cultivation of the intellectual virtue of candor: being open to correction of one’s clinical judgment and decision making on the basis of countervailing experience. We now call experience-based medicine evidence-based medicine, or, more precisely, evidence-based reasoning in medicine. Evidence-based reasoning requires physicians—and other healthcare professionals—to conform clinical judgment, decision making, and behavior to the best available evidence. In an important recent paper, “A Behavioral and Systems View of Professionalism” in the *Journal of the American Medical Association* late last year, Lesser and colleagues operationalize this first component of fiduciary responsibility as follows: “Adhere to nationally recognized evidence-based guidelines..., individualizing as needed for particular patients but conforming with guidelines for majority of patients” (Lesser et al 2010, 2734).

Committing to scientific and clinical competence aims to reduce uncontrolled variation on the processes of patient care. Uncontrolled variation in these processes becomes the definition of poor quality. The responsible, progressive, scientifically disciplined reduction of variation in these processes defines high-quality medical care or intellectual excellence in medical care. The first component of fiduciary responsibility requires the commitment to intellectual excellence in patient care. Adherence to evidence-based standards of intellectual excellence defines professional integrity in medicine.

The second and third components require commitment to moral excellence (McCullough 2006). Gregory based his account on David Hume’s (1711-1776) science of man and moral philosophy. Percival, a Dissenter, drew on the moral realism of fellow Dissenter, Richard Price (1723-1791) (McCullough 1998). Physicians achieve moral excellence in two synergistic ways. The first is to commit to the protection and promotion of the patient’s health-related interests as one’s primary concern and motivation. This commitment requires that self-interest

be kept systematically secondary. The second is to commit to maintaining, strengthening, and passing medicine on to future physicians, patients, and society as a public trust. Gregory and Percival meant these commitments to provide an antidote to the entrepreneurial, individual, and guild self-interested practice of medicine that then had come to define medical practice (McCullough 1998). These synergistic commitments define moral integrity in medicine.

Everyone whose decisions or behavior affects patient care incurs co-fiduciary responsibility to and for patients (McCullough 1999). The argument of this claim is straightforward. All of us are responsible for the consequences of actions that we freely undertake. In healthcare those consequences occur in the clinical setting, to patients or research subjects. Consequences to and for patients and research subjects are assessed on the basis of their conformity with the intellectual and moral integrity constitutive of fiduciary responsibility to and for patients.

### **Intellectual and Moral Integrity in Bioethics Advocacy Concerning Patients or Research Subjects**

Bioethics advocates who seek to influence patient care, human subjects research, or health professions education incur co-fiduciary responsibility to and for patients and research subjects. Bioethics advocates should therefore be held to standards of intellectual excellence: conformity with the requirements of evidence-based and argument-based reasoning (McCullough et al. 2004). Bioethics advocates should be held to standards of moral excellence: conformity with the primacy of the health-related interests of patients or research subjects and preserving and strengthening bioethics as a public trust.

### **A Case Study of Failure of Intellectual and Moral Integrity in Bioethics Advocacy about Patient Care and Research Subjects**

On January 29, 2010, a notice was circulated on the bioethics listserv sponsored by the Medical College of Wisconsin, calling the attention of listserv members to a “Letter of Concern from Bioethicists” about the prenatal administration of dexamethasone. The Letter was prepared by Professor Alice Dreger, an historian of science on the medical faculty of Northwestern University, and Professor Ellen Feder, a philosopher at American University. The notice and invitation to become a co-signatory on the Letter was circulated by Professor Hilde Lindemann, a philosopher at Michigan State University.

The authors of the Letter of Concern planned to send it to the Office of Human Research Protections (OHRP) and the Food and Drug Administration (FDA), both agencies of the U.S. Department of Health and Human Services. The Letter of Concern addressed the prenatal use of dexamethasone, a steroid, to prevent clitoromegaly secondary to congenital adrenal hyperplasia (CAH) in affected females. CAH is a genetic disorder of sexual development. The Letter characterized this intervention as “cosmetic,” because female genital virilization is not a pathological condition for which medical treatment would be justified. The Letter alleged that this intervention is experimental and therefore should be undertaken only with review and approval by the appropriate Institutional Review Board (IRB). The Letter further alleged that Dr. Maria New, a pediatric endocrinologist at Mt. Sinai Medical School and formerly at Weill Cornell Medical College (both in New York City), had engaged in such experimentation without IRB approval from either medical school.

The Letter was philosophically defective, inasmuch as it made contradictory claims in its penultimate and ultimate paragraphs. These two passages address whether there should be clinical trials undertaken to test the effectiveness and safety

of fetal dexamethasone for the cosmetic purpose of preventing clitoromegaly.

Claim 1: “Given the well-established risks to fetal development, physicians should initiate treatment of this type only through structured clinical trials with human subjects research protections in place” ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html), accessed April 11, 2011).

Claim 2: “Finally, we agree with Dr. Walter Miller, Distinguished Professor of Pediatrics and Chief of Endocrinology at the University of California San Francisco, who has written that ‘this experimental treatment is not warranted and should not be pursued even in prospective clinical trials’” ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)).

The Letter was also scientifically incompetent: no references were provided for its core factual claims:

Claim 3: “It is our understanding that Dr. New has long prescribed dexamethasone for purposes of preventing genital virilization associated with CAH in 46,XX females ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)).”

Claim 4: “That is to say, prenatal treatment with dexamethasone is intended to avoid a cosmetic issue associated with CAH, rather than to treat the medical issues that should be the primary concern of physicians ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)).”

Claim 5: “We are concerned instead with a particular instance of what appears to constitute a de facto clinical trial involving many hundreds of patients now among the targeted “subjects” of long-term research. In clear violation of established bioethical protocols, these pregnant women appear to have been recruited (and perhaps are still being recruited) without the benefit of IRB oversight ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)).”

Claim 6: Prenatal administration of dexamethasone results in “well-established risks to fetal development” ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)).

On the listserv I pointed out: “The letter contains no references and thus does not meet minimum standards of scholarship” (McCullough LB posting to [mcw-bioethics@mailman.mcw.edu](mailto:mcw-bioethics@mailman.mcw.edu), January 30, 2010). References were subsequently added ([http://fetaldex.org/letter\\_bioethics.html](http://fetaldex.org/letter_bioethics.html)). (The unreferenced version is not posted at fetaldex.org.) In a Target Article in the *American Journal of Bioethics*, my colleagues Drs. Frank Chervenak, Robert Brent, and Benjamin Hippen, and I provided a critical appraisal of the Letter of Concern (McCullough et al. 2010a). Professors Dreger, Feder, and Lindemann (2011) wrote one of the Peer Commentaries, to which we responded (McCullough et al. 2010b). In doing so, we characterized the Letter of Concern and the defense of it by Professors Dreger, Feder, and Lindemann as “fully liberated from accepted standards of evidence-based and argument-based reasoning” (McCullough et al. 2010b, W5). This assessment was corroborated by the OHRP and FDA responses to the Letter, showing that claims 3-6 lack foundation in fact.

This exchange is not the focus of my presentation today. The unreferenced Letter of Concern circulated to gather co-signatories is my focus. The Letter was intended to influence, by rejecting, what has been standard of care in obstetrics for many years, the prenatal administration of dexamethasone to pregnant women

with CAH-affected female fetuses. The Letter’s authors and co-signatories therefore incurred co-fiduciary responsibility to and for these fetal and pregnant patients regarding the intellectual and moral integrity of the Letter of Concern. Moreover, the Letter was sent to two federal agencies committed to the improvement of medical care by means of strict adherence to evidence-based research conducted to rigorous scientific and ethical standards of study design, implementation, and evaluation. The Letter, in short, entered the arena of evidence-based and argument-based reasoning in healthcare.

Thirty-one scholars signed on to Letter of Concern, most of them before the Letter was referenced. Their doing so conveyed to OHRP and FDA, to the clinical and research communities in fetal and pediatric endocrinology, to the affected population of pregnant women, and to the broader public that the unreferenced Letter of Concern met scholarly standards in each signatory’s discipline. For the philosophers who lent their names to this advocacy, doing so meant that it is acceptable in philosophical reasoning to violate the principle of non-contradiction and to make empirical and scientific claims with no supporting documentation. In short, egregious and repeated violation of intellectual integrity in philosophical bioethics in clinical practice and research was conveyed by the philosopher-co-signatories (and by the philosopher-author) as methodologically acceptable in philosophy. But it is false that such methodologically defective reasoning is acceptable in philosophy. A philosopher-bioethicist’s joining the Letter of Concern as a co-signatory was therefore incompatible with the commitment to intellectual integrity required by the concept of co-fiduciary responsibility and its application to bioethics in the clinical and human subjects research settings.

Subsequent activities of the authors of the Letter of Concern are not consistent with moral integrity. The referenced Letter of Concern has been posted at fetaldex.org, a website maintained by Professor Dreger. The visitor to this website is not informed about the existence of the unreferenced Letter and is not informed that most co-signatories joined it, not the referenced letter.

There is also a new preamble to the Letter. This preamble states that prenatal administration of dexamethasone to CAH-affected female fetuses “is not cosmetic,” because prenatal dexamethasone is known to prevent urogenital sinus, an anatomic pathology that requires surgical correction:

Please note that we learned after sending this that this letter neglects one important medical point: prenatal dex may prevent development of the confluence of the urethra and vagina in some girls. (If the urethra and vagina are confluent, a girl may experience problems with infections and will have problems with intercourse. This issue is not cosmetic.)

This statement supports the assessment of the Letter of Concern as having not met the standards of evidence-based reasoning. The well-known complication of urogenital sinus is something that anyone could have learned about by first undertaking a systematic review of the relevant clinical literature on CAH. The systematic review is a well-known, essential tool of evidence-based reasoning. Undertaking such a review as a first step is required to meet the minimum standard of evidence-based bioethics in the clinical and research settings: getting the facts right. The upshot of this admission is that the Letter of Concern should be withdrawn, because it was intellectually defective in its core claims that prenatal administration of dexamethasone is cosmetic and, as such, cannot justify the fetal risks. Continued failure to meet this minimum standard constitutes a failure of moral integrity.

In their responses to the Letter of Concern OHRP and FDA pointed out that Dr. New had written one prescription for dexamethasone, for a patient with CAH of record who had become pregnant. Claim 3 in the Letter was shown to be false. On the fetaldex.org website, maintained by Professor Dreger, one finds the following statement:

It appears that some researchers, notably Dr. Maria New's team, may have treated and [still be treating pregnant women with prenatal dex](#), off-label and outside any clinical trials or human subjects research protections, even while they are concerned enough to be [studying the mothers and children after the birth](#).

This statement is false. Making it in the Letter violated intellectual integrity. Repeating it when it has been shown to be false violates moral integrity. The use of "may have" I pass over in silence as a transparent attempt to evade co-fiduciary responsibility and accountability. Philosopher-bioethicist co-signatories should dissociate themselves from the Letter and its sequelae.

## Conclusion

Bioethics advocates who direct their advocacy to the improvement of patient care, human subjects research, or health professions education, like all who seek to influence healthcare, incur co-fiduciary responsibility to and for patients. Discharging this responsibility requires such bioethics advocates to satisfy the intellectual and moral commitments of co-fiduciary responsibility. To realize its full potential, bioethics advocacy must therefore end its isolation from and accept the discipline of co-fiduciary responsibility to and for patients. Carl Elliott's (2010) fine work on exposing potential abuse of research subjects at his own university provides an exemplar of intellectually and morally responsible bioethics advocacy.

Bioethics advocacy that insists on isolation from accountability to accepted standards of intellectual and moral integrity claims an unwarranted freedom: to damage bioethics in clinical care, research, and health professions education as a public trust. Damaged bioethics will violate the requirements of intellectual and moral integrity ingredient in co-fiduciary responsibility. Damaged bioethics will, justifiably, be regarded by our colleagues in clinical practice and research, not to mention major federal agencies such as OHRP and FDA, as, at best, wholly irrelevant to the improvement of patient care, human subjects research, and health professions education. At worst, damaged bioethics will make of itself a well-deserved laughingstock among constituencies the support of whom is vital for intellectually and morally responsible bioethics advocacy.

## References

- Dubler NN, Webber MP, Swiderski DM and the Faculty of the National Working Group for the Clinical Ethics Credentialing Project. "Charting the Future: Credentialing, Privileging, Quality, and Evaluation in Clinical Ethics Consultation." *Hastings Cent Rep* 39, no. 6 (2009): 23-33.
- Dreger A, Feder EK, Lindemann H. "Still Concerned." *Am J Bioeth* 10 (2010): 46-48.
- Elliott C. "The Deadly Corruption of Clinical Trials." *Mother Jones* (September/October 2010). <http://motherjones.com/environment/2010/09/dan-markingson-drug-trial-astrazeneca/> (April 11, 2011).
- Gálvao-Sobrinho CE. "Hippocratic Ideals, Medical Ethics, and the Practice of Medicine in the Early Middle Ages." *J Hist Med Allied Health Sci* 51 (1996): 438-55.
- Jones JH. *Bad Blood: The Tuskegee Syphilis Experiment – A Tragedy of Race and Medicine*. New York: The Free Press, 1981.
- Jonsen AR. *The Birth of Bioethics*. New York: Oxford University Press, 1998.

Jouanna J. *Hippocrates*. Trans. DeBevoise MB. Baltimore: Johns Hopkins University Press, 1999.

Lesser CS, Lucey CR, Egener B, Braddock III CH, Linas SL, Levinson W. "A Behavioral and Systems View of Professionalism." *JAMA* 304, n. 24 (2010): 2732-37.

McCullough LB. *John Gregory and the Invention of Professional Medical Ethics and the Profession of Medicine*. Dordrecht: Kluwer Academic Publishers, 1998. Now Springer.

McCullough LB. "A Basic Concept in the Clinical Ethics of Managed Care: Physicians and Institutions as Economically Disciplined Moral Co-Fiduciaries of Populations of Patients." *J Med Philos* 24 (1999): 77-97.

McCullough LB, Coverdale JH, Chervenak FA. "Argument-based Ethics: A Formal Tool for Critically Appraising the Normative Medical Ethics Literature." *Am J Obstet Gynecol* 191 (2004): 1097-1102.

McCullough LB. "The Ethical Concept of Medicine as a Profession: Its Origins in Modern Medical Ethics and Implications for Physicians." In *Lost Virtue: Professional Character Development in Medical Education*, edited by Kenny N, and Shelton W, 17-27. New York: Elsevier, 2006.

McCullough LB, Chervenak FA, Brent RL, Hippen B. "A Case Study in Unethical Transgressive Bioethics: Fetaldex.org's Letter of Concern about the Prenatal Administration of Dexamethasone." *Am J Bioeth* 10 (2010a): 35-45.

McCullough LB, Chervenak FA, Brent RL, Hippen B. "The Intellectual and Moral Integrity of Bioethics: Response to Commentaries on "A Case Study in Unethical Transgressive Bioethics: Fetaldex.org's Letter of Concern about the Prenatal Administration of Dexamethasone." *Am J Bioeth* 10 (2010b): W3-W5.

McCullough LB. "Was Bioethics Founded on Historical and Conceptual Mistakes about Medical Paternalism?" *Bioethics* 25 (2011): 66-74.

Nutton V. "The Discourses of European Practitioners in the Tradition of the Hippocratic Texts." In *The Cambridge World History of Medical Ethics*, edited by Baker RB and McCullough LB, 359-62. New York and Cambridge: Cambridge University Press, 2009.

Sugarman J, Sulmasy DP, eds. *Methods in Medical Ethics*, 2nd ed. Washington, DC: Georgetown University Press, 2010.

Von Staden H. "In a Pure and Holy Way: Personal and Professional Conduct in the Hippocratic Oath." *J Hist Med Allied Sc* 51 (1996): 404-37. Includes translation of Hippocratic Oath widely regarded as authoritative.

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## Speaking Out as an Obligation of Justice

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This essay attempts both to argue for speaking out as an obligation of justice, and to speak out. In writing it, I fully recognize (and caution the reader) that it is difficult to balance argument and action and I may not always have the balance right.

I begin with some assumptions about the role of academicians who work on issues of justice generally and issues of justice in healthcare more specifically.

First, we are privileged academic professionals. We have received extensive training, not fully at our own expense, and we have jobs that are valuable, valued, and in scarce supply. As such privileged academic professionals in bioethics, we have a duty to support and further just healthcare institutions. In partial compliance circumstances—that is, circumstances of injustice—this duty is a duty not to make things worse, and a duty to at least think about how to try to make things better, from the point of view of justice. Although I believe this duty can be defended on most of the major theories of justice on offer, I will not argue this point here.

Second, in the United States today, we are in circumstances of injustice. Again, this is a view that I believe can be defended

on the basis of most of the major theories of justice on offer. Libertarians may criticize our departures from the market, utilitarians our failures to pursue welfarist goals, and egalitarians of even the most minimalist stripe will express concern about the extent to which many do not have access to a basic social safety net (food, shelter, any healthcare at all).

Third, from the perspective of justice, at least in the near term, things in the U.S. seem to be getting worse, not better. Again, although I believe this claim can be defended from the perspective of many theories of justice, at this point I will note only the apparent worsening of the social safety net, at least in the near term.

There are, of course, many questions to ask about duties to support and further just healthcare institutions. Depending on the theory of justice, these questions may garner different answers, but they are questions that must be addressed nonetheless. What is the basis for the duty: Is it a special obligation in virtue of professional status, or an instantiation (per Rawls, etc.) of duties of justice that all have? Depending on how this question is answered, how the duty is instantiated may differ for those of us who play different professional roles. For example, I am a lawyer and law professor in addition to being a philosopher who works on issues in bioethics. Second, what is the content of the duty? What does it require? Does it require more than not behaving unjustly oneself, such as not taking advantage of the injustice of others, or actively pursuing justice? A third set of questions involves the weight of the duty. How strong is the duty? What can outweigh it: self interest, personal projects, interests of family members and friends, religious commitments, or social goals other than justice, to take many possible examples? Still another set of questions addresses the conditions under which the duty obtains. For example, what if others are not doing their fair share, or conversely what if others are doing more than they need to do, say through private charity?<sup>1</sup>

These are all important questions about speaking out as an obligation of justice, under-addressed in bioethics and in applied philosophy more generally.<sup>2</sup> But they are not my focus here. Instead, I'm going to turn to some very practical questions about *how* to speak out strategically, so that it has at least something of a chance to make a difference. These practical questions include who the audience is, how to communicate effectively, how to institutionalize capacities for communication, and how to approach social change more generally.

Take as an example the topic of "individual responsibility." This is a topic that philosophers have a great deal to say about. Topics related to the question of individual responsibility have garnered much attention lately in moral philosophy, moral psychology, or metaphysics: moral luck, public good, moral hazard, moral responsibility, causation, and addiction, just to name a few. "Individual responsibility" has become a mantra for opposition to the individual mandate component of healthcare reform.<sup>3</sup> The mandate is the least popular aspect of the law, and the most likely to be struck down by the courts.<sup>4</sup> But the individual mandate is also at the center of a number of important public misunderstandings about healthcare in the United States today and the aims of health reform. Just suppose academics could get people engaged in thinking about questions such as market failure and the inability of individuals to purchase health insurance on their own, whether healthcare is in some respects a public good, or the role of healthcare as an opportunity good.

This lack of engagement with difficult conceptual issues isn't a "sound bite" problem; it's a long term educational problem. Nor, in my judgment, is it just a matter of historical ideological commitments in the United States to negative liberty, the independence of the frontier, and the image of proverbial bootstrap pulling. Despite the image of the academy and the

media as "liberal" or "left," recent and highly effective efforts by the right have changed the structure of public discussion, and supporters of different positions about justice have not entered that discussion in effective ways. In this respect, I am particularly interested in the production of readily-accessible public policy materials, teaching of undergraduates and graduate students, grooming of people for academic positions, and support of people for positions of importance such as the judiciary.

Consider as an example the presence and efficacy of "think tanks." When I clerked on the United States Court of Appeals for the D.C. Circuit in 1981, I received a daily news digest from one of the then newly-founded conservative think tanks.<sup>5</sup> I wondered then, and continue to wonder now, who is doing news clips, RSS feeds, and the like in a similarly effective fashion for policy makers or academics on the left, particularly those with interests in bioethics. Think of the Brookings Institution: it remains stalwart, in its imposing building on Massachusetts Avenue, but has never been a source of such direct policy feeds. This is deliberate: Brookings has an admirable policy of academic impartiality and integrity.<sup>6</sup> But it leaves a vacuum to be filled by others. Moreover, it is apparently not engaged in health policy or health economics to the extent that it may once have been.<sup>7</sup> (Its current overall priorities are research aimed to "strengthen American democracy; foster the economic and social welfare, security and opportunity of all Americans; and secure a more open, safe, prosperous and cooperative international system").<sup>8</sup>

And observe what has grown up around Brookings. The American Enterprise Institute (AEI) was founded 1943, employed its first resident scholar in 1972, and now has over 175 employees, including Sally Satel. The Cato Institute was founded in 1977 by Ed Crane, an opponent of Social Security, and features a large presence opposing health reform. The Heritage Foundation, begun in 1973, has an entire division devoted to health and states very clearly on its website: "We communicate our message to our primary audiences: Members of Congress, key congressional staff members, policymakers in the executive branch, the news media, and the academic and public policy communities." Groups such as these have done an extremely effective job of convincing the public (and academia itself) of what's increasingly not true: that the academy is an effective voice supporting left-liberal policies.

One of the most effective actors in publicizing a picture of U.S. academia as an effective leftist voice is the Federalist Society. Here is the first sentence of the Federalist Society's statement of purpose: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Indeed, the Federalist Society is perhaps the most successful example of which I am aware of a concerted effort to build infrastructure. Founded in 1982, the Federalist Society for Law and Public Policy has become a staple of law schools, law reviews, law firms, and the judiciary. This from a long-time law faculty member of the Federalist Society: "If one can get students involved and committed to the Society, as practitioners they will have the resources to sustain the organizations and the status to realize these ideas in practical form during their many years at the bar."<sup>9</sup> (This statement is a deliberate paraphrase of the Jesuit view about how to create a Catholic for life.)

The Federalist Society now has chapters at every American Bar Association accredited law school, includes over 10,000 student members, and hosts thousands of events every year. It has international chapters and chapters at some undergraduate institutions. It has a lawyers' division, with over 30,000 members, and chapters in 60 cities. A recent study published by the American Bar Foundation documents the

role of the Federalist Society in bringing conservative lawyers together.<sup>10</sup> The Society also has a faculty division (started in 1999), with many “rising stars” in the legal academy. It provides fellowships for “promising” conservative lawyers considering going into teaching, a forum for advancing candidates for the job market, and a new set of fellowships for untenured academics. Academic journals founded with Federalist Society encouragement include the *Georgetown Journal of Law and Public Policy*<sup>11</sup> and the *Harvard Journal of Law and Public Policy*.<sup>12</sup> The Society generates a “shadow” to the American Bar Association rating of judicial nominees. I do not know whether Judge Henry Hudson (VA) or Judge Roger Vinson (FL), both ruling that the individual mandate is unconstitutional,<sup>13</sup> are members of the Federalist Society. But I do know that others who will be ruling on the Affordable Care Act have longstanding connections with the Society: Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito, to take four critical votes on the Supreme Court.<sup>14</sup>

At least in the legal academy, the Federalist Society’s role is well known and much discussed. There are similar organizations in moral and political philosophy of relevance to bioethics that are less well-publicized, however. The Liberty Fund is perhaps the oldest and best known of these. It was founded by Pierre Goodrich and sponsors over 150 conferences per year.<sup>15</sup> The Liberty Fund has also supported the Institute for Humane Studies.<sup>16</sup> That Institute, now associated with George Mason University, is funded by, among others, Charles and David Koch,<sup>17</sup> known most recently for their support of the Tea Party Movement.<sup>18</sup> The Institute awards prizes and scholarships (over \$700,000 annually) and even funds special events for undergraduates. The Freedom Center at the University of Arizona, building a major program in political philosophy, is likewise supported by the Koch Foundations as well as by other conservative donors such as Ken and Randy Kendrick.<sup>19</sup>

There are some counterexamples on the left, of highly effective litigation campaigns, or efforts to get legislation. Two in particular come to mind: the efforts of the NAACP legal defense fund that ultimately led to *Brown v. Board of Education*<sup>20</sup> and the work by Lambda Legal Defense and Education Fund on behalf of the “civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education, and public policy work.”<sup>21</sup> These efforts have results in important legal and public policy change. But they are by no means as general, or as aimed towards developing critical academics and lawyers in critical places, as are organizations such as the Federalist Society or the Institute for Humane Studies.

My goal in this essay has been to speak out—perhaps to “out”—the extent to which conservative funding and organization has influenced areas of academia of relevance to bioethics. In so doing, I am not arguing that these activities are wrong. I am arguing that they should be open, and that their influence on work on questions such as individual responsibility and social justice should be apparent.<sup>22</sup> I am also arguing that academics should be aware of the extent to which this funding is occurring, and should at least raise questions about its impact. These questions should include the influence it is having on undergraduates, on graduate training, on professional activities such as conferences, and potentially on public debate. These questions should also include whether those who do not share the views about justice funded in the manner I have detailed should be seeking their own funding, organizing with their own views in mind, or responding in some other way.

#### Endnotes

1. Important discussions of these last issues can be found in G.A. Cohen, *If You’re an Egalitarian, How Come You’re So Rich?* (Cambridge: Harvard University Press, 2000), and Liam

Murphy, *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000).

2. Indeed, these questions may be under-addressed in academia more generally, especially among scholars on what used to be called the left. See, for example, the discussion in Michael Kazin, “Whatever Happened to the American Left?” *New York Times Sunday Review*, Sept. 25, 2011, 4.
3. E.g., “the preeminence and salience of accountability for the individual.” In John O. McGinnis, An Opinionated History of the Federalist Society, 7 *Geo. J.L. & Public Policy* 403 (2009).
4. For one appellate court decision honing in on the individual mandate, see *Florida v. HHS*, No. 11-11021 (Aug. 12, 2011), <http://aca-litigation.wikispaces.com/file/view/CA11+opinion.pdf> (Sept. 25, 2011).
5. I forget whether it was the Heritage Foundation, started in 1973, [www.heritage.org](http://www.heritage.org) (Sept. 25, 2011), or the Cato Institute, started in 1977, [www.cato.org](http://www.cato.org) (Sept. 25, 2011).
6. [www.brookings.edu/about/Research.aspx](http://www.brookings.edu/about/Research.aspx) (Sept. 25, 2011).
7. E.g. Henry Aaron and William Schwartz, *The Painful Prescription* (Washington, DC: The Brookings Institution, 1984). In fairness, Brookings does have the Engelberg Center for Health Care Reform, directed by Mark McClellan, former administrator of the Centers for Medicare and Medicaid Services. Their primary interest is the improvement of healthcare quality. As well, there are other organizations that have devoted extensive resources to research concerning access to healthcare, such as the Kaiser Family Foundation, remade “from the ground up” in 1991, <http://www.kff.org/about/history.cfm> (Sept. 25, 2011).
8. <http://www.brookings.edu/> (Sept. 25, 2011).
9. John O McGinnis, Chapter 9: An Opinionated History of the Federalist Society, <http://samuelgriffith.org.au/papers/html/volume20/v20chap9.html> (Sept. 25, 2011).
10. Anthony Paik, Ann Southworth, and John P. Heinz. “Lawyers of the Right: Networks and Organization.” *Law & Soc. Inquiry* 32 (2007): 883-917.
11. <http://gjlp.wordpress.com/> (Sept. 25, 2011).
12. <http://www.harvard-jlpp.com/> (Sept. 25, 2011). The current issue features articles from the Federalist Society National Lawyers Convention in 2010.
13. *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010); *Fla. v. HHS*, 2011 U.S. Dist. LEXIS 22464 (March 2011).
14. <http://www.rightwingwatch.org/content/federalist-society> (Sept. 25, 2011) (Justices Alito and Scalia; Chief Justice Roberts); <http://digitaljournal.com/article/304111> (Sept. 25, 2011) (Justice Thomas). More generally, these Justices have been criticized for participation in a variety of activities sponsored by conservative organizations, see e.g. Jeff Shesol, “Should Justices Keep Their Opinions to Themselves?” *New York Times* (June 28, 2011) <http://www.nytimes.com/2011/06/29/opinion/29shesol.html?pagewanted=all> (Sept. 25, 2011).
15. <http://www.libertyfund.org/> (Sept. 25, 2011).
16. <http://www.theihs.org/> (Sept. 25, 2011).
17. For a listing of the over \$4 million in grants from foundations affiliated with the Kochs received by the Institute for Humane Studies between 2005 and 2009, see <http://www.greenpeace.org/usa/en/campaigns/global-warming-and-energy/polluterwatch/koch-industries/institute-for-humane-studies/> (Sept. 25, 2011).
18. Jane Mayer, “Covert Operations,” *The New Yorker* (August 30, 2010), [http://www.newyorker.com/reporting/2010/08/30/100830fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/08/30/100830fa_fact_mayer) (Sept. 25, 2011).
19. University of Arizona, SBS Developments (Winter 2009). I owe this source to Maureen Toomey Armos.
20. This history is described in a wonderful book by Richard Kluger, *Simple Justice: the history of Brown v. Board of*

Education, Alfred A. Knopf, Inc., 1976. It was made into a PBS film in 1993.

21. <http://www.lambdalegal.org/> (Sept. 25, 2011).
22. For example, the Freedom Center lists among its affiliated faculty Thomas Christiano, Michael McKenna, Guido Pincione, Dan Russell, David Schmidtz, and Steven Wall. Recent publications from this group include Christiano's *The Constitution of Equality: Democratic Authority and its Limits* (New York: Oxford University Press, 2008); McKenna's work on semantic accounts of responsibility; Guido Pincione and Fernando R. Tesón, *Rational Choice and Democratic Deliberation: A Theory of Discourse Failure* (Cambridge University Press, 2006); and David Schmidtz and Jason Brennan, *A Brief History of Liberty* (Oxford, Wiley-Blackwell, 2010).

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## Better Company

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Do your friends want to reform you?  
Do they try to mend your ways?  
Do they prod you to get moving:  
Jog, recycle, fill your days,  
Start your own organic garden,  
Eat more carrots, eat less fat?  
Well, there's always my solution:  
Blow them off, and get a cat.

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## Why Fetal Potential Matters

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### Introduction

Typically, when the family of a patient is informed that their loved one has fallen into a coma, the most pertinent question that is considered is whether the patient will reawaken. The answer to this question is vital in determining treatment for the patient. If she is expected to awake and live a fairly decent quality of life, then this often is sufficient for many families to approve, indeed insist on, continued life-sustaining treatment. If the family is told that there is minimal or no chance of recovery, they are more likely to permit the removal of life-sustaining treatment. Moreover, the answer to this question would essentially determine whether it was morally permissible to remove the patient from such treatment. Say that a physician removed a respirator from a patient who was believed to be in a persistent vegetative state but later somehow discovered that the patient was in a temporary coma instead, and may have very well reawakened to a good quality of life. The physician, and the family who gave their permission, would likely be haunted forever; at the very least it would be considered a tragic error. This illustrates that possessing the potential for future conscious awareness and a rational mind is sufficient to render the biological life of the patient worthy of preservation until that potential is realized. If this case can be made for a patient in a coma, it can be made for a human fetus. The goal of this paper is to make this case.

## Responding to anti-potentialists

While most philosophers agree that a typical human fetus is a potential person, many philosophers (Peter Singer, Michael Tooley, Mary Anne Warren, David Boonin, Bonnie Steinbock, and others) perceive this as morally irrelevant, and certainly not sufficient for according the fetus moral status or a right to life. I will refer to this point of view as “anti-potentialist.” According to anti-potentialists, the typical “pro-potentialist” view appeals to the fetus’ potential as, essentially, a place-holder. Because the fetus displays no characteristics that ground its right to life while it is a fetus, its potential is appealed to as a reason to treat it *as if* it has interests and rights just because it will one day possess them. As David Boonin puts it, according to the pro-potentialist, “potential possession of a right entails actual possession of a right. If an individual is such that it is developing into a being that clearly has a given right, then this fact about it justifies conferring the right on it already.”<sup>1</sup> But such an argument is clearly invalid, for “it is certainly not true of properties in general that if a given individual potentially has a given property, then the individual already has that property.”<sup>2</sup> There are a plethora of counterexamples that anti-potentialists offer to illustrate that “possession of a right is not entailed by potential possession of it.”<sup>3</sup> Medical students, although potential physicians, do not have the rights of actual physicians. Children, although potential adults, do not possess the rights of actual adults. A prince, although a potential king, does not possess the same rights as an actual king. As Peter Singer writes:

There is no rule that says that a potential X has the same value as an [actual] X, or has all the rights of an X. There are many examples that show just the contrary. Pulling out a sprouting acorn is not the same as cutting down a venerable oak. To drop a live chicken into a pot of boiling water would be much worse than doing the same to an egg. Prince Charles is the potential King of England, but he does not now have the rights of a king.<sup>4</sup>

How shall the pro-potentialist answer? The short response is this: Singer’s argument begs the question and, along with Boonin (and others who understand the pro-potentialist argument as abovementioned), his understanding of the pro-potentialist’s argument is mistaken. Consider the examples that Singer uses to counter the claim that potential Xs deserve the same rights as actual Xs: medical students do not have the same rights as actual doctors, children do not have the same rights as adults, princes do not have the same rights as kings. But this is incorrect. Children do have *some* of the same rights as adults: they have a right to life, a right to not be assaulted, a right to free speech and assembly etc. Granted, they don’t possess some other rights: the right to vote, or the right to enter into a legal contract. Similarly, princes do have *some* of the same rights as kings, but not other rights. When it comes to the rights children don’t share with adults, or that princes don’t share with kings, these are rights in which it is a *necessary condition* to be an actual X (an actual adult or an actual king) in order to possess those rights. Because it is a necessary condition, mere potentiality does not suffice. But, when it comes to fetuses and the right to life, *this is precisely what pro-potentialists contest*. That is, pro-potentialists challenge the contention that being an actual person is a necessary condition for possessing a right to life. Instead, they argue that being a potential person creates for the fetus an interest in continued existence, and *it is that interest*, which the fetus *currently* possesses, that grounds ascribing a right to life to the fetus. Because Singer assumes the very point that the pro-potentialist would contest (i.e., that only actual persons possess a right to life), he begs the question against the pro-potentialist.

Developing the pro-potentialist's argument necessitates distinguishing two definitions of the term "person": the metaphysical and the normative. Metaphysical personhood denotes a being who is rational, self-conscious, capable of self-motivated activity, and moral agency. A metaphysical person is, as John Locke writes, "a thinking, intelligent being that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times, and places."<sup>5</sup> Most cognitively normal human beings are persons in this sense; fetuses will become persons in this sense given typical cognitive development. Normative personhood denotes a being who possesses moral status and moral rights. In our society, all metaphysical persons are normative persons, but the converse does not hold, i.e., not all normative persons are metaphysical persons. Infants, feral children, the severely mentally disabled, and some nonhuman animals are examples of normative persons that lack metaphysical personhood.

Consider why infants are granted a right to life, even though they lack rational capacities, self-consciousness, and moral agency. This is because infants, in virtue of their potential for metaphysical personhood, possess, as Don Marquis puts it, a future full of "activities, projects, experiences, and enjoyments [that] are either valuable for their own sakes or are a means to something else that is valuable for its own sake."<sup>6</sup> In other words, an infant's potential for metaphysical personhood is what grounds its interest in continued existence. Because they have such an interest, infants are accorded a right to life in order to protect that interest from being violated. According to a pro-potentialist, if this logic works for an infant, it works equally well for the fetus.

Singer and Boonin interpret the pro-potentialist's argument as follows:

1. Potential Xs have the same right as actual Xs.
2. All persons have a right to life.
3. The fetus is a potential person.
4. Therefore, the fetus should be regarded as having a right to life.

The conclusion only follows from (2) and (3) if (1) is true, and because (1) is not true, (4) doesn't follow. Singer and Boonin are right that this argument is unsatisfactory. But this is not the pro-potentialist's argument, at least not a good version of it. A stronger version of the pro-potentialist's argument is more complex:

1. A potential X should be granted the same rights as an actual X **if** being a potential X grounds an interest that the ascription of rights would protect.
2. A being with rights is a normative person.
3. A fetus, though not now a metaphysical person, will become a metaphysical person if its natural development is not thwarted (e.g., if it does not die or experience any injuries that would compromise its potential).
4. The fetus' potential for metaphysical personhood creates a current interest in continued existence.
5. A being that possesses an interest in continued existence should be granted a *prima facie* right to life in order to protect that interest.
6. Therefore, the fetus should be granted a *prima facie* right to life (from 1, 4, and 5).
7. Therefore, the fetus should be regarded as a normative person (from 2 and 6).

Premise (1) explains why infants are accorded a right to life even though they are only potential metaphysical persons. The

principle will be further defended below. Premise (2) is simply the definition of normative personhood. Premise (3) is true given what we know about how humans typically develop. Premise (4) is perhaps the most controversial one, and it will also be defended below. Premise (5) seems like a commonsensical way of approaching rights attributions, at least when dealing with the right to life. As Joel Feinberg puts it, the interest in continued existence is the most basic and vital welfare interest an individual can possess, for without continued life, we cannot fulfill any other interests.<sup>7</sup> It makes sense, then, that any being with an interest in continued existence would be protected from death via the ascription of a *prima facie* right to life. Conclusions (6) and (7) follow if the premises are granted.

Anti-potentialists seem to hold that it is necessary that one be an actual person in order to possess a right to life (Singer, at least, explicitly admits to this). A pro-potentialist disagrees. She is not trying to argue that fetuses should be ascribed the rights of metaphysical persons, when being a metaphysical person is a necessary condition for attaining those rights, merely on the basis of the fetus' potential personhood. No pro-potentialist, for example, calls for a fetus or an infant to be given a right to vote based on the fact that it is a potential eighteen-year-old, because she understands that being eighteen years old is a necessary condition for being given the right to vote. Rather, the pro-potentialist is contesting that being a metaphysical person is a necessary condition for possessing the right to life in the first place. The potential for metaphysical personhood is sufficient for ascribing an interest in continued existence and therefore a *prima facie* moral right to life, which, in turn, renders the fetus a normative person. Thus, what the pro-potentialist *is* arguing is that the fetus' potential metaphysical personhood is sufficient for regarding the fetus as a normative person.

### Defending premises (1) and (4)

Paul Bassen argues that "[n]owhere outside the abortion debate itself is there a precedent for supposing that future prospects can create a present stake."<sup>8</sup> This is false. Every night my daughter and I read a book before bedtime, typically one that encourages her to recite the alphabet or count to ten. By contrast, I never do this with my dog or my cats. I suspect that this is a pretty standard difference between parents and pet owners. What accounts for this difference in treatment? After all, neither my daughter nor dog currently reads or engages in mathematics. The difference is simply their potential; my daughter's *potential* rationality is sufficient to ascribe to her a *current* interest in being read to. This expands to education as a whole; her potential rationality is sufficient to ascribe to her an interest in being formally educated. My dog has no such interest because he is not a potential rational agent. Formal education will simply never benefit my dog, it will never be in his interest, and so it makes no sense to say that dogs have a right to education. But it makes perfect sense to say that children have a right to be educated, and they possess this right purely in virtue of their potential rationality. As R.J. Gerber writes: "the careful education tendered to the young in our society suggests that we do, in fact, prize human potential for what it may actually receive in the distant future."<sup>9</sup>

Many argue that universal health insurance is a moral right. But why would a healthy person need health insurance? It is because healthy persons have the potential to get sick that grounds a current interest in health insurance (although not treatment, since it is necessary that one be actually sick in order to be treated; there is no interest in being treated when there is no ailment to treat). A super-human genetically engineered to never fall ill would have no interest in medical insurance or treatment, and therefore would not have a right to it. Both of these examples (medical insurance and education)

clearly illustrate that potential prospects can certainly ground current interests, and it would make sense to protect those interests via the ascription of rights. Premise (1) is, at least, rather plausible.

So the question becomes whether a fetus' potential personhood ascribes to it a current interest in continued existence. A strong case can be made that it does. If potential personhood ascribes a current interest in continued existence to a newborn infant, it is hard to see how it doesn't also apply to a fetus; in both cases the future of value, as Marquis puts it, is *its* future. Jim Stone has made a strong case that the fetus benefits from being permitted to obtain the kind of life (the life of a metaphysical person) that it is in its intrinsic nature to attain. Stone's key premise is:

Anything benefits from having the good which it is its nature to make for itself. I submit that we have a *prima facie* duty to creatures not to deprive them of the conscious goods which it is in their nature to realize.<sup>10</sup>

It seems rather clear that if a fetus' future consists of the experiences typical to that of persons, then that future is a good future, and it is for the fetus' benefit that it be permitted to attain this future. It is precisely the belief that individuals should be allowed to live in order to enjoy their lives and their future that grounds the all important question so many people ask physicians when their loved ones are in a coma. If the individual has a valuable future ahead of her, then it is in that individual's interest to live. If there is no future, then there is no interest in continued life. This applies equally to an unconscious individual, an infant, and to a fetus. Of course, this is essentially Don Marquis' argument, not my own. While Marquis derides the invalid version of the argument from potential, his argument is essentially what the pro-potentialist's argument *should* look like.

### Two caveats: Personal Identity and Abortion

The pro-potentialist's argument only works if the fetus' future really belongs to the fetus. That is, if the fetus is ascribed a right to life at  $t_1$  based on its interest in becoming a metaphysical person at  $t_2$ , it must be that the fetus at  $t_1$  is the same individual at  $t_2$  and, therefore, that the life lived at  $t_2$  can properly be ascribed to the fetus' future at  $t_1$ . That is, as Stone puts it, a "human creature's moral right to life begins when he does."<sup>11</sup> This necessitates an argument concerning the nature of diachronic personal identity, which is quite possibly one of the most arduous and debated issues in metaphysics. Where one stands on this issue will effect when one believes that a fetus' potential becomes morally relevant and, for many, this has implications for the moral permissibility of abortion. For example, Mary Anne Warren's liberal views on abortion can be traced back to her beliefs concerning which beings count as part of the moral community (fetuses do not) but also to her metaphysical beliefs concerning identity.

Personal pronouns like "we" refer to people; we are essentially people if we are essentially anything at all. Therefore, if fetuses and gametes are not people, then we were never fetuses and gametes, though one might say that we emerged from them. The fetus which later became you was not *you* because you did not exist at that time...[s]o if it had been aborted nothing whatever would have been done to you, since you would have never existed.<sup>12</sup>

This aspect of her pro-abortion rights arguments is rarely discussed. For Warren, metaphysical personhood is not only important for determining moral status, but also for determining when a human substance that persists over time (and who

therefore has a right to continued existence) comes into being (and, given this criteria, that substance would begin to exist rather late indeed, since metaphysical personhood does not really commence in a human being until the toddler years). Jeff McMahan, by contrast, believes that the attainment of the capacity for conscious awareness denotes the beginning of a human being whose identity persists over time. This happens approximately at mid-gestation, when the fetus develops the necessary neural apparatus for conscious awareness. McMahan writes:

Just prior to twenty weeks [gestation] there is no one there to be affected by an abortion. After twenty-eight weeks, the developed fetus is definitely present and would be affected for the worse by an abortion.<sup>13</sup>

Indeed, one of the most prevalent arguments against Marquis' future-of-value argument against abortion calls into question his premise that the life of a future person could properly be ascribed to a fetus. For example, Peter K. McInerney writes:

Fetuses are very different from normal adult humans. The connections between a fetus at an earlier time and a person (or person stage) at a significantly later time are very different from the connections between the person stages at different times which compose one person. Philosophical investigations of personal identity through time have revealed the complexity of the biological and psychological connections between the earlier and later stages of one person. These significant differences invalidate the claim that a fetus has a personal future in the same way that a normal adult human has a personal future.<sup>14</sup>

The conclusion, then, is that potential matters in terms of ascribing the fetus an interest in continued existence. But concluding when in gestation it begins to matter requires quite a bit of difficult metaphysical work. At the very least, this illustrates why Earl Conee's<sup>15</sup> and Frank Leavitt's<sup>16</sup> respective derision of the role metaphysics plays in bioethics is misplaced.

Finally, perhaps furthering the demoralizing of a typical pro-potentialist who now has to wrestle with metaphysics, nothing here implies that abortion is impermissible. Even if the fetus is considered a normative person on the basis of its potential metaphysical personhood, and granted a right to life on this basis, this still does not entail that the fetus has a right to continued use of a woman's body for sustenance. Indeed, no extrauterine normative person has a right to the use of another's body, particularly in an invasive way such as pregnancy, in order to facilitate continued existence. Thomsonian<sup>17</sup> arguments in favor of abortion rights still need to be considered and successfully refuted before an appeal to potential can do any real work in defending the impermissibility of abortion.

### Endnotes

1. David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2003), 46.
2. *Ibid.*
3. *Ibid.*
4. Peter Singer, *Practical Ethics* (New York, NY: Cambridge University Press, 1993), 153.
5. John Locke, "Of Ideas of Identity and Diversity," in *An Essay Concerning Human Understanding*. 1690. (Indianapolis: Hackett Publishing Company, 1996), Book II, chapter 27.
6. Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* 84, no. 4 (1989): 189.
7. Joel Feinberg, *Harm To Others: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984).

8. Paul Bassen, "Present Stakes and Future Prospects: The Status of Early Abortions," *Philosophy and Public Affairs* 11, no. 4 (1982): 333.
9. R.J. Gerber, "Abortion: Parameters for Decision," *Ethics* 82, no. 2 (1972): 149.
10. Jim Stone, "Why Potentiality Matters," *Canadian Journal of Philosophy* 17, no. 4 (1987): 821.
11. *Ibid.*, p. 824.
12. Mary Anne Warren, "Do Potential Persons Have Rights?" in *Responsibilities to Future Generations* (Buffalo: Prometheus Books, 1981), 264.
13. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 277.
14. Peter K. McInerney, "Does A Fetus Already have a Future-Like-Ours?" *The Journal of Philosophy* 87, no. 5 (1990), 265.
15. Earl Conee, "Metaphysics and the Morality of Abortion," *Mind* 108 (1999): 619-45.
16. Frank Leavitt, "Let's Keep Metaphysics out of Bioethics," *Journal of Medical Ethics* 21, no. 2 (1992): 106-11.
17. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1, no.1 (1971): 47-66.

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## The Unactualized Potential of PVS Patients

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In 1968, with the published report of the Ad Hoc Committee of the Harvard Medical School,<sup>1</sup> many scholars and medical practitioners began to abandon the traditional cardiopulmonary criterion for determining when a human being has died. They argued that, since the brain is the central organ which regulates the body's metabolic functions, irreversible cessation of the functioning of the brain as a whole—cerebral cortex, cerebellum, and brainstem—constitutes death. This "whole-brain" criterion of death is based on the understanding that a human organism cannot exist or function as a unified whole without a functioning brain.<sup>2</sup>

The general acceptance of whole-brain death led to the postulation that perhaps not every part of the brain need irreversibly cease functioning in order for death to occur. Some scholars, noting that neocortical functions are responsible for the peculiarly human "personal" activities of self-conscious rational thought and volition, argue that the death of a human person occurs when her cerebral cortex has been rendered irreversibly non-functional. This so-called "higher-brain" concept of death is used as the basis to argue that patients in an irreversible *persistent vegetative state* (PVS) are no longer persons and thus should be considered dead.

A key metaphysical question underlying this debate over higher-brain death concerns whether or not a PVS patient retains the capacity or potentiality to engage in self-conscious rational thought and volition. On the one hand, it is quite evident that a PVS patient has no such capacity since the physical structures required for her to be able to think in this manner are irreversibly non-functional, as opposed to a temporarily comatose patient who may regain consciousness at some point in the future. On the other hand, it could be argued that a PVS patient retains a *natural potentiality* for self-conscious rational thought and volition due to the fact that she persists as a living human organism, and a defining feature of the human essence is that one has such a potentiality even if she would never be able to actualize it again.

I will approach this debate from the Aristotelian-Thomistic metaphysical perspective, elucidating both Aristotle's concept

of potentiality and a Thomistic understanding of death that supports the whole-brain standard against the higher-brain concept. I conclude that, despite appearances to the contrary, PVS patients persist as human persons with a natural, intrinsic potentiality for self-conscious rational thought and volition, even if the physical condition of their body prevents them from ever actualizing this potential again—at least in this life.

### Aristotelian Concept of Potentiality<sup>3</sup>

Aristotle defines the concept of "potentiality" in terms of two broad types: *active* and *passive*. Something has an active potentiality if it has within itself everything necessary, given its proper *design environment*, to actualize itself in the relevant manner.<sup>4</sup> The locus of a substance's set of active potentialities is its *substantial form*.<sup>5</sup> By contrast, something has a passive potentiality if it can be the subject of externally directed change such that it can become what it is not already.<sup>6</sup>

Furthermore, active potentiality comes in two varieties. The first is what Robert Pasnau refers to as a "capacity in hand" to perform an operation, which means that no further development or significant change is required for the potentiality to be actualized.<sup>7</sup> For example, a person may have a capacity in hand to speak Spanish if, for example, she had majored in it in college; but it may be the case at any given moment that she is not using this capacity and so it is not in actual operation, which it would be if she were actually speaking Spanish at that moment. The second is what Norman Kretzmann refers to as a substance's "natural potentiality" to develop a capacity in hand to perform an operation.<sup>8</sup> For example, before having learned Spanish and thus developed a capacity to do so, a person would have a natural potentiality to develop this capacity, as opposed to a dog or a plant that lacks such a natural potentiality; any natural substance has numerous such potentialities as defined by its essence, some of which may be developed into capacities in hand while others are left undeveloped.<sup>9</sup> The capacity to speak Spanish is a *specification* or *perfection* of the more basic natural potentiality to learn language at all. A substance possesses its basic natural potentialities throughout the entirety of its existence, regardless of whether such potentialities are ever further developed or actualized as more specific or perfected capacities.<sup>10</sup>

### Thomistic Understanding of Death<sup>11</sup>

Aquinas's account of a human being's death begins with his understanding of a rational soul<sup>12</sup> as a human body's substantial form and its *unitive* function as such.<sup>13</sup> As the substantial form of a human body, a rational soul is the principle of the body's (1) existence, (2) unified organic functioning, and (3) specific nature as a "human" body.<sup>14</sup> Aquinas understands a rational soul to be the principle of a human body's organic functioning and to operate by means of a *primary organ*, which contemporary science would identify as the brain.<sup>15</sup>

Aquinas defines death in two ways: "Since death is the loss of life, it must be similarly distinguished so that it designates at one time the loss of that union by which a soul is united to a body as form, and at another time the loss of the operation of life."<sup>16</sup> Though he separates two understandings of the term "death," Aquinas considers them united in one and the same event. When the union of a rational soul and its body is dissolved, the dissolution of the body's unified organic functioning immediately follows.<sup>17</sup> Aquinas thus identifies a human being's death, defined metaphysically as a rational soul's separation from the body it informs, as when the body is no longer able to actualize the soul's *vegetative* capacities.<sup>18</sup> The clinical criterion for determining the occurrence of this event is the loss of vital metabolic functioning as evidenced by the cessation of respiratory activity.<sup>19</sup>

Despite his explicit acceptance of the cessation of respiration as the clinical evidence for determining death, it is reasonable to contend that Aquinas would accept the whole-brain criterion. This interpretation is advocated by Philip Smith,<sup>20</sup> Benedict Ashley,<sup>21</sup> and myself<sup>22</sup> in agreement with the Pontifical Academy of Sciences: “A person is dead when there has been total and irreversible loss of all capacity for integrating and coordinating physical and mental functions of the body as a unit.”<sup>23</sup> In Thomistic terms, when such “integrative unity” has been irreversibly lost, a body is no longer *proportionate* for rational ensoulment; for it can no longer materially support a soul’s proper capacities in a *unified* substance.<sup>24</sup> The whole-brain criterion defines death in terms of the *one* organ that is directly correlated with *all* of a human being’s proper capacities—vegetative, sensitive, and rational—the loss of which coincide in a single, empirically verifiable event.<sup>25</sup>

Acceptance of the higher-brain concept of death, from a Thomistic standpoint, would require one to argue that when a body is no longer able to provide the biological foundation necessary for self-conscious rational thought and volition, a *substantial change* occurs in which the rational soul separates and the body becomes informed by a vegetative soul. If this is what indeed occurs in cases of PVS, then the body on the bed is a mere “vegetable.”<sup>26</sup> This purportedly Thomistic account of human death is at odds with Aquinas’s explicit contention that it is a body’s inability to actualize a rational soul’s *vegetative* capacities which signals that such a soul no longer informs it; a PVS patient retains the intrinsic activity of spontaneous respiration and other vital metabolic functions. The higher-brain account thus involves an unwarranted separation of a soul’s rational and vegetative capacities.

Aquinas holds that once a rational soul is instantiated as the substantial form of a human body, it alone possesses all of a human being’s proper capacities: vegetative, sensitive, and rational. It is not the case that there are *three* souls informing a fully developed human body. Rather, the vegetative soul that first informs a living human embryo is annihilated once the embryo develops to the point where it has sense organs and sufficient neural development for sensitive operations; it thus becomes informed by a sensitive soul that has both sensitive and vegetative capacities. The sensitive soul is annihilated once the point is reached where neural development is sufficient to support rational operation and a rational soul is instantiated that has vegetative, sensitive, and rational capacities. Aquinas argues at great length that a human being’s proper capacities have their source in *one* substantial form: a rational soul.<sup>27</sup>

Given Aquinas’s strong contention of the *unicity* of a human being’s substantial form, it is not surprising that he does not characterize death in the same way that he does human generation. Once a rational soul begins to inform a properly disposed human body, the body must lose its disposition for *all* the soul’s proper capacities in order for the soul to cease informing its body. Accepting the higher-brain interpretation entails the following metaphysical description of how human death may occur: There exists first a rational substance informed by a rational soul, and then a merely living substance informed by a vegetative soul, and finally a lifeless corpse. This description violates Ockham’s Razor, which states that *ceteris paribus* the simplest explanation of a given phenomenon—i.e., the explanation that is the least ontologically complex by requiring the postulation of the least number of entities—is the explanation to which one ought to give assent.

A more plausible approach is to argue that a rational soul continues to inform its body until the body ceases to function as a *unified, integrated organism*. A rational soul is not only the seat of a human being’s rational and sensitive capacities; it is

also the substantial form of her body and is thereby the source of the body’s vegetative capacities. While PVS patients may no longer be able to actualize their rational or sensitive capacities, their souls remain embodied and are active in terms of their vegetative capacities. A human being exists before death as a composite of a rational soul and an organic body, and is not identified with merely the exercise of rational capacities.<sup>28</sup> Hence, we cannot be certain that a PVS patient does not remain a human person until there is incontrovertible evidence that her rational soul has altogether ceased to be active as the substantial form of her body. Irreversible cessation of higher-brain functioning may serve as evidence that a soul’s rational capacities can no longer be actualized, and one may wish to infer from this evidence that the rational soul has ceased to be that body’s substantial form. Such an inference, however, may be invalid insofar as the remaining vegetative operations present in a PVS patient serve as evidence that her rational soul remains active as her body’s substantial form due to the soul’s vegetative capacities still being actualized in that body.

### The Unactualized Potential of PVS Patients

Patrick Lee and Robert George contend that a PVS patient, insofar as her substantial existence as the numerically same human organism persists, possesses all the basic natural potentialities definitive of the human essence; it is only a defect in her brain that prevents the natural potentiality to engage in self-conscious rational thought and volition from being actualized.<sup>29</sup> Within the Aristotelian-Thomistic framework, the actualization of a substance’s natural potentialities is an *accidental* feature of its existence, such actualizations are not “properties *constituting* the human essence.”<sup>30</sup> Alan Shewmon considers a case of blindness that would have been incurable a century ago, but is now reversible due to currently available technology and technique. There is no *intrinsic* difference between such a blind person today and one living in the late nineteenth century; only *extrinsic* conditions have changed that impact their ability to actualize their natural potentiality for sight.

A similar conclusion has been more recently defended by Russell DiSilvestro, who argues that a substance’s *passive* potentialities may also count among the set of potentialities that define its essential nature. Hence, a cognitively deficient or comatose human being may still have an ontologically relevant potentiality to think rationally even if advanced technology—perhaps not invented yet, but theoretically possible—is required to allow him to have an immediately exercisable capacity to think rationally.<sup>31</sup> To allow, however, for a passive potentiality for self-conscious rational thought and volition to ground the claim that PVS patients count as persons may be too “promiscuous.” Considering the case of a human being who is not capable of self-conscious rational thought, because she lacks a functioning cerebrum, but could become so if the right technological intervention were to become available, DiSilvestro contends,

A thousand years from now the known ways of restoring the powers of thinking to a human organism will be much greater than the known ways of restoring such powers today. There are certain sorts of injuries to the brain that we cannot reverse with today’s technology, but will be able to reverse a thousand years from now. If such an injury occurs today, it is a mistake to claim that the injured organism does not have the power to regain the power to think. The organism does still have the power to regain the power to think. What is lacking is merely the technology to permit this higher-order power to be realized.<sup>32</sup>

What, then, should we say about *cryopreserved corpses* that clearly meet the clinical criteria for being considered “dead”

but nevertheless retain the potentiality—*per* DiSilvestro—to engage in self-conscious rational thought through some sort of imagined future technology? Given the mere *possibility* that a dead body may be cryopreserved and revived at a later time, it would seem that such a body still instantiates the human essence, albeit in a quiescent state.

*Pace* DiSilvestro, I contend that the relevant criterion is whether a cryopreserved body has an *active* potentiality to live again, meaning that it has within itself everything necessary, given its proper design environment, to actualize itself as a self-conscious rational being. Active potentiality refers to something's capacity to *be* in a certain way, as opposed to merely the possibility of its *becoming* something.<sup>33</sup> Of course, something could have an active potentiality to become something different—for example, a standing person has an active potentiality to become a sitting person—but such a case involves the thing in question being able to produce such a change in itself. A cryopreserved body, however, does not have its own motive principle by which it is able to reanimate itself. Therefore, it fails to satisfy Aristotle's condition for a potentially living body suitable to instantiate the essence of a living being, human or otherwise—that is, “one having *in itself* the power of setting *itself* in movement and arresting *itself*.”<sup>34</sup> A cryopreserved body has been arrested through dying and being frozen and it cannot set itself back in motion through its own power.

While a cryopreserved body has some degree of potentiality to become a living body insofar as it provides the material makings of such a body, this is insufficient to hold that a cryopreserved body has an active potentiality to live again at some future time, and thus that it *currently* instantiates the human essence. DiSilvestro's allowance of *passive* potentialities to suffice for the human essence to persist in a human body would imply that a cryopreserved corpse constitutes—both ontologically and morally—a person, which would fundamentally alter the ethical landscape of how we currently treat dead human bodies.

We must not go too far in other direction, though, in claiming that extrinsic conditions may *restrict* a substance's inherent natural potentiality. John Lizza argues that there are three relevant conditions that determine the “realistic” potentialities a person may possess: (1) the physical state of the person; (2) physical factors external to the person; and (3) individual and social decisions.<sup>35</sup> Appealing to the third condition, Lizza refers to the case of a person whose cardiopulmonary functions have ceased but may be resuscitated through CPR or the use of a mechanical ventilator, but who also has a “do not resuscitate” (DNR) order that precludes anyone from ethically performing CPR on them. Even though the patient's intrinsic physical state would allow for their condition to be reversed, Lizza concludes that such patients “are correctly declared dead soon after cardiac arrest”<sup>36</sup> because an extrinsic condition—in this case, others' respect for the patient's DNR order—renders their condition irreversible.

Lizza's construal of potentiality is too restrictive. Consider the extrinsic means of life-support provided by an astronaut's spacesuit, which provides what she needs to exercise her intrinsic natural potentialities for life, consciousness, etc.; but the lack of such support does not entail that she lacks the relevant potentialities for those functions. If her spacesuit malfunctions and stops supplying oxygen, she will quickly lose consciousness and her vital metabolic functions will cease shortly thereafter. If, however, a fellow astronaut fixes her suit in a timely fashion and restores the flow of oxygen, her vital metabolic functions can be resuscitated and she may regain consciousness. If this occurs, it indicates—in terms of serving

as evidence—that the astronaut's active potentiality for such functions remained despite the temporary loss of the requisite supportive environment.<sup>37</sup>

What if, though, her fellow astronaut is like “Jones” in James Rachels's famous thought-experiment concerning the active/passive euthanasia distinction<sup>38</sup>—that is, presented with an opportunity to sit back and allow his spacewalking partner to die, he does just that. Of course his inaction is morally reprehensible, but the question under dispute is whether his murderous decision affects the ontological status of the astronaut in distress. According to Lizza's conditions for asserting the presence of a “realistic” potentiality for consciousness, once our intrepid astronaut in the failing suit loses consciousness, and even before her vital metabolic functions have ceased,<sup>39</sup> she is irreversibly *dead*; for her current physical state will not allow her to regain consciousness by her own power, the requisite external means for her to regain consciousness—in this case, a well-functioning spacesuit—is no longer present, and the only other person who could repair her spacesuit and bring her back to consciousness does not intervene because of his murderous intent. While it seems inevitable that the astronaut *will die*, it does not seem at all correct to state that she is *already dead* because she lacks the relevant potentiality for consciousness. What if her murderous partner has a sudden and unexpected change of heart, deciding at the last second to repair her suit and, a few minutes after the flow of oxygen resumes, she regains consciousness? Was she literally brought back from the dead? It seems absurd to conceive of one's status as a living or dead human person to be alterable so capriciously by another's moral decisions. I thus submit that extrinsic conditions of whatever sort should not play a role in determining whether a human person is alive or dead; rather, we must endeavor to rationally identify what *intrinsic active natural potentialities* are present, allowing these alone—or in concert with other relevant intrinsic properties—to define the substantial existence and essential nature of the individual in front of us.

I conclude that PVS patients continue to possess, although they can no longer actualize, an intrinsic, natural, active potentiality for self-conscious rational thought and volition. While there is no evidence that *directly* shows the presence of such a potentiality, it may be reasonably inferred from the fact that a PVS patient persists as a living human organism and thereby, arguably, possesses *all* the relevant potentialities definitive of the human essence. While the higher-brain concept of death is rationally coherent, in claiming that—in Aristotelian terms—there is a substantial change when one falls into an irreversibly unconscious state from a person into a mere organism, it is contrary—as Aquinas argues—to a *unified* concept of human nature as involving both our existence as self-conscious rational minds and also as living animals.<sup>40</sup>

#### Endnotes

1. See “A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Death,” *Journal of the American Medical Association* 205, no. 6 (1968): 337-40.
2. The whole-brain criterion has received legislative approval in several nations, including the U.S. Uniform Determination of Death Act. See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death: Medical, Legal and Ethical Issues in the Determination of Death* (Washington, D.C. U.S. Government Printing Office, 1981). In addition, it has received moral approval from the Roman Catholic Church. See John Paul II, “Address to the International Congress on Transplants,” *National Catholic Bioethics Quarterly* 1, no. 1 (2001): 89-92; R. White, H. Angstwurm, and I. Carrasco de Paula, eds., *Working Group on the Determination of Brain*

- Death and Its Relationship to Human Death* (Vatican City: Pontificia Academia Scientiarum, 1992).
3. This section includes material derived from Jason T. Eberl, "Potentiality, Possibility, and the Irreversibility of Death," *Review of Metaphysics* 62, no. 1 (2008): 61-77; and Eberl, "Aquinas's Account of Human Embryogenesis and Recent Interpretations," *Journal of Medicine and Philosophy* 30, no. 4 (2005a): 379-94.
  4. I derive the concept of a "design environment" from Alvin Plantinga's concept of something fulfilling its *proper function*, according to its *design plan*, in an *appropriate environment*; see his *Warrant and Proper Function* (New York: Oxford University Press, 1993), ch. 2.
  5. The term "substantial form" refers to the set of properties something possesses that defines its *essence*, such that a change of substantial form would entail a change in numerical identity and perhaps also a change in its species membership; as opposed to an accidental form, such as "being red," which defines a way in which a thing may or may not be without altering its essential nature or changing its numerical identity. The concept of substantial form includes both the *universal* set of essential properties that are shared by all individual members of the same natural kind, and the *individuated* set of properties that inhere in a particular material substance. Once individuated, a particular substance's substantial form grounds its persistent diachronic identity. For further discussion of the individuation of the substantial form of human persons and the persistent identity of a person by virtue of her individual substantial form, see Jason T. Eberl, "Aquinas on the Nature of Human Beings," *Review of Metaphysics* 58, no. 2 (2004): 347-59.
  6. For further elucidation of this basic distinction in types of potentiality, see Roy W. Perrett, "Taking Life and the Argument from Potentiality," *Midwest Studies in Philosophy* 24 (2000): 192; Massimo Reichlin, "The Argument from Potential: A Reappraisal," *Bioethics* 11, no. 1 (1997): 13-17; Patrick Lee, *Abortion and Unborn Human Life* (Washington, D.C.: Catholic University of America Press, 1996), 24-26; Robert Larmer, "Abortion, Personhood and the Potential for Consciousness," *Journal of Applied Philosophy* 12, no. 3 (1995): 243-44.
  7. See Robert Pasnau, *Thomas Aquinas on Human Nature* (New York: Cambridge University Press, 2002), 115.
  8. See Norman Kretzmann, *The Metaphysics of Creation: Aquinas's Natural Theology* in *Summa contra Gentiles II* (Oxford: Clarendon Press, 1999), 39.
  9. For further elucidation of this distinction in types of active potentiality, sometimes construed as "proximate" vs. "remote" active potentiality, see Patrick Lee and Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* (New York: Cambridge University Press, 2008), 136-38; Lee 1996, p. 28, n. 33; Alfonso Gómez-Lobo, "On Potentiality and Respect for Embryos: A Reply to Mary Mahowald," *Theoretical Medicine and Bioethics* 26 (2005): 109; Stephen Schwarz, "Personhood Begins at Conception," in *The Abortion Controversy 25 Years After Roe v. Wade: A Reader*, ed. Louis P. Pojman and Francis J. Beckwith (Belmont, CA: Wadsworth, 1998), 265-66; Reichlin 1997, p. 15; Robert E. Joyce, "Personhood and the Conception Event," *The New Scholasticism* 52 (1978): 99-100; Francis C. Wade, "Potentiality in the Abortion Discussion," *Review of Metaphysics* 29 (1975): 249.
  10. See Lee and George 2008, p. 153.
  11. This section is derived from Jason T. Eberl, "A Thomistic Understanding of Human Death," *Bioethics* 19, no. 1 (2005b): 29-48; and Eberl, *Thomistic Principles and Bioethics* (New York: Routledge, 2006), ch. 3.
  12. Following Aristotle, Aquinas defines a "rational" soul as a soul that has the relevant capacities for life, sensation, and rational thought and is the type of soul proper to the human species. A "sensitive" soul, on the other hand, has the relevant capacities for only life and sensation, and is the type of soul proper to all non-human species of the animal genus. A "vegetative" soul has the relevant capacities for only life and is proper to all non-animal living organisms. See Aristotle, *De anima*, II.2-3.
  13. See Aquinas, *Summa contra Gentiles* (SCG), II.58. For an interpretive analysis of Aquinas's overall metaphysical account of human nature, Eberl 2004.
  14. See SCG, II.68; Aquinas, *Quaestio disputata de spiritualibus creaturis* (QDSC), IV; *In Aristotelis librum de anima commentarium*, II.1-2; *Summa theologiae* (ST), III, Q. 50.5, reply 1.
  15. See Aquinas, *Quaestio disputata de anima* (QDA), IX, reply 13; X, replies 4 and 11; XI, reply 16; *Scriptum super sententis magistri Petri Lombardi*, I.8.v.3, reply 3; Eberl 2005b, pp. 31-2.
  16. Aquinas, *Quaestiones disputatae de veritate* (QDV), XIII.4, reply 2; my translation.
  17. See QDV, XXV.6.
  18. See QDA, XIV, reply 20 and IX, reply 16.
  19. See ST, I, Q. 76.7, reply 2.
  20. See Philip Smith, "Brain Death: A Thomistic Appraisal," *Angelicum* 67, no. 1 (1990): 3-35.
  21. See Benedict Ashley, "Integrative Unity and the Human Soul," *National Catholic Bioethics Quarterly* 1, no. 1 (2001): 7-9; Ashley and Kevin O'Rourke, *Health Care Ethics*, 4th ed. (Washington, D.C. Georgetown University Press, 1997), 316-37.
  22. See Eberl 2005b; Eberl 2006, ch. 3.
  23. White, Angstwurm, and de Paula 1992, p. 81.
  24. See Smith 1990, pp. 24-25; Ashley 2001, p. 8.
  25. See Ashley 2001, p. 8; Corrado Manni, "A Report on Cerebral Death," in *The Dignity of the Dying Person: Proceedings of the Fifth Assembly of the Pontifical Academy for Life*, ed. Juan de Dios Vial Correa and Elio Sgreccia (Vatican City: Libreria Editrice Vaticana, 1999), 106. The whole-brain criterion has been challenged as a valid criterion for determining a human organism's death, most notably by D. Alan Shewmon; see his "The Brain and Somatic Integration: Insights into the Standard Biological Rationale for Equating 'Brain Death' with Death," *Journal of Medicine and Philosophy* 26, no. 5 (2001): 457-58. I respond to such challenges in Eberl 2006, pp. 54-60; and Eberl, "Ontological Status of Whole-Brain Dead Individuals" in *The Ethics of Organ Transplantation*, ed. Steven Jensen (Washington, D.C.: The Catholic University of America Press, forthcoming).
  26. See D. Alan Shewmon, "The Metaphysics of Brain Death, Persistent Vegetative State, and Dementia," *The Thomist* 49 (1985): 51.
  27. See ST: Ia.76.3-4; In DA: II.5; *De unitate intellectus contra Averroistas*: I.
  28. See Philip Smith, "Personhood and the Persistent Vegetative State," *Linacre Quarterly* 57 (1990): 49-57; Smith, "Transient Natures at the Edges of Human Life: A Thomistic Exploration," *The Thomist* 54 (1990): 191-227; J. P. Moreland, "Humanness, Personhood, and the Right to Die," *Faith and Philosophy* 12 (1995): 95-112; Moreland and S. Wallace, "Aquinas versus Locke and Descartes on the Human Person and End-of-Life Ethics," *International Philosophical Quarterly* 35 (1995): 319-30; Moreland and Scott B. Rae, *Body and Soul: Human Nature and the Crisis in Ethics* (Downers Grove, IL: InterVarsity Press, 2000): 316-37.
  29. See Lee and George 2008, pp. 153-54.
  30. D. Alan Shewmon, "Recovery from 'Brain Death': A Neurologist's Apologia," *Linacre Quarterly* 64, no. 1 (1997): 73.
  31. Russell DiSilvestro, *Human Capacities and Moral Status* (Dordrecht: Springer, 2010), 60-64.
  32. DiSilvestro 2010, p. 58.
  33. See Charlotte Witt, "Powers and Possibilities: Aristotle vs. the Megarians," *Proceedings of the Boston Area Colloquium in Ancient Philosophy* 11 (1995): 264.

34. Aristotle, *De anima*, bk. 2, ch. 1; emphasis mine.
35. John P. Lizza, "Potentiality, Irreversibility, and Death," *Journal of Medicine and Philosophy* 30 (2005): 56.
36. Lizza 2005, p. 59.
37. Could one counter that the astronaut's dependence on her fellow astronaut's assistance in restoring her supportive environment implies that her potentiality for being alive is merely *passive*? No, because the assistance provided does nothing to alter or replace the astronaut's organic structure by which she is able to breathe in and circulate oxygen once it is made available to her again.
38. See James Rachels, "Active and Passive Euthanasia," *New England Journal of Medicine* (1975): 78-80.
39. Lizza defends a "consciousness-related" concept of death for human persons; see Lizza 2005, pp. 52-3; Lizza, *Persons, Humanity, and the Definition of Death* (Baltimore: Johns Hopkins University Press, 2006).
40. I am most grateful to John Lizza, both for his critical commentary on this paper and for co-organizing with me a panel on the concept of potentiality at the beginning and end of life for the Committee on Philosophy and Medicine at the 2011 Central Division Meeting of The American Philosophical Association, Minneapolis, MN. I also wish to thank Bertha Alvarez Manninen, David Hershenov, and Leonard Kahn for their participation in the panel.

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## Perdure and Murder

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The rich resources of the Four-Dimensional metaphysics have been brought to bear upon many traditional philosophical problems in recent years. Alas, the implications of Four-Dimensionalism for bioethics have gone largely unexplored. Hudson is the rare exception. Relying upon a Four-Dimensional metaphysics of temporal parts<sup>1</sup> and a belief in unrestricted composition,<sup>2</sup> he argues that there is little reason to identify the perduring human embryonic animal and the perduring human person.<sup>3</sup> He makes the intriguing claim that if abortion is wrong, then it is not because the human animal within its mother's womb is a person. This he rightly claims "is a very significant result" for "an overwhelming amount of the literature on abortion and infanticide (as well as much of the public debate on these topics) seems to turn on the question of whether or not the human fetus is a person" (Hudson 2001, 153). However, I am going to argue that one doesn't have to reject unrestricted composition and the Four-Dimensionalist claim that things perdure to consider mindless embryonic human animals to be persons.<sup>4</sup> Thus, if abortion is wrong, it may be due, in part, to the mindless embryo being identical to a later thinking person.

Let's now turn to the reason why if there are temporal parts and composition is unrestricted, Hudson insists the person can't be identified with the animal. He maintains that animals are not persons for, at best, they would merely share *some* of the thinking stages, i.e., momentary temporal parts, composing a person. The normal human animal typically consists of thinking stages through most of its life and non-thinking stages during its embryonic months. There is also a distinct creature, perhaps a large temporal part of the human animal, whose temporal parts are all capable of thought. Which one is the person? Hudson finds it more plausible to identify the person with the entity consisting of *only* thinking stages rather than something like the human animal which also has non-thinking temporal parts.

However, since there are countless things that consist of only thinking temporal parts in a Four-Dimensional metaphysics, Hudson contends that the only non-arbitrary selection of stages to be given the label "person" are those thinking stages which are *not* embedded within a larger thinking being. Thus, persons are *maximal* thinkers. And it isn't any kind of thinking, such as that produced by *merely* sentient stages, that is sufficient for composing a maximal person. Also needed are self-conscious thoughts appropriately related via psychological continuity and connectedness. Even that is not enough because Hannah could be vaporized in an atomic explosion and in an incredible cosmic coincidence, a psychological duplicate of her materializes on a distant planet (Hudson 2001, 132). So there must also be the right kind of causal connection, an *immanent cause* involving earlier thinking stages bringing about later thinking stages (Hudson 2001, 132).

Hudson contends that appealing to the animal's *potential* to have a thinking stage will not succeed in rendering an animal identical to a person. The Four-Dimensionalist typically accepts unrestricted composition and so there will be countless objects that have thinking stages. Some of the thinking beings in the more generous ontology will also have mindless embryonic human stages or even human gametes as temporal parts. There will even be an object that consists of an ancient eighth-century BC Babylonian sandal and President Obama. If one advocates a restricted compositional principle to avoid such scattered objects, if it doesn't bring an unwelcome vague existence (Lewis 1986, 212-13), then it usually means excluding from one's ontology scattered objects like Hawaii, planetary systems, the letter 'i' and an hour glass of falling sand (Hudson 2001, 108; Noonan 2003). Thus it appears that if mindless embryos are persons because they have later thinking parts, then there was an additional person present in ancient Babylonia in virtue of the sandal that was an early temporal part of an object composed of it and the later thinking Obama stages. But surely that object isn't an early part of a person endowed with the moral status that is typically thought to accompany personhood.

So the dilemma Hudson presents us with is that if we want to deny a person exists in ancient Babylonia due to the sandal existing there and it possessing the later Obama thinking stages, then we must also deny that the mindless embryo is a person in virtue of its future thinking stages. My response is to suggest there are grounds for claiming that some but not all potential thinkers are themselves persons even when they haven't yet manifested that potential. There is a way to distinguish potential thinkers via the relations unifying the stages of a natural kind in order to then claim that the animal is also a person while other beings that have thinking stages for just some of their existence are not persons. The idea is roughly that the mindless embryonic stages are the same kind of stages of the latter thinking person—i.e., they are all *living* stages of an animal. There are mindless animal stages linked by life processes to thinking animal stages. Their diachronic (as well as synchronic) unity is due to their parts being caught up in the same life processes. They are stages of the same token of a natural kind, not parts of two things of distinct kinds cobbled together in virtue of the principle of unrestricted composition. The gerrymandered entity composed of the ancient sandal and President Obama doesn't have later *sandal* stages that happen to think. The capacity is not found in the developmental telos of the sandal. It is not the nature of the earlier stages to give rise to later thinking stages. But one does find such a telos programmed into all the stages of Obama, even the mindless ones.

So we can grant that mindless human animals are persons without having to bestow the title on every object which has mindless stages preceding its thinking ones. However, there

may also be a single relation, psychological continuity, unifying all of the thinking stages of the person. So Hudson could appeal to the existence of a non-gerrymandered, “natural,” psychological unity relation in order to apply the label “person” to the perduring object consisting of only thinking stages. Thus my approach might seem to commit us to there being two kinds of persons—some that are mindless for a time, others that are always thinking. And that admission will run afoul of Hudson’s maximality principle that persons are not to be found within larger persons (Hudson 2001, 121). However, I shall put forth arguments that reveal the best candidate for the label “person” to be the one that was once a very little mindless animal. So it will not be, as Hudson claims, “arbitrary and unmotivated” to identify the human person and human animal.

I now will show that the psychological continuity and connectedness criterion favored by Hudson *collapses* into animal identity. What I mean by *collapses* is that there are cases which tend to elicit from us descriptions of one thinking entity being identified with another thinker that cannot be explained by a psychological criterion of personal identity being satisfied. The intuitions we have there about identity can only be accounted for by both thinkers being the same animal. So what we want to say are stages of a persisting person in cases involving the dreaming and the awake, the rational and the demented, divided and reunited minds, can only be construed as such if an appeal is made to the biological persistence conditions of animals.

The first problem for the psychological account of identity involves a twist on Reid’s famous critique of Locke’s memory criterion (Locke 1975). Locke claimed that one’s identity extended as far back in time as one’s memories. Reid revealed a failure of transitivity by envisioning an old general who could remember his first military campaign as a young soldier, the young soldier could recall being flogged as a school boy for stealing from an orchard, but the general couldn’t remember being flogged. Therefore, the general is *not* identical to the boy, yet he is identical to the young soldier, who is identical to the boy. This absurdity could be avoided by appealing to psychological continuity, i.e., overlapping chains of psychological connections (Parfit 1983, 206-08). Psychological continuity involves the general being able to remember a time (his first military campaign) at which he could remember being flogged. So an overlap of memories will suffice in lieu of a direct memory connection. But the transitivity problem returns with a modified version of Reid’s scenario that Perry named the *Senile General* case (Perry 1975, 19). The senile general could remember being flogged (or remember a time at which he could remember a time that he was flogged). So he is identical to the boy. The young soldier could remember being flogged, so he too is identical to the boy. But the general couldn’t remember his more recent experience as a young soldier, nor could he remember any other time at which he then could remember his first military campaign. This renders the general identical to the boy but not identical to the young soldier, who is also identical to the boy. So if they are to be identified, as it intuitively seems they should, an appeal to their being the same animal can do what an appeal to psychological continuity cannot.

A second scenario where a psychological criterion of identity collapses into a biological one involves a temporary division of a mind. Consider Parfit’s *My Physics Exam* scenario where there is just a short term loss of a unified consciousness due to cutting the corpus collasum so one person can direct both hemispheres to work on different parts of a test (Parfit 1983, 246-48). The hemispheres are reunited after the dual work is done. As Parfit himself notes, the most plausible response is that there was one person temporarily cut off from himself. To

account for that intuition, something other than a single causal chain of psychological continuity must be relied upon. Four-Dimensionalists usually qualify the criterion of psychological continuity for branching cases so the result is that there are two distinct persons continuous with the same earlier stage. They do so by insisting that psychologically continuous  $x$  and  $y$  are stages of the same person if there is no stage  $z$  that is psychologically continuous with  $x$  or  $y$  but simultaneous and distinct from either  $y$  or  $x$ . So during the exam there are two streams of thought that have stages that are simultaneous but distinct from each other, thus ensuring that there is not a single person despite their both being psychologically continuous with shared earlier stages. This will deliver the counterintuitive result that there is not a person with the briefly divided mind but that there were two persons present at that time since they involve simultaneous but distinct stages (Brueckner and Buford 2008). If the intuitive response is to be preserved, then it appears that we must appeal to a rather ad hoc modification of the psychological criterion or claim that it must be because it is the same animal doing the thinking.

One can also undermine the psychological continuity criterion for identity by taking issue with Locke’s account of Socrates awake and Socrates asleep (Locke 1975, 343). Locke conjectured that if sleeping Socrates was psychologically cut off from waking Socrates then they would not be the same person. Imagine that your waking and dream states are not psychologically connected. You cannot recall your dreams and these dreams don’t follow from your waking life. I suspect that few readers would follow Locke and deny that they were states of the same person, interpreting the psychological disconnect as evidence of two people sharing a body. Since there isn’t any psychological continuity between the waking and the sleeping, then what makes them the same person must be that they are the same living animal.

A fourth scenario undermining psychological continuity theories relies upon our reactions now to the possibility of future pain after the onset of amnesia or even more debilitating impairments (Stone 1987). Consider the prudential concern many envision having for the being with their brain after a stroke undermines the brain’s capacities for rationality and self-consciousness, leaving a mere sentient child-like mind. If told earlier that the being with our damaged brain will suffer horrific pains unless we take on almost as much physical pain before losing our memories and capacity for self-consciousness, most of us would consent to the lesser pain to ensure the greater does not transpire. Such a show of apparently prudential concern for an animal in the future, despite the absence of psychological continuity and the reflective capacities associated with personhood, suggests an adherence to an animalist, i.e., biological account of our identity.

Hudson contends that an individual suffering “profound senility” would not be a person (2007, 222). There wouldn’t be the requisite self-consciousness and psychological continuity. But our prudential concern in the typical philosophy thought experiments suggests we would survive such a loss of mental capacity.<sup>5</sup> So while I think this should lead Hudson to abandon his belief that *we* are essentially self-conscious persons (2007, 218), given unrestricted composition, it need not lead him to deny that there are beings that are essentially self-conscious with psychologically continuous stages. However, if anything deserves the title “person,” we do. So given Hudson’s commitment to a maximality principle, he should accept that we persons are not essentially self-conscious psychologically continuous thinkers, merely self-conscious for just a period of our lives. We’re persons because of our capacity for self-consciousness, but that capacity is not actualized during all of

our stages. Of course, even if Hudson were to admit this, it still wouldn't commit him to identifying the human person and the human animal. He could instead claim we persons are identical to a maximal being composed of all merely conscious stages rather than only self-conscious, psychologically continuous stages. McMahan and the pre-dualist Unger offer Three-Dimensional versions of this thesis (McMahan 2002; Unger 2000), claiming that we survive as long as the same brain produces sentience (consciousness). So what I propose to do next is provide thought experiments which suggest that our prudential concern reveals that we persons believe ourselves to be not even essentially sentient. The thought experiments reveal that the future sentient states we are concerned with can be deemed ours only if they are united by a biological criterion.

An additional benefit of my interpretation of this is that I do not have to defend embodied or extended cognition (Olson 2008, 87-94) against Hudson's claim that only a (neurological) part of the organism found beneath the skin produces thought (Hudson 2001, 143-44; Hudson 2007, 224-25), though I might have to draw on Noonan-style pronoun revisionism to do so.<sup>6</sup> Hudson argues that just as it is arbitrary to apply the label "person" to an organism with embryonic non-thinking temporal parts, so it would be arbitrary to apply the label to anything with spatial parts (hair, nails, bone marrow) that don't contribute to thought. We can accept Hudson's claim that an organism has parts irrelevant to the production of thought without being committed to the claim that the person is spatially as well as temporally smaller than the organism.

Consider that we care prudentially for the stroke victim that would result from damage to our brain reducing its capacities to realizing mere sentience. I don't believe this shows that it is mere consciousness or sentience, not self-consciousness that is essential to our persistence. I think instead that our prudential responses in such scenarios should actually be construed as showing that it is biological continuity that determines our persistence conditions. Ask yourself whether your concern for your post-injury self with just a rudimentary mind really is due to your possessing the *same organ* that underlies consciousness or is it rather that it is just the *same animal* that is conscious? I think it is the latter and this can be seen by pondering the following twist. Consider whether your reaction to the prospect of coming out of a stroke-induced coma with pain and pleasure sectors intact but no cognitive capabilities above this will be different if such sentience is a result of different parts of your cerebrum being rewired during the coma to realize pain and pleasure when you awaken? I suspect that most readers would have prudential concern despite different parts of the brain contributing to such sensations.

Readers might respond that doesn't show that we persons are animals but that what matters for the person's survival is that the different sentience-realizing structures are in the *same* cerebrum. If so, consider a second case where, early in someone's life, in the absence of injury and before a web of beliefs and desires arises, different parts of a developing brain play a role in receiving and processing painful and pleasurable signals. Imagine one is in the brainstem and the other is in the cerebrum. Would it be correct to say there were two thinking beings in one body? And if one is destroyed, is it correct to claim there remains then only one thinking being? My intuitions are that we would not. And would readers say that there is a new thinking being produced by fusion if there is the later development of a self-conscious person who provides the respective pain or pleasure reports when either the sector in the brainstem or cerebrum is "stimulated"? I very much doubt it. And for all we know, this is roughly what happens in child development. The initially physically dispersed realization

and thus psychologically unrelated fragmented mental states of the baby are only later psychologically united as the older child obtains reflective access to the different states. The child can come to say that "I am in pain now and earlier had pleasant experiences," reflectively linking what before had been experienced without the capacity for reflection upon those experiences. Even if such conjectured development is not how we actually develop, our reactions to such a counterfactual assumption about ourselves does illuminate what we take ourselves to be: living human animals, rather than brain unified thinkers.

I don't see any reason to identify ourselves with parts of the consciousness-producing central nervous system (Hudson 2001; McMahan 2002), nor with a larger being only if it *continuously* possesses the same functioning brain-like structure (Unger 2000), rather than holding that these pains and pleasures would be mine because they are subserved by parts caught up in the same biological life and belong to the same animal. It seems arbitrary to insist upon the brain—understood to include the brainstem, cerebellum, midbrain, and cerebrum, etc.—as providing us with ownership of our thoughts given that in the described scenario there are neither causal connections providing psychological connections between the pains and pleasures, nor is it the same part of the brain that multiply realizes both states. Perhaps if the very same part of our brains served to realize our pains and pleasures, then it would make a little more sense to insist upon that bit of anatomy as being essential to our persistence. But that isn't the case. So to then insist that the thoughts are ours as long as *some* part of the brain produces them seems unwarranted. The boundaries of the brain have been somewhat arbitrarily drawn by the authors of anatomy texts rather than determined by a unified function. The brain does many things, only some which involve thought. Since thought production is not what unifies all the parts of the brain, there is little reason to claim we persist as long as somewhere in that brain our various thoughts are produced.

So it appears that the two most prominent psychological criteria of identity (*self-conscious* psychological continuity or a *mere* brain-based consciousness) can't deliver the intuitive response—that there is but one and the same thinker in the stroke case. What can do so is the animalist account in which human persons and human animals are identical. Thus, it makes sense to claim that the only person in the stories is the animal. As long as our animal can have pleasures and pains into the future, we have some prudential reason to obtain the former and avoid the latter. Since it is the life of the human animal that unites our thoughts as being thoughts of the same thinker, it would be arbitrary if we persons did not extend as far back in time as our animal did, which first existed in virtue of mindless embryonic stages.

Hudson makes the conditional claim that if the embryonic animal is a person, then it is presumptively wrong to abort it. He denies the antecedent while I affirm it. Hudson just said he would presuppose without argument that persons and (merely) sentient beings have moral status (2001, 151). That strikes me as uncontroversial, given that his perduring sentient being and person possess only conscious stages. I don't want to help myself to his assumption since there will be readers who deny that the mindless can be harmed. So it isn't enough to show that there is such a distinction between the potential of animal stages to give rise to thinking animal stages while there is no such potential of sandal stages to give rise to later thinking stages. The appropriate immanent causation unifying stages and the developmental telos might seem not to be enough to establish the possibility of harming or benefiting something with moral status. A further argument will have to be made why mindless

fetal animals have interests and can be immorally harmed while the sandal/Obama entity cannot be harmed while the sandal stages are present.

Before encountering Hudson's challenge, I had thought it was part of a sound argument that the mindless would be benefitted and harmed by being identical to a later being whose first mental experience could be good or bad for it. This stood in stark contrast to claims by McMahan (Marquis 2004) that early abortion wasn't wrong because there wouldn't be any psychological connections between the mindless and sentient. It seemed to me that if mindless X was identical to a later sentient Y, then if the first mental experiences of Y were good for it, then in virtue of the identity of X and Y, we should also say that it would be good for mindless X to develop and experience such experiences. And it could be a harm if its development was terminated and X never obtained the good experiences.

I didn't worry about the sperm or egg, or their scattered composite because, like Marquis and Stone (Marquis 2004; Stone 1987) I was working with an ontology in which the latter didn't exist and the first two went out of existence at fertilization. So potential mattered, but gametes and contraception didn't provide a reductio of the view for as Marquis argued, "Prior to conception there is no individual that is the same individual as the later human being that has, or would have had, a valuable life. Individual identity does not survive fusion or fission, whether contraception, amoeba reproduction or brain bisection are the examples" (2004, 33). But this is just false if we accept 4D unrestricted composition. A consequence is that Marquis and Stone can't avoid contraception posing a reductio of their "potential provides moral status" argument by claiming that there are no such creatures that were once gametes and later thinkers.

The line of reasoning that I earlier embraced might now seem to be especially dubious when applied to an entity that had a sandal stage earlier in its career and sentient stages much later. While it is true that it is one and the same entity that was a sandal for a segment of its existence and sentient during a later period, it doesn't seem that the thing with sandal stages and sentient stages would earlier have been harmed if the sentient stages were prevented from arising. So it seems that if the mindless can be benefitted or harmed, there necessarily must be more to account for this than the identity of the mindless with an entity that has a valuable future.

Why should the mindless fetus have moral status and be capable of being harmed when it seems the sandal/Obama person composite didn't have moral status at the time that its ancient temporal parts were mindless? I believe the answer starts with the recognition that mindless animals have *interests*: they have an interest in food and survival and flourishing of a sort. We can speak of things going well for mindless animals, their functioning as they should. They have a good. As creatures with a good, a later mental life can earlier be in their interest. That mental life will serve the animal's interests or telos. Just as other organ systems served to keep the organism alive and flourishing, so will its later cognitive systems. That isn't true of the sandal that is part of a sandal/Obama entity. The sandal's functioning properly doesn't prepare the way for the Obama stages to flourish. The sandal stages don't serve some end or telos (be it survival, reproduction, flourishing, knowing God) that Obama's stages do as well. One can't speak of such footwear as having any interests or good, so it can't have an interest in the later well-being of its Obama stages. Any mention of something being good for the sandal, like polish preserving its leather, is parasitical upon serving its wearer's ends which can be furthered by the polish extending the sandal's longevity. But we can speak of thinking stages of Obama having an interest in

their later thinking stages and the whole they compose. I suggest that we can likewise speak of the mindless human animal having an interest and benefiting from its later minded states. It doesn't matter that it can't be interested in i.e., self-consciously desire that those later interests be fulfilled. Nor can the merely conscious newborn (Manninen 2007). Some philosophers might bite a bullet and claim that infanticide isn't wrong in the absence of a conscious desire to survive. But can one really deny that a newborn just seconds old, not uncomfortable but unaware that being held, fed, or talked to by its mother would be pleasing, has then an interest in such undesired events transpiring? And why should it matter if the newborn was unconscious but would moments later consciously enjoy the same? Both have an interest in thriving, conscious states being but one manner in which the living flourish.

An interest in the welfare of the human animal is lacking in the sandal stages as well as the stages of the gametes. This claim is less evident in the latter. But notice that the gametes' genetic makeup and lives are distinct from those of the animal that emerges from their fusion. So while the biological function of the gametes is to produce a human animal, the gametes could have each served their biological function through fusing with different gametes. The gametes and the resulting human animal are not caught up in the same life; in other words, the lives of the gametes unfold according to natures that are distinct from the life and nature of the subsequent animal. It is not the nature of the individual gametes to make the *particular* animal that emerges from them flourish rather than another. So even if the gamete is a temporal part of the same larger entity as a human animal, the former's nature is not such that it has to produce thought and other goods in *that* embedding entity. Contrast that with the living stages of the perduring human animal. We can describe their nature as being such that they immanently produce the goods of later stages. The same life, governed by the same genetic constitution, produces the later goods. Thus, we can speak of the stages of the animal having an interest in the later stages of the animal in the way that we cannot speak of the temporal parts of the gametes having a nature to serve the later temporal parts of *the* animal, even though gametes and the human animal are all temporal parts of the larger entity.<sup>7</sup> So I agree with Stone, even though he's assuming a Three-Dimensional metaphysics, when he writes:

What the fetus *is* finally, is something that makes *itself* self-aware: that good is the fetus's good—this is its nature. Anything benefits from the good which it is its nature to make for itself. I submit that we have a prima facie duty to all creatures not to deprive them of the conscious goods which it is their nature to realize. (Perry 1975, 82)

Understanding the realization of a thing's nature in the sense of the healthy development of a living being is the morally relevant sense of potential. It is not the nature of the gamete to realize a *particular* capacity that is there in the post-fertilization embryo. So even if there is a single entity composed of an earlier gamete temporal part and a later human being temporal part, it initially doesn't have an interest in the development of the human being's particular capacities and would not be harmed by its failure to so develop. The same appeal to health and proper function to spell out the relevant sense of potential can avoid the alleged reductio of potential posed by totipotent cells in the early embryo or a skin cell that could be transformed into the clone of a human being. Thus, the skin cell or totipotent embryonic cell that is arranged so as to develop in an identity preserving way into an infant human being didn't earlier have such development as its proper function and so those cells did not have such development in their interest. Moreover, basing

the morally relevant sense of potential upon proper function avoids having to rely upon a conception of *active* potential that is often hard to distinguish from passive potential in puzzling cases. A congenitally retarded embryo may not have the active potential to develop but it does have an interest in healthy development for its kind and so it could have moral standing. Thus, if some intervention could lead to health, that should be done despite the absence of active potential. “Potential” in the abstract may lend itself to “promiscuous” interpretations and thus not provide bioethicists with useful guidance for determining the moral status and interests of entities before they have minds, but restricting the morally relevant sense of potential to the more precise notions of health and proper function can serve us much better.<sup>8</sup>

#### Endnotes

1. Temporal parts are the distinctive components of Four-Dimensionalism. A temporal part of an entity will exist only at a time and will then overlap all of the entity’s other parts that exist at that time. The Four-Dimensionalist claims that for any period of your life, such as the first half, there is a temporal part of you that exists only then.
2. Unrestricted composition is taken to mean that *Necessarily, for any collection of objects, the Xs, there exists a Y, such that the Xs compose Y.* So not only are there archipelagos, but a scattered object that consists of you and an archipelago.
3. To *perdure* means to persist in virtue of temporal parts.
4. I accept perdurance and unrestricted composition just for the sake of argument. The same is true for Hudson’s claims that the concept “person” is maximal and that only a part of the organism found “beneath its skin” is truly thinking.
5. Hudson operates on the methodological assumption that the reliance upon personal identity thought experiments will end in a stalemate (2007, 217). I find there to be more truth in his later “acknowledge(ment) that my dismissal of the fanciful thought experiment defense may have been uncharitable and over-hasty...” (2007, 233).
6. That means that the referent of “I” is not the thinking part but the perduring animal/person. (Noonan 2003, 63, 210).
7. Someone might claim that the scattered object composed of the two gametes has an interest in the resulting embryo thriving. But the scattered object is not alive, unlike its two component gametes, and so has no biological interests. It is like the sandal in being without interests. Its parts may have a telos to produce a life, but it, qua composite, doesn’t.
8. I would like to thank Hud Hudson, Steve Napier, and Jason Eberl for comments on an earlier and longer version of this paper, which will appear as “Embryos, Four-Dimensionalism and Moral Status” in *Persons, Moral Worth and Embryos: A Critical Analysis of Pro-Choice Arguments*, Springer Press 2011. I was also helped by discussions with David Shoemaker and Eugene Mills and others in the audience at the 2011 meeting of the Southern Society for Philosophy and Psychology. I benefited from a discussion of potential with John Lizza at the 2011 Central APA. My greatest debt is to Adam Taylor who discussed multiple drafts of this paper with me which led to a great number of improvements.

#### References

Brueckner, Anthony and Christopher T. Buford. “The Psychological Approach to Personal Identity: Non-branching and the Individuation of Person Stages.” *Dialogue* 47 (2008): 377-86.

Hudson, Hud. “Temporal Parts and Moral Personhood.” *Philosophical Studies* 93 (1999): 299-316.

Hudson, Hud. *A Materialist Metaphysics of the Human Person*. Cornell University Press, 2001.

Hudson, Hud. “I am not an Animal!” In *Persons: Human and Divine*, ed. Peter van Inwagen and Dean Zimmerman, 216-34. Oxford: Oxford University Press, 2007.

Lewis, David K. *Plurality of Worlds*. Oxford University Press, 1986.

Locke, John. 1975. *An Essay Concerning Human Understanding*.

McMahan, Jeff. *The Ethics of Killing: Problems at the Margins of Life*. Oxford University Press, 2002.

Marquis, Donald. “Korcz’s Objections to Future of Value.” *Journal of Social Philosophy* 35 (2004): 56-60.

Manninen, Bertha. “Revisiting the Argument from Fetal Potential.” *Philosophy, Ethics and Humanities in Medicine* 2 (2007): 7.

Noonan, Harold. *Personal Identity*, 2nd ed. London: Routledge Press, 2003.

Olson, Eric. *What are We? A Study in Personal Ontology*. Oxford: Oxford University Press, 2008.

Parfit, Derek. *Reasons and Persons*. Oxford: Oxford University Press, 1983.

Perry, John, ed. *Personal Identity*. Berkeley: University of California Press, 1975.

Stone, Jim. “Why Potentiality Matters.” *Canadian Journal of Philosophy* 17 (1987): 816-31.

Unger, Peter. “The Survival of the Sentient.” *Philosophical Perspectives* 14 (2000) 328-45.

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## On the Ethical Relevance of Active versus Passive Potentiality

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In this paper, I raise two questions about the distinction between “active” and “passive” potentiality that has been invoked in discussions about the ethical treatment of individuals at the beginning and end of human life. The first question concerns whether proponents who have invoked this distinction can resolve the issue of whether an individual has an “active” or “passive” potentiality at the boundaries of life by appealing to non-arbitrary, essentialist claims about the nature of a human being. The second concerns whether the distinction itself carries any moral weight. My discussion will focus mainly on potentiality at the end of life.

Grounding their view in an Aristotelian metaphysics in which things that exist by nature have innate principles to develop in certain ways, some bioethicists hold that the human embryo has the potential to develop characteristics, such as intellect and will, by virtue of the kind of thing it is. According to this account, as long as an individual is a member of the natural kind, human being, its potentiality to develop in certain ways is not affected by any internal or external impediments. Moreover, in this understanding of potentiality, whether the individual has any realistic or practical probability of developing these characteristics does not affect its potential. The U.S. President’s Council on Bioethics illustrates this view of potentiality at the beginning of life, when it states,

An embryo is, by definition and by its nature, potentially a fully developed human person; its potential for maturation is a characteristic it *actually* has, and from the start. The fact that embryos have been created outside their natural environment—which is to say, outside the woman’s body—and are therefore limited in their ability to realize their natural capacities, does not affect either the potential or the moral status of the beings themselves. A bird forced to live in a cage its entire life may never learn to fly. But this does not mean that it is less of a bird, or that it lacks the immanent potentiality to fly on feathered wings. It means only that a caged bird—like an in vitro human embryo—has been deprived of its proper environment. (President’s Council, 2002, 175)

D. Alan Shewmon (1997) expresses a similar view about potentiality at the end of life when he claims that artificially sustained human organisms with total brain failure retain the potential for intellect and will. Shewmon argues that the potential for intellect and will resides not in any organ, e.g., the brain, but in the organism as a whole. Since he believes that the human organism as a whole may persist through the loss of all brain function, it retains the potential for intellect and will. He sees the loss of brain function (indeed, the destruction of the brain) as simply an impediment in the actualization of the potential for intellect and will that remains in the organism. Its loss does not affect whether the organism has the potential. He gives an analogy in support of his view: before cataract surgery, people with cataracts still have the potential for sight. Moreover, he claims that if someone suffered enucleation of both eyes and even removal or infarction of the entire visual cortex, the person would still retain the potential for sight. Shewmon writes,

As with potency for sight, the potency for these functions [human intellection and will] ultimately resides not in the organ, but in the organism. Theoretically, if brains could be reconstituted (e.g., through implanted futuristically transformed neuroblasts), a “brain-dead” person could be made to regain consciousness and other human functions, although perhaps with a clean mnemonic slate and new personality traits.

Thus, if “brain death” does not cause loss of somatic integrative unity (as it now seems not to), then neither does it cause a loss of essential human properties, i.e., a loss of potency for specifically human functions—potency at the most profound ontological level, at which the occurrence or not of substantial change is determined. (Shewmon 1997, 74-75, parenthetical remarks added)

Proponents of this understanding of potentiality appeal to a distinction between “active” and “passive” potentiality. Active potentiality refers to an organism’s intrinsic “power of setting itself in movement and arresting itself” (Aristotle, *De anima* 2.1. 412a28-29). For example, features intrinsic to the seed enable it to develop into a plant in the “natural” or normal course of events; its developmental activity is goal-directed by some intrinsic features. While some theorists, such as Lee and George (2008, 52-59), maintain that the active potentiality for conceptual thought requires an immaterial principle, the potentiality is thought to lie in the human organism’s genetic and epigenetic factors. Passive potentiality, in contrast, requires that the individual be acted upon in ways outside of the normal or natural course of events. For example, Aristotle gives the example of a block of wood having the potential to become a statue of Hermes (*Metaphysics* 1048b1-3). There is no intrinsic motive principle in the block of wood that in the natural or normal course of events would direct it to become a statue of Hermes. The wood thus has a “passive” potentiality to become a statue. This distinction between active and passive potentiality is then used to distinguish, for example, human embryos, either in vivo or in vitro, from human gametes or other human cells. Human gametes and other human cells lack the internal genetic and epigenetic factors that are necessary to develop naturally or normally into individuals with intellect and will, whereas normal human embryos have such factors. Gametes and other cells have to be acted upon in ways that change the kind of the thing that they are. While embryos need an appropriate environment to realize their potential, the realization of the potential does not involve a change in kind.

Despite agreement on a distinction between active and passive potentiality and the significance of something

undergoing a change in kind, proponents who invoke this distinction differ on the necessary material conditions for something to have the active potentiality for intellect and will. For example, they disagree over whether anencephalic fetuses and infants have the biological substrate necessary for the active potential for intellect and will and therefore whether they should be accorded the same rights and respect as normal human beings.<sup>2</sup> They also disagree over which individuals have the active potentiality for intellect and will at the end of life. For example, in his discussion of whether a person who has undergone cryopreservation or total brain failure may retain the active potentiality definitive of human life, Jason Eberl (2008) points out how his view differs from that of van Inwagen and Shewmon. Van Inwagen holds that a cryopreserved organism remains “a living corpse.” He writes,

Before the cat was frozen, its life consisted of mostly chemical reactions and various relatively large-scale physical processes (the breaking and establishing of chemical bonds, the movement of fluid under hydraulic pressure, the transport of ions); when the cat was frozen, its life was “squeezed into” various small-scale physical processes (the orbiting of electrons and exchange of photons by charged particles). Its life became the sum of those subchemical changes that underlie and constitute chemical and large-scale physical change. But the life was *there*, disposed to expand into its normal state at the moment sufficient energy should become available to it. I, who am fond of oxymorons, would describe the frozen cat as a living corpse. (van Inwagen 1990, 146-147)

Eberl disagrees. He takes “the ‘subchemical changes’ that persist in a cryopreserved organism to constitute its structural integrity, but such changes are not equivalent to the vital metabolic processes definitive of life” (Eberl 2008, 70). According to Eberl, the cryopreserved organism lacks “its own motive principle” by which it is able to reanimate itself and thus has at most a passive potentiality for reanimation. Eberl (2008, 70-71) further notes that subchemical changes at the atomic and subatomic levels also persist in a corpse. Therefore, he is concerned that van Inwagen’s view absurdly entails that a corpse or even a human skeleton would retain the active potentiality for distinctly human traits. Van Inwagen tries to distinguish the cryopreserved body from a corpse on grounds that the cryopreserved body “is disposed to expand to its normal state at the moment sufficient energy should become available to it” (van Inwagen 1990, 147), whereas the same cannot be said about a corpse. Eberl, however, argues that the whole matter turns on “how the requisite disposition should be defined” and maintains that in terms of Aristotelian potentiality, “a cryopreserved body is not sufficiently disposed to be a living (ensouled) organism” (Eberl 2008, 71), since it no longer has the capacity to coordinate its vital metabolic functions (Eberl 2008, 75).<sup>3</sup>

While I am not sure how Shewmon would weigh in on the question of whether a cryopreserved human body retains the active potential for intellect and will, he thinks that an artificially sustained, whole-brain-dead, human body retains this potential and therefore rejects total brain failure as a criterion for determining death. Again, Eberl disagrees. Eberl appeals to the difference between a body’s vital functions being taken over by external support and a person being in control of those functions. Since he holds that a functioning brain is essential for a person to have control over vital functions (heartbeat and respiration), individuals who have irreversibly lost all brain functions are dead. Eberl (2008, 75) distinguishes cases of total brain failure from cases in which a patient may temporarily depend on artificial life-support, e.g., someone undergoing

cardiopulmonary bypass surgery. In Eberl's view, the capacity or active potentiality of the bypass patient to coordinate vital functions remains intact "due to the fact that the patient's ability to engage in cardiac and respiratory activity under her own control can be restored with available technology and technique" (Eberl 2008, 76). Eberl goes on to distinguish this case from the cryopreserved body by appeal to "a significant difference with respect to the degree of internal change the two types of bodies must undergo in order to live independent of life-sustaining technology" (Eberl 2008, 76). Whereas metabolic functions persist in the bypass patient and the patient retains "some control" of vital functions, a cryopreserved body has undergone total arrest of all vital metabolic functions and has no control over those functions.

Eberl is right that whether an individual has an "active potentiality" as opposed to a "passive potentiality" turns on "how the requisite disposition should be defined." However, it is entirely unclear whether such a disposition can be defined in a non-arbitrary way to resolve the borderline cases. For example, while the bypass patient is certainly functioning metabolically, it is unclear what type of "control" the patient has over those functions and therefore whether the patient has, in Aristotle's terms, "in itself the power of setting itself in movement and arresting itself" (Eberl 2008, 68). Isn't it precisely the lack of such a "motive principle" that necessitates the bypass operation? Moreover, suppose a patient permanently required a mechanical ventilator, pacemaker, or artificial heart. In Eberl's view, "If a person cannot actually perform his vital metabolic functions, then he is dead" (2008, 75). Many patients, however, have been permanently dependent on artificial life-support, e.g., those who were dependent on "iron lungs," but it would be absurd to consider them dead. Are they no longer ensouled, when they can still exercise intellect and will albeit through artificial support? Shewmon would also challenge Eberl's view, since he holds that brain function is not necessary for organic integration. In Shewmon's view, artificially sustained human organisms with total brain failure may be organically integrated and therefore would still be alive.

I agree with Eberl's criticism of van Inwagen. If van Inwagen recognizes the cryopreserved body to have an active potentiality, then he would have to allow an inanimate but structurally preserved corpse to have the same potentiality. But this would be absurd. Neither being is going anywhere on its own. Both lack the supposed "motive principle" to develop in certain ways. Eberl would say that the cryopreserved body has at best a passive or "weak" potential to develop intellect and will. I (Lizza 2005; 2006, 99-110) have charged Shewmon with a similar difficulty. If an artificially sustained human organism with no brain function has the potential for intellect and will, then I see no non-arbitrary grounds for not attributing this same potential to an artificially sustained decapitated human organism, the cryopreserved body, or to even a corpse. Perhaps instead of just implanting future neuroblasts, we also implant other materials and energy that generate the restoration of life in the cryopreserved body or corpse. Presumably, the kind of consciousness and other functions that would be restored would be human. Would we take this to mean that all along these individuals had the active potential for intellect and will? To do so, I think, would blur the distinction between active and passive potentiality and make the distinction useless for deciding the borderline cases.

In conclusion, Shewmon tries to justify his view by appealing to the degree of organic integration that may be maintained, albeit artificially, in a whole-brain-dead body and claiming that because of that degree of metabolic functioning and organic integration, the individual retains the potential for

intellect and will. Eberl, in contrast, tries to justify his view by claiming that the degree of organic integration that may remain in an artificially sustained, whole-brain-dead body is insufficient for that body to retain the active potential for intellect and will. He maintains that "since these patients no longer exhibit control over the primary metabolic functions of heartbeat and respiration, they are no longer rationally ensouled" (Eberl 2008, note 55, 77). There is, however, no way to determine when an individual retains or loses this active potentiality in these borderline cases. For Eberl, the fact that the artificially sustained whole-brain-dead body requires external support and control for circulation and respiration indicates that it no longer has the active potential definitive of human beings. However, this view leads to the absurd conclusion that patients permanently dependent on artificial support for these functions are dead.<sup>4</sup> For Shewmon, the external support is irrelevant, as he thinks that there is enough internal organic activity and integration to indicate that the individual retains the active potential definitive of human beings. However, this view leads to the absurd conclusion that artificially sustained, decapitated human bodies would be living human beings with the potential for intellect and will. Both positions are untenable. Thus, I do not see how this type of disagreement between Shewmon and Eberl can be resolved by appealing to the standard ways of distinguishing between active and passive potentiality. It is unclear in these borderline cases when we should say that the individual retains an active potentiality as opposed to its having merely a passive potentiality.

Part of the difficulty in answering this question stems from the fact that the Aristotelian-inspired notion of potentiality that these authors rely on involves ensoulment. At work is a spiritual principle that informs physical bodies and gives them the potentials that they have. However, since souls or spiritual principles are not directly observable, this makes determinations of ensoulment and therefore which active potentialities an individual has dependent on inferences from what is physically observable. While the tradition and these authors are clearly committed to the idea that not every bit of matter can be rationally ensouled and that the matter must be sufficiently organized to be rationally ensouled, the spiritual nature of the soul makes it impossible to give a determinate answer to the borderline cases. There is no more reason to think that an artificially sustained whole-brain-dead body retains the potential for intellect and will due to ensoulment than to think that it lacks such potential due to the separation of the soul from the body. Thus, even if one accepted that the actuality and potentiality for intellect and will could not be explained without appealing to a spiritual principle, as Lee and George maintain, the theory is no help in resolving the borderline cases.

Another difficulty in determining when there is an active potentiality as opposed to a passive potentiality and, in fact, whether the distinction between these types of potentiality makes sense and has any ethical import stems from the nature of potentiality itself. Edward Covey (1991) has suggested that part of what we mean when we say that *X* has the potential to become *Y* is that it must be *possible* for *X* to become *Y*. If this condition correctly captures part of the ordinary meaning of potentiality (and I believe that it does), it is then critical to understand the notion of possibility invoked in this condition. Feinberg (1974) has pointed out that it cannot mean logical possibility, since that would make the concept of potentiality so "promiscuous" as to be useless. As Feinberg notes, any bit of matter is potentially anything. All we have to do is adjust the conditions. I (Lizza 2007) have followed Covey in suggesting that the kind of possibility assumed in ascriptions of potentiality must be "realistic" or "actual" possibility. In this view, any sensible theory of potentiality must recognize that potentiality is at least

dependent on certain internal factors, since those internal factors may affect whether a possibility is actual or not. Thus, Stone (1987), for example, correctly holds that the potentiality of a genetically defective human embryo *is* different from the potentiality of a normal, healthy one. The genetic defect, especially one that we have no idea how to correct, may make it realistically impossible for that embryo to develop intellect and will. In addition, while the possibility of correcting the genetic defect may be within the realm of physical possibility, its remoteness makes it and therefore any potentiality dependent on it ethically irrelevant. Similarly, brain damage may be so significant and the possibility of correcting that damage may be so remote that it makes no sense to ascribe the potentiality for intellect and will to such individuals.<sup>5</sup>

Ascriptions of potentiality are made against a background of assumptions about the external world. Thus, the potential for intellect and will is ascribed to human embryos because in the natural or normal course of events and if not interfered with those embryos will actualize those potentials. If the world were radically different, such that in the normal or natural course of events, human embryos did not actualize those potentials, there would be no reason to ascribe such potentials to them. However, at this point, there is disagreement over whether ascriptions of potentiality are affected by the kind of external conditions that naturally or normally obtain for different kinds of things or by the actual external conditions that may obtain for the particular thing.<sup>6</sup> Singer and Dawson (1990), for example, argue that because frozen embryos exist outside the “natural” course of development and therefore have no realistic or practical possibility for further development unless acted upon, they lack whatever natural potential *in vivo* embryos may have. In contrast, others use the concept of potentiality in its Aristotelian sense where it applies most clearly to biological species. For example, normal, healthy bees have the potential to build hives, because in a “normal” or “suitable” environment that is what they will do. Bees differ from birds in that they have internal characteristics that in the normal environment cause them to build hives. In contrast to birds, there is a realistic possibility that bees will build hives. Because the potentiality is thought to be intrinsic to the bees, the realistic possibility invoked is not affected by factors external to the bees that would prevent them from building hives. For example, the fact that some bees will be wiped out by a natural disaster before they ever get to build a hive does not affect their having the potentiality to do so. Similarly, although *in vitro* embryos may not realize their potential unless acted upon, they have the inherent motive principle to develop in a certain way, given the kind of thing that they are.

While this latter view coheres with the assumption that potentialities are a kind of power or disposition intrinsic to entities, it cannot be correct. Predictions entail beliefs about possibility. However, as Michael Kottow observes, possibility statements “refer to entities as systems seen in the context of their relationships and interactions” (Kottow 1984, 297). Hence, insofar as ascriptions of potentiality necessarily refer to possible future states of the entity, potentiality cannot be understood completely in terms of the internal features of the entity. Instead, ascriptions of potentiality to an entity must always be understood against a background of assumptions about the entity’s relation to the world and the possibility that it may be actualized.

As noted above, Covey (1991, 237) has suggested that the sense of possibility assumed in ascriptions of potentiality must be physical possibility, not logical possibility. This is because considerations of logical possibility rather than physical possibility would make the concept, in Feinberg’s terms, so

“promiscuous” that it would be useless for any practical matter. Covey contrasts physical possibility with logical possibility and analyzes the former in terms of nomic regularities, i.e., “an event or state of affairs is nomically possible just in cases its coming about is in accordance with the laws of nature, given the initial state of affairs which actually obtains in the world” (Covey 1991, 237).<sup>7</sup> To illustrate the distinction, Covey cites the example from Nicholas Rescher that it is logically possible or conceivable that an acorn could develop into a tree that produces pears, but it is not nomically possible that it can. Covey, however, goes on to draw another distinction within the category of nomic possibility, which qualifies his treatment of the example cited from Rescher. He observes that sometimes we make conjectures about what might be nomically possible but which fall short of the lawlessness of logical possibility. For example, although it is absolutely nomically impossible for two masses to be near one another without being affected by gravity, as this would be inconsistent with the most basic physical laws in the actual world, it is not absolutely nomically impossible for an acorn to grow into a tree that produces pears. While respecting the laws of nature, it is possible that people could exploit them by developing techniques of genetic alteration, which reprogram acorns with pear genes (Covey 1991, 240). However, Covey observes that given our existing state of knowledge about genetics, it is actually nomically impossible for a particular acorn starting to germinate at this time to produce pears. In these cases, certain absolute physical possibilities, e.g., that we could manipulate the genes of the acorn to get pears, fail to generate actual possibilities about, e.g., currently existing acorns. In other words, the possibility of a possibility does not yield an actual possibility. Thus, certain potentialities are ruled out because of consideration of actual possibility.

Although Covey’s example involves what some would say is a “passive” potentiality of the acorn to grow into a tree that produces pears, his point also applies to purported “active” potentialities. For example, normal, healthy bees have the potential to build hives and produce honey, because in a “normal” or “suitable” environment it is physically possible that that is what they will do. In contrast to birds, there is a realistic physical possibility that bees will build hives. However, if a swarm of bees were destined to be wiped out by a natural disaster before they could possibly build a hive and produce honey, i.e., if it is only logically or absolutely possible that they could build a hive and produce honey, then those particular bees would have no more actual possibility and hence no more potentiality of building a hive and producing honey than a flock of birds. Assuming that we value bees that have the potential to produce honey but that it is actually physically impossible for those bees to produce honey, there would be no more reason to value those bees as a source of honey than a flock of birds. The same can be said of human embryos, whole-brain-dead individuals, and individuals in permanent vegetative state that have no actual possibility to develop intellect and will, due to external conditions beyond our control. Based on considerations of potentiality, there is no more reason to value them as potential or actual beings with intellect and will than a flock of birds.

Even if one rejected Covey’s claim that the ascription of any kind of potentiality requires actual possibility and held that these individuals had an active potentiality for intellect and will, it would not follow that they would have more value than individuals who had merely a passive potentiality for intellect and will. For example, suppose that we allow for Shewmon’s distinction (Shewmon 2010, 273) between an embryo’s having “the potential with assistance” (active potentiality) and a potential due to “the performance of *X* by an external agent” (passive potentiality). Suppose further that we categorize an

anencephalic embryo as a human embryo with the active potential for intellect and will *with assistance* and a human skin cell as having only a passive potential for intellect and will because it would need to undergo a transformation in kind caused by an external agent, e.g., cloning. Suppose that the assistance provided to the anencephalic involved correcting some genetic defect and that the correction, because it is only “assistance,” would preserve the identity of the embryo over time. In contrast, suppose that the cloning of the skin cell would not preserve the identity of the skin cell but would create a new kind of being. Although a human being with the potential for intellect and will might result from the cloning procedure, that individual would not be identical to the skin cell. Does active potentiality and identity preservation make a moral difference in how the anencephalic embryo and skin cell should be treated? The answer would seem to depend on other relevant facts, rather than whether the potentiality is active and the procedure is identity preserving. For example, suppose that we have the knowledge and technology to clone the skin cell but lack the knowledge and technology to correct the genetic defect in the anencephalic embryo. Suppose further that we had some dire need to increase the human population and that the cloning technology was in very limited supply. Even though the anencephalic embryo might be said in Shewmon’s view to have the active potential for intellect and will with assistance, we would not value it as much as the skin cell and cloning technology that could “produce” a human being. If one had to perform triage and devote resources to either the anencephalic embryo or the skin cell, it would be ethically justified to devote those resources to the skin cell rather than to the embryo. Thus, what is ethically significant about potentiality is not whether it is active or passive but whether there is an actual possibility for the potentiality to be realized.

In addition, suppose again, contra Covey, that actual possibility is not required for active potentiality. Suppose the embryo was not anencephalic but normal and therefore had the requisite genes for further development. It might be said to have an unqualified “active potentiality” in the sense that it does not require the type of “assistance” that Shewmon would say an anencephalic embryo might require. However, suppose the embryo is in an environment that will in fact prevent the embryo from actually realizing its potential and there is nothing that can be done to change the requisite environmental conditions, e.g., the embryo may be situated in a uterus that is so scarred that implantation is physically impossible and there is nothing physically possible that could be done to save the embryo.<sup>8</sup> If it is only absolutely possible but not actually possible to change the requisite external conditions, the embryo would lack the actual possibility for the potential to be realized but would nonetheless be said to have the active potentiality for intellect and will. What would be the ethical significance of such an active potentiality? The absolute but not actual possibility of the embryo’s realizing such a potentiality would make it so remote that it would lose whatever ethical significance it might have, if the potentiality were more proximate. Again, if there were some urgent need to increase the human population, we would value a human skin cell that, through available cloning technology, would have a more proximate potentiality to become a being with intellect and will than a human embryo that had a more remote active potentiality to develop intellect and will. Thus, when the remoteness of a potentiality is out of our hands and fixed by external physical conditions, whether a potentiality is “active” or “passive” becomes ethically irrelevant.

The situation is more complicated when it comes to individuals who may have an actual physical possibility of realizing some active or passive potentiality but there are external impediments to the realization of the potential due

to social or individual decisions. For example, suppose, as advocates of the potentiality argument in the abortion debate maintain, that many in vivo and in vitro human embryos, in contrast to whole-brain-dead individuals and individuals in permanent vegetative state, have the active potential for intellect and will, but may not realize their potential due to decisions such as abortion, a refusal to allow a frozen embryo to be implanted, or a refusal to adjust the external conditions in ways that will enable them to realize their potential. In such cases, these embryos have an actual physical possibility of realizing their potential for intellect and will and it is “up to us” whether we provide the requisite external conditions for their realization. Does the potentiality of all such embryos give these embryos the same ethical significance? Indeed, does their having such a potentiality give them such ethical significance that it would be wrong not to provide the conditions for their development?

Consider a normal embryo situated in a womb that is so scarred that physical implantation in that womb is not actually possible. However, suppose further that it is actually possible to flush the uterus, harvest the embryo, and implant it in a surrogate mother. Suppose that the technology to do this transfer is readily available, and there is a willing surrogate. Would such an active potentiality be so ethically significant that it would warrant the transfer and implantation, even if the woman in which the embryo was gestating refused to allow the transfer? Would her refusal to allow the transfer be tantamount to child neglect and murder? Indeed, if the active potentiality of an embryo for intellect and will were sufficient to make it a person with basic rights, then it seems that we ought to be taking measures to detect and rescue such embryos. Shouldn’t we be doing much more to rescue embryos that are destined to be destroyed due to external factors that will prevent their development? Just as we might initiate a search mission to save someone whom we believe may be lost at sea, shouldn’t we search for embryos that might be miscarried due to external conditions that it is in our power to rectify? If an embryo’s having the active potentiality for intellect and will were sufficient for the embryo to have the same moral standing as any other person, then it is hard to see why such conclusions would not follow. However, since we do not and should not engage in search missions to rescue endangered embryos or compel women to allow endangered embryos to be harvested, the presence of an active potentiality without consideration of the ethical implications of what it takes to realize the potentiality does not have the ethical significance that proponents of the potentiality assume it to have.

Assuming for the sake of argument a distinction between active and passive potentiality, an embryo with an active potentiality as opposed to something with a passive potentiality, e.g., a skin cell, will require normally less external intervention to realize its potential. Many of the causal factors that lead to the realization of the potential are inherent in the embryo. Therefore, *ceteris paribus*, it has a greater probability of realizing the potential than the skin cell. This makes its potentiality more proximate than something with merely a passive potentiality. Moreover, it is the proximity of realization that may make it more ethically significant. If there are factors that make its realization more remote and, at the extreme, not actually possible, its ethical significance would be diminished. As noted above, a human embryo in a womb that is so damaged that it will prevent implantation may have an active potentiality for intellect and will. However, if there is nothing that can be done to correct the situation, its possibility of realizing this potential would be so remote that it would have little ethical significance. If there is an actual possibility of the embryo’s realizing its potentiality but it would require intervention that would involve violation of some law or moral principle that we ought to respect, those legal and

moral obstacles create conditions that make the potentiality more remote and consequently less ethically significant. Thus, if the actual possibility of an embryo located in an inhospitable womb to realize its potential were dependent on compelling a woman against her will to undergo the harvesting of the embryo, the potentiality of that embryo would be more remote than that of an embryo in a similar predicament with a woman who was willing to undergo the procedure. Since respect for the autonomy and bodily integrity of women prevents us from intervening without their consent, the lack of consent makes the potentiality of that embryo more remote and therefore less ethically significant. Because potentiality is dependent on assumptions about conditions of its realization, it does not have ethical significance in and of itself. Its ethical significance is bound up with the possibility of its realization.

To reinforce this claim, consider how what is usually considered a “passive” potentiality can have ethical significance. Someone might say, “That hunk of marble has the potential to become a great sculpture, as Michelangelo intends to start working on it tomorrow.” Appeal to such potentiality may be used to justify certain moral claims, e.g., “I don’t care about the granite but *be very careful* when moving that hunk of marble.” In this context, potentiality refers to the internal properties of the marble that are part of the causal story involved in the actual possibility that some end may be realized. The marble is not in itself valuable, but its value is inextricably bound up with the actual possibility of its being transformed into a sculpture by Michelangelo. So, too, an active potentiality is not in itself valuable or ethically relevant independent of the actual possibility of its being realized. Just as the hunk of marble would become less valuable if it were unlikely that Michelangelo would work on it, an active potentiality may have less value or moral significance if it is unlikely or, at the extreme, not actually possible that it will be realized. The point is that any appeal to potentiality, active or passive, as having some ethical relevance involves assumptions about the actual possibility of the potential being realized. If there are physical conditions or respect for ethical rules that impede the realization of the potential, whatever ethical significance the potentiality has cannot be evaluated independently of consideration of whether those impediments can or should be removed.

These considerations bear on our ethical evaluation about potentiality at the end of life. For example, critics of non-heart-beating organ donation, such as Joanne Lynn (1993), have questioned whether such donors are really dead after, say, two or even five minutes of their heart stopping. Lynn’s concern can be rephrased as one about potentiality: How can these donors be “irreversibly” dead, if there is the potential for their circulatory and respiratory functions to resume? Lynn is correct that there is some uncertainty that two or even five minutes of asystole renders the cessation of circulatory and respiratory functions irreversible. Also, if we consider the possibility of performing cardio-respiratory resuscitation on these patients, then the physical condition alone is insufficient to conclude that the cessation of functions is irreversible. Many of these donors would have an actual possibility and therefore potential to be revived. However, Lynn ignores ethically justified decisional factors that put real restrictions on the possibility of the resumption of functions, e.g., a patient’s advance directive not to be resuscitated. Respect for the advance directive diminishes the ethical relevance of any potential that the individual may have for the resumption of circulatory and respiratory functions. The ethical relevance of the potential for functions to resume in a patient in the same physiological state but with an advance directive to be resuscitated would be different, since the actual possibility of the functions resuming is different. The individual and social decisions affect the ethical significance of the

potentiality, as they may make the possibility of the realization of the potentiality more or less remote.

In conclusion, even if there is a distinction between something’s having an active as opposed to passive potentiality, the distinction is irrelevant to whatever ethical significance potentiality has. In cases in which there is no actual possibility for an active potentiality to be realized due to either internal privation or external barriers that cannot be rectified, the potentiality has little or no ethical significance. Since we cannot do anything to help the thing realize its potential, it has little bearing on how we ought to act. In cases in which we could do something to rectify the internal privation or remove the external barriers, the ethical significance of the potentiality cannot be determined independently of an ethical evaluation of whether our intervention to correct the privation or remove the external barriers is justified. If there are strong ethical reasons for thinking that intervention should not take place or that the barriers should not be removed, the potentiality will and ought to have little ethical significance in our deliberations.

#### Endnotes

1. I would like to thank Jason Eberl for comments on an earlier draft of this paper.
2. Contrast, for example, the Catholic positions articulated in Smith 1989, 275-76, and Ashley and O’Rourke 1986, Ch. 11.2, and 1989, 311-12.
3. If the frozen cat were reanimated, van Inwagen would consider it to be the same organism. In contrast, Eberl holds that it would be a new organism, since the cat underwent a substantial change when it was frozen.
4. Eberl has responded that “patients who are permanently dependent on artificial support for circulation and respiration are not dead, but that the parts that compose them may be less in number. Thus, before his death, the quadriplegic Christopher Reeve was composed of only his head. The rest of his body was merely structurally but not functionally conjoined to him. Just as if his head were completely decapitated and hooked up to a machine that kept him alive, the machine would not be a part of him in such a case but a source of external support (personal communication; See further, Eberl, 2005).” In this case, it is unclear to me whether such a radical change in the parts that compose the person following Reeve’s accident would involve a substantial change. If the change is substantial, then, on Eberl’s view, Christopher Reeve after becoming quadriplegic would be a different kind of being than he was before the accident. If the change is not substantial, then, assuming an artificially sustained head is not a human organism, it is unclear whether Reeve was ever essentially a human organism. However, this implication would conflict with the assumption that on the Aristotelian inspired view that Eberl defends, Reeve is essentially a human organism.
5. Whole-brain-dead individuals and individuals in *permanent* vegetative states should be distinguished from some individuals in a vegetative state, where there may be a realistic possibility of their transitioning to a minimally conscious state and undergoing further improvement.
6. There are two other complications concerning “external” conditions of potentiality. First, proponents of the potentiality argument believe that the active potentiality of the human embryo resides in the genetic and epigenetic material of the embryo. While the genetic material (DNA) may be construed as internal or intrinsic to the embryo, this is not true of the epigenetic factors. Due to environmental influences, epigenetic factors are not static and change as the organism develops. If the epigenome is determined as much by factors external as internal to the embryo, it cannot be understood as an intrinsic power or motive principle of the embryo, i.e., an active potentiality, in the way that the DNA can be so understood. Moreover, if the epigenome is essential to the developmental trajectory of the embryo, the

distinction between whether an embryo has an “active” or “passive” potentiality to develop in certain ways becomes blurred. There is no more reason to think of the epigenome as the material conditions for an active potentiality than for a passive potentiality. Thus, if the distinction between active and passive potentiality turns on whether the power or motive principle is intrinsic or extrinsic, the distinction may be nonsensical when it comes to the epigenome. In short, it would not make sense to talk about the potentiality of the embryo to develop in certain ways independent of the environmental conditions which bear on the determination of the epigenome.

Second, since persons are not simply biological beings but social and cultural beings as well, it is unclear how any account of what a “normal” or “suitable” environment can be given independently of social and cultural considerations. To do so would involve a distortion of the nature of persons. In contrast to other biological beings, we can shape our environment based on rational consideration of the good and how to best realize it. Thus, it is hard to see how the attribution of potentialities to persons can be given without considering at the same time the nature of a good or suitable environment, which seems to take us beyond strictly biological considerations.

This same complication is raised in another way by Roy Perrett (2000). According to Perrett, a major problem for the standard potentiality argument is that it appeals to the “naturalness” of the kind of potentiality of an embryo to develop in certain ways, but does not provide a justification for why we should conform to nature. “Descriptive facts about biological functions,” Perrett argues,

do not by themselves entail any prescriptive claims. What has to be added is something like the Thomistic distinction between *laws of nature* and *natural laws*, where the former are descriptive statements derived from scientific observation of regularities in nature and the latter are prescriptive statements derived from metaphysical knowledge of the essential properties of human nature. Knowledge of our essences is then supposed to tell us how we *ought* to behave because of our nature as human beings. (Perrett 2000, 193)

Perrett expresses skepticism that natural law theorists have been able to make sense of the obscure distinction between laws of nature and natural laws and justify why we should not interfere with anything that is “natural.” In particular, Perrett takes issue with Stone’s argument that the potential of the embryo grounds an interest in continued life, because the embryo has a nature that, when actualized, involves conscious goods. Perrett claims that Stone’s argument (Stone 1987, 821) assumes the undefended and unobvious claim that “we have a prima facie duty to all creatures not to deprive them of the conscious good which it is their nature to realize.”

8. This paragraph and the following are drawn from Lizza (2005).
9. Suppose the embryo will die if not implanted in a surrogate and that there is no available technology or surrogate to accomplish the transfer before the embryo will die.

## References

- Aristotle. *De anima* and *Metaphysics*. In *The Complete Works of Aristotle*, ed. J. Barnes. Princeton: Princeton University Press, 1984.
- Ashley, B. M., and O’Rourke, K. D. *Ethics of Health Care*. St. Louis: Catholic Health Association of the United States, 1986.
- . *Health Care Ethics*, 3rd ed. St. Louis: Catholic Health Association of the United States, 1989.
- Covey, E. “Physical Possibility and Potentiality in Ethics.” *American Philosophical Quarterly* 28, no. 3 (1991): 237-44.
- Eberl, J. “Potentiality, Possibility, and the Irreversibility of Death.” *The Review of Metaphysics* 62, no. 1 (2008): 61-77.
- . “Aquinas’s Account of Human Embryogenesis and Recent Interpretations.” *Journal of Medicine and Philosophy* 30, no. 4 (2005): 379-94.
- Feinberg, J. “The Rights of Animals and Unborn Generations.” In *Philosophy and Environmental Crisis*, ed. W. T. Blackstone. Athens, GA: University of Georgia Press, 1974.
- Kottow, M. “Ethical Problems in Arguments from Potentiality.” *Theoretical Medicine and Bioethics* 5, no. 3 (1984): 293-305.
- Lee, P., and George, R. P. *Body-Self Dualism in Contemporary Ethics and Politics*. Cambridge: Cambridge University Press, 2008.
- Lizza, J. “Potentiality, Irreversibility, and Death.” *Journal of Medicine and Philosophy* 30 (2005): 45-64.
- . *Persons, Humanity, and the Definition of Death*. Baltimore: Johns Hopkins University Press, 2006.
- . “Potentiality and Human Embryos.” *Bioethics* 21, no. 7 (2007): 379-85.
- Lynn, J. “Are the Patients Who Become Donors Under the Pittsburgh Protocol for “Non-Heart-Beating-Donors” Really Dead?” *Kennedy Institute of Ethics Journal* 3 (1993): 167-78.
- Perret, R. W. “Taking Life and the Argument from Potentiality.” *Midwest Studies in Philosophy* 24 (2000): 186-97.
- President’s Council on Bioethics. *Human Cloning and Human Dignity: An Ethical Inquiry*. Washington, D.C.: U. S. Government Printing Office, 2002.
- Shewmon, D. A. “Recovery from “Brain Death”: A Neurologist’s Apologia.” *Linacre Quarterly* 64, no. 1 (1997): 31-96.
- . “The ‘Critical Organism’ for the ‘Organism as a Whole’: Lessons from the Lowly Spinal Cord.” In *Brain Death and Disorders of Consciousness*, ed. C. Machado and D. A. Shewmon, 23-41. New York: Kluwer, 2004.
- . “Constructing the Death Elephant: A Synthetic Paradigm Shift for the Definition, Criteria, and Tests for Death.” *Journal of Medicine and Philosophy* 35 (2010): 256-98.
- Singer, P., and Dawson, K. “IVF Technology and the Argument from Potential.” In *Embryo Experimentation*, ed. P. Singer et al. Cambridge: Cambridge University Press, 1990.
- Stone, J. “Why Potentiality Matters.” *Canadian Journal of Philosophy* 17 (1987): 815-30.
- van Inwagen, P. *Material Beings*. Ithaca: Cornell University Press, 1990.