HUMAN RIGHTS AND NATURAL LAW

An Analysis of the *Consensus Gentium* and its Implications for Bioethics

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SYNOPSIS

This work represents an attempt to see what measure of agreement exists on human values in the face of the radical disagreement in moral philosophy on fundamental human values, and a further attempt to see what would be the implications of these findings for bioethics. The thesis begins with looking firstly at the values that human beings appear to hold in the world community. Attention is paid to the range of human rights declarations, codes and statements of medical ethics, and beliefs of religious traditions. The methodology employed rejects an assessment of these documents in terms of dominant moral philosophies, seeking simply to identify the values held, their ubiquity in history, and the current attachment to those values. Those values are expressed in the twentieth century predominantly in terms of human rights. Chapter I discovers evidence of a consensus gentium on fundamental human values such as the right to life and the right to a reasonable standard of health care.

The second chapter discusses the origins of human rights in natural law philosophy, particularly the natural law of Thomas Hobbes. The return of the older tradition of natural law in the work of John Finnis et al is also considered for the light it sheds on both human values and human rights. The notion of the consensus gentium is defined and discussed in the light of the data collected in the first chapter. A fuller discussion of human rights follows taking into account the ambivalence to human rights expressed in utilitarian philosophy and in humanism. The chapter concludes with a discussion about the way human rights have been received and understood in terms of the common good. Account is taken of the gap between what people profess and what they do, and opens up the problem of the attenuation of human rights in terms of certain notions about the common good.

The third chapter presents bioethics as possibly a threat to society as well as a benefit. Current trends in bioethics towards a one-sided account of the doctrine of autonomy, together with utilitarian notions of the common good, and the influences of social Darwinism, eugenics, and humanism militate against the strict observance of human rights. Even societies which claim a strict attachment to human rights, understood as rights of individuals over and against society, move away from their professed obligations in the light of these other influences. Bioethicists frequently provide the intellectual justifications for breaches of human rights.

The final chapter further discusses the philosophical and social linkages between bioethical justifications for human rights violations and the division of humanity into persons and non-persons. The ultimate justification for the setting aside of certain classes of individuals from moral consideration is that they are non-persons. It is argued that there is, in fact, no agreement on what constitutes personhood and non-personhood, and no agreement as to when personhood begins and ends. There is, however, a universal agreement that all
members of the human family have the inviolable and inalienable right to life. In the light of the lack of consensus on personhood and moral theory, it is concluded that the consensus gentium on human values and human rights remains as the only agreed basis for people to live together in community, and that all members of the human family are to have their rights protected.
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STATEMENT

I, John Irving Fleming, affirm that this work, HUMAN RIGHTS AND NATURAL LAW, has never previously been submitted for a degree or diploma in any University and that to the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis.

John Irving Fleming
CHAPTER I
HUMAN RIGHTS and HUMAN VALUES

1. INTRODUCTION

Contemporary bioethicists involve themselves in bioethical discussion on the basis of personal beliefs and commitments to a particular school of moral philosophy. These commitments may be declared in advance or may simply be assumed in the debate. Bioethics may then find itself hostage to the fortunes of the debate in moral philosophy, a debate which Alasdair MacIntyre has described as "interminable", a debate over the most fundamental of human values and the way moral choices are to be made.

Since there is so little agreement among moral philosophers, and no likelihood of arbitration between the competing and often mutually exclusive moral philosophies, I have chosen to begin this inquiry by looking at what values people actually hold, to see if there is any substantial agreement. The bioethical enterprise is more likely to be successful as a community project if we are able to find an agreed starting point of shared values, and then to see whether moral agreement can be reached on some of the more controversial and perplexing bioethical issues arising from the application of the medical sciences.

The tradition of medical ethics is a long one. The Oath of Hippocrates is one of the earliest statements on medical ethics and probably the most influential. It represents the Pythagorean school rather than Greek thought as a whole. Nevertheless the extent to which it became normative in large parts of the world indicates that its basic values were in tune with a broader perception of human values than its identification as "Pythagorean" might otherwise suggest.

I shall examine a wide range of codes of medical ethics, statements and declarations of international bodies which touch on bioethics, and religious medical ethical traditions to see which, if any, human values are universally recognised. In particular I shall concentrate on the ubiquity of the most fundamental human values of life and health.

The literature provides various critiques of some of the codes from particular points of view. This work is not concerned so much with what is not in these codes so much as with what is in them. For example, Edmund Pellegrino rightly refers to some of "the limitations and omissions in traditional medical ethics as embodied in the Hippocratic corpus and its later exemplifications. These limitations are largely in the realm of social and corporate

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1 The Oath of Hippocrates is variously dated from the Sixth Century B.C. to the First Century A.D.
2 Ludwig Edelstein, "The Hippocratic Oath: Text, Translation, and Interpretation", in Cross Cultural Perspectives in Medical Ethics: Readings, ed. Robert M. Veatch, (Boston: Jones and Bartlett, 1989), 6-24
ethics, realms of increasing significance in an egalitarian, highly structured, and exquisitely interlocked social order."³

However, Pellegrino, in accepting the "need for expanding traditional medical ethics" believes that the reverence we accord to the Hippocratic precepts is rightly accorded, and that "some of the major proscriptions of the Hippocratic Oath are already being consciously compromised".⁴ It is the precepts which are in the Hippocratic Oath and which appear in other codes, statements, and declarations that this study is concerned to identify and then later to assess in terms of their universality.

While not prescinding from the importance of ethical theory, no attempt will be made to impose on any code, statement, or declaration, any particular theory of ethics. The consideration of natural law theories will take place in this work only after identification has been made of the human values which lay claim to universality.⁵

It is not intended to imply from this study that all human beings everywhere have ever embraced a set of basic human values, let alone have been able to live by them.⁶ The intention here is to examine what human values have been declared by competent authorities representative of humanity generally, the medical profession as a profession, and various religions to be essential to a minimum understanding of what constitutes a truly human way for human beings to treat each other, and to see if there is a sufficient consensus to enable us to say that certain basic human values ought always and everywhere to be defended. That human beings may vary in the way they might seek to honour those values will be acknowledged, but such observations should not be taken to mean that no such values exist as part of the human self-understanding, only that the values might be realised in an "inexhaustible variety of ways"⁷ which will vary according to human personality, culture, historical epoch, and life's circumstances. And further, when human beings behave in ways that would seem to infringe these values, that of itself should not be seen as sufficient evidence that those same human beings are unaware that they have infringed a basic human value. In fact it has been the infringement of these values on a large scale in this century that

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³ Edmund D. Pellegrino, "Toward an Expanded Medical Ethics: The Hippocratic Ethic Revisited", in Robert M. Veatch, op. cit., 36

⁴ Ibid., 26

⁵ An example of the difficulties that occur when one attempts to discuss the codes by reference to modern ethical theories can be found in Robert M. Veatch, "Codes of Medical Ethics: Ethical Analysis", Encyclopedia of Bioethics, ed. Warren T. Reich, (New York: The Free Press, 1978), 172-179. This matter will be taken up, in detail, later.

⁶ The problem of human behaviour and an account of morality has been well expressed by Bernard Gert: "Although I am unable to hold that if one knows what is morally right he will always do it, I do think that many persons of good will do what is morally wrong because they are unclear about the nature of morality. I fully agree with Hobbes's remark ..., 'The utility of moral and civil philosophy is to be estimated, not so much by the commodities we have by knowing these sciences, as by the calamities we receive from not knowing them.'" Bernard Gert, Morality: A New Justification of the Moral Rules, (New York: Oxford University Press, 1988), 302

has occasioned the formulation of the very statements of human rights by which, it is declared, all human beings and governments should be bound.

2. THE SIGNIFICANCE OF THE NUREMBERG DOCTORS’ TRIAL FOR THE CODIFICATION OF HUMAN RIGHTS

According to John Warwick Montgomery "contemporary concern for human rights grew directly in reaction to man's inhumanity to man during the Second World War." Montgomery's examples of 'man's inhumanity to man' include the "axis atrocities, especially the wanton destruction of six million Jews, other religious minorities, and political dissidents". Sidney Bloch, in the context of his evaluation of the unethical uses to which psychiatric medicine was put in the Soviet Union, uses Nazi Germany as a parallel example. "The euthanasia programme of Nazi psychiatrists, for example - responsible for the death of thousands of mentally disabled and handicapped patients - constitutes one of the most unsavoury chapters in twentieth-century psychiatry."

The discovery of the Nazi treatment of the Jews, the Gypsies, and the psychologically unfit "impelled the Allies to conduct War Crimes Trials at Nuremberg and in the Eastern theater of war. These trials were specifically designed to punish violations of human dignity."

The Nuremberg Doctors' Trial began on October 26, 1946 and culminated in the conviction of 17 of the 23 accused on August 20, 1947. The accused, "high-ranking officers in the SS and professors from German medical schools", were convicted of, amongst other things, crimes against humanity, specifically medical crimes.

In their defense the German physicians argued that human experimentation had been going on "for many years, not only in German concentration camps but also in other parts of the world. The German physicians at the trial quoted, as part of their defense, cases of experiments on prison inmates that took place in the United States and in other parts of the world."

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9 Ibid.
11 John Warwick Montgomery, op. cit., 20-21
12 This trial is sometimes confused with the earlier trial of the International Military Court [November 25, 1945 to October 10, 1946] against the political and military leadership of the National Socialist regime.
Well after the conclusion of the Nuremberg Trials, unethical experiments on human beings were still being conducted and, in one case, evidence came to light of such an experiment which took place in the United States when the Nazis were in power in Germany.

However, it was the activities of the Nazis that "led to the drafting of the United Nations' Universal Declaration of Human Rights and to the creation of the European Convention on Human Rights and the legal machinery for its implementation." These documents contain explicit formulations of human rights that are to be defended, rights which reflect certain basic human values. Further, these same rights and values assume the character of universality; they apply to all human beings.

The judgment of the Nuremberg Doctors' trial "contained the guidelines for human experimentation known as the Nuremberg Code, a basic international guide for subsequent ethical thought on human experimentation." This Code, a more detailed consideration of which will be offered later, "formed the basis of the so-called Declaration of Helsinki of the World Medical Association in 1964." The Declaration of Helsinki, subsequently refined and amended in 1975, was adopted precisely because the lessons of Nuremberg had not been learned.

By the mid-1960s, a number of ethical crises and disasters occurred due to the lack of impartial consideration of whether research ought to be done at all ... These dire events sensitized leaders in science and political life to take action, not only within nations but internationally.

That such "ethical crises and disasters" still occur because of the failure of medical scientists and other medical professionals to take adequate account of the rights of their patients is well illustrated in the Report of the Cervical Cancer Inquiry 1988 which had been set up to inquire into "Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters".

15 "In one case ... twenty-four persons were given LSD to study the long-range changes in their personality, performance, value judgments and attitudes. All twenty-four had answered an advertisement and were paid at the rate of $2 per hour. They were not informed as to the possibility of personality changes and other dangers connected with the experiment. Some of them had never heard of LSD and others only had a slight knowledge of it." *Ibid.*, 98

15 The Tuskegee Syphilis Study first came to public attention in 1972. The experiment was begun in 1932 in Alabama by the U.S. Public Health Service to study the natural course of untreated syphilis. This case is referred to in Daniel Ch. Overduin and John I. Fleming, *Life In A Test Tube, Medical And Ethical Issues Facing Society Today*, (Adelaide: Lutheran Publishing House, 1983), 185-6

16 John Warwick Montgomery, *op. cit.*, 21

17 F.C. Redlich, *loc. cit.*, 1018

18 Andrew C. Varga, *op. cit.*, 99


Despite the calamities of the Nazi experience "the postwar integration of research into medical practice has been accompanied by acceptance that non-therapeutic experimentation is indispensable to medical science."\(^{21}\) The support for destructive non-therapeutic research on live human embryos among many scientists is widespread and conditions much of the contemporary debate on what it is to be human, alive, and a person. The reference point in much of the debate is the overall benefit to society, yet it is the preoccupation with human rights and values which has been so much a feature of the late twentieth century.

The most influential documents as far as human rights and values are concerned, and which are a product of the twentieth century, owe a great deal, then, to the reaction of the world community to the traumatic events of the first half of that century. It should not be forgotten, however, that this appeal to human rights and human values has been the moral basis for all contemporary civil rights protagonists. The American civil rights movement, the world-wide opposition to apartheid in South Africa, the work of Amnesty International in the name of prisoners of conscience and those deprived not only of their liberty but also of their lives for what they believe in, and the various dissident movements in communist regimes have all appealed to a law higher than that of the State, and to human values and rights beyond those recognised and protected by the State. And the continuing efforts to bring Nazi war criminals to justice reflect a mentality that has not forgotten the holocaust. The notion that what the State says in its laws is morally right is necessarily morally right, and in any case to be obeyed [legal positivism], has few supporters in the modern era.

The consequences of the Third Reich are, in many ways, more keenly felt in Europe than in the United States and Australia, and in Germany more than anywhere else. William E. Seidelman has argued, for example, that attendance be obligatory for professors and students of medical faculties, throughout a United Germany, at a proposed public burial of anatomical specimens derived from victims of the Nazis and still in use in some German Universities and research institutions. He further recommends that every medical school in the world observe the day in some appropriate manner. "A legitimate ethical foundation in medicine cannot be established until the profession has demonstrated the insight and capacity to acknowledge evil, to recognize its victims, and to commemorate their suffering."\(^{22}\)

It is not necessary to accept Seidelman's recommendation of compulsory attendance at the proposed public burial of anatomical specimens to take his main point. The experience of the Third Reich requires an acknowledgment of what happened, to whom and by whom. The various contemporary statements of human rights reflect the need to articulate and defend human rights and human values in the context of a human history characterised by the violation of those rights and values. And Seidelman is surely right when he sees the problem as a universal human problem and not simply an aberration of the German nation. The Nazi


doctors are not the only doctors to have engaged in "crimes against humanity" any more than doctors are the only class of human beings who have engaged in "crimes against humanity". It is, perhaps, the scale of the Nazi atrocities and not the fact of them that assures the Nazis of their infamous place in human history together with Pol Pot and the Khmer Rouge, and Joseph Stalin.

The contemporary codes and statements themselves are part of a long tradition of human insistence on basic human values to be defended. These rights and values were not invented in the aftermath of the Second World War. The special circumstances which have obtained with the sophistication of science and technology have demanded a more legally effective way of defending human values and of articulating a methodology for bioethical decision-making. But logically prior to decision-making is the identification of the values themselves because it is these values which are the base-line or foundation for the whole bioethical enterprise. The Nuremberg Trials are important not only because the judgment of the Doctors' Trial laid down the basis for the Helsinki Declarations, but because they also acted as an incentive for a codification of human rights and values which would gain universal acceptance because they are, in general, in accord with the deepest aspirations of human beings and with long-held perceptions of what it means to be human.

3. METHODOLOGY FOR THE CRITICAL EXAMINATION OF HUMAN RIGHTS DOCUMENTS

I shall examine the various codes of medical ethics and statements of human rights which, for convenience, I have sorted into five groups.

3.1. Statements Of Human Rights Of World Secular Bodies

a) The Universal Declaration of Human Rights Approved by the General Assembly of the United Nations 1948

b) Declaration against Torture of U. N., 1975


d) UN Convention on the Rights of the Child 1989

e) The European Convention For The Protection Of Human Rights And Fundamental Freedoms 1950 [as amended by Protocols Nos. 3 and 5, which entered into force on 21 September 1970 and 20 December 1971 respectively]

f) The European Social Charter and its Protocol

3.2. Statements Of International Human Rights Bodies [Private]

b) Conference On The Abolition Of The Death Penalty, Declaration Of Stockholm, 1977

c) Statements of the World Federation of Doctors Who Respect Human Life

3.3. Codes And Statements Of Medical Ethics Of World Secular Bodies

a) Principles of Medical Ethics of the United Nations, 1982

b) World Medical Association documents

c) The Draft European Declaration On The Rights Of The Patient

3.4. Codes And Statements Of International Professional Bodies Within The Medical Profession

a) Code for Nurses 1973 of the International Council of Nurses

b) Statement On The Nurse's Role In Safeguarding Human Rights of the International Council of Nurses, 1983

c) Role Of The Nurse In The Care Of Detainees And Prisoners of the International Council of Nurses, 1975


e) Statement By The International Union Of Psychological Science, July 1976
3.5. Codes And Statements Of Religious Bodies

a) The Oath of Hippocrates [6th Century BC - 1st Century BC]

b) Commands and Statements from the Bible

c) Oath of Initiation (Caraka Samhita) [First Century AD]

d) Oath of Asaph [3rd Century-7th Century AD]

e) Advice to a Physician: Advice of Haly Abbas (Ahwazi) [10th Century AD]

f) The 17 Rules of Enjuin (For Disciples in Our School) [16th Century AD]

g) A Physician's Ethical Duties (From Kholasah Al Hekmah) [1770 AD]

h) Daily Prayer of a Physician ("Prayer of Moses Maimonides") [1793? AD]

3.6 Codes, Statements And Moral Theory

The human values with which this study is concerned are:

a) human life, i.e. the right of the individual to live, the inviolability and inalienability of human life

b) good health, i.e. the right of the human individual to good medical care either in terms of cure whenever that is possible, and the alleviation of pain and distress

c) protection, i.e. the right of the human being not to be hurt or damaged by another, not to be exploited sexually

d) confidentially, i.e. the right to be able to consult the physician without fear of exposure

e) autonomy, i.e. the right of the patient to accept or refuse treatment, and to be fully informed before consent is given.

The various codes of medical ethics and statements of human rights will be analysed to see how general are some or any of these human values. That these human values have not been arbitrarily chosen will become obvious in the light of the data examined. Each one of the designated human values will, in turn, be used as the focal point for the analysis of the documents. We will then be in a position to see whether there is a consensus gentium as far as human values is concerned which can serve as a basis for bioethical reflection and public policy decision-making. In this way distinctions can be made between an agreed set of values, if it can be shown that such an agreement exists, and the speculative opinions of philosophers and bioethicists.
The search for these basic human values in authoritative statements of human rights and in medical ethical codes is, therefore, not one without promise. The methodology chosen will allow consideration of contemporary convictions as to what those basic values are in the light of a continuing and developing human self-understanding.

The discussion of the ancient medical codes in reference to contemporary ethical theories and preoccupations has many disadvantages, the worst of which is the obfuscation of the human values being defended. In attempting to focus on the form in which the codes are presented the essence of the codes may be overlooked or obscured. An example of this approach is the essay by Robert M. Veatch, "Codes Of Medical Ethics: Ethical Analysis", in the *Encyclopedia of Bioethics.*

Veatch acknowledges that "ethical analysis of the codes of medical ethics creates problems. It is unfair to expect them to be fully developed, systematic theories of medical ethics." He concedes that "it might be argued that documents that are the product of practitioners rather than theoreticians reflect even more accurately the ethical stance of the group than do the more systematic efforts at developing theories of medical ethics." However Veatch goes on to immediately qualify that concession with the observation that such a concession provides the reason why "it is valuable to examine the principles that seem to be implied in them."

But Veatch does not define what he means by the terms "the ethical stance" and "principles". Does "ethical stance" mean the position taken in relation to ethical theory, or the conclusions a group has reached after careful ethical reflection within some (undeclared) ethical framework, or the human values to be defended? And do "principles" refer to a "fundamental source, primary element" (as in a basic human value), a "fundamental truth as basis of reasoning etc.", or a "personal code of right conduct"?

Immediately Veatch shifts his use of language to identify what he calls "a central ethical obligation, a basic principle that provides the physician with a core moral stance for resolving ethical dilemmas." This principle is, he says, "the "patient-benefitting" ethic". The difficulty here is to know precisely what it is that Veatch is trying to say. He uses the same words [e.g. "principle", "ethical"] in several different ways without saying which meaning he attaches to the word in a given context.

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23 Robert M. Veatch, "Codes Of Medical Ethics: Ethical Analysis", in *Encyclopedia of Bioethics*, 172-179
24 Ibid., 172
25 Ibid.
26 Ibid.
28 Robert M. Veatch, *loc. cit.*, 172-3
29 Ibid., 173
The *Hippocratic Oath* and the *Declaration of Geneva* are then cited to show that the physician's first obligation is to do what he thinks will be of benefit to the sick, a principle or ethic which Veatch claims to be "controversial" when it is "contrasted with other major ethical positions". This involves Veatch in comparing two unlike things, the *Oath of Hippocrates* and the *Declaration of Geneva* on the one hand, and modern utilitarian moral theories on the other.

"The first characteristic of the Hippocratic ethic is that it is individualistic: It concentrates only on benefit to the patient."30 This assertion is by no means an unquestionable statement of the facts of the matter. It is not clear from the formularies of Hippocrates or Geneva that such a narrow focus was intended or practised. Did physicians interpret the duty to do well by their patients to mean that they would do only what was in the patients' interests? If so, what becomes of the prohibition of abortion and euthanasia which the patient might well think are procedures which would be of "benefit" to her or him? The notion of "benefit to the sick" is a qualified one which takes into account not killing the fetus [another person?] for the benefit of the patient, nor killing the patient even at their own request. Does the latter reflect a wider duty to morality or to the best interests of the community at large for doctors not to kill? In which case the benefit to the patient may take second place to wider loyalties and commitments.

Veatch then contrasts the alleged "individualistic" ethic of the two codes with the theory of utilitarianism as presented by "Bentham, Mill, and G.E. Moore" who "would consider such a narrow focus on consequences for the patient to be ethically unjustified."31 The Hippocratic principle could only be acceptable to a utilitarian if there was empirical evidence to show "that, by having physicians concern themselves only with benefits to their individual patients, the greater good of the greater number will be served in the long run". [my emphasis]32 But the Oath of Hippocrates (as shown above) and the *Declaration of Geneva* should not be so narrowly construed. In the *Declaration of Geneva* the first pledge is "to consecrate my life to the service of humanity".33 The commitment to "the health of my patient" as the first consideration has to be interpreted in the light of the other precepts. The Declaration does not provide the means for such an interpretation, for balancing the various values which it espouses. Nor does it articulate a particular ethical theory or make explicit a preference for a particular ethical theory. The kind of analysis which Veatch sets for himself is not possible. This becomes even clearer when he deals with the "paternalism" of the Oath of Hippocrates, and when he contrasts its "patient-benefiting ethic ... with other nonconsequential ethical theories".34

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30 Ibid.
31 Ibid.
32 Ibid.
33 *Declaration of Geneva*, World Medical Association, 1948
34 Robert M. Veatch, *loc. cit.*, 174
In the latter case, Veatch projects the *Oath of Hippocrates* as being, to some extent, consequentialist since the physician is required to do only those things which benefit the patient. He refers to what he did not refer earlier, i.e. when 'the physician is to do what he thinks will benefit the patient but is not to give a deadly drug or use the knife, not even on sufferers from stone.' What is the physician to do if he believes that giving a deadly drug or an abortifacient remedy, or using the knife will benefit his patient?" The resolution to this apparent contradiction, says Veatch, could be resolved by the Pythagorean physician if he believes "that such actions can never be beneficial to the patient." If this is the case then the Oath merely spells out some guidance for the physician as he decides what is beneficial. But listening to the patient is also beneficial to the patient and no procedure for resolving what is beneficial is provided. Alternatively, says Veatch, "these actions" might be "seen as inherently wrong even if they might be of benefit" [as a Kantian might argue] in which case the "Hippocratic ethic abandons its consequentialism, at least for these cases." Again, not listening to the patient and ignoring the patient's autonomy may also be "inherently wrong", and no procedure is provided for resolving the conflict.

Codes of medical ethics and statements of rights need to be handled very carefully. Certain values might be defended by the codes and statements, but the same codes and statements may provide no mechanism for the resolution of difficult cases. In search for this kind of coherence the analysis of codes in reference to ethical theories is unhelpful. The surer way to proceed is not to speculate on the ethical theory authors of codes might have entertained but not articulated, and certainly not to speculate on theories they could not have entertained because they had not yet been formulated.

It is of more than passing significance that textbooks on bioethics pay scant attention to the medical codes and to other statements of human rights which have a direct bearing on bioethics. In so far as they are referred to at all it is the form of the codes and statements that attracts attention presumably because the theoretical commitments of the bioethicists concerned are accorded a higher priority.

Raanan Gillon refers to some of the "medical oaths, declarations and codes" in his *Philosophical Medical Ethics.* His concern is the "moral standing of the rules". He wants to know what the moral standing is of "declarations of the World Medical Association" which contain a considerable body of moral rules that purport to govern medical practice." Is it law that provides the "stable and coherent grounding for medical ethics?" In noting that the World Medical Association "changed its ethical principle from a requirement of 'utmost respect for human life from the time of conception' to 'utmost respect for human life from its beginning'”

35 Ibid.
36 Ibid.
37 Ibid.
38 Raanan Gillon, *Philosophical Medical Ethics*, (Chichester: John Wiley & Sons, 1986), 9-13
39 Ibid., 12
and that the British changed their abortion law in 1967 "to a law so permissive that many doctors understand it to permit abortion on request during the first trimester". Gillon concludes that the law is not such a stable and coherent grounding for medical ethics. This conclusion is further supported by "the wide range of conflicting laws that exists in different societies and, above all, the powerful human intuition that almost everyone has that it is possible for laws to be immoral". [my emphasis]

Gillon then refers to the fact that the Declaration of Geneva pledges that the doctor not use his medical knowledge "contrary to the laws of humanity" as evidence that medical ethics is neither self sufficient nor entirely reliant on national laws. It is at this point that Gillon makes an astonishing methodological leap. In asking what are these "laws of humanity" he then devotes his next two chapters to "two types of moral theory - deontological and consequentialist - that attempt to answer this fundamental question". [my emphasis]

The presumption of the methodology to be employed in this work is quite different. Human values exist prior to moral theories and the same values may be held by people who espouse different moral theories and by people who know nothing of moral theory. People may differ in the way they solve complex moral problems and may order human values hierarchically in different ways. To attempt to discover what are the "laws of humanity" it is necessary to discover which human values are widely held to be human values and what kinds of actions are held to be violations of those values. It is in the latter question, what kinds of actions violate human values, that moral theory may assist. It will also follow that moral theories which advocate actions that violate human values must come under judgment since it is the existence of at least a bare minimum of agreed human values that makes social life possible. Indeed neither the fact that the German doctors obeyed the lawful command of the State nor that they followed the dictates of a certain moral and political theory absolved them in the Nuremberg Trials from conviction for "crimes against humanity".

In their Principles of Biomedical Ethics, Tom L. Beauchamp and James F. Childress say that their "focus is applied normative ethics". They express concern about "the adequacy and comprehensiveness of the specific moral rules found in existing professional codes". They note that most of the codes have things to say about the principles of beneficence and non-maleficence, and about some rules such as confidentiality, but "little if

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40 Ibid. It is not clear from Gillon's statement just what is the difference between respect for human life "from the time of conception" and respect for human life "from its beginning". According to one understanding of "human life from its beginning" it might be thought to refer to the moment of insemination, whereas "conception" is defined by some to mean the event which culminates in the embedding of the embryo in the uterine wall. Gillon's use of this example is not without ambiguity.

41 Ibid., 13

42 Ibid.

43 Tom L. Beauchamp and James F. Childress, Principles of Biomedical Ethics, (New York: Oxford University Press, 1979), 9

44 Ibid., 11
anything to say about some other important principles and rules, such as veracity, autonomy, and justice.”45 Thus Beauchamp and Childress focus on what is not in the codes, on how what is in the codes is formulated, but not on the human values embedded in the codes. Even more controversially they aver that "a professional code represents an articulated statement of role morality as seen by members of the profession. It is distinguished from sets of standards imposed from the outside by other bodies such as governments."46 But what of the Nuremberg Code, the precursor to the Declaration of Helsinki? Was not that Code, in fact, the judgment of the court at Nuremberg, a judgment which reflected human expectations of by what the members of the medical profession should be bound? And in any case, such preoccupations obscure the fact that the codes are defending human values by prescriptions and proscriptions which are not, nor ever could be, exhaustive. The rules such as veracity, autonomy and justice [if indeed justice is a rule] rest upon, and stem from, prior commitments to beneficence and non-maleficence.

In proceeding now to analyse the various codes and statements affecting bioethics and the practice of medical science, an attempt will be made to discover from those documents the human values which are foundational and need defending in a peaceable society, and which can lay claim to universal human allegiance.

5. THE RIGHT TO LIFE IN HUMAN RIGHTS DECLARATIONS

5.1 United Nations

The Universal Declaration of Human Rights was approved by the General Assembly of the United Nations in Paris, France, on December 10, 1948. The major author of the Declaration was Nobel Prize winner René Cassin.47 Cassin "locates the ideological roots of the Declaration in the Ten Commandments.”48 With this in mind John Warwick Montgomery argues that

45 Ibid.
46 Ibid., 10
48 Ibid., 30
Johannes Morsink certainly goes too far in maintaining that 'the U.N. representatives ... replace eighteenth century deism with a twentieth century secular humanism' (The Philosophy of the Universal Declaration, Human Rights Quarterly 6 [3] [August 1984]: 333-34). The absence of reference in the Declaration to 'nature and nature's God' is hardly the equivalent of 'turning down any suggestion of a normative source transcendent to human nature.' The Commission of Human Rights, which drafted the Declaration (chiefly drawing on Cassin's labors) and the Third Committee which revised it (one of its most influential members was Lebanese Christian Charles Malik) avoided for political and pragmatic reasons the question of the ultimate origin of human rights - leaving each signatory and reader to supply the lacuna. 49

The French jurist Karel Vasak categorizes human rights in "three generations". The "first-generation" of human rights are those which could be termed civil liberties and are extensively incorporated in the Universal Declaration of Human Rights in Articles 2-21. "Second-generation" human rights are those which concern economic, social, and cultural rights. Many of these rights can be found in Articles 22-27. The "third-generation" of human rights are more nebulous and controversial, and have been referred to as "solidarity rights". 50 An analysis of "rights talk" and theories about human rights will be dealt with later. At this stage it is necessary to concentrate only on the values which are the basis for human rights claims, and the extent to which human societies acknowledge the claim that such values should have on them.

This Universal Declaration of Human Rights is founded upon the notion that there are human values and that these values are inherent in the human individual. In the Preamble the Declaration states that "the foundation of freedom, justice and peace in the world" is the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family".

As far as the Declaration is concerned there are human values inherent in all members of the human family because of their "inherent dignity". Since "dignity" is about true worth or excellence ["dignus" L. means worthy], and, in the context, human worth, then the claim for the inherent dignity of human beings is a claim for basic human values.

Further, the Preamble links human dignity, human values with human rights which are described as "inalienable rights", rights of which we may not be deprived and cannot deprive ourselves. I must not be sold into slavery and I am to be restrained from selling myself into slavery.

These human rights which reflect human values must, says the Preamble, "be protected by the rule of law" otherwise humankind may be driven, "as a last resort, to rebellion against tyranny and oppression". This protection of the rule of law is necessary not only for human beings to live together peaceably within the State, but also so that nations may live together in peace.

49 Ibid., 275, note 23
50 Ibid., 28
The *Universal Declaration of Human Rights* presents itself to the world as "a common standard of achievement for all peoples and all nations" and as a guide for every structure in society and for every individual in order that the rights identified in the Declaration may have "their universal and effective recognition and observance" secured.

In Article 1 the Declaration asserts certain things about human beings which affect the understanding of the rest of the document. Human beings, it says, "are born free and equal in dignity and rights". This value of equality of human beings, this injunction not to show preference between individuals in the recognition of "the rights and freedoms set forth in this Declaration" is further specified in Article 2. In particular, in the entitlement to the rights and freedoms in the Declaration there is to be no distinction of any kind, "such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In this way the Declaration excludes discrimination against the elderly and the very young, the physically and mentally disabled and the chronically ill. All have equal claim to the rights and freedoms enunciated in the Declaration.

Further, the Declaration presumes freedom of choice and action because all human beings are "endowed with reason and conscience and should act towards one another in a spirit of brotherhood." [Article 1] To be endowed with "conscience", that is, the moral sense of right and wrong, suggests an inherent sense of how to treat others in at least the minimal level identified by the Declaration. Through the exercise of reason with which we have been endowed, we make moral choices. The Declaration requires that those moral choices be made "in a spirit of brotherhood". The use of the term "brotherhood" suggests a commonality of nature by which we know what it means to treat each other in a fraternal way.

In Article 3 the Declaration begins the articulation of the human values to be defended in terms of human rights. "Everyone has the right to life, liberty and the security of person." Thus is human life held to be both inviolable and inalienable. The Declaration does not begin with hard cases or exceptions, but with the general proposition which concerns the value of human life. It is also interesting to note the order of the rights articulated - life first, then freedom [liberty], and then security of person. Unless the right to life can be guaranteed by the State then there is no meaningful rights to freedom or to security of person. The right to life is logically prior to considerations of the quality of the individual's life.

The right to "security of person" is developed in subsequent articles which deal with, among other things, the prohibition of slavery [Article 4], the abjuration of torture [Article 5], and the rejection of "arbitrary arrest, detention or exile" [Article 9].

As far as international law is concerned, the binding force of the Declaration has been a disputed question. Because the Universal Declaration is not a treaty, but is only a proclamation of the General Assembly, the conventional wisdom used to be that it has no legal force. However, the former Director of the UN Division of Human Rights, Professor John P. Humphrey, questions that conventional wisdom. For him "the emergence of a
juridical consensus evidenced by state practice subsequent to its original proclamation has made the Declaration binding as part of the law of nations."  

Humphrey makes his case in this way:

The conventional wisdom of certain jurists is to say that, while the Declaration may have great moral and political authority, it is merely, as its preamble says, "a common standard of achievement" and has no binding legal force; the Covenants on the other hand are binding on all states that ratify them. It is unlikely, however, that the Covenants will ever be universally ratified; but if, by the development of a new rule of customary international law, the Declaration has become an authentic interpretation of the human rights provision of the Charter, then its provisions, like those of the Charter itself, bind all member states. If, in addition to becoming an authentic interpretation of the Charter, the Declaration has become part of the customary law irrespective of the Charter, it is also binding on all states whether they are members of the United Nations or not. This would mean, amongst other things, that if, for example, a country were expelled from the Organization under article six of the Charter, that country would nevertheless continue to be bound by the Declaration. In countries, moreover, in which the customary law of nations is part of the law of the land, the Declaration could be invoked before and applied by national courts.

The question of the juridical character of the Universal Declaration is not, therefore, an idle academic exercise. If the thesis set forth in this essay that it has become a part of the customary law of nations is correct then its adoption by the United Nations on 10 December 1948, was a far greater achievement than its authors could ever have imagined.

A slightly different perspective is offered by Amnesty International. In the Amnesty International Handbook 1983 it is stated that the Universal Declaration "is not of itself legally binding, although membership in the United Nations is normally considered to be an implicit acceptance of the principles of the declaration. It should be noted that under the Charter of the United Nations, member states are pledged to take joint and separate action to promote universal respect for, and observance of, human rights and fundamental freedoms. This is a legal obligation. The declaration is an authoritative statement of what those human rights and fundamental freedoms are."

The question as to whether or not the Universal Declaration is part of international law is a critically important one. The first generation of civil and political rights, and the second generation of economic, social and cultural rights have been specified in international covenants and have the force of law on those who sign them. Can not the same thing be said for the Universal Declaration itself? The Charter of the United Nations has, among its purposes, the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race,

51 Ibid., 30. This is Montgomery's summary of Humphrey's opinion.
sex, language, or religion." 54 The Charter further commits the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" 55 by way of a pledge.

All members pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55. 56

What we have here is the idea of a consensus gentium, an agreement among the nations, a consent to be bound by certain values expressed as human rights. This doctrine of consent involves the idea that the "basis of obligation of all international law, and not merely of treaties, is the consent of States." 57

There has been a long-standing debate between positivists and natural lawyers as to the connection between international law and consent. Positivists, taking a strong view of consent, have seen international law as the product of actual or at least clearly implied agreements between nations. 58 Natural law theorists have taken a weaker view of consent, arguing that international law seeks to manifest and enforce principles which are prior to a state of consent, but to which all 'civilised' nations might be presumed to consent. 59 In classic textbooks the consensus gentium is seen as crucial to the authority of international law. Fulbecke (1602), in his appeals to "the consent of the nations" or "the consent of all the nations" as the basis of the ius gentium, appears to be using consent only in the weakest sense, what is common ground among nations despite their various customs and occasional arguments. 60 This common ground among the nations is based upon nature or reason, what is evident to reasonable people. So, in The Prize Cases (1862) J Grier for the US Supreme Court held that "the law of nations is also called the law of nature; it is founded upon the common consent as well as the common sense of the world." 61

John Salmond's exposition of the doctrine of consent, "the clearest modern exposition to be found", 62 is instructive. Salmond refers to the "commonly received opinion, that the jus gentium, although identified as early as the time of Cicero with the jus naturale of

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54 Charter of the United Nations, Article 1(3)
55 Ibid., Article 55 (c)
56 Ibid., Article 56
58 The emergence of the social contract theories during the Enlightenment as a basis for establishing natural or human rights which were not dependent upon Revelation were applied to international law. E.g. Oppenheim applied his definition of law - a body of rules to regulate the conduct of members of a community and which by common consent of the community shall be enforced - to international law. L. Oppenheim, International Law, 2nd ed., (London, 1912), vol. 1, 8-18
59 Cf the appeal to 'custom' or 'necessary law' in Hugo Grotius, De Jure Belli ac Pacis Libri Tres, I, 1, para 14; Justinian, The Elements of Roman Law, I, 2, para 9; E. de Vattel, The Law of Nations, (1797), lviii
61 The Prize Cases, Supreme Court of the United States (1862), 2 Black, 635
62 Parry and Grant Encyclopaedic Dictionary of International Law, op. cit., 72
the Greeks, was in its origin and primary signification something quite distinct - a product not of Greek philosophy but of Roman law." 63 Dismissing contrary views, Salmond accepts the common opinion that "jus gentium was in its very origin synonymous with jus naturale". Over time the meaning of the term ius gentium changed.

Jus gentium came to mean not only the law of nature - the principles of natural justice - but also a particular part of the positive law of Rome, namely, that part which was derived from and in harmony with those principles of natural justice, and which therefore was applicable in Roman law courts to all men equally, whether cives or peregrini. 64

It was Thomas Aquinas who "brought natural law into the world as it is" by making it "applicable here and now" and by bringing it "into a direct relation with human law, by which it might be amplified, added to or even subtracted from." 65 The natural law is a "reflection of human nature, the natural human inclinations toward appropriate human ends." It is the "link between the eternal law in the mind of God and the moral law for human beings." 66 The natural law tradition, found in varying ways to be unsatisfactory, underwent further revision and development. Aquinas' distinction between natural law, jus gentium and positive law was rejected by Suarez. For Aquinas, "the law of nations, or better, the common law of civilization, differs from natural law because it is known, not through inclination, but through the conceptual exercise of reason, or through rational knowledge." 67 For Suarez, natural law was "straightforwardly a case of human positive law." 68 Lloyd and Freeman show that the concept of international law was "at least implicit in the writing of Vitoria, though it was Grotius (1583-1645) a century later who was the first to propound a system of international law." 69

The concept of consent was invoked to explain how it is possible for a free individual to become the subject of a legitimate state. Suarez was the first to give attention to the problem of how the idea of political authority could be brought into existence by a general act of consent performed by men in a state of nature ... It is, however, significant that the problem was being perceived: neither Hobbes nor Locke really grasps the nettle at all. 70

64 Ibid.
65 Lloyd L. Weinreb, Natural Law and Justice, (Cambridge, Massachusetts: Harvard University Press, 1987), 55
66 Ibid., 59 and cf Thomas Aquinas, Summa Theologiae, 1a 2ae, qq 93; 94; 95; 96. Cf also A.P. d'Entrêves, Natural Law, ((London: Hutchinson University Library, 1970), 42ff
69 Ibid.
70 Ibid., 113
Salmond, accordingly describes the law of nations as "the most important branch of conventional law". Conventional law is "any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other."\footnote{71 Sir John Salmond, 	extit{op. cit.}, 30}

The international agreement which thus makes international law is of two kinds, being either expressed or implied. Express agreement is contained in treaties and international conventions ... Implied agreement is evidenced chiefly by the custom or practice of states. By observing certain rules of conduct in the past, states have impliedly agreed to abide by them in the future. By claiming the observance of such customs from other states, they have impliedly agreed to be bound by them themselves.\footnote{72 Ibid., 32}

Legal positivism, the dominant theory of the early part of the twentieth century, "combined with a strict application of the doctrine of national sovereignty ... effectively excluded the possibility of judging, and therefore criticizing, the treatment of any people by its own government." Paul Sieghart has observed that the apotheosis and consequent downfall of that position "came in National Socialist Germany" when that regime perpetrated "historically unprecedented atrocities".\footnote{73 Paul Sieghart, 	extit{The International Law of Human Rights}, (Oxford: Clarendon Press, 1983), 14}

According to the strict doctrine of national sovereignty, any foreign criticism of those laws was therefore formally illegitimate; according to the strict positivist position, it was also meaningless. And precisely the same position could be, and was, taken in relation to the atrocities perpetrated at much the same time upon some millions of its citizens by the régime then legitimately in power in the USSR.\footnote{74 Ibid.}

In the aftermath of the Second World War the United Nations came into existence with "the victorious nations determined to introduce into international law new concepts designed to outlaw such events [as occurred in Nazi Germany] for the future, in order to make their recurrence less probable."\footnote{75 Ibid.} The Universal Declaration of Human Rights was followed by the various treaties which "now impose obligations on many governments as to what they may or may not do to individuals over whom they are able to exercise power"\footnote{76 Ibid., 15} such that the strict doctrine of national sovereignty has been modified in two respects. Sieghart identifies these two "crucial respects".

First, how a State treats its own subjects is now the legitimate concern of international law. Secondly, there is now a superior international standard, \textit{established by common consent}, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territories and in the exercise of their internal jurisdictions, and may therefore be regarded as ranking in the hierarchy of laws even above national constitutions.\footnote{74 Ibid.}

\begin{itemize}
  \item \footnote{71 Sir John Salmond, 	extit{op. cit.}, 30}
  \item \footnote{72 Ibid., 32}
  \item \footnote{73 Paul Sieghart, 	extit{The International Law of Human Rights}, (Oxford: Clarendon Press, 1983), 14}
  \item \footnote{74 Ibid.}
  \item \footnote{75 Ibid.}
  \item \footnote{76 Ibid., 15}
\end{itemize}
Wolfgang Friedmann, accepting the *consensus gentium* on human rights evidenced by the adoption of the Universal Declaration by so many nations, and seeing the Declaration as "an embodiment of what may be described as fairly generally accepted standards of international public policy", observes that states which continue to practice abuses of human rights "will be in the role of defendant." They "will seek to deny rather than to justify such practices."77

Brierly, however, has argued that "mere consent can never be the ultimate source of legal obligation." Grotius can easily be misrepresented as basing the law of nations, the *ius gentium*, on consent.

But there is a well-known passage which shows that he did not regard consent as the 'mother' both of civil law and of *jus gentium*, adding, however, that consent itself derives its force from natural law, so that human nature turns out to be the great-grandmother (*proavia*) both of civil law and of *jus gentium*. The imagery of this passage should not be allowed to obscure for us the importance of the truth upon which Grotius is insisting, which is simply that mere consent can never be the ultimate source of legal obligation.78

Nevertheless, Brierly accepts that "Grotius regarded the basis of the *jus gentium* as consensual" in the sense that "the occasion out of which it arises is a consensus of parties."79 In his discussion of the notion of consent as the ultimate basis of obligation in international law, Brierly finds that it simply does not hold.

The truth is that the doctrine that tacit consent can be the ultimate basis of obligation in customary law has always involved a fiction, for it requires us to assume from the mere fact that a rule is observed and treated as obligatory that those who recognize its obligatory force have consented to it, and this may or may not be true in fact.80

While the search for an "ultimate" basis for obligation is likely to continue in the various theories of natural law, a sufficient basis for obligation, though perhaps not ultimately satisfying, may still be found in consent. Where human rights are concerned, this is an agreement about the way in which civilized human beings ought to behave towards each other, what every sane and decent human being knows to be morally right and is bound to observe notwithstanding the command of the state. The aftermath of the two World Wars saw a rise in multinational treaties such that, as Salmond maintained, actual consent came to be held as the strongest ground for international law and implied consent (in customary law and general law) the next strongest basis. Thus the *consensus gentium* was no longer a device to describe the natural law without appeals to God or nature. In the *Lotus* case (1927) the

79 Ibid.
80 Ibid., 13
Permanent Court of International Justice (precursor to the present International Court of Justice) held:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.81

In the Reservations to the Convention on Genocide case (1951) the International Court of Justice held that "it is well established that in its treaty relations a state cannot be bound without its consent ... It is also a generally recognized principle ... that none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions of particular agreements, the purpose and raison d'être of the convention." The court argued that this basis of international treaty law is directly inspired by the notion of contract or actual consent. On the other hand, other conventions (such as the Convention on Genocide) merely codify pre-existing legal "principles which are recognized by civilized nations as binding on States, even without any conventional [i.e. treaty] obligation."82

Thus national sovereignty does not entitle states to make reservations which undermine the moral and humanitarian principles which are the basis of this convention. Here the International Court was apparently appealing directly to non-consensual sources for international law (especially natural law or human rights) or to the consensus gentium in the classical presumed-consensual, reasonable and empirically evident sense ... In this the International Court reflected its own Statute which lists (1) treaties, (2) custom and (3) "the general principles of law recognized by civilized nations" as the source of international law (Statute of the International Court of Justice, para 31(1)(c)).83

Brierly has noted that states consider themselves to be legally bound by international law.

It is significant too that when a breach of international law is alleged by one party to a controversy, the act impugned is practically never defended by claiming the right of private judgment, which would be the natural defence if the issue concerned the morality of the act, but always by attempting to prove that no rule has been violated.84

One may take the view of Hans Morgenthau that nations will generally obey the rules of international law "without actual compulsion, for it is generally in the interest of all

82 Reservations to the Convention on Genocide, I.C.J. Rep. (1951) 15
nations concerned to honor their obligations under international law."\(^{85}\) Alternatively one could accept Fitzmaurice's account that

the real foundation of the authority of international law resides similarly in the fact that the States making up the international society recognise it as binding upon them, and, moreover, as a system that ipso facto binds them as members of the society, irrespective of their individual wills.\(^{86}\)

Do human rights form part of the customary law of nations based upon the consistent practice of nations and despite the complication that part of that practice involves abuse of those same human rights? There appear to be real difficulties in subjecting human rights to the methodology and language of international customary law. Oscar Schachter acknowledges the difficulties in justifying human rights "on the basis of the usual processes of customary law formation."\(^{87}\) He accepts, without minimisation, the human rights infringements which are "widespread, often gross and generally tolerated by the international community".\(^{88}\) Seeing the difficulty in drawing conclusions from the behaviour of nations which indicate or constitute international custom, he nevertheless holds that "some of the rights recognized in the Declaration and the other human rights texts have a strong claim to the status of customary law."

This can be shown not so much by applying formal criteria of customary law as by considering conduct that has been universally condemned as violative of the basic concept of human dignity.\(^{89}\)

However, Bruno Simma and Philip Alston seek other ways of understanding human rights in terms of international law by "treating the Universal Declaration and the body of soft law built upon it as an authoritative interpretation of the obligation contained in Articles 55 and 56 of the U.N. Charter."\(^{90}\) In these articles the members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization" in order to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Importantly, they also refer to Article 38 of the Statute of the International Court which gives as a basis for unwritten international law "the general principles of law recognised by civilised nations".\(^{91}\) Both of


\(^{88}\) Ibid., 335

\(^{89}\) Ibid., 336

\(^{90}\) Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *Australian Year Book of International Law* (1992), 100

\(^{91}\) Cited in Ibid., 102
these ways of grounding "substantive obligations to respect human rights in positive international law" are commended by Simma and Alston as "more acceptable under the premises of consensual international law-making."\textsuperscript{92}

Who, then, is bound by the \textit{ius gentium}? N.A. Maryan Green holds, in company with many others, that the subjects of international law are (1) states, (2) international organizations, (3) certain special entities such as the Vatican, (4) special individuals such as diplomats, aliens, refugees, slaves, minorities, and (5) persons, corporations and governments with respect to human rights.\textsuperscript{93} Individuals are bound by the \textit{ius gentium} in so far as human rights are at issue.\textsuperscript{94}

In his discussion of the development of international law D.J. Harris observes that the "demise of Oppenheim's doctrine that 'States solely and exclusively are the subject of International Law' is also evident ... it is ... the case that inter-state treaties are increasingly concerned with the 'trans-national' affairs ... of private individuals and companies."\textsuperscript{95} Harris, in a later discussion of the activities of the UN Commission on Human Rights, draws attention to the fact that "the idea that the treatment of a state's own nationals is a matter within its own jurisdiction has been abandoned."

The practice of the Commission shows clearly the acceptance by states, as they respond without question to allegations against them, that \textit{the protection of human rights is now within the domain of international law}.\textsuperscript{96} [my emphasis]

One may take the view, following John Humphrey or Oscar Schachter that, because of a \textit{consensus gentium} relating to the actual behaviour of nations, the Universal Declaration has become part of the customary law of nations. Or, one may accept the alternative views of Simma and Alston, put slightly differently by Ivan Shearer, that the \textit{consensus gentium} refers to

a widespread conviction that certain principles of conduct are binding in law - or at least in morality - without the necessity of applying the usual proofs of customary law; indeed, that even widespread evidence of non-observance of these norms will not invalidate them. It is in this way, for example, that one would argue that genocide and torture are contrary to international law.\textsuperscript{97}

\begin{itemize}
\item \textsuperscript{92} \textit{Ibid.}, 107
\item \textsuperscript{93} N.A. Maryan Green, \textit{International Law}, 3rd ed., (London: Pitman, 1987), chapters 3 and 4
\item \textsuperscript{94} \textit{Ibid.}, 114-125
\item \textsuperscript{95} D.J. Harris, op. cit., 18
\item \textsuperscript{96} \textit{Ibid.}, 604
\item \textsuperscript{97} Private correspondence, January 4, 1993. Professor Shearer is the Professor of International Law at Sydney University, New South Wales, Australia
\end{itemize}
The *consensus gentium* on human rights, a fuller specification of which will be offered in the next chapter, has now gathered the force of international law, despite the fact that "there are no legally binding sanctions available."  

The Universal Declaration is, then, something which is morally and legally binding in the sense that member states assent to it by virtue of their membership of the United Nations and in the sense that it embodies human values expressed as human rights on which civilized people are agreed. And by the end of 1988 there were 159 member states representing a total estimated population of 5,040,770,000. The world population in 1988 was estimated to be 5,130 million. This means that about 97% of the world belonged to nations that were member states of the United Nations and were thereby committed, at least morally, to the Universal Declaration of Human Rights.

The Covenants which are based upon it are clearly binding on the nations who are signatories to those Covenants. Here there is a discrepancy between the commitments which accrue to member States and what they are prepared to sign as a Treaty. There may well be a number of reasons for this, including the apprehension about allowing an international body too much political and legal leverage in the affairs of a sovereign nation. [vid. Section 40] There is also the fact that many governments, who might acknowledge the moral force of the values contained in the Universal Declaration, or who would not want to be known as a government that did not acknowledge the human rights of their own people, nevertheless do not live up to even the most basic human rights. One cannot assume that governments - even less the people - repudiate human rights simply because they have not ratified the *Covenant on Civil and Political Rights*, especially when they are members of the United Nations which has embraced the Universal Declaration. Still, member States of the United Nations that have ratified the Covenant and/or signed it represent an estimated population of 2.85 billion people, 55.5% of the world's population.

It is interesting to note that the *Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment*, which was not adopted by the General Assembly of the United Nations until December 10, 1984, has already been ratified and/or signed by nations representing 62% of the world's population. The significance of this is that the Convention, in its preamble, uses as its basis the "principles contained in the Charter of the United Nations" with their "recognition of the equal and inalienable rights of all members

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98 D.J. Harris, op. cit., 604


100 Ibid.

101 John Warwick Montgomery refers to the United States of America which "has one of the worst nonratification records where international human rights treaties are concerned." He accounts for this as a consequence of "a combination of misplaced pride in its own Bill of Rights, chauvinism, and not a little nationalistic isolationism". Op. cit., 31-32

102 *Human rights, Status of International Instruments as at 1 September 1988, United Nations*, (Sales No. E.87.XIV.2)
of the human family" as "the foundation of freedom, justice and peace in the world", and recognizes "that those rights derive from the inherent dignity of the human person".

*The International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations on December 16, 1966, reiterates the recognition of the "inherent dignity of the human person", and insists that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." [Article 6(1)]

Again the language used is that of an "inherent" right, a right which we have by virtue of being human. In this way the right to life is not thought of as a right to be conferred on citizens by the Government. If Governments confer rights they may also take them away. If the right to life is an inherent right then it is the role of Governments to recognise that fact and to protect the citizen against the arbitrary deprivation of his life. Human life is something to which all living human beings have a right and something which Governments are duty bound to defend.

Does the Covenant present the right to life as an absolute right? Apart from the obvious fact that all must die, it allows for the possibility of capital punishment even if in a seemingly grudging way. It refers to "countries which have not abolished the death penalty", a choice of language which suggests a less than enthusiastic recognition that the death penalty is still practised in some [a majority?] countries. This lack of enthusiasm for capital punishment is further reflected in section 6 of Article 6: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." Even in the case where capital punishment is lawful there is no justification for such deprivation of life that would constitute genocide. Further, the "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." [my emphasis] This latter provision suggests a respect for the human life in utero such that the deprivation of life to be carried out on the mother according to law shall be forestalled until after the time of birth.

In *Article* 4 of the Covenant, provision is made for the time of a "public emergency which threatens the life of the nation" when some relaxation of the provisions of the Covenant is possible subject to certain qualifications. These qualifications include the provision that "No derogation from articles 6 ... may be made under this provision." It would appear that the Covenant recognises the fact of capital punishment but does not encourage its continuance, and that the right not to be arbitrarily deprived of one's life holds in all sets of circumstances. In other words, the opinion of Amnesty International, that the

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103 *International Covenant on Civil and Political Rights*, Preamble
104 Ibid., Article 6(5)
105 Ibid., Article 4(2)
right to life is presented as an absolute right in the *International Covenant on Civil and Political Rights*, would appear to be a justified.\textsuperscript{106}

The question of the limitations which might apply to the exercise of rights is an important one. In the Covenants which arise from the Universal Declaration and other documents such as the European Convention, the limitations are specified article by article, right by right. As we have just seen the right to life is dealt with, in terms of its exceptions, by the *International Covenant on Civil and Political Rights*. In the Universal Declaration, however, limitations on the exercise of rights is pronounced only once, "in generic terms".\textsuperscript{107} This is Article 29 which reads:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no way be exercised contrary to the purposes and principles of the United Nations.

It is at this point that the Universal Declaration, in trying to find some all inclusive phrase that would take account of conflict in the exercise of rights, lapses into ambiguity and vagueness. What is meant by the term "general welfare"? If the term means some conception of "aggregate collective good"\textsuperscript{108} or the "general interest"\textsuperscript{109} or "general utility",\textsuperscript{110} then, for those theorists who treat rights as ‘individuated political aims' which are not subordinated to such conceptions, the reference to 'general welfare' is inept. John Finnis agrees with that conclusion but for different reasons. Since he finds conceptions of "aggregate collective good" incoherent except in limited technical contexts, and since "the ongoing life of a human community is not a limited technical context" then "the common good of such a community cannot be measured as an aggregate, as utilitarians suppose."\textsuperscript{111} For Finnis the "ineptitude of Art. 29’s reference to the 'general welfare', as a distinct and separate ground for limiting rights"\textsuperscript{112} is due to the fact that the manifesto conception of human rights [of which the Universal Declaration is an example] is a sketch of the "*outlines of the common good*, the

\textsuperscript{106}Amnesty International Handbook 1983, op. cit., 84

\textsuperscript{107}John Finnis, op. cit., 212


\textsuperscript{109}R.M. Dworkin, op.cit., 269

\textsuperscript{110}ibid., 191

\textsuperscript{111}John Finnis, op. cit.

\textsuperscript{112}ibid., 214
various aspects of individual well-being in community." In other words, every aspect of human well-being must be considered and favoured "at all times by those responsible for coordinating the common life. Thus when the human rights proclaimed in the Universal Declaration are spelt out, and amplified as in the subsequent United Nations Covenants, there is no room left for an appeal, against the exercise of these rights, to 'general welfare'." So on both utilitarian and natural law reckoning the reference to 'general welfare' is inept and unhelpful. The point here is to recognise that the provision appears in the Universal Declaration and to understand why not too much importance is attached to it.

In so far as the value of human life is concerned, and given the terms of the subsequent codification of the right to life in the *International Covenant on Civil and Political Rights*, it can be said that the safeguarding of the individual's life is an inherent right associated with the inherent dignity of the human person and involving the duty of the State to protect that right in law. Its implications for bioethics and the practice of medicine are fundamental.

The *United Nations Convention on the Rights of the Child* was adopted by the General Assembly of the United Nations on November 20, 1989. When 20 countries have ratified the Convention it will become part of international law and binding on those countries which have signed it. However there is no provision for judicial machinery to enforce the Convention and no right of individual complaint. "Each country will be placed under a duty to publicise the Convention's provisions and report progress towards fulfilling their obligations under it to a specially constituted UN Committee."

Many of the provisions of the Convention are controversial, which probably explains why it took more than 10 years to draft. It is too early to see how acceptable it will be to member states. However, by the end of January 1990, 59 nations had signed the Convention.

As far as the value of human life is concerned the Convention reiterates the positions taken by the *Universal Declaration of Human Rights* in terms of the "equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world" and that the "United Nations has proclaimed that childhood is entitled to special care and assistance". In particular the Convention asserts: "States Parties recognize that

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113 Ibid.
114 Ibid.
115 John Finnis discusses the other limitations, ibid., 215ff, and shows that there are other aspects of the common good which limit each other.
116 *Childright*, No. 63, Jan/Feb 1990,13
117 Ibid.
118 *Convention on the Rights of the Child*, Preamble
every child has the inherent right to life"\textsuperscript{119} and that "States Parties shall ensure to the maximum extent possible the survival and development of the child".\textsuperscript{120}

With regard to abortion, the Convention bears in mind that, "as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'".\textsuperscript{121} It does not follow from this, however, that the right to life of the child is protected before birth. Senator Gareth Evans, the Minister for Foreign Affairs and Trade told the Australian Senate on October 26 1989 that the Australian Government understands the reference to the rights of the child "before as well as after birth" in a way that does not preclude abortion. Acknowledging that the reference to the rights of the child "before as well as after birth" does appear in the \textit{Preamble} in the then draft Convention, "at the same time a statement in the travaux preparatoires - the preparatory materials - makes it clear that the contentious issue of the child's rights before birth is a question to be determined by individual states parties."\textsuperscript{122}

\begin{flushleft}
\textsuperscript{119} \textit{Ibid.}, Article 6(1) \\
\textsuperscript{120} \textit{Ibid.}, Article 6(2) \\
\textsuperscript{121} \textit{Ibid.}, Preamble \\
\textsuperscript{122} \textit{Hansard, Australian Senate}, 26 October 1989, 2309
\end{flushleft}
5.2 Europe

The European Convention on Human Rights was drawn up within the Council of Europe, was signed on November 4, 1950 and came into force on September 3 1953. Eight protocols have since been adopted two of which, Nos. 3 and 5, modify the text of the Convention itself. The Council of Europe comprises twenty three member states, representing, in 1988, 410 million people, or 8% of the world's population. "All the member States of the Council of Europe have ratified the Convention, except Finland which has signed." 

In its own publication the Council of Europe avers that "the European Convention on Human Rights represents a collective guarantee at a European level of a number of principles set out in the Universal Declaration of Human Rights, supported by international judicial machinery making decisions which must be respected by contracting States." This connection between the European Convention and the Universal Declaration is spelled out in the preamble to the European Convention. The Europeans saw themselves as not in any way departing from the Universal Declaration but in furthering the cause of human rights, human values, by securing them within a legal framework as far as Europe is concerned.

Accordingly the European Convention declares: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." This section is subject to qualification. Protocol No. 6, in referring to "the evolution that has occurred in several member States of the Council of Europe" as expressing "a general tendency in favour of abolition of the death penalty", states firmly that "the death penalty shall be abolished. No one shall be condemned to such penalty or executed." This blanket condemnation is itself qualified with the concession that a State "may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war ..." 

Article 3 of the European Convention forbids the practice of torture, while Article 4 abjures the practice of "slavery or servitude".

So far as this Convention is concerned, then, human life has value such that, in general, no one should be deprived of their right to live. The possibility of the death penalty is acknowledged, but not recommended, and even then, only in times of war or threat of war, and according to law. This fits well with the stated intention of the European governments "to

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123 The European Convention on Human Rights, (Strasbourg: Council of Europe, 1989), 3
125 The European Convention on Human Rights, op. cit., 3
126 Ibid., 3
127 Ibid., Article 2(1), 6
128 Ibid., Sixth Protocol, Article 1, 39
129 Ibid., Sixth Protocol, Article 2, 39
take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.”  

This is not surprising as the member States of the Council of Europe are also members of the United Nations, with the exceptions of Switzerland, Liechtenstein and San Marino. Eighteen of the twenty three member States have signed the *International Covenant on Civil and Political Rights*, and seventeen of these have ratified it. The commitment of the member States of the Council of Europe to the protection of human life is clear and unambiguous.

"The European Social Charter is the counterpart of the Convention on Human Rights in the sphere of economic and social rights”. In this way the Council of Europe describes the context in which we should understand and interpret the Social Charter. The Charter was signed at Turin on October 18, 1961 and came into force on February 26, 1965 after ratification by five states.

In furthering the commitment of the Council of Europe to the value of human life, the Charter commits the Contracting Parties to pursue conditions in which certain "rights and principles may be effectively realised". These "rights and principles" are identified in Part 1 of the Social Charter and include the right of workers "to safe and healthy working conditions" [Part 1 no. 3], the right of "children and young persons ... to a special protection against the physical and moral hazards to which they are exposed" [Part 1 no. 7], and the right of employed women, "in case of maternity, and other employed women as appropriate, ... to a special protection in their work" [Part 1 no. 8].

In terms of the statements of human rights of world secular bodies it can be readily seen that there is an almost universal acceptance of the value of human life, that the right to life is an inherent right to which the individual lays claim by virtue of being human and which ought to be recognized and protected by governments. Since bioethics and the practice of medicine does not occur in a vacuum then full account must be taken of the context in which the medical sciences are practised, a context which at the level of human rights precludes the taking of human life.

5.3 Amnesty International

Amnesty International [AI] describes itself as "a world wide movement independent of any government, political, persuasion or religious creed. It plays a specific role in the

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130 *Ibid.*, Preamble, 6
131 The member States of the Council of Europe which have not signed the International Covenant on Civil and Political Rights are Greece, Liechtenstein, Malta, Switzerland and Turkey. Ireland signed the Covenant but has not yet ratified it. Since all these States are bound by the European Convention on Human Rights this places their failure to sign the United Nations Covenant in a more positive light.
132 *The European Social Charter*, (Strasbourg: Council of Europe, 1988), 5
international protection of human rights.”\(^{135}\) AI grew from an appeal for the forgotten prisoners by Peter Benenson in *The Observer* newspaper, London, and in *Le Monde*, Paris, on May 28, 1961. Articles then appeared in other European newspapers, publicizing Benenson’s appeal and attracting international support for Amnesty.

AI "has more than 700,00 members, subscribers and supporters in over 150 countries and territories."\(^{136}\) It has earned for itself a prestigious place in international affairs for its defence of human rights and its campaigns on behalf of prisoners of conscience. The object of Amnesty International is "to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights"\(^{137}\) by certain specific means. AI does not see human rights as an issue to be exploited for other purposes in the international power game. "Fundamental human rights ... are ends rather than means."\(^{138}\)

AI is committed to the value of human life as something to be protected by law. In the *Declaration of Stockholm 1977*, which deals with the abolition of the death penalty, AI "affirms that it is the duty of the state to protect the life of all persons within its jurisdiction without exception" and declares "Its total and unconditional opposition to the death penalty, Its condemnation of all executions, in whatever form committed or condoned by governments, Its commitment to work for the universal abolition of the death penalty."\(^{139}\)

AI followed up the *Declaration of Stockholm* in 1981 with its *Declaration On The Participation Of Doctors In the Death Penalty*. In this Declaration AI, invoking "the spirit of the Hippocratic Oath [which] enjoins doctors to practise for the good of their patients and never to do harm", considering "that the Declaration of Tokyo of the World Medical Association provides that 'the utmost respect for human life is to be maintained even under threat, and no use made of any medical knowledge contrary to the laws of humanity’", further considering that "the same Declaration forbids the participation of doctors in torture or other cruel, inhuman or degrading procedures”, noting that the "United Nations Secretariat has stated that the death penalty violates the right to life and that it constitutes cruel, inhuman or degrading punishment”, declares "that the participation of doctors in executions is a violation of medical ethics".\(^{140}\)

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\(^{136}\) Ibid.


\(^{138}\) *Impartiality and the Defence of Human Rights [an explanation of AI’s policy of impartiality]*, cited in *ibid.*, 68

\(^{139}\) Declaration of Stockholm, (Adopted by the Amnesty International Conference on the Abolition of the Death Penalty, Stockholm, December 1977) cited in *ibid.*, 73-74

In making this declaration AI is mindful that doctors could be called on to participate in executions in a variety of ways by "determining mental and physical fitness for execution, giving technical advice, prescribing, preparing, administering and supervising doses of poison in jurisdictions where this method is used, making medical examinations during executions, so that an execution can continue if the prisoner is not yet dead."\(^{141}\) Accordingly the Declaration "calls upon medical doctors not to participate in executions", and "medical organizations to protect doctors who refuse to participate in executions, and to adopt resolutions to these ends."\(^{142}\)

So far as AI is concerned, the right to life is an absolute which should not be violated, with obvious implications for the medical profession, implications which they indicate are in any case part of the medical ethical, and therefore bioethical tradition.

6. THE RIGHT TO LIFE IN CODES OF MEDICAL ETHICS

6.1 United Nations

The *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted by the General Assembly of the United Nations on December 18, 1982 (resolution 37/194).\(^{143}\)

The *Principles of Medical Ethics*, which is annexed to the resolution which adopts those Principles, with their particular reference to the role of health personnel to whom are given the care of prisoners [see the full title above], calls upon all Governments to give the *Principles of Medical Ethics* the widest possible distribution, and "invites all relevant intergovernmental organizations, in particular the World Health Organization, and non-governmental organizations concerned to bring the Principles of Medical Ethics to the attention of the widest possible group of individuals, especially those active in the medical and paramedical field."\(^{144}\)

The *Principles of Medical Ethics* begins by reminding the physician and health personnel generally of their "duty to provide them [prisoners and detainees] with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained".\(^{145}\)

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\(^{141}\) Ibid.

\(^{142}\) Ibid.


\(^{144}\) Ibid., 87

\(^{145}\) Principle 1, ibid.
The *Principles* depicts any "acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment" as a "gross contravention of medical ethics".\(^{146}\)

And since resolution 37/194 reaffirms the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which had been unanimously adopted by the General Assembly in its resolution 3452 (XXX) of December 9, 1975,\(^{147}\) and that Declaration regards such treatment as "a denial of the purposes of the Charter of the United Nations and a violation of the Universal Declaration of Human Rights"\(^{148}\), it may be concluded that the *Principles of Medical Ethics* is opposed to physicians or other health personnel being involved in the killing of patients as well as the torture of patients who, despite the fact that they are prisoners or detainees, have a right to the "same quality and standard [of medical care] as is afforded to those who are not imprisoned or detained".\(^{149}\) The United Nations maintains its consistent support for the inalienability and inviolability of human life based on its insight that human life is a basic human value.

### 6.2 World Medical Association

The World Medical Association [WMA] was established in 1948 in the aftermath of the Second World War. It immediately turned its attention to the development of international standards of medical ethics. At its second General Assembly in September 1948 in Geneva, Switzerland, it adopted the *Declaration of Geneva*. In the third General Assembly in October 1949 in London, U.K. it adopted the *International Code of Medical Ethics* into which the *Declaration of Geneva* was incorporated.

The *Declaration of Geneva* has been amended twice which resulted in consequential amendments to the *International Code of Medical Ethics*.

The International Code attempted to summarize the most important principles of medical ethics particularly as they affect the actual treatment of the patient. Less emphasis was apparent on the "formality of relations between one another or between doctor and patient."\(^{150}\) The preceding century and a half had seen a preoccupation, especially in America, with detailed regulations concerning etiquette. In place of that elaborate etiquette the International Code declares that a physician "shall behave towards his colleagues as he would have them behave towards him", that "a physician shall not entice patients from his

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146 Principle 2, *ibid.*
147 *Ibid.*, 86
149 Principle 1, in *ibid.*, 87
150 Donald Konold, "Codes of Medical Ethics: History" *Encyclopedia of Bioethics*, 168
colleagues", and that "a physician shall observe the principles of the 'Declaration of Geneva' approved by the World Medical Association".\(^{151}\)

The International Code, which incorporates the *Declaration of Geneva*, strongly asserts the doctors' commitment to the preservation of human life and the alleviation of sickness and distress. Accordingly, the physician is enjoined to "act only in the patient's interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient".\(^{152}\) This general duty of the physician is codified further with the declaration that "a physician shall always bear in mind the obligation of preserving human life".\(^{153}\)

The *Declaration of Geneva* [The Declaration] suggests that the student, "at the time of being admitted as a member of the medical profession" take the pledge or oath located in the Declaration. In any case, as has already been observed, the physician is bound to observe the principles of the *Declaration of Geneva*. In the Declaration, the physician pledges that he will "consecrate my life to the service of humanity", that "the health of my patient will be my first consideration"", and that "I will maintain the utmost respect for human life from its beginning even under threat and I will not use my medical knowledge contrary to the laws of humanity."\(^{154}\)

The International Code, incorporating the *Declaration of Geneva*, is clear in the value it assigns to human life and to the obligations and duties which fall upon the physician in protecting human life. In its earliest form the Declaration urged the maintenance of human life "from the time of conception".\(^{155}\) These words were deleted and replaced with "from its beginning" at the 35th World Medical Assembly, Venice, Italy, October 1983.\(^{156}\) At the same time the *Declaration of Oslo Statement On Therapeutic Abortion* was also amended. This statement recognizes that the "diversity of response" to the situation where "circumstances ... bring the vital interest of a mother into conflict with the vital interests of her unborn child"\(^{157}\) "results from the diversity of attitudes towards the life of the unborn child".\(^{158}\) Nevertheless, "the first moral principle imposed upon the physician is respect for human life from its beginning".\(^{159}\) The question then remains as to what the phrase "human life from its beginning" really means.

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\(^{151}\) *International Code of Medical Ethics*, published by The World Medical Association, November 1983, doc. 17.A

\(^{152}\) Ibid.

\(^{153}\) Ibid.

\(^{154}\) Ibid.

\(^{155}\) Encyclopedia of Bioethics, 1749

\(^{156}\) *International Code of Medical Ethics*, op. cit.

\(^{157}\) *Declaration Of Oslo Statement On Therapeutic Abortion*, published by The World Medical Association, November 1983, doc. 17.D, paragraph 2

\(^{158}\) Ibid., paragraph 3

\(^{159}\) Ibid., paragraph 1
Whatever meaning is affixed to these words the Declaration of Oslo is by no means an endorsement for abortion-on-demand. This document speaks only of those circumstances of conflict between the "vital interests" of mother and "unborn child". The word "vital" refers to something "concerned with or essential to organic life", "essential to existence of a thing or to the matter in hand", or something "affecting life; fatal to or activity". This suggests that the Declaration Of Oslo accepts the rights of States to determine their stance on abortion in cases of conflict of "vital interests" [undefined] of mother and child, and in the light of the fact that the "first moral principle imposed upon the physician is respect for human life from its beginning" where "from its beginning" is also undefined.

Whatever lack of clarity there may be in the application of the declared "first moral principle", and however evasive and arguably contradictory it is for the WMA to say that "it is not the role of the medical profession to determine the attitudes and rules of any particular state or community in this matter" the Declaration still maintains its commitment to the value of human life and its general inviolability. However, the effect of the amendments to the Declaration of Geneva and to the Declaration of Oslo, and the fact of the Declaration of Oslo, has been to produce less rather than more clarity as to how the WMA wishes to apply its "first moral principle" where abortion is concerned.

The same ambivalence is detected in the WMA's Statement on In-Vitro Fertilization And Embryo Transplantation adopted by the 39th World Medical Assembly, Madrid, Spain, October 1987. In this Statement the WMA "urges physicians to act ethically and with appropriate respect for the health of the prospective mother and for the embryo from the beginning of live (sic)“. Without supporting argumentation the WMA states that "from the ethical and scientific viewpoint, medical assistance in human reproduction is justified in all cases of infertility which do not respond to classical drug or surgical treatment ...” Nevertheless the physician "must always act in the best interests of the child to be born of the procedure", but cryopreservation of embryos is permitted. While "the physician should not violate his personally held moral principles and must be sensitive to, and respect, the moral and ethical principles held by patients", he may nevertheless engage himself "in research directed towards a better understanding of how genetic defects arise and are transmitted, and how they might be prevented or treated". This Statement neither condemns nor commends human embryo experimentation. It appears to allow that it happens and might be thought to be acceptable. The same could be said for the discarding of embryos believed to be defective. Still, the Statement insists on the value of human life and the requirement that

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160 *The Concise Oxford Dictionary*

161 Declaration of Oslo, op. cit., paragraph 4. If the physicians took advantage of paragraph 6 which offers conscientious objection to the practice of abortion then any law which provided for abortion would be simply unworkable.

162 *World Medical Association Statement on In-Vitro Fertilization And Embryo Transplantation*, published by The World Medical Association, October 1987, doc. 17.N

163 Ibid.

164 Ibid.
doctors "act ethically and with appropriate respect for ... the embryo from the beginning of live".165

Where other controversial questions are concerned, however, the WMA is much clearer on the application of the "first moral principle imposed upon the physician [which] is the respect for human life from its beginning" [Declaration of Oslo], and the obligation to "maintain the utmost respect for human life from its beginning" [Declaration of Geneva].

The questions of euthanasia and the care of the terminally ill have been addressed by the WMA. In the case of the terminally ill "the duty of the physician is to heal and, where possible, relieve suffering and act to protect the best interests of his patients."166 Further, "there shall be no exception to this principle even in the case of incurable disease or malformation."167 Having stated the general principles which are to obtain, the WMA then enunciates three rules, two of which are relevant here. "The physician may relieve suffering of a terminally ill patient by withholding treatment with the consent of the patient or his immediate family if unable to express his will. Withholding of treatment does not free the physician from his obligation to assist the dying person and give him the necessary medicaments to mitigate the terminal phase of his illness."168 And "the physician shall refrain from employing any extraordinary means which would prove of no benefit for the patient."169 In this way the physicians are enjoined to relieve suffering including the application of useless and burdensome treatment. Killing the patient is not offered as a method of pain relief even if the patient requests death.

This last point was confronted directly four years later, in 1987, in Madrid, Spain at the 39th World Medical Assembly of WMA. "Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient's own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow the natural process of death to follow its course in the terminal phase of sickness."170 [my emphasis]

Despite the representations of the Dutch doctors and pressure from other interested groups and individuals, the WMA maintained its strong opposition to euthanasia, its support for the value of human life, and its support for the inviolability and inalienability of human life.

165 Ibid.
167 Ibid., paragraph 2.
168 Ibid., paragraph 3.1
169 Ibid., paragraph 3.1
170 World Medical Association Declaration on Euthanasia, published by the World Medical Association, October 1987, doc. 17.P
Six years previously, the 34th World Medical Assembly meeting in Lisbon, Portugal, in September/October 1981, affirmed the patient's "right to die in dignity". Given the subsequent statements of the WMA, the right to die in dignity does not include the right to be killed.

The requirement of respect for human life has also led the WMA to voice its opposition to the involvement of physicians in the administration of the death penalty. The occasion for the expression of this opposition was spelled out in a press release issued on September 11, 1981 on behalf of the WMA by the then Secretary General, Dr André Wynen. This press release was subsequently endorsed by the 34th World Medical Assembly, September 28 - October 2, 1981. The press release was attached to the Resolution on Physician Participation In Capital Punishment, thereby forming part of that Resolution. The Resolution stated "that it is unethical for physicians to participate in capital punishment, although this does not preclude physicians certifying death."172

However it is the press release which sheds light on why the WMA addressed the question and why it reached the conclusions it did. "The first capital punishment by intravenous injection of lethal dose of drugs was decided to be carried out next week by the court of the State of Oklahoma, USA."173 This decision appeared to necessitate the use of physicians, beyond the certification of death, for the purposes of legal executions. The Secretary General gave his reasons, reasons later endorsed by the WMA. "Acting as an executioner is not the practice of medicine and physician services are not required to carry out capital punishment even if the methodology utilizes pharmacologic agents or equipment that might otherwise be used in the practice of medicine."174 By clearly stating that "acting as executioner is not the practice of medicine" and that "physicians are dedicated to preserving life"175 the WMA concludes that "no physician should be required to be an active participant."176

The World Medical Association maintains its strong commitment to human life in a number of other documents. In time of armed conflict "it is deemed unethical for physicians to ... employ scientific knowledge to imperil health or destroy life."177 The "rules governing the care of sick and wounded, particularly in time of conflict" provide that "any procedure

171 Declaration Of Lisbon on The Rights Of The Patient, published by the World Medical Association, doc. 17.H
173 Press Release, from the Secretary General of the World Medical Association, Dr André Wynen, September 11, 1981, and attached to doc. 20.6/81 ibid.
174 Ibid.
175 Ibid.
176 Ibid.
detrimental to the health, physical or mental integrity of a human being is forbidden unless therapeutically justifiable.”

And finally, the WMA has branded boxing "a dangerous sport. Unlike other sports, the basic intent of boxing is to produce bodily harm in the opponent. Boxing can result in death and produces an alarming incidence of chronic brain injury. For this reason, the World Medical Association recommends that boxing be banned.”

Despite some imprecisions in applications of the rule not to kill but to protect human life, the World Medical Association remains consistent in its adherence to what it calls "the first moral principle imposed upon the physician", viz "respect for human life from its beginning”.

6.3 Europe

The Draft European Declaration On The Rights Of The Patient, dated August 2, 1989, has been circulated for comment not only by the Council of Europe but by the World Health Organization. This document takes up the rights of patients because of the perceived need in Europe for a fuller elaboration of those rights. The Draft Declaration is not binding on member states but is "offered as a contribution towards supporting the growing interest in many Member States in the issues of patients' rights.”

The Draft Declaration has been written in that of health care systems with increasing complexity and bureaucracy, and of dramatic developments in medical science and technology.

The Draft Declaration takes into account "intergovernmental declarations and analogous statements, which together offer a framework and a set of basic concepts for patients' rights”. This includes the Universal Declaration of Human Rights (1948), The International Covenant on Civil and Political Rights (1966), the European Convention on Human Rights and Fundamental Freedoms (1950), and the European Social Charter (1961). These documents and others form the "Conceptual Foundations" for the Draft Declaration.

It is not surprising, therefore, that the Draft Declaration asserts: "Everyone has the right to respect of their person as a human being.” This is the first principle enunciated under the heading "The Application Of Human Rights And Values In Health Care" and

178 Rule A.2., Ibid.
180 Declaration Of Oslo, op. cit.
182 Ibid., 2
183 Ibid., 3
underscores the commitment to the value of human life and the right of the individual to be protected. The third principle tightens the meaning further: "Everyone has the right to physical and mental integrity and to the security of their person."\textsuperscript{184} All other applications proceed from that guarantee, including the "right to receive such health care as is appropriate to their health needs",\textsuperscript{185}

6.4 Nurses, Psychiatrists And Psychologists

The international organisations of various professions within the health profession have produced ethical codes and statements of human rights by which they are bound in the practice of their arts. They provide further evidence of adherence to a minimum set of human values which can lay claim to universality.

In 1973 the International Council of Nurses [ICN] published its new \textit{Code for Nurses} which included some notable changes from its earlier 1965 Code.

As far as the value of human life is concerned only one of those changes is of concern. The 1965 Code stated that the "nurse believes in the ... preservation of human life," adding: "The fundamental responsibility of the nurse is threefold: to conserve life, to alleviate suffering and to promote health."

In place of this provision "the 1973 Code points to a fourfold responsibility: '... to promote health, to prevent illness, to restore health and to alleviate suffering,' adding that 'respect for life, dignity and rights of man are inherent in nursing.'"\textsuperscript{187}

In August 1975 the Council of National Representatives of the International Council of Nurses, meeting in Singapore, adopted a statement on \textit{The Role Of The Nurse In The Care of Detainees And Prisoners}. In that statement the "ICN condemns the use of all such procedures harmful to the mental and physical health of prisoners and detainees."\textsuperscript{188} This condemnation is made in the context of recalling that "in 1971 ICN endorsed the United Nations Universal Declaration of Human Rights and, hence, accepted that: 1. 'Everyone is entitled to all the rights and freedoms, set forth in this Declaration, without distinction of any kind ...'"\textsuperscript{189}

\textsuperscript{184} Ibid.
\textsuperscript{185} Ibid., 6
\textsuperscript{186} \textit{Encyclopedia of Bioethics}, 1788
\textsuperscript{187} \textit{Loc. cit.}
\textsuperscript{188} "Role Of The Nurse In The Care Of Detainees And Prisoners", \textit{Ethical Codes And Declarations Relevant To The Health Professions}, (London: Amnesty International, 1985), 17
\textsuperscript{189} \textit{Loc. cit.}
At its meeting in Brasilia in June 1983, the International Council of Nurses adopted the *Statement On The Nurse's Role In Safeguarding Human Rights* in which it declared that "Health care is a right of all individuals. Everyone should have access to health care regardless of financial, political, geographic, racial or religious considerations. The nurse should seek to ensure such impartial treatment."\(^{190}\)

The VIth World Congress of Psychiatry held in Honolulu, Hawaii in 1977 adopted an international code of ethics. Minor amendments to the *Declaration of Hawaii* were made in July 1983 at the VIIth Congress in Vienna. The amended text affirms that "ever since the dawn of culture, ethics has been an essential part of the healing art."\(^{191}\) The Declaration enunciates its ethical guidelines which it views as "minimal requirements for ethical standards of the psychiatric profession", the first of which says that the "aim of psychiatry is to treat mental illness and to promote mental health. To the best of his or her ability, consistent with accepted scientific knowledge and ethical principles, the psychiatrist shall serve the best interests of the patient ..."\(^{192}\)

The *Declaration of Hawaii* carries its own internal contradictions. On the one hand it refers to "accepted ethical principles" which can be viewed as "minimal requirements for ethical standards", i.e. some objective minimal standard. On the other hand it states that "ethical behaviour is based on the individual psychiatrist's conscience and personal judgement".\(^{193}\) Notwithstanding that subjective perspective the Declaration goes on to assert the need for written guidelines "to clarify the profession's ethical implications".\(^{194}\) These apparent contradictions are nowhere resolved and obfuscations such as the "profession's ethical implications" are nowhere clarified. Nevertheless the World Psychiatric Association seems to align itself with generally accepted human values and commits itself to the promotion of good mental health.

The Assembly of the International Union Of Psychological Science, in July 1976, "unanimously approved the statement of the Executive Committee of the International Union of Psychological Science made in July 1974."\(^{195}\) This Statement is a clearer enunciation of ethical commitment to human rights than that of the World Psychiatric Association. In it the psychologists express their particular concern "with any acts by which individuals in a systematic and deliberate way infringe upon the inviolable rights of human beings, regardless of race, religion or ideology, these rights being guaranteed by the Charter of the United

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\(^{190}\) "Statement On The Nurse's Role In Safeguarding Human Rights", in *Ethical Codes And Declarations Relevant To The Health Professions*, 19

\(^{191}\) "The Declaration Of Hawaii", in *Ethical Codes And Declarations Relevant To The Health Professions*, 12

\(^{192}\) *Ibid.*, 13

\(^{193}\) *Ibid.*, 12

\(^{194}\) *Ibid.*

\(^{195}\) *Ibid.*, 22
Nations". Further the Statement reiterates an earlier statement of its Executive Committee on July 27 1974 in which it "denounces vigorously all practices that are contrary to the high level of morality that must regulate the scientific and professional roles assumed by psychologists in modern society."  

7. THE VALUE OF HUMAN LIFE IN RELIGIOUS TRADITIONS

The attitude to human life in the great religions of the world is one of reverence and respect. Medicine and religion traditionally went hand in hand, the priest and the doctor frequently being one and the same person. It is not surprising, then, to find codes and statements of medical ethics expressed in religious language and setting standards of behaviour, both personal and professional, for the physician.

A comparatively modern example of this is the Daily Prayer Of A Physician, commonly called the "Prayer of Moses Maimonides". This prayer first appeared in print in 1793 as "Daily prayer of a physician before he visits his patients - From the Hebrew manuscripts of a renowned Jewish physician in Egypt from the twelfth century". There is doubt about both the date and the authorship, with many now believing it to have been authored by "Marcus Herz, a German physician, pupil of Immanuel Kant, and physician to Moses Mendelssohn."  

In this prayer the physician asks God to help him keep his mind on his job "for great and sacred are the thoughtful deliberations required to preserve the lives and health of Thy creatures." God is asked to remove "all charlatans and the whole host of officious relatives and know-all nurses, cruel people who arrogantly frustrate the wisest purpose of our art and often lead Thy creatures to their death." And finally he prays: "Almighty God! Thou hast chosen me in Thy mercy to watch over the life and death of Thy creatures."  

In Islamic Persia, Mohamad Hosin Aghili of Shiraz wrote Kholasah Al Hekmah in 1770 A.D.. In the first chapter of that book he lists the ethical duties of the physician. Rule 15 states that the physician "should never recommend any kind of fatal, harmful or enfeebling drugs".  

Traditional Japanese medical ethics is informed by both Buddhist thought and the indigenous Shinto tradition. From the sixteenth century a code known as the Seventeen Rules
of Enjuin was drawn up by the practitioners of the Ri-shu school of medical art. This code requires that the physician "should not kill living creatures", nor should he "admire hunting or fishing". [Rule 8] "In our school, teaching about poisons is prohibited, nor should you receive instructions about poisons from other physicians. Moreover you should not give abortives to the people." [Rule 9]202

In the tenth century A.D. a leading Persian figure in medicine and medical ethics, Haly Abbas (Ahwazi), who died in 994 A.D., wrote Liber Regius (Kamel Al Sanaah al Tibbia). The first chapter, devoted to medical ethics, advises the physician "to worship God and obey his commands". The physician, he says, is "never [to] prescribe or use a harmful drug or abortifacient".203

The Oath of Asaph is variously dated from the Third Century to the Seventh Century A.D. and appears at the end of the Book of Asaph the Physician (Sefer Asaph ha-Rofe). This is the oldest Hebrew medical text and was written by Asaph Judaeus, also known as Asaph ben Berachyahu, who was a Hebrew physician from Syria or Mesopotamia. This Oath, "which in part resembles the Oath of Hippocrates, was taken by medical students when they received their diplomas."204 The Oath requires the student to "take heed that ye kill not any man with the sap of a root; and ye shall not dispense a potion to a woman with child by adultery to cause her to miscarry; ... and ye shall take no bribes to cause injury and to kill ... Neither shall ye mix poisons for a man or a woman to slay his friend therewith; nor shall ye reveal which roots be poisonous or give them into the hand of any man, or be persuaded to do evil."205

The Indian physician Caraka is responsible for the ancient Indian oath for medical students which appears in the Caraka Samhita, a medical text written around the first century A.D.. "Unlike the Hippocratic Oath, which exemplified only one school of Greek thought, the Oath of the Caraka Samhita reflects concepts and beliefs found throughout ancient nonmedical Indian literature."206 This Oath requires complete obedience from the disciple to the teacher who instructs "the disciple in the presence of the sacred fire, Brahmanas [Brahmins] and physicians." The teacher is to tell the student: "There shall be nothing that thou should not do at my behest except hating the king, causing another's death, or committing an act of great unrighteousness or acts leading to calamity."207 [my emphasis]

The Oath of Hippocrates, as has been stated at the beginning of this chapter, is one of the earliest and most important statements on medical ethics. Estimates of its dating vary from the Sixth Century B.C. to the First Century A.D. with its authorship attributed to

203 Encyclopedia of Bioethics, 1735
204 Ibid., 1733
205 Ibid.
206 Ibid. 1732
207 Oath of Initiation [Caraka Samhita], Ibid.
Hippocrates. Despite the fact that it represents the Pythagorean school rather than Greek thought as a whole it has been extremely influential in the medical schools of the Western World. The student swears: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art."\textsuperscript{208}

The Christian religion has played a formative role in the development of many cultures, Western and Eastern European, North American, and South American and other Third World countries. And since the major author of the \textit{Universal Declaration of Human Rights} has located the ideological roots of the Declaration in the \textit{Ten Commandments}\textsuperscript{209} account must be taken of the Fifth Commandment, "You shall not kill." (\textit{Exodus} 20:13) The Christian religion promotes the \textit{Ten Commandments} as the basis of human morality, a basis derived from God's revelation to the Hebrews.

The book of \textit{Exodus} has been dated variously from the fifteenth century to the thirteenth century B.C.. Contemporary scholarship suggests the thirteenth century because of archeological evidence.\textsuperscript{210}

The command not to kill in the book of \textit{Exodus} is really a reference to specific types of killing. "The Fifth Commandment seeks to protect the very sacredness of human life by forbidding murder. Killing in battle or by capital punishment is not an issue here. The \textit{Pentateuch} fully approves both in Dt 20:1-14 and in Ex 21:12-17." \textsuperscript{211} The same interpretation applies to \textit{Deuteronomy} 5:17. "The vb. rasah covers deliberate and accidental homicide but not capital punishment and the killing of animals for food, both practised in Israel."\textsuperscript{212}

The Protestant scholar Gerhard von Rad similarly observes that "the verb in the sixth commandment\textsuperscript{213} (rasah) cannot be translated strictly as 'kill'; it does not denote just any killing, for example in war or in the administration of justice. In these cases more usual words are available. On the other hand, it conveys something different from our 'murder', because it is, of course, used also for accidental homicide. Hence it means anti-social killing."\textsuperscript{214}

\begin{thebibliography}{99}
\bibitem{208} Oath of Hippocrates, \textit{ibid.}, 1731
\bibitem{209} René Cassin's contribution has been referred to earlier in John Warwick Montgomery, \textit{Human Rights And Human Dignity}, op. cit., 30
\bibitem{211} \textit{Ibid.}, 57
\bibitem{212} Joseph Blenkinsopp, "Deuteronomy", \textit{Jerome Biblical Commentary}, 98
\bibitem{213} There is a difference between the Churches in the numbering system for the Ten Commandments. The command "You shall not kill" is the Fifth Commandment for Catholics and the Sixth Commandment for Anglican, Greek and Reformed traditions.
\end{thebibliography}
Special provision is made in the *Old Testament* for accidental homicide which is not seen as coming under moral sanction. For those who commit an accidental homicide special places are made available to which they can flee. (*Exodus* 21:13-14, *Numbers* 35:11, *Deuteronomy* 19:4-6)

Positive approval of the content of the *Ten Commandments* as found in the teachings of Jesus (*Matthew* 19:18) and Paul (*Romans* 13:9) cemented the observance of the *Ten Commandments* among Christians and assured their place in all cultures influenced by Christianity. It has sometimes been said of Christianity that there is no place for "rights" talk, since "sinners have no rights before God. Their sin is without excuse, they stand condemned. Strictly speaking, there is not even any natural 'right to life', for the wages of sin is death. If there is any right to both life and death, it belongs to God."215 The suggestion here is that Christians and Jews do not kill because it offends God rather than because human life is inherently good, and that one cares for the poor and the indigent because it pleases God and augurs well for our salvation. The hostility to "rights talk" in the Churches has given way to a rediscovery of the fact that when God created human beings in his own image He did something which carried implications not only for God Himself but also for human beings. This *imago Dei* suggests something about human beings which is inherently different from any other creature. Dietrich Bonhoeffer provides a perceptive insight into what underlies this change in attitude by the Churches in his *Ethics*, written in 1940.

Reason, culture, humanity, tolerance and self-determination, all these concepts which until very recently had served as battle slogans against the Church, against Christianity, against Jesus Christ Himself had now, suddenly and surprisingly, come very near indeed to the Christian standpoint. ... What is decisive is rather the fact that there took place a return to the origin. The children of the Church, who had become independent and gone their own ways, now in the hour of danger returned to their mother. During the time of their estrangement their appearance and their language had altered a great deal, and yet at the crucial moment the mother and the children once again recognized one another. Reason, justice, culture, humanity and all the kindred concepts sought and found a new purpose and a new power in their origin. This origin is Jesus Christ.216

The use of "rights" talk is not only consistent with the Jewish and Christian traditions but is explicitly used in both the Old and New Testaments [*mishpat* and *exousia*]. In the book of the *Proverbs* the writer states that "a righteous man knows the rights of the poor; a wicked man does not understand such knowledge."217 Elsewhere in the same book the

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215 Victor C. Pfitzner, "Justice and Human Rights: Some Biblical Perspectives, II New Testament", *Lutheran Theological Journal*, 24:1, 1990:9. This essay is part of a single article, the Old Testament section of which was written by J.T. Erich Renner. Interestingly this view is rejected in the following article in the same issue, "Being a Christ to the Neighbour: Luther and the Development of Human Rights", by Maurice Schild. Schild insists that "Human Rights are an achievement of human historical experience made in the wake of Christianity's powerful insistence upon responsibility of the faithful for the world." Ibid, 15


217 *Proverbs* 29:7
rights of "all the afflicted"\textsuperscript{218}, "all who are left desolate"\textsuperscript{219}, and "the poor and needy"\textsuperscript{220} are specifically referred to. In his first letter to the Corinthians St Paul, too, asks rhetorically, "Do we not have the right to our food and drink?"\textsuperscript{221} The Greek word \textit{exousia} means "authority, jurisdiction, liberty, power, right, strength"\textsuperscript{222} and is translated in the passages referred to as "right". The Hebrew word \textit{mishpât} means "ordinance, right"\textsuperscript{223} and is translated as "right" in the passages referred to. It is not possible to suggest an exact correlation in the use of the Biblical words with current usage of \textit{iura}. However, the meanings of the words and their context justify the observation that modern "rights" talk is consistent with the biblical usage. It is, then, not difficult to see the influence of the Jewish and Christian traditions in the formulation of rights talk and that it is theologically consistent with the doctrine of the \textit{imago Dei} and the ethical requirements of the \textit{Ten Commandments}.

8. THE RIGHT TO GOOD HEALTH

It follows from the universal commitment to the value of human life, to the general inviolability and inalienability of human life, and to the inherent dignity of the human person that certain other rights will be claimed that serve to enhance and protect the individual's right to life. As far as bioethics is concerned these rights surround the provision of health care, the protection of the doctor-patient relationship, and the rights of the patient to be informed and to give or withhold consent to treatment.

The \textit{Universal Declaration of Human Rights} of the United Nations states:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.\textsuperscript{224}

In the \textit{Standard Minimum Rules For The Treatment Of Prisoners And Related Recommendations of the United Nations [1955, 1977]} the right of the prisoner to good health

\begin{enumerate}
\item Proverbs 31:5
\item Proverbs 31:8
\item Proverbs 31:9
\item 1 Corinthians 9:4
\item James Strong, "A Concise Dictionary of the Words in the Hebrew Bible, in \textit{Hebrew-Greek Study Bible, op. cit.}
\item Article 25 of the \textit{Universal Declaration of Human Rights (United Nations 1948)}
\end{enumerate}
is safeguarded by the detailed provisions concerning the nature of the accommodation provided, personal hygiene standards to be observed, and the standard of food, clothing, bedding, and medical services offered by the prisons.\textsuperscript{225}

The UN \textit{Convention on the Rights of the Child} "recognize(s) the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health services."\textsuperscript{226} The Article goes on to detail the kinds of provision for health care deemed necessary.

The \textit{European Social Charter} makes detailed provision for the right of the individual to good health. Workers have "the right to safe and healthy working conditions". [Article 3] Everyone "has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable." [Article 11] Anyone "without adequate resources has the right to social and medical assistance", [Article 13] while special provision is made for the protection of children, young persons, employed women, and employed women who are pregnant. [Articles 7,8]

Thus the relevant human rights declarations or statements of world secular bodies recognize the right of the individual to the best standard of health attainable.

The documents of the World Medical Association are predicated on the unspoken assumptions that the individual has the right to good health and that the physician is there to assist the individual to enjoy the best possible health. "The health of my patient will be my first consideration" is the solemn pledge of the physician.\textsuperscript{227}

The \textit{Draft European Declaration On The Rights Of The Patient} asserts that "everyone has the right to protection of health as afforded by appropriate health care, and to the opportunity to pursue their own highest attainable level of health."\textsuperscript{228}

The religious traditions link good physical health with spiritual duty. The believer is to protect his body and to keep it healthy. The religious food laws of the \textit{Old Testament} are about maintaining a healthy body. Cleanliness of body and clothing is emphasised in the purification rituals of \textit{Leviticus} 14 and in the use of the bronze laver in \textit{Exodus} 30: 17-21. \textit{Deuteronomy} 23: 10-14 lays down carefully regulated sanitary procedures. Israel was called to look to God for healing: "For I am the LORD your healer". (\textit{Exodus} 15:26) "Healing is, in the best tradition of both Judaism and Christendom, an activity of both the intellect and faith."

\begin{itemize}
\item \textsuperscript{225} \textit{Standard Minimum Rules For The Treatment Of Prisoners And Related Recommendations} (United Nations 1955, 1977), Part 1., sections 9-26
\item \textsuperscript{226} \textit{Convention On The Rights Of The Child} (United Nations 1990), Article 24 (1)
\item \textsuperscript{227} \textit{Declaration of Geneva}, appended to the \textit{International Code of Medical Ethics}, published by the World Medical Association, November 1983, doc. 17.A
\item \textsuperscript{228} \textit{Draft European Declaration On The Rights Of Patients}, published by the World Health Organisation 2nd August 1989, doc. ICP/HLE 121
\end{itemize}
The New Testament, which describes the activities of Christ and his apostles, places due emphasis on their 'healing ministry'. Sometimes healing takes place by Divine intervention (Matthew 4:23; 9:35; Mark 1:34; Luke 4:40; 6:17,18; 7:21), at other times Christ states that the sick are in need of a physician (Matthew 9:12; Mark 2:17). And in Ecclesiasticus 38:1-15, Ben Sira writes beautifully of the interrelationship of the physician and the spiritual life of the patient.

Honour the doctor with the honour that is his due in return for his services; for he too has been created by the Lord. Healing itself comes from the Most High, like a gift from a king. The doctor's learning keeps his head high, he is regarded with awe by potentates. The Lord has brought medicines into existence from the earth, and the sensible man will not despise them. Did not a piece of wood once sweeten the water, thus giving proof of its virtue? He has also given men learning so that they may glory in his mighty works. He uses them to heal and to relieve pain, the chemist makes up a mixture from them. Thus there is no end to his activities, and through him health extends across the world. My son, when you are ill, do not be depressed, but pray to the Lord and he will heal you. Renounce your faults, keep your hands unsoiled, and cleanse your heart from all sin. Offer incense and a memorial of fine flour, and make as rich an offering as you can afford. Then let the doctor take over - the Lord created him too - and do not let him leave you, for you need him. Sometimes success is in their hands, since they in turn will beseech the Lord to grant them the grace to relieve and to heal, that life may be saved. A man sins in the eyes of his Maker if he defies the doctor. (Jerusalem Bible. Note: the last sentence is the footnote translation)

The same connection between personal holiness and good health in both physician and patient may be found in the other religious codes. The point here is that from a religious stand-point good health is what God desires for His people, although physical health is not seen in isolation from the total well being of the individual.

9. THE RIGHT OF THE PATIENT TO PROTECTION

Two key principles in bioethics are the principles of non-maleficence and beneficence. Following the usage of Beauchamp and Childress non-maleficence refers to "the noninfliction of harm on others" while beneficence refers "to acts involving prevention of harm, removal of harmful conditions, and positive benefiting". It is not the purpose of this study to discuss these principles as principles together with their applications. Rather it is to identify in the various medical ethical codes and statements of human rights the extent to which the values of protecting the patient from harm and serving his or her best interests are stipulated.

As far as the United Nations is concerned "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". This Article 5 of the Universal

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230 Tom L. Beauchamp and James F. Childress, Principles of Biomedical Ethics, (New York: Oxford University Press, 1979), 135

231 Universal Declaration of Human Rights, Article 5
Declaration of Human Rights is repeated in Article 7 of the International Covenant on Civil and Political Rights (1966) with the following words added: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation." The principle "primum non nocere" ["above all do no harm"] is encapsulated here as an absolute. That is, no one shall be subjected to treatment or punishment that is cruel, inhuman or degrading. Even more trenchantly, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) states that "no state may permit or tolerate" such behaviour. The Standard Minimum Rules For The Treatment Of Prisoners And Related Recommendations (1955, 1977) further codifies what constitutes good or beneficial treatment from a health point of view. Treatment of prisoners requires the ready availability of medical officers, and the need for any treatment or punishment to be modified or stopped if it will injure the health of the prisoner.232


Amnesty International, in its Declaration On The Participation Of Doctors In The Death Penalty (1981) invokes the "spirit of the Hippocratic Oath", takes into account "the Declaration of Tokyo of the World Medical Association", "declares that the participation of doctors in executions is a violation of medical ethics" and "calls upon medical doctors not to participate in executions".233

The World Medical Association has declared that "A PHYSICIAN SHALL act only in the patient's interests when providing medical care which might have the effect of weakening the physical and mental condition of the patient",234 that "A PHYSICIAN SHALL always bear in mind the obligation of preserving human life",235 and that "the utmost respect for human life from its beginning" will be maintained "even under threat", and that "medical knowledge contrary to the laws of humanity"236 will not be used by the medical practitioner. The physician is "to preserve and restore bodily and mental health without distinction as to persons, to comfort and to ease suffering of his or her patients."237 Indeed the whole thrust of The World Medical Association's policy documents is towards the care of the sick, to do good for the patient and not to harm the patient.

232 Vid. especially sections 22-34, and also sections 82-83 which requires the removal of insane and mentally abnormal patients to "mental institutions as soon as possible".
233 "Amnesty International Declaration On The Participation Of Doctors In The Death Penalty", in Ethical Codes And Declarations Relevant To The Health Professions, op. cit., 56
234 International Code of Medical Ethics, published by The World Medical Association, November 1983, doc. 17.A
235 Ibid.
236 Declaration of Geneva, ibid.
237 Declaration of Tokyo, published by The World Medical Association, October 1975, doc. 17.F
The religious codes are strongly committed to the care and protection of the patient. "I will keep them from harm and injustice" says the Oath of Hippocrates. "Thou shalt not desert or injure thy patient for the sake of thy life or the living" is a requirement of the Oath of Initiation. These examples are typical of the religious traditions which see the physician as acting within the mandate of God's "Eternal Providence" in which physicians are "chosen ... to watch over the life and health of Thy creatures."238

Further protections for the patient are offered in the obligation of doctors to treat their dealings with their patients as confidential and to protect the autonomy of their patients. Confidentiality has been enjoined on the physician from the earliest times. The Oath of Hippocrates, the Oath of Initiation all refer to confidentiality. The Declaration of Geneva requires the doctor to swear that he will "respect the secrets which are confided in me, even after the patient has died". The doctrine of autonomy, whereby the rights of the patient to full disclosure of all relevant information and to refuse treatment is safeguarded, and the doctor is required to seek the consent of the patient before he treats the patient, has been formulated only in more modern times. The "paternalism" of the medical profession is giving away to the active participation of the patient in his or her treatment. But the doctrines of confidentiality and autonomy are themselves predicated upon certain human values which include the value of human life as a good in itself, the inviolability and inalienability of human life, the value of good mental and physical health and people's rights to those services and conditions that will allow people to enjoy the highest attainable standard of health, and the requirement to do good and not harm to the patient.

10. THE GOLDEN RULE

Andrew Varga refers to the Golden Rule, "so whatever you wish that men would do to you, do so to them; for this is the law and the prophets",239 as a criterion of morality often recommended as the surest and best. "The Golden Rule is certainly a convenient practical guide in our daily moral decisions. It presupposes, however, that we all have the same nature, the same needs and desires. Otherwise the principle could not be applied and could hurt those whose tastes and wishes might be different from ours. Thus the Golden Rule basically appeals to a uniform human nature as the objective norm of morality."240

In a similar way Germain Grisez sees the Golden Rule as expressing the requirement of impartiality in our treatment of others which, he says, "extends to all acts and omissions".241 Grisez takes the matter of the Golden Rule further by seeing the virtuous disposition as one which requires "of others not even that to which fairness entitles one and to be available to them without any consideration of what is fair."242 This, of course,

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238 "Daily Prayer Of A Physician", Encyclopedia of Bioethics, 1737
239 Matthew 7:12; cf. Luke 6:31
240 Andrew C. Varga, op. cit., 13
242 Ibid., 645
presupposes some idea of what it is to be fair to others arising out of the self-knowledge of what it would mean for others to act fairly to me.

The **Golden Rule** emphasises equality and reciprocity, yet its first appearances are in very aristocratic and hierarchical societies. This raises the question as to whether the **Golden Rule** was understood to apply universally or merely to those within one's own class, social grouping, race or culture. Within Judaism there is ambiguity in the way people actually behaved and the way they were meant to behave according to the **Golden Rule**, "You shall love your neighbour who is like yourself." In terms of the fundamental human values the **Golden Rule** was certainly meant to be applied both personally and communally. However historically we note that, as a matter of practice, those who had power in society often misused their power to the detriment of the individual. Nothing much has changed, from that point of view, except, perhaps, the greater accountability of most governments to the people. Nevertheless, most people have paid lip-service to the moral legitimacy of this rule.

The fact that the substance of the **Golden Rule** appears in many cultures of diverse religious attachments sits well with the notion that there are basic human values about which we can know and to which we ought to be committed. The Rule may be differently formulated and may appear in a negative form - "And what you hate do not do to anyone." It is expressed in this form in "Philo, Confucius, and bShabbath 31a." The essence of the saying is to be found, then, in Jewish, Greek, Chinese, Arabic and Christian influenced cultures.

**11. CONCLUSION**

There are certain human values which are universally held to be goods in which all human beings have a right to participate. In contemporary language these are often expressed in terms of human rights, the right to life, the right to the highest attainable standard of health, the right to be treated in accordance with the inherent dignity which belongs to every human being.

Any moral theory, or attempt to lay foundations for bioethics which does not take account of the human perception of fundamental human values, and the fundamental human rights that accompany them, together with the purposive nature of medical ethics which is based upon those values, is inadequate for public policy decision-making. Natural law theory takes full account of these universal human values.

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244 Tobit 4:15

CHAPTER II
HUMAN RIGHTS and NATURAL LAW

1. ORIGINS AND DEVELOPMENTS OF HUMAN RIGHTS IN RELATION TO
NATURAL LAW THEORIES

The emergence of a plethora of human rights bills and charters applicable across
national barriers is a major feature of the twentieth century. The creation of the United
Nations, with its Universal Declaration of Human Rights, has provided a forum for
international relations since the second world war, a forum which has become the focal point
since the ending of the cold war. Now that the rivalry between the super powers is no longer
the dominant fact of international politics, the United Nations has taken on increased
significance in the settling of international disputes, and as a mechanism, together with the
Council of Europe, for the promotion of human rights.

As far as the Universal Declaration of Human Rights is concerned, it was
enthusiastically accepted and endorsed by the United States and other countries whose
political systems emerged directly out of the Anglo-American political and philosophical
tradition. It has been accepted and endorsed by the former Soviet Union, and Third World
countries which are governed either in the context of an overall political ideology or a
communitarian ethos, whether political such as communism or religious such as Islam or
Catholicism or some other local ethos, but in a more equivocal way. This difference in the
terms in which human rights claims are received in different countries reflects a
fundamentally different perception of the role that human rights play in the relationship
between individuals and the state.

In communist countries, for instance, human rights are to be exercised in such a way
that the essential identity of the community is not destroyed but rather built up. One uses the
freedom of speech "constructively", to build socialism rather than to propose an alternative
form of political organisation.

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1 The decision of the United Nations to intervene on behalf of the government of Kuwait against the Iraqi occupying
power in 1990-91 was made possible by, among other things, the ending of the Cold War.
2 Other bodies, such as Amnesty International, work through the United Nations as well as independently.
3 The recent dismantling of the Soviet Union, and the disintegration of the Communist Party of the Soviet Union,
together with the demise of communist regimes in Eastern Europe, is further evidence of the desire for guaranteed human
rights over and against the interests and goals of the State.
4 The present writer participated in a workshop in the Soviet Union in 1977 in which the then new draft Soviet
Constitution was being discussed. The view of the representatives of the CPSU was that individuals have the right to free
speech, for example, provided that it was used to build socialism. In this sense human rights are seen as serving the State
which is constituted on other grounds as the "best" form of political organisation which inevitably arises through the inexorable
forces of history.
Third World countries, too, being organised and governed in a communitarian tradition rather than according to any idea of a social contract between individuals and a sovereign, receive human rights claims in an ambiguous way. On the one hand they have signed the *Universal Declaration of Human Rights*, on the other hand their cultures are held together by a range of customs and religious beliefs which individuals, who are part of that community, are expected to honour. Sometimes that involves activities which the West might describe as examples of the abuse of human rights.

The inconsistency between the international culture of human rights and local cultures, even those who explicitly accept the kind of social contract theory upon which the *Universal Declaration of Human Rights* is predicated, is a critically important issue that will be attended to in more detail later. It should be noted, however, that the contradictions involved in holding together two quite incompatible strands of thought, are dealt with by compartmentalising them into two discrete categories of dogmatism and scepticism, neither of which through the centuries has been able to overcome the other.

According to Ronald Dworkin, the tension experienced within the Western democracies over human rights has its origins in the confusion over the word 'right'. We use the word 'right' when we speak of the right thing to do, that there is no wrong in doing that particular thing. But we also use the same word when we speak of someone's right to do a certain thing, meaning that we would do wrong to interfere with that person's action unless there were some very compelling intervening grounds for doing so.\(^5\)

This usage of the same word to mean different things ordinarily causes no problems. However, says Dworkin, it is the unacknowledged difference in meaning between these two words which may lead to problems even in a liberal democracy such as that which obtains in the United States. Both liberals and conservatives would acknowledge the following propositions or expression of principle:

In a democracy, or at least a democracy that in principle respects individual rights, each citizen has a general moral duty to obey all the laws, even though he would like some of them changed. He owes that duty to his fellow citizens, who obey laws that they do not like, to his benefit. But the general duty cannot be an absolute duty, because even a society that is in principle just may produce unjust laws and policies, and a man has duties other than his duties to the State. A man must honour his duties to his God and to his conscience, and if these conflict with his duties to the State, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgment and punishment that the State imposes, in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation.\(^6\)

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6 Ronald Dworkin, *ibid.*, 186-7. Dworkin allows for minor variations in which this expression of principle might be formulated, and that there might be a few people who allow of no exception to the duty to obey the law, and a few who think that one is under no obligation to obey the law. However, this formulation would represent the consensus in the United States of America.
However, liberals might want to use the law to restrict the right to freedom of association by stopping whites running a school for whites and excluding blacks. Conservatives might want to use the law to discourage draft dodgers even if the draft dodgers believe that they are conscientiously bound to resist the draft. Liberals would justify their position on the grounds that it is right to prevent racial discrimination, and conservatives justify theirs on the grounds that it is right to discourage disrespect for the law. Both sides have a view of what society should be like, a view which, at times, assumes greater importance than an absolute adherence to particular rights.

The point that Dworkin makes here is that both liberals and conservatives propose the possibility of breaking the law if the law is unjust, and both propose using the law to enforce a political settlement which accords with their view of the way society should be structured. If the individual has the right to break a law he or she considers to be unjust in the strong sense of a 'right', that it would be wrong for the Government to seek to prevent it by arrest and punishment, then the paradox between liberals and conservatives remain. If however we take the view that it is sometimes right for individuals to break the law "so that we should all respect him even though the Government should jail him", then both sides are recognising that individuals do no wrong if they break the law when conscience demands it.\(^7\)

What, then, is meant by a "right"? Do human beings possess rights, and if so in what sense? Are there such things as 'natural rights' or 'basic human rights', or are human rights derived from something else? Are some rights inherent rights, or are all rights conferred rights? How are the rights of individuals to be seen in the context of the state? Which human beings have rights, or are we justified in recognising as possessors of rights only certain categories of humans that we call 'persons'?

The landscape is marked by several competing theories which appear to offer the philosophical underpinnings for the human values held by the United Nations in terms of the rights of every human individual, or alternatively regard all talk of natural rights as 'nonsense on stilts'.\(^8\) It is the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" which is held to be "the foundation of freedom, justice and peace in the world."\(^9\) But which rights should be recognised as "equal and inalienable", and upon what basis should they be so recognised?

Contemporary human rights discourse has, as its origin,\(^10\) the modern doctrine of natural law inaugurated by Thomas Hobbes riding on the back of Machiavelli's realism about

\(^7\) Ibid., 189-90


\(^9\) The Universal Declaration of Human Rights Approved by the General Assembly of the United Nations, Preamble

\(^10\) In 1215 the English barons extracted the Magna Carta from King John. Perhaps the most notable feature of the Magna Carta was the right not to have a punishment imposed without due process of law. That right, however, only applied to "free men".
the way human beings actually behave. Hobbes, like Machiavelli before him, rejected the Aristotelianism of the Schoolmen as building castles in the air. But Machiavelli's substitution of political virtue for moral virtue created difficulties as did his admiration for "the lupine policies of republican Rome". Hobbes attempted to restore the moral principles of politics, the natural law, "on the plane of Machiavelli's 'realism'."11

Human beings, said Hobbes, act in a self-interested manner and are inclined to "a perpetual and restless desire of power after power, that ceaseth only in death."12 Traditional philosophy had failed to deal with scepticism. Hobbes believed that the only way to come to terms with the truth contained in a scepticism which persisted despite all attempts by dogmatism to overcome it, was to give full range to scepticism. Whatever "survives the onslaught of extreme skepticism is the absolutely safe basis of wisdom."13 The only fact about human existence that survived the full blast of scepticism was the impulse to self-preservation.14 From this fact Hobbes deduced the natural right to live, the right of individuals to use their own power for their self-preservation. The law of nature

... is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved.15

Hobbes' scepticism, full blown as that scepticism is allowed to be, does not overcome dogmatism. David Hume, whose answer to scepticism was not to take scepticism too seriously, saw Hobbes as "a dogmatist in the guise of a sceptic."16 As Richard Tuck goes on to observe, moral relativism might not necessarily lead to a kind of liberal pluralism. "Moral relativism, thought through properly, might lead instead to the Leviathan; and the Leviathan, while it will destroy older intolerances, may replace them with newer ones."17

The scepticism which was a major driving force of the seventeenth century is not remote to the twentieth century. Nor is the dogmatism of earlier centuries. Dogmatism, in modern form, is to be found in the various international covenants, charters and bills of human rights, while the contemporary acceptability of scepticism is well expressed by Richard Tuck.

11 Leo Strauss, *Natural Right and History*, (Chicago: University of Chicago Press, 1953), 179
13 Leo Strauss, *op. cit.*, 171
14 In this matter Hobbes followed the scepticism of Justus Lipsius and Michel de Montaigne who both "condemned public spiritedness and patriotism, for such feelings exposed their possessor to great danger", a conclusion which Hobbes did not endorse. cf Richard Tuck, *Hobbes*, (Oxford: Oxford University Press, 1989), 6-11.
15 Thomas Hobbes, *op. cit.*, 84
16 Richard Tuck, *op. cit.*, 116
17 Ibid.
Many people would now pay at least lip-service to the sceptical relativism of Montaigne's generation. Scepticism about both science and ethics is more persuasive now than for many generations. Claims about the special validity of modern Western natural science have been undermined by the work of historians and philosophers of science, who have come to stress the culturally determined and unsubstantiated character of many scientific assumptions, while the literally ancient sense of the sheer multiplicity of human moral opinions, and of their incompatibility, has come once again to possess us.  

This latter claim, about "the literally ancient sense of the sheer multiplicity of human moral opinions, and of their incompatibility", has been strongly challenged in recent years with the development of a doctrine of natural law theory which owes much to the natural law theory of Saint Thomas Aquinas. John Finnis has challenged the assumption that "cultures manifest preferences, motivations, and evaluations so wide and chaotic in their variety that no values or practical principles can be said to be self-evident to human beings, since no value or practical principle is recognized in all times and all places." This assumption has been recently tested by surveys of the anthropological literature carried out by philosophers and professional anthropologists. They have found, says Finnis, "with striking unanimity that this assumption is unwarranted". All human societies "show a concern for the value of human life", "regard the procreation of new human life as in itself a good thing unless there are special circumstances", "restrict sexual activity", "display a concern for truth" through the provision of education for their children, and favour "the values of cooperation, of common over individual good, of obligation between individuals, and of justice within groups."

Finnis holds that there are certain basic human values which are self-evident. These self-evident basic human values are in harmony with contemporary human rights talk. These are the first principles of natural law.

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18 Ibid., 115
19 Lloyd Weinreb agrees with Finnis that "his theory is properly described as a natural law", but draws attention to critical differences between Aquinas and Finnis which marks out his natural law position from the older Thomistic tradition. Lloyd Weinreb, Natural Law and Justice, (Cambridge, Massachusetts: Harvard University Press, 1987), 108-115. Russell Hittinger prefers to call the attempt by Germain Grisez and John Finnis, the "Grisez-Finnis position", a "new natural law position". He prefers this usage because they are not about the business of recovering an isolated strand of a premodern ethics", but contend that they have "retrieved the systematic core of natural law theory in a way that is congruent with the older tradition and in a way that is persuasive to contemporary ethicists." Russell Hittinger, A Critique of the New Natural Law Theory, (Notre Dame: University of Notre Dame Press, 1987), 5
21 Ibid.
22 Ibid. Here Finnis states that in all human societies "there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations."
23 Ibid.
24 Self-evidence remains a formidable philosophical problem, especially for sceptics. Finnis develops his ritorsive argument using the basic human value of knowledge as his demonstration self-evident good. He returns to this problem more fully in Germain Grizez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, And Ultimate Ends", in The American Journal Of Jurisprudence, Notre Dame Law School, Natural Law Institute, 32, 1987, 99-115
25 John Finnis, op. cit., 198-230
One of these first principles is practical reasonableness. Through the application of the principles of practical reasonableness one can choose to participate in the basic human values and thereby flourish, it being through our free choices27 that we constitute ourselves as a particular kind of person.28 The principles of practical reasonableness enable us to establish a set of moral standards or moral norms.29 Finnis believes that in detailing the principles of practical reasonableness he has made good a deficiency in Aquinas.30 It is the philosophical explication of this practical wisdom, the search for the intermediate principles, which is the "history of moral philosophy, especially in the centuries during which it has sought to distinguish its method from the method proper to theology..."31 This history, says Finnis, is characterised by "the unhappy tendency to find a spurious, or at best only partial, unity of ethical thought, by casting a single principle as the master principle or axiom from which all moral virtues are to be explained."32

In this last remark Finnis particularly has in mind utilitarian theories which developed especially through the work of Jeremy Bentham and John Stuart Mill. Bentham, to some extent, followed both Hobbes and Locke in his estimation of human nature. Just as Hobbes had projected "good" and "bad" in subjective and hedonic terms, so also did Bentham. We act so as to maximise pleasure and to minimise pain. The passions move us towards certain objects. Reason enables us to get what we want. We act reasonably when we act to maximise the good and minimise the bad. The "good" and the "bad" are to be understood as pleasures and pains produced in the experience of individual human persons. Science helps us to produce a better and a more commodious world. Following Hobbes Bentham held that there was no scientific way to make people either good, happy or

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27 The philosophical defence of “free choice” in the newly restated and reformulated traditional natural law theory may be found in Joseph M. Boyle, Jr., Germain Grisez, Olaf Tollefsen, Free Choice: A Self-Referential Argument, (Notre Dame and London: University of Notre Dame Press, 1976), John Finnis, Fundamentals of Ethics, (Oxford: Oxford University Press, 1983), 136-42, Germain Grisez, The Way of the Lord Jesus, op. cit., 41-72, and cf Saint Thomas Aquinas, Summa Theologiae, 1, q.83, a.1; 1-2, q.1, a.1; q.6, a.1; q.18, a.1

28 John Finnis, Fundamentals of Ethics, 139. Germain Grisez, The Way of the Lord Jesus, op. cit., 52 puts the same view in this way: “But a choice, once made, determines the self unless and until one makes another, incompatible choice.” Grisez then, usefully, employs an analogy with intellectual learning and knowing. “Learned people usually are consciously thinking of only a fragment of what they know. But the knowing involved in learning something lasts as a development of one’s knowledge as a whole. As lasting, knowledge is more than a power to recall what one previously thought; one’s store of knowledge is the systematic context of further inquiry and judgment which continually expand one’s view of reality. Similarly, choices as self-determination last, not simply as dispositions to act similarly in similar situations, but as developments of the existential self, which will continue to unfold itself in further deliberation and choice.”

29 John Finnis, Natural Law And Natural Rights, 23

30 According to Finnis, Aquinas failed to fill the gap philosophically between the basic first principles or human values and the moral norms which obtain in, for example, the Decalogue. He failed to do so because his work was theology not moral philosophy. Cf John Finnis, Fundamentals of Ethics, op. cit., 70

31 Ibid., 70

32 Ibid.
spiritually satisfied. However, human beings can generally improve their lot materially, thereby providing the "conditions in which spiritual anxiety will dissipate."\(^{33}\) Bentham's aim to achieve the greatest happiness for the greatest number gives no privileged place to any particular person's happiness. Indeed the abolition of the slave trade may be generally seen as good, but not for those who owned slaves or those who profited from the trade. Bentham departs from Hobbes in the matter of the war of all against all. The power of government can be used to foster the common good, to implement policies scientifically worked out which will show a nett benefit. The morally good act is the one which maximises utility, which maximises the greatest good. There are no absolute goods or self-evident truths. "Still, social engineering to improve the general well-being scientifically can reasonably take precedence over individual claims of rights."\(^{34}\)

John Stuart Mill identified happiness with "intended pleasure, and the absence of pain", and unhappiness with "pain, and the privation of pleasure".\(^{35}\) Mill distinguishes between kinds of pleasure, some of which are more desirable and more valuable than others. In evaluating pleasures it would be absurd to make one's estimations "depend on quantity alone".\(^{36}\) The principle of progress flows from individualism, maximising the liberty of the individual and throwing off the stultifying conformity of "custom". Society best progresses through the democratic appointment of representatives to make prudent public policy. Proportional representation [as suggested by Thomas Hare] would give the best opportunity for election to those with the "intellectual qualifications desirable in the representatives."\(^{37}\) In this way society would get what it would otherwise miss - "leaders of a higher grade of intellect and character than itself."\(^{38}\) These representatives will come from the "middle rank". The "middle rank" is that portion of society most inclined to prudence, and most suitable as mediators between poor and rich.

The development of utilitarianism occurred in a climate which increasingly had moved away from the hard-headed realism about human nature characteristic of Thomas Hobbes and orthodox Christianity. That climate also contributed to the idea of the spontaneously growing, improving society. While Hobbes had abandoned any idea of the perfectibility of humankind, Bentham, like the philosophes, believed in the improvement of the human condition through the sheer proliferation of knowledge. The eighteenth century did not return to the idea, common among earlier Christian mystics, that perfection came as a kind of breakthrough after a long period of preparation. Rather, men and women were perfected gradually such that "the idea of perfectibility came to be entirely divorced from the

\(^{33}\) Timothy Fuller, "Jeremy Bentham and James Mill", in *History of Political Philosophy*, eds. Leo Strauss and Joseph Cropsey, (Chicago and London: The University Of Chicago Press, 1987), 715

\(^{34}\) *Ibid.*, 716


\(^{36}\) *Loc. cit.*, 8

\(^{37}\) J.S. Mill, "Considerations on Representative Government", in H.B. Acton, *op. cit.*, 286

\(^{38}\) *Ibid.*, 291
idea of absolute perfection." Education is the key to human perfectibility according to John Locke. "Of all the men we meet with, nine parts of ten are what they are, good or evil, useful or not, by their education. It is that which makes the great difference in mankind." From Locke on into the twentieth century the belief that human beings could be improved [perfected in a much more gradualist sense] went hand in glove with the search for the laws of social dynamics and the social controls needed to avail all of such a good education as would improve their fundamental humanity. Walter E. Houghton, in his discussion of the optimism of the young English liberals of the nineteenth century, suggests that their goal was by no means merely intellectual. It included the practical elimination of physical suffering through medicine, and even of moral evil through the new science of sociology, founded by Comte and first discussed in England by Mill. Since the historical process was an organic process, the possible discovery of its dynamic law or laws, through the combined study of history and human nature, held out immense possibilities.

Houghton then refers to W.K. Clifford's prediction that, once the laws of sociology are mastered, we may "rationally organize society for the training of the best citizens ... Those who can read the signs of the times read in them that the kingdom of Man is at hand."

The signs of the times included, for popular writers of the age, like T.B. Macaulay, the material fruits of the Baconian philosophy. "When he looked forward to even greater progress in the future, he had no theories in mind, sociological or evolutionary, and no transformation of purgatory into paradise. He simply saw the endless continuation of applied science producing greater and greater industrial civilizations." This industrial progress was confidently expected to mean the end of war. "The argument that the advance of international communications would displace the prejudice of ignorance by the friendliness of understanding was supplemented by another: that the control of society was passing out of the hands of the old aristocratic-military class into those of an industrial middle class interested only in peaceful trade and of civic affairs."

The nineteenth century belief in a continuing world peace as human beings evolve into better human beings through better education, with science disabusing humanity of the superstitions and bigotry that lead to conflict, carried over into the twentieth century. That belief in a continual progress towards a better and more enlightened human society was dealt a heavy blow by two world wars and the evidence of human babarity on a previously

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39 John Passmore, op. cit., 158
40 John Locke, Some Thoughts concerning Education, para 1, cited in John Passmore, op. cit., 159
43 William E. Houghton, op. cit., 40
44 Ibid., 41-42
unimaginable scale. Houghton is, perhaps, correct when he observes that the devastations of the twentieth century have not, in fact, "destroyed an underlying faith that the progress of science must mean the progress of civilization."\textsuperscript{45}

Indeed, the optimism that social policies could be scientifically determined for the benefit of human society gained further momentum after the post-war reconstruction. Secular humanists of one kind or another set about meeting the problems of world population, unwanted pregnancies, sickness, and human disability. Julian Huxley prophesied "with confidence" that evolutionary humanism was "to become the dominant idea-system of the next phase of psychosocial evolution".\textsuperscript{46} Huxley claimed that man is "the sole active agent on earth" of evolution, and not just the latest dominant to be produced by it. This led Huxley to claim that the destiny of man "is to be responsible for the whole future of the evolutionary process on this planet."\textsuperscript{47} For Huxley there are "no Absolutes of truth or virtue, only possibilities of greater knowledge and fuller perfection."\textsuperscript{48} [my emphasis] Having established the reality of problems like over-population, which he refers to as "the differential multiplication of economically less favoured classes and groups in many parts of the world", and the increasing numbers of genetically defective human beings "permitted" to survive and reproduce, problems which have occurred partly because of the achievements of medicine and public health, he proposes a reversal of these trends. The plans which he has in mind will produce a society "which will favour the increase instead of the decrease of man's desirable genetic capacities for intelligence and imagination, empathy and cooperation, and a sense of discipline and duty."\textsuperscript{49}

At the same time international society, in the crisis of human values exposed by National Socialism in the aftermath of the Second World War, was driven back to fundamentals. There are, it was claimed, certain values which all must recognise if human beings are to survive at all. These values in fact are, and have always been recognised, as fundamental. Those who infringe those values cannot plead ignorance of them. They are known by every sane, mature, human being. Decisions by individuals to act against those values is not evidence of ignorance of those values. It is evidence of perversity. Even the noble professions of medicine, the judiciary and the clergy have been besmirched by the activities of significant sections of those professions. These fundamental values, evident in the moral teachings of all the world religions, and in the traditional ethical codes of the medical profession, have been given clear and unequivocal expression in the twentieth century bills of human rights and other statements of international bodies. In the previous chapter the evidence of the universality of those values has been assembled.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{45} Ibid., 36
  \item \textsuperscript{46} Julian Huxley, \textit{Essays of a Humanist}, (Harmondsworth: Pelican Books, 1969), 125
  \item \textsuperscript{47} Ibid.
  \item \textsuperscript{48} Ibid., 127
  \item \textsuperscript{49} Ibid., 269
\end{itemize}
\end{footnotesize}
Jacques Maritaine noted the practical convergence on fundamental values despite profound disagreement on ideology.\(^{50}\) Despite all the difficulties it is possible, "as the International Declaration of The Rights of Man published by the United Nations in 1948 showed very clearly ... to establish a common formulation of such practical conclusions."\(^{51}\) When one asks the question as to why these rights or values ought to be accepted, "the dispute begins".\(^{52}\) This difference between the speculative and the practical, between what theory or ideology one holds which explains human rights and the practical commitment to those rights, Maritaine specifies by reference to an address he gave to the second International Conference of UNESCO:

I have just said that the present state of intellectual division among men does not permit agreement on a common speculative ideology, nor on common explanatory principles. However, when it concerns, on the contrary, the basic practical ideology and the basic principles of action implicitly recognized today, in a vital though not articulated manner, by the consciousness of free peoples, this happens to constitute *grosso modo* a sort of common residue, a sort of unwritten common law, at the point of practical convergence of extremely different theoretical ideologies and spiritual traditions.\(^{53}\)

Maritaine does not dismiss the theoretical considerations as of no importance. They are "vitally important." Nevertheless, because of "an agreement on the practical formulation of that [democratic] charter ... they can formulate together common principles of action."\(^{54}\)

What we appear to have, then, is a set of values which human society has agreed on not because these values have been proved in some other way to be "objective", but because they are universally shared values. These values are expressed as rights that individuals have over and against the government and the community. This is not to assert that every right the United Nations has ever asserted reflects a value universally shared, but that there are certain rights which reflect universally shared values and are thought of, therefore, as fundamental. At the same time we have to confront two other realities which co-exist with universally shared values. All cultures have been able to find a justification for by-passing certain basic human rights at least in some circumstances and for some groups or classes of individuals in the pursuance of certain social programmes and goals. Second, the political systems of different nations and cultures vary from that resembling social contract theory to those communitarian cultures where individuals are bound together by a common set of beliefs, customs, and mores which may take precedence over Western democratic human rights claims.

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\(^{51}\) Ibid., 69

\(^{52}\) Ibid., 70

\(^{53}\) Ibid., 70-71

\(^{54}\) Ibid., 71
Philosophers have attempted to establish those rights or to find some other basis for the peaceable society with limited success. Light can be shed on the implications for bioethics of the twentieth century consensus on human rights by attending to a) a consideration of what constitutes a *consensus gentium* and whether any rights claims can meet those criteria, and b) what has been said about human rights and human values by natural law theorists, from the Enlightenment onwards, in the context of the aspirations of contemporary secular humanists.

2. THE MEANING OF CONSENSUS GENTIUM

In chapter one the empirical evidence which might be used to indicate the existence of universally shared human values was assembled. It is necessary to define carefully what is meant by a *consensus gentium*, and what criteria need to be met before it could safely be said that a particular right or human value meets the test of universality.

The criteria which will be advanced in this work will be constructed in such a way as to make safe any claims for universality of any particular right or human value. It will not be enough to establish that a majority of people at any one time hold to a certain value, nor even a very large majority. Any value that is time-bound or culture-bound will not be deemed to be universally held. What then are the criteria to be used?

Firstly, there has to be a current universal consensus that transcends cultural, religious, and national boundaries.

Secondly, that consensus must be historically expressed and verified. It is not sufficient that the consensus represents only the opinion of the late twentieth century, but that it is also consistent with the perceptions of previous generations living in earlier centuries. This is not to say that those values for which universality is claimed, have always to have been expressed in the same way. The formulation of rights talk is of comparatively recent origin, although the values which they express may be very ancient. The implications of a particular human value or right may take centuries to work out. An example of this is slavery which for many centuries was tolerated.

Thirdly, a consensus does not require acceptance by every single person. It is sufficient that there is evidence of overwhelming agreement.

Fourthly, a *consensus gentium* exists if the above criteria are met, and even if it is inconsistent with the social programmes, or cultural norms or ethos, of particular societies. People are quite capable of holding together two contrary ideas, both of which they may wish to defend. A *consensus gentium* represents a consensus of nations in general about what is of human value, and worthy of respect and protection by human laws. There may be a contradiction between the way societies actually organise themselves and behave, and the values they openly profess and hold. This is true of individuals as well. It may be that societies see no contradiction in holding to a general right to live while persecuting to the point of death dissidents who represent a threat to the continued life of that society in the way that it is currently structured. It may also be that some societies see the contradiction and live
with it. Other societies may have governments which pay lip service to human values and human rights but ruthlessly impose systems and programmes upon non-consenting peoples. Perhaps it can be said that the consensus gentium as to human values expressed as rights claims stands as a constant moral reference point as societies grow and develop, there being no utopia or prospect of utopia, only the possibility of self-correction from time to time.

The above criteria have the advantage of sufficient specificity by providing a method of cross checking. An example of this is the right to life. In the previous chapter it was noted that "about 97% of the world belonged to nations that were members of the United Nations and were thereby committed, at least morally, to the Universal Declaration of Human Rights."55 The general inviolability of innocent human life is also defended within the major medical and religious traditions which have shaped the cultures of most of the nations on earth, including Third World countries which may have received Christianity or Islam later than others, but whose own cultural traditions, prior to the definitive influence of those major world religions, contained taboos or laws against the killing of the innocent and provision for the care of the sick. It should be recalled here that Christianity was a major influence in the development of The Universal Declaration on Human Rights.56

Further, even if a particular philosophy, (say) National Socialism, should repudiate the general right of every human being to live, and even if particular individuals are prepared to carry out the implications of that philosophy, the consensus gentium still remains. So strongly has this been felt that individuals who behave in this manner, even if they carry out an articulated philosophical position which rejects the fundamental moral principle, and even if they do so in obedience to the dictates of the Government, are held to be morally culpable of crimes against humanity and may be punished accordingly.

In the working out of the implications of the values proclaimed as fundamental and inviolable, values which are projected as rights and meant to apply equally to all human beings, there are, as I have already said, always inconsistencies, blindnesses, and even calculated attempts to categorise some humans as "non-persons", so that they can be dealt with accordingly, to fulfil certain social and political programmes. This enables lip service to be given to the consensus gentium, while providing a means of by-passing that consensus gentium when particular governments and even whole cultures want to for specific reasons. The consensus gentium remains, however, that there are certain human values which are fundamental, against which the social and political policies and activities of governments, religions, corporations, scientists, and medical practitioners can be measured, and according to which individuals and governments can be held to be accountable.

55 Supra, page 24
56 The major author of the Universal Declaration on Human Rights, René Cassin, "locates its ideological roots in the Ten Commandments." "From the Ten Commandments to the Rights of Man", in Of Law and Man: Essays in Honor of Haim H. Cohn, ed. Shlomo Shoham, (New York and Tel Aviv: Sabra Books, 1971), 13-25 and cited in John Warwick Montgomery, Human Rights And Human Dignity, (Dallas: Probe, 1986), 30. This is not to say that there were not other influences. Reference has already been made to the contribution of Thomas Hobbes’ “natural right” about which more will be said later.
The United Nations as an institution has made many claims in the area of human rights, not all of which have achieved a consensus in the twentieth century that they are the natural working out of other values which do represent a *consensus gentium*. This work, however, is concerned only with those rights about which a *consensus gentium* is evident and which serve as a moral basis for medical ethics and bioethics in general. These rights have as their basis the right to life, and include the right to a minimum standard of health care, the right not to be intentionally killed or otherwise harmed by the physician, the right not to be trespassed on by the physician, the right to have one’s secrets kept confidential, the right to know the truth about one’s condition and the treatments being offered, the right not to be discriminated against on the basis of sex, religion, class, or race, and the right not to be taken advantage of sexually by the physician. These rights or human values pass the test of a *consensus gentium* as outlined above, the evidence for which has been assembled in the previous chapter. In bioethics they are frequently stated as a set of bioethical principles:

1. The principle of the inviolability and inalienability of human life, sometimes referred to as the sanctity of human life principle.

2. The principle of non-maleficence [*primum non nocere*].

3. The principle of beneficence.

4. The principle of distributive justice.

5. The principle of autonomy [sometimes referred to as the principle of informed consent].

6. The principle of double effect.

7. The principle of totality.

8. The principle of confidentiality.

57 Bioethics refers to "the rightness or wrongness of human conduct in the life sciences." Andrew Varga, *The Main Issues In Bioethics*, (New York: Paulist Press, 1980), ix. It is concerned with the impact of science and technology on the human body and the moral limits to the applications of those technologies. It is broader than medical ethics which might be thought to refer only to the "doctor-patient" relationship. Now that other scientific professionals are engaged in experiments on human individuals and in the treatment of human individuals, the broader term bioethics is helpful. Those "non-medical" professionals may include veterinary scientists, pharmaceutical companies, and governments.


59 The principle of double effect is controversial in bioethics, although it frequently appears in text-books as a bioethical principle. Nancy (Ann) Davis has noted that "both philosophers and legal theorists have criticized the principle of double effect, and raised questions about the tenability of the distinction between intention and mere foresight." Nancy (Ann) Davis, "Contemporary Deontology", in *A Companion to Ethics*, ed. Peter Singer, (Oxford: Basil Blackwell, Ltd., 1991), 215
These principles are generally "received principles", not surprisingly since they rest upon values for which there is a clear consensus gentium. The ways in which these values, rights or principles may be justified, understood and applied are more controversial. Indeed, the history of the practice of medicine is characterised by serious breaches of these same principles which reflect the ethical commitments of the International Code of Medical Ethics of the World Medical Association, the Nuremberg Code and the Principles of Medical Ethics of the United Nations, and the whole host of other declarations and statements of principles canvassed in the last chapter.

The tendency of doctors to issue orders to their patients, to "manage" their patients, to over prescribe, and to apply treatments without reasonable explanation is widespread.\(^ {60}\) So too is the tendency in specialists' practices to allow science and technology to dominate the relationship between doctor and patient as a trip to the X-ray clinic soon reveals. Current medical practice is replete with examples of "medical aggression".\(^ {61}\) Recent cases of medical aggression which have received widespread publicity include the case of the treatment of cervical cancer at National Women's Hospital in New Zealand, and the "deep sleep therapy" practised at Chelmsford Private Hospital in Sydney, New South Wales. The widespread nature of the abuse of patients in the United States of America by their doctors, most of which is covered up, has been laid bare by Charles B. Inlander, President of the People's Medical Society, Lowell S. Levin, Professor at Yale University School of Medicine, and Ed Weiner, Senior Editor of the People's Medical Society.\(^ {62}\) Reference should also be made to the role of members of the medical profession in Germany in the first half of the twentieth century, and in the former Soviet Union.\(^ {63}\)

This is in no way to suggest that physicians in general do not demonstrate reasonable care for their patients. It is necessary, though, to be realistic about human nature in which physicians, too, share. The gap between universally shared values and the reality of medical practice will vary from country to country and place to place. The consensus about

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\(^ {60}\) Robert S. Mendelsohn, *Confessions Of A Medical Heretic*, (Chicago: Contemporary Books Inc., 1979). In this book Dr Mendelsohn describes himself as a "medical heretic". As Associate Professor of Preventive Medicine and Community Health in the School of Medicine of the University of Illinois, US, he believes that "the greatest danger to your own health is usually your own doctor". He strongly argues against over-prescribing and for patients to be more in control of their treatment programs. In a subsequent book, *Male Practice: How Doctors Manipulate Women*, (Chicago: Contemporary Books Inc., 1981) Mendelsohn describes the overbearing and domineering attitude to women by their doctors which leads to mistreatment. In *The Silent World of Doctor and Patient*, (New York: The Free Press, 1984) Jay Katz analyses doctor-patient relationships and attempts to restructure that relationship on a more equal basis and with a greater degree of communication where the doctor is not afraid to admit what he or she does not know. Reference is also made to Charles B. Inlander, Lowell S. Levin, and Ed Weiner, *Medicine On Trial*, (New York: Prentice Hall Press, 1988) in which is told "the appalling story of ineptitude, malfeasance, neglect, and arrogance". This is a well documented account of the less flattering aspects of medical treatment.

\(^ {61}\) This term was coined by Hiram Caton. It refers to the hubris of many medical scientists and practitioners vis-à-vis their patients, and is reflected in the aggressive treatment of patients, and in the habit of "closing ranks" in the face of complaint from a patient or a relative of a patient.

\(^ {62}\) Cf. footnote 57 above.

these values, rights and principles, is important as a reference point of accountability, providing a sound basis for the ever present need for the adjustment of practice to principle.

Even those utilitarian philosophers who believe that it is possible to set aside, for example, the right to life in specific circumstances, such as abortion, infanticide and euthanasia, for reasons of social and moral utility, are not content to rest their case on the basis of their utilitarian calculations, but feel a need to back up that calculation with the assertion that the fetus is not a "human person" and therefore has no right to live. Thus no moral wrong is being done against the consensus gentium that it is wrong to kill an innocent human "person" since a fetus is not a "person". It will be necessary to return to the question of the possible disjunction between humanity and personhood as a basis for the non-application of bioethical principles to specific classes of human life.

The approach to bioethics in this work rests upon the evidence for a consensus gentium on human rights, particularly the rights to life and a reasonable standard of health care. These rights are to be understood in terms of natural law theories. However, it is the fact of a consensus gentium on these rights, and the place that human rights have come to occupy in international law because they have been agreed to and are in harmony with the deepest understandings of what it means to be human, that provides the basis for bioethics in this thesis. Human beings have bound themselves to these fundamental rights, rights which are not only the product of the twentieth century but are in harmony with human values recognised in all cultures over many centuries.

Since "the philosophical foundation of the Rights of Man is Natural Law", natural law theories will be dealt with in order to clarify the meaning and scope of human rights. As Maritaine has observed:

The history of the rights of man is linked up with the history of Natural Law, and ... the discredit into which for some time positivism brought the idea of Natural Law inevitably entailed a similar discrediting of the idea of the Rights of Man.

Natural law theories are important because they are so inseparably linked to the notion of fundamental human rights about which human beings are agreed, and because they

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64 Since utilitarians generally accept Bentham's dictum that natural rights "is nonsense on stilts", strictly speaking they are not setting aside the right to life because they do not believe in rights other than those which are legally conferred. They do, contradictorily, speak of the right of the woman to choose an abortion, the right of a woman to control her own fertility, and the right of women to have control over their own bodies. Peter Singer approves of abortion because a "woman's serious interests would normally override the rudimentary interests of the fetus." The only qualification he makes to this general position, including late abortions, is that the method of abortion may cause pain to the fetus in the case of a late abortion. "If there are grounds for thinking that a method of abortion causes the fetus to suffer, that method should be avoided." Peter Singer, Practical Ethics, (Cambridge: Cambridge University Press, 1989), 118-119

65 This might suggest a lack of confidence in the persuasive power of utilitarianism even if utilitarians themselves are persuaded that no one has a natural right to live, and that some human individuals are dispensable if thereby greater nett good results.

66 Jacques Maritaine, op. cit., 73

67 Ibid.
shed so much light on the meaning and scope of those rights. In this sense, this thesis does not preclude from the search for the philosophical validity of the consensus gentium, nor from the objective merit of the philosophical arguments which both reinforce and explain it. At the same time one recognizes the importance of Maritaine's distinction between the theoretical, which is problematic and controversial, and the practical agreement on fundamental human values which is universal.

Accordingly, no attempt will be made to resolve the myriad of philosophical problems that philosophers themselves have been unable to agree about. Indeed, it will be argued that partisan attachments to particular moral philosophies is no basis for public policy because modern moral philosophy is in disarray, that modern moral philosophers "offer a rhetoric which serves to conceal behind the masks of morality what are in fact the preferences of arbitrary will and desire."68

Since human beings in general are agreed that there are certain values which bind the behaviour of all human beings in a natural law sense, and since "the protection of human rights is now within the domain of international law",69 then philosophers and opinion makers like all other human individuals are bound to those fundamental values expressed as human rights. The Nuremberg Doctors' Trial was conducted on the basis that individuals were to be held accountable for human rights abuses, crimes against humanity, even if what they did was carried out as a lawful command of the state. Individuals are bound to these human values expressed as human rights on the basis that any sane person knows that it is wrong to harm or kill innocent human beings.

Philosophers and opinion-makers have no special place of privilege which legitimises their advocacy of what human beings in general agree to be inhuman acts. Accordingly, moral philosophies which attack the consensus gentium will be critically examined as philosophies in order to understand why it is that these philosophies are inimical to the consensus gentium and to appreciate just why they have so profoundly influenced contemporary bioethical evaluations.

68 Alasdair MacIntyre, After Virtue, (London: Duckworth, 1987), 71
3. THE NATURAL RIGHT TO LIFE

3.1 Thomas Hobbes

There is a universal consensus that "everyone has the right to life."\textsuperscript{70} The rights language used to defend the value of human life expressed in each individual human being, is based upon a notion of the "inherent dignity ... of all members of the human family", and a "faith ... in the dignity and worth of the human person."\textsuperscript{71} This is the language of natural rights and natural law. By virtue of being a member of the human family the individual has the natural right to live. The recognition and protection of this right to life is seen as fundamental to the peaceable society.\textsuperscript{72}

Thomas Hobbes restored the moral and ethical dimension to political theory in the face of Machiavelli's insistence that political theory deal with the way human beings actually behave, as distinct from the way we might like them to behave. He developed the modern theory of natural law by reference to human nature. The one thing that human beings have in common is the desire to survive, and to live commodiously. Political life is only possible on the basis of a consensus. The consensus which binds people together is the fear of death, the will to live and to live as comfortably as possible. On all other matters, says Hobbes, scepticism and science require us to accept that there is no consensus, only opinions. We might call an object "red" because this is the way that it strikes us. To say that it is "red" is not to say anything objective about the object but only how it affects our sensory system. So it is with the categories of "good" and "bad". We call things "good" if they give us pleasure, and "bad" if they give us pain.\textsuperscript{73}


\textsuperscript{71} Ibid., Preamble

\textsuperscript{72} "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Ibid.

\textsuperscript{73} Larry May has identified "the two most notable developments in ethical theory" after Aquinas as "the turn from Aristotelian realism to Ockhamist nominalism on the one hand, and the turn towards a prudence-based understanding of right and justice epitomised by Machiavelli on the other hand." In addition to these two developments should be added "the new science of Copernicus, Newton and Galileo which set out a mechanical model of understanding human beings." The seventeenth century saw the development of a moral philosophy "which focused almost exclusively on the secular human person, rather than on community or church." Larry May, "Hobbes", in Ethics in the History of Western Philosophy, eds. Robert J. Cavalier, James Gouinlock and James P. Sterba, (New York: St. Martin's Press, 1989), 125
But whatsoever is the object of any man's appetite or desire, that is it which he for his part calleth good: and the object of his hate and aversion, evil; and of his contempt, vile and inconsiderable. For these words of good, evil, and contemptible, are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil, to be taken from the nature of the objects themselves; but from the person of the man, where there is no commonwealth; or, in a commonwealth, from the person that representeth it; or from an arbitrator or judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof.  

For Hobbes, then, every human being, as an individual, labels what is good or evil in terms of appetites and aversions. We have an appetite when we endeavour towards something which attracts us. We have an aversion when we are repelled from something, when our "endeavour is fromward something." So human beings love the things they desire and hate the things for which they have an aversion. People hold in contempt those things which they neither desire nor hate, "CONTEMPT being nothing else but an immobility, or contumacy of the heart ..."

Hobbes considers human beings in the state of nature, before the existence of the state. In this prepolitical existence every one seeks their own self-interest, every one has a right to everything, in order that each can maintain his or her own life. We can all agree, says

74 Thomas Hobbes, op. cit., 32-33

75 The mediaeval debate between realism and nominalism has a contemporary importance as John Haldane points out in his essay "Voluntarism and realism in medieval ethics", Journal of Medical Ethics, 15:1, 1989, 39-44. Joseph Fletcher claims that the whole mind-set of modern man is nominalist. For Fletcher, "nothing is worth anything in and of itself. It gains or acquires its value only because it happens to help persons (thus being good) or to hurt persons (thus being bad)." Joseph Fletcher, Situation Ethics, (London: SCM, 1966), 59. As Socrates remarked to Euthyphro: "The point which I should first wish to understand is whether the pious or holy is beloved by the gods because it is holy, or holy because it is beloved of the gods." Plato, Euthyphro, 10a. The debate began in theological circles with Ockham and the Scotists averring that, as the will is superior to the intellect, and since the formal constituent of God is infinity, then the moral law rests simply on the arbitrary decree of God, that actions are good because God commands them to be. For the Thomists, it was being that was fundamental. The moral law is rooted in the nature of man, who is made in God's image. "The moral law is thus in its essence neither antecedent nor consequent to God; it is simply the expression of his own self-consistency. To say, therefore, that God is bound by it is merely to say, from one particular angle, that God is God." E.L. Mascall, He Who Is, (London: Darton, Longman & Todd, new edition, 1966), 122.

76 Thomas Hobbes, op.cit., 31

77 Ibid., 32

78 There has been a lot of discussion over whether there was ever a 'state of nature'. Hobbes denies that it has ever been so over all the world at any one time. A.E. Taylor refers to Hobbes' "imaginative 'state of nature'. A.E. Taylor, "The Ethical Doctrine of Hobbes", Hobbes's Leviathan: Interpretation And Criticism, ed. Bernard H. Bauman, (Belmont: Wadsworth Publishing Company, Inc., 1969), 42. Richard Norman attacks the whole idea of a state of nature on the grounds that if we really had been solitary then no language or other distinctively human activities could have emerged, and so no one would be in a position to negotiate a social contract. Richard Norman, op. cit., 139. It need not detain us to consider this matter further at this point, except perhaps to observe that one need not interpret the "state of nature" too literally, seeing it more as a kind of 'thought experiment'. The essential question is about the nature of human beings. Where there is no sovereign authority, anarchy results. Hobbes living at a time of civil war was painfully aware of this. In time of peace we may believe "that every man is not naturally and constantly a would-be murderer or thief, but Locke forgot that the bad men do not go about labelled for our benefit; and (as Hobbes pointed out) every man who locks his house when he goes for a walk lays mankind under the same general accusation." J.D. Mabbott, The State and the Citizen, (London: Hutchinson & Co., 1967), 23
Hobbes, that everyone has the right to preserve their own life. We all, then, take steps towards self-protection. I might think my behaviour is quite benign, but you may perceive it as a threat and accordingly attack me to protect your own life and interests. This is the war of all on all of which, Hobbes remarked, "present-day Americans give us an example."\(^79\)

Now according to Hobbes certain of our passions incline us to peace. These passions "are fear of death; desire of such things as are necessary for commodious living; and a hope by their industry to obtain them."\(^80\) Human persons are not by nature social, but they recognise that if they are to survive, live a life of reasonable comfort, and have the opportunity to work for that comfort, they need to come to terms with each other and therefore with the sovereign who shall have the power to keep the peace, by force if necessary. The peaceable society, needs a sovereign who has absolute power\(^81\), and the will of individuals and the sovereign to keep their side of the bargain.

Allied with the movement of the passions towards peace are the requirements of reason. But the passions are antecedent to reason, according to Hobbes. The desire for power, riches, knowledge and honour are the great driving forces of human nature, "all of which may be reduced to the first, that is, desire of power."\(^82\) Anyone who does not desire these things, who has no great passion for them, has not much in the way of creativity or judgment.

For the thoughts are to the desires, as scouts, and spies, to range abroad, and find the way to the things desired: all steadiness of the mind's motion, and all quickness of the same, proceeding from thence: for as to have no desire, is to be dead: so to have weak passions, is dullness; and to have passions indifferently for every thing GIDDINESS, and distraction; and to have stronger and more vehement passions for any thing, than is ordinarily seen in others, is that which men call MADNESS.\(^83\)

In this passage Hobbes presents reason as the slave of the passions. Man is driven by his passions, and reason provides the way for persons to get what they want. The passions push the individual from behind in the sense that it is not so much the objects desired that drive an individual as the passions themselves. The human individual is driven by the passions for life, power, and glory on the basis of appetite, desire, love, aversion, joy and grief. Those whose passions are weak, who have no desire, are lifeless individuals. Those in whom the passions are inordinately felt are mad.

\(^79\) Thomas Hobbes, De Cive, I.13, translation by Richard Tuck and cited in Richard Tuck op. cit., 59
\(^80\) Thomas Hobbes, op. cit., 84
\(^81\) The absolute power to which Hobbes has referred has been misunderstood. Hobbes foresees a minimal role for government but a maximum power to play that role. The minimum role is one of security. The sovereign has no particular interest in education or religion except a security interest. If citizens do not experience reasonable prospects of commodious living this threatens the peace. So Hobbes later remarks: "THE OFFICE of the sovereign ... consisteth in ... the procuration of the safety of the people ... But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself."  Ibid., 219. J.D. Mabbott has observed that "in one sense Hobbes' sovereign is not nearly absolute enough."  J.D. Mabbott, op.cit., 19
\(^82\) Thomas Hobbes, Leviathan, 46
\(^83\) Ibid.
Even when human persons act in a virtuous way, says Hobbes, they do so for advantage to their passions. It is the desire for honour, for praise that "disposeth to laudable actions". But reason compels human beings to preserve themselves. In the state of nature the individual is justified in doing anything that conduces to self-preservation. One cannot survive in such a state of nature, in the war of all on all, by sitting idly around doing nothing. It is a logical error to imagine one has a better chance of self-preservation in a time of war than in a time of peace. So it is that individuals contract with a sovereign, (be it king or parliament), to give up their rights to everything to the sovereign, in return for peace and the hope of commodious living. In a time of war there is neither security of life nor prosperity. It is in one's self-interest to seek peace. The social contract is based, then, upon a consensus about the natural right to life which all have, and which can best be preserved and protected by the Leviathan or sovereign power, who may use all necessary force to preserve peace and to promote the security necessary for individuals to work safely to make their own prosperity.

The law of nature, reason, tells us what we ought to do if we are thinking rationally, that is to preserve our lives by seeking peace. The right of nature makes it clear that the individual is "naturally and psychologically free to go any way" he chooses "towards the necessary goal of our survival." Hobbes is clear that the only natural right we have is the right of self-preservation and that we should keep our word to honour the social contract because it would be against the law of nature, that is irrational (malum in se), not to do so. It is possible to persuade people to almost anything, except to give up their life. Human beings live in fear of sudden and violent death and rationally seek peace in order to live securely. Citizens make a contract with the sovereign who will have absolute and unlimited power to protect their natural right to life.

Hobbes' idea of the transfer of right to the sovereign by individuals contracting with each other is clearly set out in the Leviathan. In speaking of the need for defence of life not only from the attack of one's neighbour but also from the invasion of foreigners Hobbes establishes the need for a common power.

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84 Ibid., 64. John Aubrey recalls that Hobbes himself "was very charitable to those that were true objects of his Bounty. One time, I remember, going in the Strand, a poore and infirme old man craved his Almes. He, beholding him with eies of pitty and compassion, putt his hand in his pocket and gave him 6d. Sayd a Divine that stood by, Would you have donne this, if it had not been Christ's command? Yea, sayd he. Why? quoth the other. Because, sayd he, I was in paine to consider the miserable condition of the old man; and now my almes, giving him some reliefe, doth also ease me." John Aubrey, "Thomas Hobbes", Aubrey's Brief Lives, ed. Oliver Lawson Dick, (London: Penguin Classics, 1987), 236

85 Hobbes did not think that human beings in the state of nature have a right to do everything they want to do. Benedict de Spinoza thought that the right to do anything to preserve oneself was a special case of a general right. Hobbes did not agree. In De Cive "he observed that it would be impossible ever to justify drunkenness or cruelty ('that is, revenge which does not look to some future good'), since they could never be seen as conducing to our preservation. (III.27)" Richard Tuck, op. cit., 60

86 Richard Tuck, op. cit., 63 and cf Thomas Hobbes, "RIGHT, consisteth in liberty to do, or to forbear: whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty ...", Leviathan, 84
The only way to erect such a common power, as may be able to defend them ... is to confer all their power and strength on one man, or upon an assembly of men, that may reduce all their wills, by plurality of voices, unto one will ... This is more than consent or concord; it is a real unity of all in one and the same person, made by covenant of every man with every man, I authorize and give up my right of governing myself, to this man, or assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.  

In reality what the individual gives up, is the right to exercise complete power, not the power itself. If the sovereign is unable or unwilling to provide effective safety, then "the people could legitimately use their own power which they had temporarily agreed not to use in certain matters." Thus the limit of the sovereign's power is not to do with justice since justice is what the sovereign says it is.

Hobbes' moral philosophy equates reason with prudence and prudence with self-interest. This stands in sharp contradiction to Aquinas who saw the work of prudence as directing our actions to an end. Reason determines the ends for which we should act, and "prudence determines in what manner and by what means the end is to be achieved in accordance with reason." Aquinas does not say that reason determines ends since "necesse est quod fines moralium virtutem praeexistant in ratione" [the ends of moral virtue must of necessity pre-exist in the reason]. However reason determines which of those ends will become the focus of attention. The role of prudence is to regulate the means to an end. Hobbes' moral philosophy represents, then, a break from the earlier natural law thinking in equating reason and prudence and in seeking to provide a rational basis for ethical norms independent of theological considerations. Hobbes, at the same time, represents continuity with the earlier thinking in his support for the traditional norms and virtues "which, following Aquinas and his supporters ... were identified as constituting the substance of the laws of nature."

3.2 Jeremy Bentham And The Utilitarians

The eighteenth century ushered in the first systematic attempts to construct a new political and social order on the basis of natural human rights. Under the influence of the

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87 Thomas Hobbes, Leviathan, 112
88 Larry May, loc. cit., 143
89 Edward J. Gratsch, Aquinas’ Summa: An Introduction and Interpretation, (New York: Alba House, 1985), 168 cf Summa Theologiae, II-IIae, 47 a.6
90 Summa Theologiae, ibid.
91 Larry May, loc. cit., 149
writings of John Locke, himself strongly influenced by Hobbes, the Americans began to experiment with various declarations and bills of human rights based on the social contract theory of the seventeenth century. In 1789, at about the same time as the Americans produced the First Ten Amendments to the United States Constitution known as the American Bill of Rights, the French Revolution produced the Declaration des droits des hommes et citoyens. This French Declaration, "a landmark document in the history of human rights" sums up the Enlightenment notion of human rights in universal terms. It

proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and the citizen. 1. Men are born and remain free and equal in rights ... preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression. 3. The source of all sovereignty resides essentially in the nation ... Law is the expression of the general will ... No man may be accused, arrested, or detained except in the cases determined by law, and according to the forms prescribed thereby.

Just when the modern doctrine of natural law, as a foundation for human rights, was finding favour in terms of the American and French Revolutions, the whole notion of human rights was being called into question by the utilitarian philosopher, Jeremy Bentham. As I have already remarked, Bentham followed Hobbes in so far as he regarded the idea of "good" and "evil" as subjective, that people call what gives them pleasure "good", and that which gives them pain "bad". Since everybody wants to have pleasure and avoid pain it is possible to arrive at objective standards of right conduct since "statements about conduciveness to pleasure can be verified."

Bentham departed from Hobbes on the idea of the war of all on all. In fact after Hobbes there is a general movement away from the very bleak view of human nature which Hobbes insisted was the only realistic one. Human beings seek society because that is the

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92 Locke presented himself to the public in a much more sympathetic way than did Hobbes. He appears to repudiate Hobbes on the "state of nature" declaring it to have been "a State of Peace, Good Will, Mutual Assistance, and Preservation." John Locke, "The Second Treatise Of Government", ch. III, para. 19 in John Locke Two Treatises of Government, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1988), 280. However, Locke also holds to a version of the "state of nature" in complete contradiction to the "golden age". "The pravity of mankind being such that they had rather injuriously prey upon the fruits of other men's labours than take pains to provide for themselves, the necessity of preserving men in what honest industry has acquired ... obliges men to enter into society with one another." A Letter Concerning Toleration With an Introduction by Patrick Romanell, (New York: Macmillan Publishing Company, 1988), 47. And see also "The Second Treatise Of Government", ch. IX, paras. 123 and 127, op. cit., 350 and 352. This second and more adequate version appears to be identical with that of Hobbes. The reason for these two apparently conflicting views is that Locke holds to a literal understanding of the Old Testament and a Christian orthodoxy which suggests an ideal state before the fall. Contemporary Christian theology, influenced by developments in Biblical criticism, is not necessarily committed to the idea that the ideal state envisaged by God was ever historically realised. In this case the Fall occurred at the beginning of human self-consciousness.


94 Ibid.

95 John Plamenatz, Man And Society Volume Two, (Harlow: Longman Group Limited, 1963), 4. Plamenatz goes on to observe that it does not follow from Bentham's definitions of what is right and good that we should do what is right even if we get no pleasure from it.
only way to get security, true, but there are no rights without the law. In relation to the French
Declaration he said:

How stand the truth of things? That there are no such things as natural rights - no
such things as natural rights opposed to, in contradistinction to, legal: that the
expression is merely figurative. ... We know what it is for men to live without
government - and living without government, to live without rights ... no government,
and thence no laws - no laws, and thence no such things as rights - no security - no
property: - liberty, as against regular control, the control of laws and government
perfect; but as against all irregular control, the mandates of stronger individuals,
none.\textsuperscript{96}

The basis of Bentham's position is that there can be no rights unless there is a
guaranteed power, guaranteed either by an institution or by a convention. Both the institution
and the convention must themselves be strong enough to guarantee those rights. In the 'state
of nature', if indeed such a state ever existed, there are no rights, can be no rights. Human
rights, if it is to mean anything, is connected with the law which guarantees such rights.
Natural rights, though, "is simple nonsense ... nonsense upon stilts."\textsuperscript{97}

However, utilitarians have their own equivalent to natural rights, and that is the right
"entailed both by the greatest happiness principle and by the rule which ... might be
substituted for it; and that is the right of every man that his happiness or his wants should not
count for less than any one else's. This is the right to equality, which is as fundamental to the
Utilitarian philosophy as natural rights are to Locke's." This right, together with the
assumption "that every man prefers his own interest to other people's, and that he is usually
the best judge of his own interest,"\textsuperscript{98} represents the basis of the utilitarian argument for
democracy.

John Stuart Mill, foregoing "any advantage which could be derived to my argument
from the idea of abstract right as a thing independent of utility", summarises the position
thus:

I regard utility as the ultimate appeal on all ethical questions; but it must be utility in
the largest sense, grounded on the permanent interests of man as a progressive
being. Those interests, I contend, authorise the subjection of individual spontaneity to
external control, only in respect to those actions of each, which concern the interest
of other people.\textsuperscript{99} [my emphasis]

Three things emerge at this stage which are important for assessing the contribution
made to ethics by utilitarianism. The first is that the ethically right thing to do or to forbear is

\textsuperscript{96} Jeremy Bentham, \textit{Anarchical Fallacies}, in \textit{Works}, ed. John Bowring (London 1843, and New York 1962), 500,
University Press, 1987), 139

\textsuperscript{97} Ibid.

\textsuperscript{98} John Plamenatz, \textit{op. cit.}, 22

decided with reference only to the calculation of nett pleasure over pain which the action promises to bring. Secondly, utility is grounded on the permanent interests of man as a progressive being. Thirdly, actions of individuals which "concern the interest of other people" are subject to external control.

As to the calculation of pleasure over pain, the happiness principle, or the principle of utility, it is clear that the individual can address this matter far more easily than can the government, or the state. Individuals have their own idea of what gives them pleasure or pain. Bentham and Mill both accept, following Hobbes, the idea that the concepts of pleasure and pain are subjective. At the same time Bentham speaks of pleasure and pain as if all are agreed as to what constitutes pleasure and what constitutes pain. But one person's pleasure may be another person's pain, and vice versa. Some individuals take pleasure in exercising power over others while others appear to have little interest in it. The pains of the senses are to some a pleasure. That being the case, it is difficult to see how the state can decide legislative policy on the basis of maximisation of pleasure over pain since no objective calculation can be made.

Yet for Mill, not only do we agree on what the pleasures are, but it is a "fact, that some kinds of pleasures are more desirable and more valuable than others." Mill's argument is elitist. In choosing between two pleasures as to which has the greater "quality", he appeals firstly to a consensus gentium, then qualifies the consensus gentium by polling only those "who are competently acquainted with both", and concludes that it is "an unquestionable fact that those who are equally acquainted with, and equally capable of appreciating and enjoying, both, do give a most marked preference to the manner of existence which employs their higher faculties." Mill assumes that people will generally prefer "quality" to "quantity". By people he means only those that meet his qualifications. Utilitarianism, as a calculation of pleasure over pain, is then made to serve the ends of the elite who are qualified to determine the moral fact of which "kinds of pleasure are more desirable and more valuable than others."

Peter Singer puts the case like this:

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100 Jeremy Bentham, "An Introduction To The Principles Of Morals And Legislation", in Mary Warnock, Utilitarianism, 68-77
101 Cf Jeremy Bentham, loc. cit., 35-36. Bentham says: "A measure of government ... may be said to be conformable to or dictated by the principle of utility, when in like manner the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it." (p. 35)
102 John Stuart Mill, "Utilitarianism", in Mary Warnock, Utilitarianism, 258
103 Ibid., 259
104 Ibid., 258
Consequentialists start not with moral rules but with goals. They assess actions by the extent to which they further these goals. The best-known, though not the only, consequentialist theory is utilitarianism. The classical utilitarian regards an action as right if it produces as much or more of an increase in the happiness of all affected by it than any other alternative action, and wrong if it does not.\textsuperscript{105}

Secondly, since utility is "grounded on the permanent interests of man as a progressive being" consideration needs to be given as to what Mill means by this. For Mill, human beings strive to be happy by seeking pleasure and avoiding pain. Moral and political judgments are made to assist progress towards the ideal end-state of happiness. This "law of progress generalized from history as an empirical law could be converted into a scientific theorem by deducing it \textit{a priori} from the principles of human nature, as the laws of ethology must ultimately be deduced from laws of mind."\textsuperscript{106} Mill was confident that history and sociology could provide "\textit{axiomata media}, principles, and rules of and for progress."\textsuperscript{107} Progress, as both the intermediate and operational principle in politics, depends on the liberty of the individual. Only those individuals, for whom liberty and freedom of discussion would promote self-development, should have it. This excludes children and the mentally handicapped. Indeed, on the matter of universal adult suffrage, with which he generally agreed, Mill nevertheless wrote:

\begin{quote}
I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read, write, and, I will add, perform the common operations of arithmetic.\textsuperscript{108}
\end{quote}

This exclusion is not to be permanent. Education is to be provided to allow all to participate in the good life, to enjoy that liberty without which progress is not possible. People are to be educated from their dependent status to an independent one. The law of the successive transformation of public opinion is such that the level of the progression in the intellectual convictions of humankind determines progress.\textsuperscript{109}

Thirdly, on the basis of the facts thus far established, namely the consensus about what pleasures are to be preferred and the progressive unfolding of science, history and sociology informing the discovery of the necessary intermediate principles necessary for human progress, individual spontaneous actions may be subject to the control of government. Mill thought that such interventions would be few. Later utilitarians have not been quite so non-interventionist as the explosion in social legislation in many countries bears witness. Citizens are to be discouraged and inhibited by law from engaging in behaviour, including the spoken word, from infringing socially progressive programmes connected with the

\textsuperscript{105} Peter Singer, \textit{Practical Ethics}, (Cambridge: Cambridge University Press, 1979), 3
\textsuperscript{107} Ibid. Gibbins cites J.S. Mill, \textit{The System of Logic}, (London, 1965), X, 10, 6, 603 & 612
\textsuperscript{108} J.S. Mill, "Representative Government", in H.B. Acton, \textit{op. cit.}, 303
\textsuperscript{109} John Gibbins, \textit{loc. cit.}, 99
relations between the sexes, the races, and age groups. Utilitarian ethical theory, in its various forms, has appeal to the spectrum of political parties from left to right. Thus the scepticism with which Bentham began, following Hobbes, is controlled by a later dogmatism about what is progressive, about what is good for society as a whole.

Two observations need to be made at this point. The utilitarian rejection of pain coincides with the humanist rejection of pain. Bentham, described by Peter Singer as "the founding father of modern utilitarianism"\(^ {110} \), connected pain with personhood and human rights, despite his view that such rights "is nonsense on stilts".

The day may come when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but, Can they suffer?\(^ {111} \)

Thus Peter Singer, following Jeremy Bentham, is able to develop a whole theory about human personhood on "things like the capacity to suffer". He concludes that "we ought to expand the circle of concern beyond the boundary of species to include all beings who are capable of suffering."\(^ {112} \) This, of course, has implications for the way some human individuals may be seen and treated.

While it may sound shocking to some, certainly the chimpanzee is far more aware of what is going on, capable of suffering, capable of forming lasting attachments to others, and in that sense is a more morally significant being than an anencephalic who, although undoubtedly biologically a member of our species, lacks the brain and therefore the capacities for any of these things - for forming attachments with other beings, even for recognising his or her parents - and presumably lacks all capacity for suffering as well.\(^ {113} \)

\(^ {110} \) Peter Singer, *op. cit.*, 49


\(^ {113} \) *Ibid.* Singer's understanding of anencephaly appears to be faulty. The Medical Task Force On Anencephaly (United States) defined anencephaly as "a congenital absence of a major portion of the brain, skull, and scalp, with its genesis in the first month of gestation ... Anencephaly does not mean the complete absence of the head or brain." *The Infant With Anencephaly*, *The New England Journal Of Medicine*, 322:10, 1990, 669. In an unpublished paper, "Notes on Anencephaly in Relation to a proposed Policy of Early Induction of Labour", dated March 6, 1990, Peter McCullagh includes in his list of the abilities of anencephalics "responses to acoustic stimuli, the capacity to express dietary preferences or dislikes by continuing or ceasing feeding and withdrawal from painful stimuli such as injections."
It will be more fully shown later that Singer, following Bentham, moves beyond expanding the application of human rights and human concern to animals, into the disenfranchisement of certain human individuals from moral consideration in terms of human rights.

Secondly, the dogmatic principle inherent in fully developed utilitarian theory, leaves the human rights of individuals hostage to the fortunes of the social and political programmes that utilitarian and humanist thinkers believe to be progressive. When humanists declare that "technology is a vital key to human progress and development", and that they would "resist any moves to censor basic scientific research on moral, political, or social grounds" recommending only that "harmful and destructive changes should be avoided", they do so on the basis of a "belief". They "believe that humankind has the potential intelligence, good will, and cooperative skill to implement this commitment" to a world community based on peace and mutual trust and support.114 Gone is the "war of all on all", and the idea that "goods" are essentially subjective save the right to life, ideas which may be traced back to Hobbes. Bentham rejected the "war of all on all", and utilitarianism has effectively turned its back on its original commitment to the subjectivism which is consequent upon Hobbes' scepticism about the goods.

3.3 Humanism

In his account of the triumph of humanism and science "over the obscurantist and reactionary forces of religion and superstition"115, E.J. Tapp describes Darwin's theory as "the most devastating and far reaching assault upon traditional religion". Most educated Christians have now accepted the truth of the theory of evolution, he says. This has given great impetus to "the cause of humanism", such that Julian Huxley could write in 1957, "the real wonder of life is the fact that the automatic and non-purposeful process of biological evolution should eventually have generated true purpose (and thus denying metaphysical purpose) in the person of the human species."116 This confidence that human beings, through the exercise of reason expressed as scientific thinking, can give true meaning and purpose to what was previously a "non-purposeful process of biological evolution" is developed further by Tapp in his examination of the future of humanism. "Humanists see the future of mankind in the full extension and expression of its rational faculties ... may not humanism be regarded as the gradual triumph of the intellect over irrationalism and demeaning humility with the ascendancy of justifiable confidence and self-respect?"117

114 "Humanist Manifesto II", in Humanist Manifestos I and II, ((New York: Prometheus Books, 1973), 22-23
117 E.J. Tapp., op. cit., 96
The "justifiable confidence" of humanists is again expressed as a "belief" by Peter G. Woolcock. "The Humanist believes (sic) that social progress comes by three means - active participation by concerned persons in the political process, by personal example in one's own lifestyle and by education."118 The "acceptance of responsibility for human life in the world"119 by humanists is quoted with approval by Woolcock.

Humanism proceeds from an assumption that man is on his own and this life is all and an assumption of responsibility for one's own life and for the life of mankind.120

In his review "of man's progress from superstition and magic to science", Alex Carey confronts what he believes to be the traditional view of human nature with the theories of Sigmund Freud. Belief in the uniqueness of the human individual as a possessor of a god-like "power of reason"121 has been annihilated by Freud. Science hasn't failed. Human beings are still beset by two "characteristics", a propensity for religious explanations and the "vanity" that we can know things by intuition. Revelation and intuition remain the basis upon which human beings maintain convictions about the things of which they feel they can be certain. Notwithstanding Freud's annihilation, Carey believes that the problems of human nature can be overcome by education in the scientific attitude.

If and when we are prepared to abandon the "other" world we have inherited from the Middle Ages sufficiently to make it a first concern of our educational system to teach every child what it means to adopt a scientific attitude to the solution of some of our most troublesome social problems; and to equip him with some minimal inclination and skills to approach life in this way himself - then we may indeed hope for very great advances in human wisdom and compassion.122 [my emphasis]

When it comes to specific moral conclusions there appears to be diversity among humanists in many areas such that Max Hocutt is able to "suspect that the humanist

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119 "Manifesto of the International Humanist Ethical Union", International Humanism, No. 4, 1975, cited in Peter Woolcock, op. cit., 5
121 Carey's account of "man's traditional view of himself" is curiously partial. For example, it is true that the Christian tradition does view man as god-like in the sense he indicates [cf Psalm 8]. That same tradition, however, also sees human beings as "fallen", as captives to original sin, as given to pride and self-interest. "That through the sin of the first man, free choice was so warped and weakened that thereafter no one is able to love God as he ought, or believe in God, or do anything for God that is good, except the grace of God's mercy prevent him." "The Council Of Orange, 529. Mansi, viii. 712 sqq" cited in Documents Of The Christian Church, ed. Henry Bettenson, (Oxford: Oxford University Press, 1977), 62. It interesting to note that the Council of Orange did not follow Augustine on all that he taught. For example it specifically repudiated the doctrine of double predestination in a passage which follows upon that just quoted: "But not only do we not believe that some have been predestinated to evil by the divine power, but also, if there be any who will believe so evil a thing, we say to them, with all detestation, anathema ..."
122 Alex Carey, "The Scientific Attitude", in A Humanist View, ed. Ian Edwards, (Sydney: Angus & Robertson Ltd, 1969), 30. The problems Carey has in mind include "war, racial prejudice, crime; and alienation and discontent that promise to make psychological and emotional illness a graver problem for the future than physical disease." Ibid., 28
consensus' will reduce in the end to agreement that God does not exist." Nevertheless, it would appear that certain underlying attitudes and commitments are very common among humanists, including a trust in reason and in science, and a belief that the world can be made a better place by progressive reforms in human attitudes informed by science and reason through education. Progressive reforms may be implemented, as Woolcock has suggested, through education, the law, and the personal example of humanists.

Many humanists, with their conviction that, with the advent of human beings, human beings can now give direction and purpose to a previously non-purposive evolution, seem to hold that even human nature itself can be remoulded. Thus, to be in control of human reproduction in order to eliminate the defective is a priority for some humanists. By this means human suffering may be reduced, especially for those on whom would fall the burden of care. Not all humanists are given to the full-blown eugenics policies of Huxley, but humanists favour a pro-choice position on abortion which includes abortion for eugenic reasons. And most humanists appear to favour experimentation on human embryos for the purpose of either eliminating defectives, or in the hope of finding a way to "mend" or replace a defective gene or genes.

That the step from prenatal diagnosis and genetic counselling to an acceptance of wider eugenic measures is a small step, is well illustrated in J. Harris' discussion of the ethical aspects of prenatal diagnosis. He cites, with approval, the following moral dictum based on utilitarian and humanist presuppositions:

That we have an obligation to prevent suffering and disability, or, more abstractly, that we should try to produce a world with less rather than more suffering in it, that we should try to produce a happier world.

In addressing the ethical considerations involved in gene therapy, Leon Rosenberg believes that it is essential that those in the scientific community "who believe that the genetic manipulation of human cells may one day cure disorders and, thereby, reduce human suffering" be involved in the wider societal ethical debate. Education of the citizenry is essential.


124 "Humanist Manifesto II", in Humanist Manifestos I and II, 18

125 J. Harris, "Ethical Aspects of Prenatal Diagnosis", in Antenatal Diagnosis of Fetal Abnormalities, eds. J.O. Drife and D. Donnais, (London: Springer-Verlag, 1991), 285. The goals of geneticists around the world in the context of local laws and customs may be found in Ethics and Human Genetics, eds. D.C. Wertz and J.C. Fletcher, (Berlin: Springer-Verlag, 1989)

126 The presupposition is, of course, that scientific experts are possessed of the wisdom that the citizenry does not have and consequently may set the social goals and agenda necessary for progress. A similar point is made by Rosaleen Love in her review of Embryo Experimentation, eds. Peter Singer, Helga Kuhse, Stephen Buckle, Karen Dawson & Pascal Kasimba, (Cambridge: Cambridge University Press, 1990). "The analytical approach taken by Singer and Kuhse plays down the importance of disturbing personal reactions, and that is the problem. These philosophers seem to know the answers, and their purpose is evangelical, to convince the rest of us." Australian Society, January-February 1991, 55
Only by so doing will we quiet the public concern that gene splicing might remake human beings and reply to the worry that this technology challenges deeply held feelings about what being human is.\textsuperscript{127}

The humanist psychologist, B. F. Skinner, believes that the fundamental nature of man has been changed and will continue to be changed.

The man that man has made is the product of the culture man has devised. He has emerged from two quite different processes of evolution: the biological evolution responsible for the human species and the cultural revolution carried out by that species. Both of these processes of evolution may now accelerate because they are both subject to intentional design.\textsuperscript{128}

In the Skinnerian analysis the environment is the key. The determination of behaviour shifts from the autonomous individual to the environment which is "responsible both for the evolution of the species and for the repertoire acquired by each member." The major problem facing humanity is human beings. Attempts to overcome problems such as over-population, the nuclear threat, disease, and pollution by technological means have failed. Skinner proposes a scientific programme to alter the nature of humanity. Thus, humankind is not abolished either as a species or as individuals. "It is the autonomous inner man who is abolished, and that is a step forward." Human beings will in one sense be slaves to the environment, but it is an environment made by human beings. "The evolution of a culture is a gigantic exercise in self-control ... A scientific view of man offers exciting possibilities. We have not yet seen what man can make of man."\textsuperscript{129}

The ambivalence to human rights expressed in Bentham is also apparent in other humanists who would "safeguard, extend, and implement the principles of human freedom evolved from the Magna Carta to the Bill of Rights, the Rights of Man, and the Universal Declaration of Human Rights,"\textsuperscript{130} while promoting euthanasia in all its forms,\textsuperscript{131} abortion, and moral education programmes to refashion sexual attitudes and morality by ridding society of "intolerant attitudes, often cultivated by orthodox religions and puritanical cultures, [which] unduly repress sexual conduct."\textsuperscript{132} But the idea of individual human rights is

\textsuperscript{127} Leon E. Rosenberg, "Can We Cure Genetic Disorders?", in Genetics And The Law III, eds. Aubrey Milunsky and George J. Annas, (New York: Plenum Press, 1985), 12
\textsuperscript{129} Ibid., 205-6
\textsuperscript{130} "Humanist Manifesto II", in Humanist Manifestos I and II, 19
\textsuperscript{131} New South Wales Humanist Society, Euthanasia, Prepared by a Sub-committee of the N.S.W. Humanist Society and adopted, February 1973. In this document support is given for suicide and assisted suicide especially in the form of voluntary euthanasia [V.E.] for competent persons. "Converting some forms of N.V.E. [non-voluntary euthanasia] to V.E. is very desirable," according to the document, and "could cover: Babies grossly mentally or physically handicapped, Children grossly mentally or physically handicapped, The severe mentally afflicted, Senile degenerates. It does seem undesirable to keep these unfortunates alive. Their continued existence burdens relatives, friends and the community, and often, though not always, themselves." [pages 4-5]
\textsuperscript{132} "Humanist Manifesto II", in Humanist Manifestos I and II, 18
completely absent in Skinner who opts for the dominance of the scientific and cultural elite who will shape the environment for the "benefit" of us all. Thus may humankind progress.

3.4 Ronald Dworkin's Theory Of Rights

Against the developments in utilitarian and humanist thinking which is ambivalent about human rights, and which sets the attainment of progress through the pursuit of social programmes, Ronald Dworkin defends human rights in what he calls "the strong anti-utilitarian sense" of human rights such that individuals have certain rights over and against governments. For Dworkin utilitarianism is philosophically defective when it counts external preferences, and practically impossible when it does not. Preference utilitarianism will be discussed in detail in the next chapter. However, it is worth noting here Dworkin's distinction between personal preferences and external preferences. Personal preferences are preferences for one's own enjoyment of goods and opportunities. External preferences concern my attitude to others and a desire to restrict their enjoyment of goods and opportunities. Dworkin sees external preferences corrupting the alleged egalitarianism of utilitarianism, as well as the practical impossibility of sorting out whether an expressed preference is personal or external.

The chief features of Dworkin's theory are:

a) Individual rights are rights of individuals which are not to be made subject to the external preferences which some utilitarian theories count, and which even those utilitarian theories which propose not to count but are unable to exclude.

b) It begins with reference to the right to life and the right to equality from which the rights to various liberties derive.

c) Any idea of a general right to liberty is rejected as incoherent.

However, Dworkin allows what he calls "overall or unrefined utilitarianism" as expressing some idea of the common good. Dworkin's theory allows this unrefined utilitarianism to occur while at the same time protecting "the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences that democracy reveals." Where do rights come from, especially the right to equal concern and respect? Dworkin's response to this is that our "intuitions about justice presuppose not only that people have rights but that one among these is fundamental even axiomatic." Montgomery,
however, observes that "one man's presupposition may be - and through history often has been - another man's poison." In another context Dworkin deals with the objection that no moral principle can be true unless it can, at least in principle, be shown to be true, by asserting that there "is no good reason to accept that thesis as part of a general theory of truth, and good reason to reject its specific application to propositions about legal rights." In other words, it does not follow from the fact that the existence of human rights cannot be proved that they are not true. "Which is true," says MacIntyre, "but could equally be used to defend claims about unicorns and witches."

Ultimately Dworkin rescues himself from a consideration of where rights come from, or how you demonstrate the existence of human rights, when he says:

I shall not be concerned, in this essay, to defend the thesis that citizens have moral rights against their governments; I want instead to explore the implications of that thesis for those, including the present United States Government, who profess to accept it.

Dworkin is arguing that governments and individuals who hold to a view of human rights, in the strong sense, need a theory to help them act consistently. Utilitarianism is rejected because it proposes consequences as the determining calculation for moral rightness, and wishes to impose social and political programmes on the basis of the common good, understood as producing the maximum of happiness for the maximum number of people, even if those programmes infringe the so-called human rights of some individuals. Dworkin is clear that there is no general right to liberty in the strong sense that we have the right to do whatever we want. He argues that liberties derive from the right to be treated with equal concern and respect.

In a referendum on homosexuality, for example, it is not possible to say whether people vote on the basis of personal or external preferences. Is it the case if one votes against the decriminalisation of homosexuality that one is saying that one would not want to so behave oneself, or that one does not want anyone else to behave in that way, or a mixture of the two. Hence, Dworkin concludes, homosexuals suffer because they have their liberty to be what they want to be limited through the external preferences of others. Homosexuals are not, as a result, being treated equally, that is with equal concern and respect. It may be that a majority of members of the community believes that the community will be better off if no one practises homosexuality. But if utilitarian calculations are to be used to determine public policy a means will have to be discovered whereby the utilitarian calculation is based only on personal preferences and not external ones. In practice, says Dworkin, this solution, "the only defensible form of utilitarianism", favoured by J.S. Mill, is unworkable. And Dworkin

137 John Warwick Montgomery, op. cit., 86.
138 Ronald Dworkin, op. cit., 81
139 Alasdair MacIntyre, After Virtue, (London: Duckworth, 1985), 70
140 Ronald Dworkin, op. cit., 184
reminds us that "external preferences ... are no less genuine, nor less a source of pleasure when satisfied and displeasure when ignored, than purely personal preferences." 141

This same problem exists in the matter of eugenics. To say I would not want to live if I was disabled is a matter of personal preference, and is rather different in its implications from saying that I do not want anybody else to live if he or she is disabled, a matter of external preference.

Ronald Dworkin, in the end, eschews the question of how to demonstrate the existence of moral rights, natural human rights. The present writer follows his example and seeks to locate human rights as an agreed basis for the way human beings should be treated in society. Dworkin explores the implications for those who accept human rights in the strong sense. I want to add to that the fact that there is a consensus gentium about human rights which individuals have over and against governments, although not every right ever claimed by the United Nations or any other body as a human right, enjoys the status of a consensus gentium. The mere assertion of a right is not sufficient. 142 It is the appeal to universality that is persuasive in terms of the contract that individuals make with each other and with the sovereign, 143 and that states make with each other in the world community in the sense in which it has so strongly emerged since the Second World War, and even more so with the end of the Cold War. 144

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141 Ibid., 276

142 This matter of the assertion of rights bothers Alasdair MacIntyre, op. cit., 69. MacIntyre is right not to accept human rights merely on the basis of assertion, even by the United Nations. The criteria laid down in this work offer a basis for accepting human rights not as objectively true, but as a matter of universal human agreement.

143 Tristram Engelhardt objects to the social contract theory of Thomas Hobbes on the grounds that "everyone has not in fact agreed ... Many may simply respond that the commonwealth may go its way peacefully, as they will go their way peacefully." Hobbes would no doubt say that those who live in a particular society, provided they are free to emigrate, are ipso facto agreeing to the social contract. If a parting of company is desired then, of course, such individuals may go elsewhere. Vid. H. Tristram Engelhardt, Jr., The Foundation Of Bioethics, (New York: Oxford University Press, 1986), 139

144 Mary Maxwell counts the unenforceability of human rights internationally as a failure of the human rights movement. She concedes that whenever international law becomes part of national law by the signing of treaties and by other means it is enforceable. However, she says, no case has come before the International Court of Justice. Mary Maxwell, Morality Among Nations, (Albany: State University of New York Press, 1990), 46. This, however, paints too narrow a picture of how human rights might be enforced. The international community has, in fact, used economic sanctions against South Africa, Iraq, The People’s Republic of China, and other nations precisely over the question of human rights. Organisations like Amnesty International and Keston College have used world public opinion as a weapon for change in human rights practices in sovereign states. Maxwell further observes that, despite the populism of the human rights movement, treaties were made by sovereign states not individuals. Ibid.. This is true and is all the more important because the rights are rights of individuals over governments.
4. THE COMMON GOOD

The way in which human rights have been actually received and implemented in individual societies varies greatly. Every culture has been able to find a way to be equivocal about human rights at least at some points. A major difference in approach can be seen between those cultures influenced by Anglo-American individualism, and those countries which are formed on a communitarian basis of an over-riding allegiance to a particular religious or political philosophy, or other cultural norms. The appeal to human rights, when the exercise of those rights in a particular way might threaten the religious or cultural consensus, is not convincing to societies which rely, for their continuing existence, on such a consensus.

As far as religion is concerned there have been major developments in the Catholic Church. In 1832 Pope Gregory XVI described liberty of conscience as the "false and absurd, or rather mad principle (deliramentum), that we must secure and guarantee to each one liberty of conscience; this is one of the most contagious of errors ... To this is attached liberty of the press, the most dangerous liberty, an execrable liberty, which can never inspire sufficient horror."\textsuperscript{145} In 1864 Pius IX repeated the condemnation.\textsuperscript{146} However, by 1948, the Papal Nuncio in Paris, Angelo Giussepe Roncali [later Pope John XXIII] was active in the formulation of the Universal Declaration of Human Rights, and hoped that "the Universal Declaration would save humanity from another war."\textsuperscript{147}

In his Encyclical \textit{Pacem in Terris}, Pope John XXIII, in contrast to Gregory XVI and Pius IX, stated firmly:

\begin{quote}
Man has a natural right ... to freedom of speech and publication ... to worship God in accordance with the right dictates of his own conscience and to profess his religion in both private and public.\textsuperscript{148}
\end{quote}

In the Second Vatican Council, the Catholic Church dealt with the question of religious liberty in these terms:

\begin{quote}
145 Pope Gregory XVI, Encyclical Letter \textit{Mirari Vos}, 14, 15. It should be noted that the tension within Catholicism over conscience can best be seen in reference to Augustine who taught against following one's conscience, except when it was correctly informed by the Catholic Church, and Thomas Aquinas following Albert the Great who argued in favour of following one's conscience even if it was in conflict with the Church. "Anyone upon whom the ecclesiastical authority, in ignorance of true facts, imposes a demand that offends against his clear conscience, should perish in excommunication rather than violate his conscience." IV Sentences, dist. 38, a.4. Aquinas, however, defined what he meant by a conviction of conscience and in sharp distinction from the contemporary tendency to treat conscience as being more or less equal with strongly held opinions or even taste. A discussion on Augustine's view of conscience being informed by Revelation may be found in Etienne Gilson, \textit{The Christian Philosophy Of Saint Augustine}, (London: Victor Gollancz Ltd., 1961), 127-132.

146 The Encyclical Letter \textit{Quanta Cura}, 3.

147 Sean McBride, "The Universal Declaration - 30 Years After", in \textit{Understanding Human Rights: An Interdisciplinary and Interfaith Study}, ed. Alan D. Falconer, (Dublin: Irish School of Ecumenics, 1980), 8ff. "The eminent French jurist and Nobel Peace Laureate, the late Renée Cassin, has paid eloquent tribute to the assistance which Monsignor Roncali then gave to the French delegation."

\end{quote}
All men are bound to seek the truth, especially in what concerns God and His Church and to embrace the truth they come to know, and to hold fast to it ... in matters religious no one is to be forced to act in a manner contrary to his own beliefs ... It is therefore completely in accord with the nature of faith that in matters religious every manner of coercion on the part of men should be excluded.\textsuperscript{149}

Finally, Pope John Paul II placed great stress on human rights in \textit{Redemptor Hominis}:

We cannot fail to recall at this point, with esteem and profound hope for the future, the magnificent effort made to give life to the United Nations Organization, an effort conducive to the definition and establishment of man's objective and inviolable rights ... There is no need for the Church to confirm how closely this problem is linked with her mission in the modern world. Indeed it is at the very basis of social and international peace, as has been declared by John XXIII ...\textsuperscript{150}

It is not necessary here to arbitrate between those who believe either that the Catholic Church has or has not changed its mind on this matter in some profound sense affecting its teaching authority.\textsuperscript{151} Both sides to that debate would agree that the teachings of Pope John XXIII and John Paul II, and the Second Vatican Council accurately reflect the essential teaching of the "Judeo-Christian religion", one of the pillars of Western civilisation.\textsuperscript{152} It should also be noted that the fundamental question of religious liberty has troubled Protestant as well as Catholic Christians as, for example, the experiment in Calvin's Geneva indicates.

Apart from the question of religious liberty, it is interesting to note changes not only in the context in which the Catholic Church affirms fundamental human rights, but also in the justifications of human rights. In \textit{Pacem in Terris} (1963), John XXIII appeals to both Revelation and the \textit{ius gentium} in his assertion of human rights. Referring to St Paul's dictum that human beings "show that what the law requires is written on their hearts, while their conscience also bears witness"\textsuperscript{153}, the Pope upholds the natural law idea that human beings have access by reason to minimum standards of behaviour.

\textsuperscript{149} \textit{Dignitatis Humanae} (Declaration on Religious Liberty of the Second Vatican Council), 1, 2 & 10

\textsuperscript{150} Encyclical \textit{Redemptor Hominis}, 59-60

\textsuperscript{151} Compare Brian Harrison, \textit{Religious Liberty And Contraception}, (Melbourne: John XXIII Fellowship Co-op. Ltd., 1988) with Leonard Swidler, "Human Rights: A Historical View", in Hans Küng and Jürgen Moltmann, \textit{op. cit.}, 21. Harrison argues that a proper understanding of what the nineteenth century Popes said does not place them in opposition to Pope John XXIII, the Second Vatican Council, and Pope John Paul II. They were addressing the problem of indifferentism. In the context of the Catholic understanding of doctrinal development, "Dignitatis Humanae contradicts no previously existing doctrine (it goes no further than rescinding a previous norm of ecclesiastical public law)." (page 144)


\textsuperscript{153} Romans 2:15
These laws clearly indicate how a man must behave towards his fellows in society, and how the mutual relationships between the members of a State and its officials are to be conducted. They show too what principles must govern the relations between States; and finally, what should be the relations between individuals or States on the one hand, and the world-wide community of nations on the other. Men's common interests make it imperative that at long last a world-wide community of nations be established.\textsuperscript{154}

This world-wide community, if it is to be well regulated and productive, "demands the acceptance of one fundamental principle: that each individual man is truly a person" with "rights and duties [which] are inviolable, and therefore altogether inalienable."\textsuperscript{155} In this context John XXIII goes on to speak of "man's rights", beginning with the right to live.\textsuperscript{156}

In \textit{Donum Vitae} (1987), the Sacred Congregation for the Doctrine of the Faith, dealt with the "right to life" and the "dignity of the human person" in more exclusively theological terms and in the context of its moral evaluation of contemporary reproductive technologies.

Human life is sacred because from its beginning it involves "the creative action of God" and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can, in any circumstance, claim for himself the right to destroy directly an innocent human being.\textsuperscript{157}

This more exclusively theological approach to human dignity and human rights is furthered in \textit{Centesimus Annus} (1991) in which Pope John Paul II identifies the "fundamental error of Socialism" as being "anthropological in nature." This mistake is responsible for the reduction of humankind "to a series of social relationships" such that "the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order." For John Paul II, the "first cause" of "this mistaken concept of the nature of the person" is atheism.\textsuperscript{158}

Human Rights has also presented difficulties for Islam, difficulties which are not insuperable. Roger Garaudy insists that Islam is not a new religion beginning with the preaching of the prophet Muhammad. Islam begins with Adam. "The basis of human rights in Islam is the same as that of all revealed religions: the transcendent dimension of human beings."\textsuperscript{159} Garaudy makes a distinction between what the religion of Islam really teaches and presupposes, and the way the traditions of Muslims, emanating from different historical

\textsuperscript{154} \textit{Pacem in Terris}, 7

\textsuperscript{155} \textit{Ibid.}, 9

\textsuperscript{156} \textit{Ibid.}, 11

\textsuperscript{157} \textit{Donum Vitae} (Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation, February 22, 1987), Introduction, 5

\textsuperscript{158} \textit{Centesimus Annus}, Encyclical Letter of John Paul II, May 1 1991, 13

\textsuperscript{159} Roger Garaudy, "Human Rights and Islam: Foundation, Tradition, Violation", in Hans Küng and Jürgen Moltmann, \textit{op. cit.}, 46
periods, have become conflated with the religion in the way the religion is actually lived out in various communities. He wants an end to triumphalism, legalism and literalism and a return to an understanding of Allah, formulated by the Persian mystic Ruzbeh of Shiraz and after him Ibn Arabi: "Before the existence and destiny of the world, Allah was the unity of love, of the loving and the loved." For Muslims, as for Christians, says Garaudy, "the ultimate basis of human rights [is] ... the necessity to struggle against everything which, for millions of human beings, through injustice, disfigures the face of God."\textsuperscript{160}

Nevertheless, the fact is that many societies are faced with the unresolved conflict between the human rights they profess to be committed to defend and the social, religious, cultural and political values which are held to be crucial to their identity as cultures.\textsuperscript{161} As has already been identified, those nations influenced by Anglo-American individualism also, from time to time, find conflicts between social goals and human rights, especially under the influence of consequentialist and humanist thinking.

The emergence of a renewed interest in natural law theory in recent years has been significant.\textsuperscript{162} More significantly for this work, though, is the collaboration of John Finnis, Germaine Grisez, and Joseph Boyle to which reference has already been made. Finnis attempts to establish the basic human goods in which everyone, through the exercise of free choice, may participate. His defence of human rights is not built around the notion of the common good seen in consequentialist terms. For Finnis the common good is a set of conditions "which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other ... in a community."\textsuperscript{163}

Finnis attacks both act and rule utilitarianism as being irrational and incoherent. The utilitarian calculations required in the claims that "(i) one should always choose the act that, so far as one can see, will yield the greatest net good on the whole and in the long run ('act-utilitarianism'), or that (ii) one should always choose according to a principle or rule the adoption of which will yield the greatest net good on the whole and in the long run ('rule

\begin{itemize}
  \item \textsuperscript{160} Roger Garaudy, \textit{loc. cit.}, 59
  \item \textsuperscript{161} The same problem exists for totalitarian states under, for example, Communist rule. The People’s Republic of China is just one example among many that can be suggested.
  \item \textsuperscript{162} Alasdair MacIntyre’s trilogy of books represents his progression away from contemporary moral philosophy and its reliance on the traditions emanating from the Enlightenment. In his \textit{After Virtue}, \textit{op. cit.}, 51-78 he discusses why the Enlightenment project of justifying morality had to fail, and returns to a reconsideration of Aristotle. In his second book, \textit{Whose Justice? Which Rationality?}, (London: Duckworth, 1988) MacIntyre attends more closely to the Aristotelian and Thomistic traditions, and argues that conceptions of justice and practical reason emerge in and are justified by particular social communities. In his third book, \textit{Three Rival Versions of Moral Enquiry}, (London: Duckworth, 1991) MacIntyre develops the Thomistic philosophical method as a way through the current fragmentation of the philosophical and theological landscape.
  \item \textsuperscript{163} John Finnis, \textit{Natural Law and Natural Rights}, \textit{op. cit.}, 155
\end{itemize}
utilitarianism")"164 are senseless. It is like trying to "sum together the size of this page, the number six, and the mass of this book."165

When R.M. Hare states that "we must have acted rightly, all things considered" when "the whole of the consequences of our actions (what in sum we do)," taking into account both desirable and undesirable consequences, "were what we ought to do,"166 what does he mean? In the case of a ban on embryo experimentation in Australia the consequences will include a loss of jobs for scientists who may have to seek employment overseas, and a failure to realize the benefits that could come from research such as the alleviation of infertility or the "elimination of some crippling hereditary disease".167 Finnis would consider such a computation as "senseless".

Montgomery regards Finnis' attempt to "establish human rights in terms of practical reasonableness and the common good of the community" as "commendable". However he finds great difficulties with several of the "basic human values" or first principles of natural law which Finnis argues is the basis of natural law on the grounds of per se nota, self-evidence.168 Following Bankowski he finds that only "knowledge" is "effectively justified by his retortive argument". Even then, the vital question of what knowledge we should seek has

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164 Ibid., 112
166 R.M. Hare, "Public policy in a pluralist society", Peter Singer et al., op. cit., 187
167 Ibid., 190. It is interesting to note that in the same essay Hare dismisses the bad consequences of research on human embryos, the destruction of embryos, as not morally relevant since embryos are not persons with feelings and interests. If the embryo were a person would Hare's calculation of net benefit still favour embryo experimentation? In principle there is no reason to conclude that embryo experimentation, even if all agreed that the embryo is a person, would be excluded by the utilitarian calculation. However, Hare relies partly on his utilitarian calculation and partly on his argument about the embryo not being a person. If the embryo is not a person, then opposition to embryo research would lose its essential power and appeal and there would be no need to appeal to the utilitarian calculus to prove the point. (pages 190-193)
168 "Self-evident principles are per se nota - known just by knowing the meaning of the terms. This does not mean that they are mere linguistic clarifications, nor that they are intuitions - insights unrelated to data ... Rather it means that these truths are known (nota) without any middle term (per se), by understanding what is signified by their terms." Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, And Ultimate Ends", in The American Journal Of Jurisprudence, 106
been left open by Finnis. Hittinger, on the other hand, argues that the Grisez-Finnis project to recover a new theory of natural law has failed. He is particularly critical of the Grisez-Finnis argument "that there is no objective hierarchy among the basic goods because each is 'essential'." Nevertheless he is "not unsympathetic to the stated objectives of the system" which is to do "something similar to what Alasdair MacIntyre and Alan Donagan have proposed. All three wish to recapture the essence of nonutilitarian, traditional ethics without becoming entangled in the problems which are bound to arise once one tackles those areas in which philosophy of nature touches upon practical reason."

William E. May has reviewed the criticisms of Grisez, Finnis and Boyle and their responses to those criticisms. May believes that they have "responded fully" to the criticism that they failed "to ground the precepts of natural law in human nature itself." He holds that they have "shown that erroneous understandings of the human person can indeed block or inhibit one's ability to grasp rightly the goods of human existence and the principles based on them."

It is obvious that the goods perfective of human persons would be different from what they are if human persons had a different kind of nature than they do. Still this does not mean that one comes to know these goods and the principles based on them by deriving them from one's speculative understanding of human persons. It is, nonetheless, necessary to defend, by dialectical argument, the truth of these first principles, and this Finnis, Grisez, and Boyle have sought to do.

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169 John Warwick Montgomery, op. cit., 89. Christopher Berry has indicated the problems associated with an appeal to particular theories about human nature, vid. his Human Nature, (Houndmills, Basingstoke: Macmillan Education Ltd., 1986). One is mindful of the difficulties with Finnis' work, however, and that this theory remains controversial because some of those difficulties have not yet been overcome. Alisdair MacIntyre has developed an account of Aquinas which is at variance with Finnis' work who hold that it is possible to construct a genuinely Thomistic account of natural law "without needing to advert to the question of God's existence or nature or will." cf Whose Justice? Which Rationality?, op. cit., 188, and John Finnis, Natural Law and Natural Rights, op. cit., 48-49. Other criticisms of Finnis' Natural Law and Natural Rights may be found in Z. K. Bankowski, "Review of Natural Law and Natural Rights by John Finnis", Law Quarterly Review 98 (July 1982): 474; Ian Duncanson, "Finnis And The Politics Of Natural Law", Western Australian Law Review, December 1989, Vol 19, No 2: 243 ff; Valerie Kerruish, "Philosophical Retreat: A Criticism Of John Finnis' Theory Of Natural Law", Western Australian Law Review, 1983, 15, 224-244; Neil Brown, The Worth of Persons, (Sydney: Catholic Institute of Sydney, 1983), 54 ff. A thorough and detailed critique may be found in Russell Hittinger, op. cit.

170 Russell Hittinger, op. cit., 195

171 Ibid., 75

172 Ibid., 190-191


174 Ibid.

175 Ibid.
Finally, May believes that "other scholars have shown that the kind of criticism raised by Hittinger and others ... is misplaced and inaccurate, based at times on misunderstandings or misinterpretations of their thought."176

The problems involved in the moral theory of Finnis, Grisez and Boyle will be the subject of continuing discussion. What one can say, however, is that natural law theories at least attend to the common morality of human beings, not seeking to destroy it but to build upon it. The consensus gentium on human values and human rights stands as a foundation for moral reflection in a way that ethical theory, at the present time, cannot. We have an agreement on some fundamental human values, but not on moral theory.

If human rights are to hold the force ascribed to them in the Universal Declaration of Human Rights they must be rights of individuals over and against governments, and even, ultimately, cultural norms. If the rights that fall into this category are restricted to those rights which have a consensus gentium then the basis for appeal against governments and cultures in terms of bioethics is limited but decisive in terms of the natural right to live and those other rights which support that right. There will always be a gap between what human beings profess and what they do. Mutually incompatible ideas may be held at the same time. Governments and whole cultures will, for traditional cultural reasons, or other reasons of public policy based on some utilitarian calculations, seek to get around fundamental human rights claims. They do so in the face of a consensus gentium, and in the face of a growing determination by the world community that the laws of individual nations are in some sense subject to the natural law as understood by the world community, and to which formal acknowledgement has been given by nations, professions [including the medical profession], and international organisations.

CHAPTER III

THE ATTENUATION OF NATURAL RIGHTS

1. BIOETHICS - A BENEFIT OR A THREAT

Bioethics is the study of the rightness or wrongness of human conduct in the human life sciences. Its task is to look at developments in medical science and technology and to evaluate what human beings should do as distinct from what they can do. Bioethics is, therefore "everybody's business". Bioethics is the discipline which seeks to lay down the parameters of human conduct in the life sciences so that public policy can be developed in a morally responsible way, safeguarding human rights while encouraging developments which might improve the standard of health care available to people.

Tristram Engelhardt is, I believe, only partly right to characterise the "history of bioethics over the last two decades" as being the "story of the development of a secular ethic". While bioethics has its origins within religious traditions, its focus now is far broader or, more correctly, there are now a number of competing foci, with a preference for a secular ethics being expressed in many countries but certainly not all. At the same time in many places bioethics has emerged as its own discipline alongside moral theology or theological ethics, no longer dominated by it, but still owing much to it. What in fact we are seeing is the development of a plurality of approaches to bioethics not all of which are consistent with the ethos - the customs, values, and mores which form the basis of the moral and political consensus of a community - of the community which they seek to serve.

The consensus gentium of fundamental human rights is hardly ever addressed by contemporary bioethicists. In fact there has developed within bioethics strong currents of thought which are destructive of the values which form the consensus gentium as expressed in the bills and charters of human rights. In particular, many bioethicists have set about formulating an intellectual justification for the setting aside of the fundamental human value, the inviolability and inalienability of human life. Bioethics represents, therefore, both the possibility of benefit and harm to the community in terms of human rights about which there is a consensus gentium. Thus, many bioethicists have become apologists for a whole range of activities which are destructive of human life and which place the social goals of medical scientists, humanists, utilitarians, social Darwinists, and the like ahead of the traditional role of bioethics and medical ethics, which is to protect human life, and ahead of

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3 The Republic of Ireland and The Philippines are examples of two countries which have enshrined a constitutional ban on abortion and legal strictures on the promotion and sale of contraceptives. Both are strongly Catholic countries. Many other examples may be found in contemporary Islamic States whose public policies are influenced by the ethical guidelines set by the International Organisation of Islamic Medicine, cf Hassan Hathout, Topics in Islamic Medicine, (Kuwait: I.O.I.M., 1984)
that overwhelming consensus gentium, that individuals have rights over and against the wishes, desires and interests of the community as a whole, rights which were identified in chapter I. At the same time other bioethicists have sought to assist the community as a whole, both patients and those who serve them, by using the consensus gentium as the point of departure from which difficult decisions in a situation of conflict can be sensibly made.

The theories of bioethics which seek to justify a break from the consensus gentium about the inviolability and inalienability of human rights are characterised by a combination of some or all of a number of factors. Some of these factors are ways of thinking philosophically, while others are habits of mind. They are all to be found in the previous chapter and need to be precisely articulated here to make clear that these theories of bioethics being urged upon contemporary society come from philosophies and habits of mind peculiar to certain elites who claim to know better than the human race as a whole what should form the moral basis of the human race as a whole, and of particular societies derived from it. Utilitarian philosophies have supplied some of the factors to which I have referred. I do not argue that all those bioethicists who have borrowed from the utilitarians are necessarily full-blooded, consistent utilitarians. Some are. Others are not.

2. PERSONAL AUTONOMY AT ALL COSTS

One strand of utilitarian thinking is that the individual knows what it is that gives him or her pleasure and is acting morally well when choosing an action that maximises pleasure and minimises pain. The only restraint to the individual being free to do as he wishes is that his actions do not infringe the interests of others or harm others. It is worth citing Mill in detail on this point.

The object of this Essay is to assert one very simple principle ... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant ... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.4

The major case against this principle enunciated by Mill is that "it appears to rest on the possibility of classifying human actions into two categories - actions which concern only the agent and actions that concern others beside the agent."5 The impossibility of sustaining this distinction may be stated thus: "The greater part of English history since his day has been a practical commentary on the fallacy of this distinction. No action, however intimate, is free from social consequences. No human being can say that what he is, still less what he does,


affects no one but himself."\(^6\) However, J.C. Rees has argued that Mill is really talking about the effects on the *interests* of other people. He justifies this interpretation by reference to Mill's restatement of the "two maxims which together form the entire doctrine" of his Essay *On Liberty*, a restatement which occurs in chapter 5 of the Essay where he deals with the way in which his practical principle may be applied.

The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself ... Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.\(^7\)

Rees goes on to justify his reading of Mill as the enunciation of Mill's consistency, that when Mill said one thing, "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others", he really meant another, "that for such actions as are prejudicial to the interests of others, the individual is accountable".\(^8\) What is of concern here, though, are two different effects of Mill's thought arising from the two different ways in which he formulates his practical principle which attacks the *consensus gentium* about the inviolability and inalienability of human life.

In his first formulation Mill concludes that "over himself, over his own body and mind, the individual is sovereign". That has lead to a version of personal autonomy that declares that the individual has the right to commit suicide, the right even to be assisted to suicide, if in his or her own judgment a greater good is served. That is, the inalienability of human life may be set aside to meet the individual's assertion of sovereignty. If, *par impossibile*, Rees is correct that Mill really means that the only qualification to such sovereignty is that the action be not "prejudicial to the interests of others", and that interests means something which is directly concerned with the person materially and not just an emotional effect on another, then it might be thought that this principle of absolute personal sovereignty over one's own body and mind could be reasonably invoked to justify voluntary euthanasia.

Engelhardt invokes utilitarian considerations to allow the practice of euthanasia,\(^9\) as does Helga Kuhse. Kuhse admits the tension between respecting a patient's autonomy and securing the well-being of a patient. To resolve the tension she "believes" that we "should begin ... with the principle espoused ... by John Stuart Mill in his classic essay *On Liberty*. Mill urged that the only legitimate basis on which the state may coerce the individual is to protect others: the individual's own good ... is not sufficient warrant."\(^10\) Engelhardt, and

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\(^7\) J.S. Mill, *loc. cit.*, 162-163

\(^8\) J.C. Rees, *loc. cit.*, 87-98

\(^9\) H. Tristram Engelhardt, Jr., *The Foundations of Ethics*, 316-317

Kuhse both recognize the qualification of avoiding harm to others but, like Jonathan Glover they hold that

To refuse to provide help [to commit suicide] is a very serious denial of the person's autonomy over the matter of his own life and death, and is only to be justified by powerful arguments appealing either to the future quality of his life or to side-effects.¹¹

None of these writers believe that we have cause to worry about deleterious social consequences.¹² Their very sanguine view about the impact of doctors legally killing patients who request it is not shared by the German State with its very fresh memory of how the euthanasia arguments used in the Weimar Republic were taken to a disastrous conclusion by the Nazis in the Third Reich.¹³ Nor is it shared by keen observers of the euthanasia experiment in the Netherlands.¹⁴

The first results of the Dutch nationwide study on "euthanasia and other medical decisions concerning the end of life (MDEL)" give pause for thought. The report, published in the British medical journal The Lancet and based upon larger reports published in Dutch, hereinafter referred to as The Lancet Dutch Report, acknowledges that "in cases of euthanasia the physician often declares that the patient died a natural death"¹⁵. This amounts to a tacit admission that Dutch doctors are prepared to make false statements even when they kill patients according to the strict medical guidelines laid down by the judiciary. The study, which is a prospective survey, needs to be handled carefully given the fact that Dutch doctors

¹² Jonathan Glover says: "In my view thorough discussion should enable us to sort out the serious requests from the others, and the arguments from side-effects are not sufficiently strong to constitute an overriding objection." Ibid., 188. Tristram Engelhardt suggests that "the experience in the state of Texas suggests that a practice grounded in respect of free individuals does not lead to disasters." The Foundations of Ethics, 317. Cf Helga Kuhse, op. cit., 216-8
¹³ Peter Singer was invited to lecture on euthanasia in Germany in June 1989. That invitation was withdrawn nine days before the symposium was due to open at the University of Dortmund. Public protests, organised by German organisations for people with disabilities, against Singer and his views on euthanasia dominated the mass media at that time. Singer was later to complain that his "suggestion that some lives might be so full of suffering as not to be worth living, from the perspective of the individual whose life it is, was always cast in the Nazi terminology 'lebensunwertes Leben', which in Nazi jargon conveyed the very different idea that some life was not 'worthy of living' because it was racially or genetically impure and thus unworthy to be part of the Aryan 'Volk'." Peter Singer, "Bioethics And Academic Freedom", Journal of Bioethics, 4:1, 1990, 35.
¹⁴ In a recently completed research project carried out in the Netherlands, John Keown argues that the 'guidelines' for euthanasia in the Netherlands are not strict or precisely defined, and that there is no "satisfactory procedure, such as an effective independent check on the doctor's decision-making, to ensure that they are met". I.J. Keown, "The Law and Practice of Euthanasia in the Netherlands", in The Law Quarterly Review, 108, January 1992, 62. Keown goes on to remark that the "overwhelming majority of cases are falsely certified as death by natural causes and are never reported and investigated. ... a doctor who has acted in breach of the law is no more likely to admit having done so in his report than a tax evader is likely to reveal his dishonesty on his tax return." Ibid., 67-68. Pollard refers to this statement by the Advocate General of the Netherlands: "The medical profession is in all likelihood the only academically trained group of professionals, who by virtue of their profession, are guilty of making false statements in writing with great regularity when, after a euthanasia procedure, they make inaccurate death declarations which conceal the unnatural death cause."

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who perform acts of euthanasia are not always very truthful. Nevertheless, *The Lancet Dutch Report* indicates that about 0.8% of the 38.0% of all deaths involving MDEL were "life-terminating acts without explicit and persistent request". The need for the request to come from the patient, for it to be well-considered, durable and persistent, as well as a free and voluntary request forms part of the strict medical guidelines laid down by the Dutch courts and summarised by Mrs Borst-Eilers, Vice-President of the Dutch Health Council. This means that *The Lancet Dutch Report* acknowledges the deaths of about 1,000 Dutch citizens in a single year which were the result of the doctor hastening the death of the patient, without the patient’s explicit request and consent. *The Lancet Dutch Report* summarises it in this way:

Sometimes the death of a patient was hastened without his or her explicit and persistent request. These patients were close to death and were suffering grievously. In more than half such cases the decision had been discussed with the patient or the patient had previously stated that he would want such a way of proceeding under certain circumstances. Also, when the decision was not discussed with the patients, almost all of them were incompetent.

In the light of the fact that Dutch doctors do not always tell the truth in these matters, that some 1,000 patients are killed outside of the 'strict medical guidelines', the lack of concern by the authors of the *The Lancet Dutch Report* is noteworthy. Two other matters arising from this report also give cause for concern.

Firstly, the definition of euthanasia used in the report is a very narrow one: "active termination of life upon the patient's request". This definition does not include those who die of involuntary euthanasia, and so does not include the 1,000 patients to which I have already referred. The real number of physician assisted deaths, estimated by the Remmelink Committee Report, upon which the *The Lancet Dutch Report* is based, is 25,306 which is made up of:

2,300 euthanasia on request

400 assisted suicide

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16 Ibid., 670
18 Paul J. van der Maas et al, *op. cit.*, 673
20 Remmelink Report, 13
21 Ibid., 15
1,000 life-ending treatment without explicit request\textsuperscript{22}

4,756 patients died after request for non-treatment or the cessation of treatment with the intention to accelerate the end of life\textsuperscript{23}

8,750 cases in which life-prolonging treatment was withdrawn or withheld without the request of the patient either with the implicit intention (4,750) or with the explicit intention (4,000) to terminate life\textsuperscript{24}

8,100 cases of morphine overdose with the implicit intention (6,750) or with the explicit intention (1,350) to terminate life.\textsuperscript{25}

This total of 25,306 physician-assisted deaths amounted to 19.61 per cent of total deaths [129,000] in The Netherlands in 1990.

To this should be added the unspecified numbers of handicapped newborns, sick children, psychiatric patients, and patients with AIDS, whose lives were terminated by physicians, according to the \textit{Remmelink Report}.\textsuperscript{26} The narrow definition of euthanasia masks the real number of individuals whose lives are ended by interventions from the medical profession, and also masks the fact that more people are killed by physicians without their consent than with their consent.\textsuperscript{27}

Secondly, \textit{The Lancet Dutch Report} blandly observes:

Many physicians who had practised euthanasia mentioned that they would be most reluctant to do so again, thus refuting the 'slippery slope' argument.\textsuperscript{28}

This begs the question as to why such physicians "would be most reluctant" to practise euthanasia again. Is it that they feel they have done something very wrong? Was it, all things considered, an unpleasant experience, and, if so, in what way? It further begs the question as to how the 'slippery slope argument' is refuted. To be "most reluctant" to do so again doesn't mean that one will not do it again. And in the light of the actual information in the \textit{Dutch Euthanasia Survey Report}, on which \textit{The Lancet Dutch Report} is based, there

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  \item \textsuperscript{22} Ibid.,
  \item \textsuperscript{23} There were 5,800 such cases, \textit{cf} \textit{Ibid.}, 15. However only 82\% [ie 4,756] of these patients actually died. \textit{Cf Dutch Euthanasia Survey Report}, 63ff
  \item \textsuperscript{24} There were 25,000 such cases, \textit{cf} \textit{Ibid.}, 69. However, only 35\% (8,750 cases) were done with the intention to terminate life. \textit{Cf} \textit{Ibid.}, 72; \textit{cf also Remmelink Report}, 16
  \item \textsuperscript{25} There were 22,500 patients who received overdoses of morphine, \textit{cf} \textit{Ibid.}, 16. 36 per cent were done with the intention to terminate life, \textit{cf Dutch Euthanasia Survey Report}, 58
  \item \textsuperscript{26} The \textit{Remmelink Report}, 17-19
  \item \textsuperscript{27} Another review of the evidence from the two Dutch reports supporting the present writer's analysis may be found in Richard Fenigsen, "The Report of the Dutch Governmental Committee on Euthanasia", \textit{Issues in Law & Medicine}, 7-3, 1991, 337-344
  \item \textsuperscript{28} Paul J. van der Maas \textit{et al}, \textit{op. cit.}, 673
\end{itemize}
is ample evidence of the slipperiest of slopes, thereupon giving support to Hobbes' observation that to voluntarily agree to be killed threatens the right to life of other members of the community as well.

The Remmelink Report, in the context of dealing with the nature of medical decisions at the end of life, does not effectively deal with the questions of palliative care, patient depression, patient fears, and the subtle and not too subtle pressure brought to bear on patients to end it all now, rather than to continue being a burden on others. The Remmelink Report fails to give reasons why patients who were close to death "were suffering grievously" and why a wealthy country like The Netherlands does not offer patients effective means to relieve that suffering. "Good care is not cheap; it is much cheaper to kill people."

There is an abundance of evidence to indicate that suicide is strongly associated with clinical depression and other psychiatric illnesses. This may also be the case even when, as in the suicide of Arthur Koestler and his wife in 1983, a suicide may be "heralded by some as

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29 Helga Kuhse, referring to the "social experiment with active voluntary euthanasia" currently in progress in the Netherlands, has stated that "as yet there is no evidence that this has sent Dutch society down a slippery slope." Helga Kuhse, "Euthanasia", in A Companion to Ethics, ed. Peter Singer, (Oxford: Basil Blackwell Ltd., 1991), 302. The evidence cited together with I.J. Keown, "The Law and Practice of Euthanasia in the Netherlands", loc. cit. 70-77 suggests a less encouraging conclusion should be drawn from the facts.

30 The Remmelink Report, 21ff. Part II, par. 6 deals with "De aard van medische beslissingen rond het levenseinde."

31 This stands in sharp contradistinction to the Report of the Committee on the Environment, Public Health and Consumer Protection on "care for the terminally ill" [European Communities - European Parliament, Session Documents (English Edition), 30 April 1991 A3-0190/91] which contains a "Motion For a Resolution" on care for the terminally ill which refers in its preamble ("E") to the proposal that "the right to a dignified death" be enshrined in the European Charter on the Rights of Patients. However, the emphasis in the motion itself is on palliative care, rather than on assistance in dying.

32 Paul J. van der Maas et al., op. cit., 673

33 Ian Maddocks, The Advertiser, (Adelaide, South Australia, November 2, 1991), 1. Professor Maddocks is the Professor of Palliative Care, Daw Park Repatriation Hospital in South Australia. He was referring to allegations that some doctors in South Australia help patients to die by lethal injection.

an act of pioneers in promulgating an acceptable way of death."\textsuperscript{35} Many patients fear that they will be left to die in pain or alone, fears which can be met by reassurance and the application of sound palliative care measures. In many places, however, there is "insufficient public and professional awareness of pain relief, symptom control measures and palliative care available to people facing severe prolonged pain in terminal illness."\textsuperscript{36} The pressure that patients may be made to feel to ask for an early death is perhaps summarised in this comment from Meynen:

\begin{quote}
The duty to suicide occurs when through my continued living lack of autonomy, misery, isolation, uniformity, unfruitfulness, incurability, lameness, pain, insensitivity, disgrace, madness, sin threaten to become the norm for humanity and my suicide is the only means available to me to prevent this.\textsuperscript{37}
\end{quote}

This humanist credo exposes an underlying presupposition that, notwithstanding the Universal Declaration on Human Rights, not all human beings have an "inherent dignity", that there are some human life forms which exhibit such an offensive degeneracy that they ought to ask to be killed. If a duty to suicide is acceptable in the terms suggested by Meynen, then there exists a ready made argument for involuntary euthanasia of mental defectives and other forms of degenerate humanity. For those who have difficulty in accepting the desirability of "mercy killing" Helga Kuhse proposes the following strategy.

\begin{quote}
If we can get people to accept the removal of all treatment and care - especially the removal of food and fluids - they will see what a painful way this is to die, and then, in the patient's best interests, they will accept the lethal injection.\textsuperscript{38}
\end{quote}

The New South Wales Humanist Society has suggested that "converting some forms of N.V.E. [non-voluntary euthanasia] to V.E. [voluntary euthanasia] is very desirable." It suggested the possibility of a "senile degenerate" having signed prior consent to being killed "while still in full possession of his faculties". They further suggest that the law could be changed to allow "the mentally ill, the right of consent to E. [euthanasia]." As for babies "born with severe mental or physical disabilities, such as are sure to make it a misery to itself

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\textsuperscript{35} Robert Goldney has reviewed the psychiatric history of Koestler and his wife in light of the fact that "Koestler was a persuasive proponent of" the view that "suicide may be an appropriate and rational form of death." Goldney's analysis of the lives of Koestler and his wife "from his extensive autobiographical works indicates that suicidal thoughts, and indeed acts, played a not insignificant role in his life, and this coupled with a family history of suicide and a life-threatening illness indicates that caution should be exercised before considering his suicide, and that of his wife, rational." Robert D. Goldney, "Arthur Koestler: Was His Suicide Rational?", \textit{Crisis}, 1986; 7/1: 33-53. Goldney's paper was presented at the 13th World Congress of the IASP, in Vienna, July 1985.


\textsuperscript{37} Daniel Mynen, "Zur ethischen Beurteilung der Selbsttötung" (\textit{Deutsche Gesellschaft für humane Sterben}, 1982)

\textsuperscript{38} Fifth Biennial Conference of the World Federation of Right to Die Societies; Nice, France; Sept. 20-23, 1984. From "Ethics Panel: The Right to Choose Your Death - Ethical Aspects of Euthanasia." Remarks by panel member Helga Kuhse, Ph.D., lecturer in philosophy at Monash University and Research Fellow at the Centre for Human Bio-Ethics in Melbourne, Australia, Sept. 21, 1984 and cited in Rita L. Marker, "The Ethical Values That Civil Law Must Respect in the Field of Euthanasia", \textit{The Linacre Quarterly}, 56:3, August 1989, 26
\end{flushleft}
or to those who have to look after it, its life should be terminable by legal process before any person becomes emotionally attached to it." This could be done by "passing a law granting to parents a right to assign certain discretion to a doctor". The N.S.W. Humanist society refers specifically to "Babies grossly mentally or physically handicapped. Children grossly mentally or physically handicapped. The severe mentally afflicted. Senile degenerates. It does seem undesirable to keep these unfortunates alive. Their continued existence burdens relatives, friends and the community, and often, though not always, themselves." This discussion of the non-voluntary killing of some "degenerates" occurs in a document which begins firstly with a discussion of suicide, assisted suicide, and voluntary euthanasia, a discussion which inexorably leads to the canvassing of the killings even of the mentally ill.

As I have already observed, utilitarians, whether of the consistent variety or those who use particular principles derived from utilitarianism, have forgotten Hobbes' lesson of the war of all on all. The naivety of imagining that people will always be reasonable, especially professional elites like physicians and nursing staff, appears to be characteristic. Yet Helga Kuhse and Peter Singer have already shown that some doctors and nurses will break the law and kill their patients in certain circumstances. Kuhse and Singer appear willing to take doctors at their word, that they had killed patients "who had asked them to do so", without any independent corroborating evidence. Why doctors should be any more law-abiding if voluntary euthanasia were to be legalised is never clearly explained. Perhaps it is the "belief" in utilitarianism [Helga Kuhse, see above], the "belief" in humanism [see previous chapter], or faith in reason which obscures the truths about human nature so

39 N.S.W. Humanist Society, Euthanasia (Compassionate Death), prepared by a Sub-committee of the N.S.W. Humanist Society and adopted, February 1973

40 It seems that Martin Luther approved of the killing of the degenerate. He "advised the Prince of Anhalt to drown a twelve-year old malformed and imbecile boy who 'devoured as much as four farmers did and who did nothing else than eat and excrete'. (cf LW. American Edition Vol. 54, 'Table Talk', No. 5207, pp 396-7 and note 140.)" Cited in D. Ch. Overduin, Euthanasia, (Adelaide: Lutheran Publishing House, 1980), 4. Luther's view needs to be understood in the context of the prevailing mores of the time. The famous Dutch jurist Hugo de Groot (1583-1646) spoke of 'bodies unsuitable to contain a rational soul.' "Euthanasia (suffocation) of such malformed children was permitted in some countries until the first half of the 19th century." Ibid.

41 Helga Kuhse and Peter Singer, "Doctors' Practices and Attitudes Regarding Voluntary Euthanasia", The Medical Journal of Australia, 148:12, June 20, 1988, 623-627. Of the 369 doctors in the State of Victoria who answered the question, "Have you ever taken steps to bring about the death of a patient who asked you to do so?" 107 (29%) "replied that they had taken active steps to bring about the death of a patient who had asked them to do so." Ibid., 624. Vid. also Helga Kuhse and Peter Singer, "Euthanasia: A survey of nurses' attitudes and practices", Australian Nurses Journal, 21:8, March 1992, 21-22. In this article Kuhse and Singer conclude, on the basis of their survey that "of those nurses who had been asked by a patient to hasten death, 5% had taken active steps to do so without having been asked by a doctor. Almost all of the 25% who had been asked by a doctor to engage in active steps to end a patient's life had done so." Ibid., 22

42 Helga Kuhse and Peter Singer, "Doctors' Practices and Attitudes Regarding Voluntary Euthanasia", loc. cit., 624

43 Helga Kuhse endorses the principle summarised by Peter Singer, "If we sense an inconsistency in our beliefs and actions, we will try to do something to eliminate the sense of inconsistency... One way of doing this is to make "our beliefs and actions both true and consistent." Peter Singer, The Expanding Circle, (New York: Farrar, Straus & Giroux, 1981), 143 cited in Helga Kuhse, The Sanctity-of-Life Doctrine in Medicine, 28. Without the benefit of Revelation from God, about which not all are convinced, this would appear to be an impossible task, one which no moral philosophy has been able to achieve to the satisfaction of any except the disciples of a particular school.
ruthlessly exposed by Hobbes, Augustine, Aquinas and Niebuhr. In his Introduction to his *Bioethics and Secular Humanism* Tristram Engelhardt makes his own profession of faith: "Moreover, though faith in reason is largely lost, I have not lost the Faith." 44

Natural Law theory whether of the Hobbesian variety or that of John Finnis sees any attack on a single human life as an attack on all. For Hobbes it is in principle irrational to kill oneself. 45 The State cannot allow individuals to kill themselves because this would open the way to an attack on the social contract which requires the sovereign to protect the lives of all citizens. Legalised voluntary euthanasia places all lives at risk in the same way that the exercise of personal autonomy to sell oneself into slavery threatens the freedom of all. John Finnis argues that it is irrational and immoral to attack a basic human value, and that the role of the community is to facilitate opportunities for individuals to participate in the goods. The *consensus gentium* is that the right to life is not alienable. There is no *consensus* in modern moral philosophy, but rather deep divisions over the very fundamental questions about which human beings in general are agreed. Alasdair MacIntyre has put it this way:

> Premises about the moral law with a Thomistic and biblical background are matched against premises about individual rights that owe a good deal to Tom Paine, Mary Wollstonecraft, and John Locke; and both are in conflict with post-Benthamite notions of utility. I call such premises incommensurable with each other precisely because the metaphor of weighing claims that invoke rights against claims that invoke utility, or claims that invoke justice against claims that invoke freedom, in some sort of moral scale is empty of application. There are no scales, or at least this culture does not possess any ... Because no argument can be carried away to a victorious conclusion, argument characteristically gives way to the increasingly shrill battle of assertion with counterassertion. 46

Which is why I have chosen to use, as a foundation for my approach to biomedical issues in this thesis, those values, expressed as rights, about which there is a consensus, rather than to attempt to arbitrate between competing moral philosophies when no arbitration is likely to succeed. The problem of competing philosophies and moral philosophies is an ancient one. Thomas Hobbes described this phenomenon in ancient Greece where the "philosophers themselves had the name of their sects" derived from the places where they

44 H. Tristram Engelhardt, *Bioethics and Secular Humanism*, xvii

45 For Hobbes the law of nature "is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved." Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, ed. M. Oakeshott, (Oxford: Blackwell, 1960), 84. Hobbes, however, did refer to the way people feel about extreme pain. Writing in a pre-palliative care age he stated that "though death is the greatest of all evils (especially when accompanied by torture), the pains of life can be so great that, unless their quick end is foreseen, they may lead men to number death among the goods." Thomas Hobbes, *De Homine*, in *Man and Citizen*, [Introduction and chapters 10-15 only], ed. Bernard Gert, Latin to English translation Charles T. Wood, T.S.K. Scott-Craig, and Bernard Gert, (Garden City, New York: Anchor-Doubleday, 1972), 48-49

46 Alasdair MacIntyre, "Why is the Search for the Foundation of Ethics so Frustrating?", *Hastings Center Report*, 9:4, August 1979, 16-17
taught and disputed, and among Jews and Christians. Hobbes, citing the authority of Cicero, asserted that "there can be nothing so absurd, but may be found in the books of philosophers." In his own day Hobbes regarded the contribution of the schools negatively. "The natural philosophy of those schools was rather a dream than science, and set forth in senseless and insignificant language." In a devastating attack on moral philosophy which he described as "but a description of their own passions", Hobbes observed that

their logic, which should be the method of reasoning, is nothing else but captions of words, and inventions how to puzzle such as would go about to pose them. To conclude, there is nothing so absurd, that the old philosophers, as Cicero saith, (who was one of them,) have not some of them maintained.

The Enlightenment has not greatly assisted the problem of competing schools in moral philosophy. The Hobbsian war of all on all continues among moral philosophers, their philosophies being "but a description of their own passions". MacIntyre makes a similar observation about the "major protagonists of the distinctively modern moral causes of the modern world", that they "offer a rhetoric which serves to conceal behind the masks of morality what are in fact the preferences of arbitrary will and desire." Acknowledging that this is not an original claim, he notes that "each of the contending protagonists of modernity, while for obvious reasons unwilling to concede that the claim is true in their own case, is prepared to make it about those against whom they contend." MacIntyre is, in my view, right when he argues that there "is indeed a striking consensus against modern analytical philosophy concealed within it: every modern philosopher is against all modern moral philosophers except himself and his immediate allies. There is scarcely a need for an external attack."

The second implication of Mill's position stems from the use of the term "concern the interests of no person but himself". This raises the question of who are the persons who have interests, and the further question about the ability of modern philosophy to safely decide which categories of human individuals are persons with interests and which are not. I shall leave a consideration of these matters until later. It is sufficient to observe at this point the conflict between those who hold that one can safely define personhood such that non-persons are those who have no rights, with the provisions of the Universal Declaration of

47 Thomas Hobbes, Leviathan, 437-439, 446
48 Ibid., 27
49 Ibid., 438
50 Ibid., 438-439. Hobbes completes the attack by debunking Aristotelianism. Aristotle's Metaphysics he calls "absurd", his Politics "repugnant to government", and a "great part of his Ethics" ignorant. Hobbes' attack on the Aristotelianism of his day is to be understood in the context of the humanist account of science and mathematics, especially geometry. The contemporary revival of interest in Aristotle is in large measure due to the bankruptcy of the Enlightenment legacy in modern moral philosophy.
51 Alasdair MacIntyre, After Virtue, (London: Duckworth, 1987), 71
52 Ibid.
53 Alasdair MacIntyre, "Why Is the Search for the Foundation of Ethics So Frustrating?", loc. cit., 18
Human Rights which provides that "all human beings are born free and equal in dignity and rights", that "everyone has the right to recognition everywhere as a person before the law", and that "everyone has the right to life, liberty and the security of person."

It is true, though, that Mill's idea of autonomy, granting "absolute" dominion of the individual over his or her own body provided it does not harm the interests of others, is in conflict with the *consensus gentium* about the inviolability and inalienability of fundamental human rights. It is also very imprecise in practice since what constitutes harm to the interests of others, as the Netherlands experience of euthanasia shows, is a matter of opinion and therefore an unsafe bioethical basis for public policy decision-making. The principle of autonomy, as a bioethical principle, in the context of utilitarian thinking, becomes a stick with which to beat other bioethical principles such as the inviolability of human life, non-maleficence, and beneficence. As David Pence has put it:

"The most grievous errors in policy formulation ... have occurred when certain valid individual principles have been isolated as solitary truths. One principle combined with other principles can act as corner pillars to support an intellectually and morally ordered structure. Make the corner pillar stand alone and the structure becomes skewed and falls, as surely as those structures built on the sand of slogans or the quicksand of falsehood."

### 3. THE TYRANNY OF THE COMMON GOOD

Declarations and charters of human rights, among other things, recognise and codify the rights of human beings, which include the rights of the individual over and against society, the State, and the interests of other individuals. Thus stated, every human being has the inviolable and inalienable right to life, which is not to be set aside to further the hopes, interests and aspirations of the individual and society. At the same time laws are made to govern the community to further what is usually called the common good. However, some bioethicists and moral philosophers propose an understanding of the common good which makes human rights, at least for some human individuals, hostage to the fortunes of desired social goals. Those who propose a setting aside of human rights for social goals are often influenced by some or all of three factors: utilitarian ideas of the greatest happiness for the greatest number, social Darwinism, and the humanist confidence in science, reason, and the essential goodness and benevolence of human nature rightly educated.

The common good is served, according to Hobbes, when the security of individuals is guaranteed by the sovereign and when people have the hopes of a commodious standard of living through their own industry. This notion of the common good preserves the idea of the

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54 *Universal Declaration of Human Rights*, Article 1
55 *Ibid.*, Article 6
56 *Ibid.*, Article 3
58 *Cf* Thomas Hobbes, *Leviathan*, 84
political community and the rights of the individuals who make up that community. I have already recalled Hobbes' law of nature which

is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved.\(^{59}\)

One of the limits to the power of the Sovereign is that the individual is not bound to obey the Sovereign's command to perform acts which would destroy that individual's life,\(^{60}\) that individuals are bound to resist commands which threaten the right to life.\(^{61}\) They are bound to resist the Sovereign, too, whenever the Sovereign attacks the right to life of others since an attack on the right to live of one is an attack on all.

The earlier view of natural law, in the tradition of Aristotle and Thomas Aquinas, has been renewed and rethought by John Finnis, Germain Grisez, and Joseph Boyle. Finnis depicts the common good as the eighth of his nine requirements of practical reasonableness.\(^{62}\) He uses the term in three complementary ways. There is, firstly, a 'common good' in the sense that all of the basic human values including "freedom in practical reasonableness are good for any and every person."\(^{63}\) Secondly, "each of the basic human values is itself a 'common good' inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions."\(^{64}\) And thirdly, the 'common good' is "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."\(^{65}\) This does not mean that everyone has to "have the same values or objectives." It is simply the requirement of a set "of conditions which needs to obtain if each of the members is to attain his own objectives."\(^{66}\) The content

\(^{59}\) Ibid., 84. Vid. pages 71-72 Supra

\(^{60}\) Ibid., 142. Hobbes says, "a man that is commanded as a soldier to fight against the enemy, though his sovereign have right enough to punish his refusal with death, may nevertheless in many cases refuse, without injustice." This is consistent with Hobbes' right of nature or "jus naturale, [which] is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature." Ibid., 84

\(^{61}\) Hiram Caton has observed that "the citizen enters society to preserve his life; but when capital sentence is pronounced, the condemned man's natural right to life is, from the sovereign's point of view, abrogated. But since safety is the purpose of the contract, Hobbes declared, the situation reverts to the state of nature: the condemned man and the sovereign are on equal footing, and may justly destroy the other." Hiram Caton, The Politics of Progress, (Gainesville: University of Florida Press, 1988), 155 and cf Thomas Hobbes, op. cit., 91-92, 196-97


\(^{63}\) Ibid., 155

\(^{64}\) Ibid.

\(^{65}\) Ibid.

\(^{66}\) Ibid., 156
of the common good of the political community and the international community Finnis deals with elsewhere.\footnote{Ibid., 161-296}

Thus, for Finnis, the Government protects the common good when laws are made to maximise the opportunities for every individual to participate in the basic human values, of which human life is one. Therefore, laws which attack basic human values attack the common good.

Utilitarian ideas of the common good are very different from those of both Hobbes and Finnis. As has been already recalled, Bentham believed that we act reasonably whenever we act to maximise pleasure over pain. Science can assist us to establish the objectively better society. "Social engineering to improve the general well-being scientifically can reasonably take precedence over individual claims of rights."\footnote{Timothy Fuller, "Jeremy Bentham and James Mill", in History of Political Philosophy, eds. Leo Strauss and Joseph Cropsey, (Chicago and London: The University of Chicago Press, 1987), 716}

Utilitarianism, as a means of determining the common good, attracts a wide range of people who claim to know what is best for the community and justify their confidence in that knowledge by appeal to a scientific calculation which claims to be able to commensurate pleasure with pain. Ronald Dworkin makes a distinction between what he calls a utilitarian argument and an ideal argument.

The University of Washington might use either utilitarian or ideal arguments to justify its racial classification. It might argue, for example, that increasing the number of black lawyers reduces racial tensions, which improves the welfare of almost everyone in the community. That is a utilitarian argument. Or it might argue that, whatever effect minority preference will have on average welfare, it will make the community more equal and therefore more just. That is an ideal, not a utilitarian argument.\footnote{Ronald Dworkin, Taking Rights Seriously, (London: Duckworth, 1987), 232}

Dworkin, and other critics of utilitarianism, would question what is meant by collective or average welfare, and how such calculation could be made. Jeremy Bentham’s psychological utilitarianism is vulnerable to both such criticisms, with the further difficulty that "it is doubtful whether there exists a simple psychological state of pleasure common to all those who benefit from a policy or of pain common to all those who lose by it." Moreover, says Dworkin, "it would be impossible to identify, measure, and add the different pleasures and pains felt by vast numbers of people."\footnote{Ibid., 233. Cf John Finnis, Natural Law and Natural Rights, op. cit., 112-113, John Finnis, Fundamentals of Ethics, (Oxford: Oxford University Press, 1983), 86-90, and Joseph Boyle, Germain Grisez, and John Finnis, "Incoherence and Consequentialism (or Proportionalism) - A Rejoinder". American Philosophical Catholic Quarterly, 64:2, Spring 1990, 271-277}

The difficulties involved in psychological utilitarianism were apparent to Mill who shifted from the ideal "of maximised pleasure, espoused in Utilitarianism" to "that of
cultivated and free persons, eloquently expressed in *On Liberty*. For Mill, refined pleasures are better than "gross physical pleasures", a fact which comes from an empirical study of actual human choices.

People in whom mental life has not reached a high level cannot, of course, be supposed to have expressed a preference: unless we experience both the higher and the lower pleasures, we cannot choose between them. Our study must, therefore, focus on those who have had a taste of both ... The argument is a brilliant way of making the opinions of the seriously outnumbered philosophers and holy men carry the day.

Those philosophers who are attracted to utilitarianism, but who reject the psychological utilitarianism of Bentham, propose another variant, says Dworkin. Dworkin acknowledges that this form of utilitarianism, called *preference utilitarianism*, still suffers from the failing of the incoherence of the utilitarian calculation. However, he wishes to point to another failing of this currently popular form of utilitarianism which is used as a philosophical basis for bioethics by, for example, Peter Singer. Before dealing with Dworkin’s objection to this form of utilitarianism, it is useful to summarise Singer’s advancement of it for the purpose of bioethics.

Singer begins by espousing a universal approach to ethics based upon his understanding of the *Golden Rule*. I am not to consider only what is in my own interests, but the interests of others as well. My own interests cannot count for more than any other person’s simply because they are my interests. Singer then concludes that I must take account of the interests of all the others to be affected by my action. This, he says, "requires me to weigh up all these interests and adopt the course of action most likely to maximise the interests of those affected. Thus I must choose the course of action which has the best consequences, on balance, for all affected." This is a form of utilitarianism, as Singer remarks, although one is bound to say that it does not follow inexorably from his premisses. Singer further observes that this form of utilitarianism differs from classical utilitarianism in that "'best consequences'
is understood as meaning what, on balance, furthers the interests of those affected."\textsuperscript{75}

This form of utilitarianism is, at first sight, thoroughly egalitarian. It seems to treat the interests or preferences of each impartially.\textsuperscript{76} This impression is often deceptive. Dworkin refers to the confusion of personal preference with external preference. A personal preference refers to a preference for one's "own enjoyment of some goods or opportunities", while an external preference refers to the "assignment of goods and opportunities to others, or both." Dworkin gives an example of what he means.

A white law school candidate might have a personal preference for the consequences of segregation ... because the policy improves his own chances of success, or an external preference for those consequences because he has contempt for blacks and disapproves social situations in which the races mix.\textsuperscript{77}

As Dworkin points out, the utilitarian must only count personal preferences and not external preferences because the external preferences corrupt the very egalitarianism that he or she has begun with as a working assumption. If, for example, limited medical resources are being allocated on preference utilitarian lines, and external preferences are counted along with personal preferences, then resources may be denied to one section of the community because they are disapproved of by the rest of the community. The same thing can work in an altruistic way, says Dworkin.\textsuperscript{78}

Utilitarianism is consistent with the liberal thesis if, and only if, personal preferences alone are counted. If external preferences are counted as well then the utilitarian calculation may be repressive. Utilitarians, however, if they wish to remain faithful to their egalitarian assumptions,\textsuperscript{79} cannot agree to the counting of external preferences, and will want to restrict the counting only to personal preferences or personal interests. But, as Dworkin points out, "it is not always possible to

\textsuperscript{75} Ibid., 12-13. Singer goes on to observe: "It has, however, been suggested that classical utilitarians like Bentham and John Stuart Mill used 'pleasure' and 'pain' in a broad sense which allowed them to include achieving what one desired as a 'pleasure' and the reverse as 'pain'. If this interpretation is correct, the difference between classical utilitarianism and utilitarianism based on interests disappears." \textit{Ibid.}, 13

\textsuperscript{76} In the end 'interest', and 'preference' in the sense of 'informed preference' come down to the same thing. My interests involve my securing the goods which I prefer to pursue.

\textsuperscript{77} Ronald Dworkin, \textit{op. cit.}, 234-5

\textsuperscript{78} \textit{Ibid.}, 235. Here Dworkin uses as an example a community choice between building a new theatre and a swimming pool. If many citizens, who do not themselves swim, but prefer a pool to a theatre on the grounds that they in general approve of sports and admire athletes, but at the same time regard the theatre and those involved in it as immoral, then if these altruistic preferences are counted along with the interests of the swimmers "the result will be a form of double counting."

\textsuperscript{79} Utilitarianism runs into further difficulties on the question of human personhood. Egalitarian assumptions notwithstanding, most utilitarians feel able to define at least some categories of human individuals as "non-persons" who have no rights to be considered.
reconstitute a utilitarian argument so as to count only personal preferences." Dworkin summarises the position thus:

Sometimes personal and external preferences are so inextricably tied together, and so mutually dependent, that no practical tests for measuring preferences will be able to discriminate the personal and external elements in any individual's overall preference.80

Dworkin's example of this is segregation. The personal preference of whites to associate with their own kind is saturated with external preferences of a distinctively racist kind. So much is this the case that "no utilitarian argument purporting to justify a disadvantage to that minority can be fair."81 The same problem arises in the case of persons with physical and intellectual disabilities. Following preference utilitarianism it may be argued that utility is best served either by incarcerating them all in institutions, or by selectively killing them. Such utilitarian calculations based on the expression of preference may well, however, be saturated with the external preferences of those not disabled that people with disabilities should not receive resources because this sort of human life is "degenerate", is not worth living,82 has no inherent dignity and offends the sensitivities of "normal" people.

In bioethics, preference and interest utilitarian considerations are used to justify the setting aside of fundamental human rights. The apparently egalitarian nature of these utilitarian calculations may well mask noxious attitudes to the same human individuals that are to be repressed. Bioethicists and others who may not be full-blooded consistent utilitarians nevertheless appeal to consequentialist calculations as part of their ethical equipment. So Tristram Engelhardt is able to say:

One should attempt to secure as maximal a balance of benefits over harms as possible through forethought and careful calculation and within the constraints set by the morality of mutual respect.83

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80 Ronald Dworkin, op. cit., 236
81 Ibid., 237
82 Helga Kuhse and Peter Singer argue this case for handicapped children. They accept that the fact "that we would not like to live the kind of life lived by a retarded person is no indication that the retarded person finds life unpleasant." This does not stop them from concluding, however, that we can still "say that it is in the best interests of a child with Lesch-Nyhan's disease to die rapidly." This conclusion is possible on the calculation of more pain than pleasure and on the assertion that such a child "cannot become a person with an interest in a continued life." Helga Kuhse and Peter Singer, Should the Baby Live?, (Oxford: Oxford University Press, 1985), 146. Kuhse and Singer also argue for the deaths of such children on the basis of them being unwilling "to add to the burden on limited resources by increasing the number of severely disabled children who will, if they are to lead a worthwhile life, need a disproportionately large share of these resources." Ibid., 171. This is an admission that such children could lead "a worthwhile life" after all. The decision to kill seems to rest upon the counting of the external preferences of those whose opinion it is that such children are not persons, have no life worthy of being lived, and for whom the spending of the necessary money on such children is not warranted.
83 H. Tristram Engelhardt, Jr., The Foundations of Bioethics, 96
4. SOCIAL DARWINISM

For most men ... the Origin was not an isolated event with isolated consequences. It did not revolutionize their beliefs so much as give public recognition to a revolution that had already occurred. It was belief made manifest, revolution legitimized.84

In this way Himmelfarb summarises her view that the basic concepts used by Darwin in support of evolution, including the idea of evolution itself, were already "in the air" before Darwin produced his On the Origin of Species. Despite Darwin's denial of it85, says Himmelfarb, "it was in the air and men were prepared for it - the public for evolution in general, and the scientific community for some special theory that Darwin was known to be working on."86 Although Darwin is now the best known name associated with the theory of evolution, the co-founder, whose own work was ready for publication before Darwin had completed the Origin, was Alfred Russel Wallace.

Wallace came upon the same idea of evolution as Darwin quite independently. He had not found a solution to the problem of the succession of species until one day in 1854, while recovering from a bout of the fever at Ternate, an island near New Guinea, he reflected on Malthus' Essay on Population. Malthus saw the "positive checks to population" as including "the whole train of common diseases and epidemics, wars, infanticide, plague, and famine."87 These positive checks on population kept the population of savage races below that of civilized peoples. It occurred to Wallace that the same thing might operate in the animal population, thereby forgetting that Malthus had in fact "derived all his speculations about the human population from the more obvious situation among animals".88

86 Gertrude Himmelfarb, op. cit., 240
88 Gertrude Himmelfarb, op. cit., 245
Then it suddenly flashed upon me that this self-action process would necessarily improve the race, because in every generation the inferior would inevitably be killed off and the superior would remain - that is, the fittest would survive. Then at once I seemed to see the whole effect of this, that when changes of land and sea, or of climate, or of food-supply, or of enemies occurred - and we know that such changes have always been taking place - and considering the amount of individual variation that my experience as a collector had shown me to exist, then it followed that all the changes necessary for the adaptation of the species to the changing conditions would be brought about; and as great changes in the environment are always slow, there would be ample time for the change to be effected by the survival of the best fitted in every generation. In this way every part of an animal's organization could be modified exactly as required, and in the very process of this modification the unmodified would die out, and thus the definite characters and the clear isolation of each new species would be explained. The more I thought over it the more I became convinced that I had at length found the long-sought-for law of nature that solved the problem of the origin of species.89

It is not within the scope of this work to consider the relative merits and demerits of evolution as a theory which best accounts for the facts. What is significant is that Darwinian evolution quickly became the new orthodoxy. As a way of thinking its essential elements helped revolutionise attitudes to the interpretation of human history, social and political progress, and ethics itself. In particular Darwinians found a receptive audience in Germany where they were "triumphant".90

Later it was to be said that Darwinism, born in England, found its real home in Germany ... In the United States too ... the controversy assumed a distinctively local color ... With the appearance of Social Darwinism, the occasions for controversy increased, and Darwinism became a national political issue.91

Herbert Spencer may fairly be regarded as the originator of Social Darwinism. It was he who first coined the term 'the survival of the fittest'.92 Spencer, a popularizer of evolutionary ideas, had embraced evolution on the basis that the only other alternative, special creation, was "intrinsically incredible".93 Spencer argued from the notion of the 'survival of the fittest' to the inexorable progress of humanity to higher and higher states of excellence and goodness. Thus, he said, "it is clear that by the ceaseless exercise of the faculties needed to contend with them, and by the death of all men who fail to contend with them successfully, there is ensured a constant progress towards a higher degree of skill,

90 Himmelfarb, ibid., 304
91 Ibid., 304-305. A detailed account of the reception of Social Darwinism into Germany may be found in Paul Weindling, Health, race and German politics between national unification and Nazism 1870-1945, (Cambridge: Cambridge University Press, 1989), 11-48
92 "For as those prematurely carried off must, in the average of cases, be those in whom the power of self-preservation is the least, it unavoidably follows, that those left behind to continue the race must be those in whom the power of self-preservation is the greatest - must be the select of their generation." Herbert Spencer, "Theory of Population", pamphlet, (London, 1852), cited in Himmelfarb, op. cit., 224
intelligence, and self-regulation - a better co-ordination of actions - a more complete life." Thus Social Darwinism "sanctified greed and aggression as merely the 'survival of the fittest'" by making them the "inevitable and biologically ordained fulfilment of evolutionary destinies." Later, G.K. Chesterton was to characterise the 'survival of the fittest' as the 'survival of the nastiest'.

Through the enthusiastic optimism of Francis Galton, whose eugenic theories became combined with Spencer's Social Darwinism, Darwinism came to be used as a theoretical basis for understanding that blind evolution was now in the hands of self-conscious human beings who were capable, through the exercise of choice, to direct evolution to a noble and morally sound end. Julian Huxley has claimed that the "knowledge explosion of the last hundred years since Darwin" has given us a "new vision of our human destiny - of the world, of man, and of man's place and role in the world." Since the principle of the "survival of the fittest" was seen to be an integral part of the theory of evolution, it came to be seen as a justifying principle for racial purity and racial hygiene pursued as biological imperatives through repressive policies involving sterilisation, both voluntary and involuntary.

Building on Thomas Malthus' claim that a rapidly growing population would outstrip the capacity of a nation to provide enough food, and his division of the world "into the innately Deserving Rich and the naturally Undeserving Lower and Middling Classes", the influence of Malthus through Darwin, Spencer and Darwin's cousin, Sir Francis Galton, was felt in terms of racism, colonialism, relatively unrestricted free market economics, and the racial hygiene movement. For Malthus the preservation of "the status quo of low wages, child labor, and the absence of education and health care for the white, Anglo-Saxon,

94 Herbert Spencer, "Theory of Population", cited in Himmelfarb, ibid., 225
95 Allan Chase, The Legacy of Malthus, (Urbana: University of Illinois Press, 1980), 8
96 Vid. Daniel J. Kevles, In the Name of Eugenics, (Harmondsworth: Penguin Books Ltd., 1985), 331 note 27
98 I say that the principle of the survival of the fittest was seen to be integral to the theory of evolution because that is the way, under the influence of Malthus and Spencer, it was widely interpreted. In fact Darwin does not espouse that principle in the same way, preferring to speak of the principle of natural selection. A clear exposition of Darwin's theory, distinguishing what Darwin actually wrote from more popular beliefs about what he wrote, may be found in Kenneth Korey, The Essential Darwin, (Boston: Little Brown and Company, 1984), 289-308. When Darwin uses the term fitness he is referring to the "adaptedness of organisms to their environments ... Of course, better adapted organisms generally enjoy greater fertility than those more poorly adapted; this is, after all, a fundamental postulate of Darwinism." ibid., 293, footnote. Moreover, Darwin did not admire Spencer as an evolutionary scientist, although he thought him to be "the greatest living philosopher in England, perhaps equal to any that have lived." Charles Darwin to E. Ray Lankeaster, March 15, 1870: Life and Letters, III, (London, 1887) 120 cited in Himmelfarb, op. cit., 226
99 Allan Chase, op. cit., 85
100 Garland E. Allen describes American eugenicists of the early twentieth century as coming from "upper-class, ruling elites, and middle-class professionals". The latter group were all "Darwinians but derived their eugenic ideas and inspirations from Francis Galton rather than from the social Darwinists of the preceding generation." Garland E. Allen, "The role of experts in scientific controversy", in Scientific Controversies, eds. H. Tristram Engelhardt, Jr. and Arthur L. Caplan, (Cambridge: Cambridge University Press, 1987), 186-187
Protestant families who worked for wages on the land, in the factories, and in the mines was the whole point of his *Essay on Population*. Thus Malthus could say:

But if, from the numbers of the dependent poor, the discredit of receiving relief is so diminished as to be practically disregarded, so that many marry with the almost certain prospect of becoming paupers, and the proportion of their numbers to the whole population is, in consequence, continually increasing, it is certain that the partial good attained must be much more than counterbalanced by the general deterioration in the condition of the great mass of the society and the prospect of its daily growing worse.

Darwinian science, informed and further reformed on competitive Malthusian lines, was put in service of Darwin's account of the workings of nature, "the many fall that the few might progress". A low-wage, high-profit capitalist society guaranteed the progress of life. Surplus poor could be sent to the colonies during times of Depression. Thus "Malthus's followers in the 1830s circumvented death by deportation and shuffled the poor out of the country." Karl Pearson, Galton's "principal successor in eugenics", was originally suspicious of Darwinism and its use in support of Spencerian individualism and laissez-faire capitalism. However, following the English reformers of the eighteen-eighties, Pearson forged "Darwinism into a weapon against laissez-faire ... by substituting competition between national groups for individual struggle." This approach further cemented the connection between Darwinism and racism.

Pearson came to equate morality with the advancement of social evolution, the outcome of the Darwinian struggle with the ascendancy of the fittest nation, and the achievement of fitness with a nationalist socialism.

That Galton, Darwin and a whole range of German scientists were racists cannot be doubted. Galton neatly summarised the position thus:

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101 Alan Chase, op. cit., 83
102 Thomas Malthus, *loc. cit.*, 57
104 *Ibid.*, 266
105 Daniel J. Kevles, op. cit., 21
106 *Ibid.*, 23
108 Daniel Kevles observed that Galton "had confirmed his standard views of 'inferior races'" through his African travels. Nevertheless, "racial differences occupied only a minuscule fraction of his writings on human heredity." Daniel J. Kevles, *Ibid.*, 8
109 "[Darwin] thought blacks inferior but was sickened by slavery." Adrian Desmond & James Moore, op. cit., xxi
As regards the democratic feelings, its assertion of equality is deserving of the highest admiration so far as it demands equal consideration for the feelings of all, just as in the same way as their rights are equally maintained by the law. But it goes farther than this, for it asserts that men are of equal value as social units, equally capable of voting, and the rest. This feeling is undeniably wrong, and cannot last.\footnote{Sir Francis Galton, in "Hereditary Improvement," Fraser's Magazine, January 1873, cited in Allan Chase, op. cit., 85. Chase later observes that "the only remarkable thing about Galton's Hereditary Genius - whose thesis was that the rich and the famous are great because of their superior genes rather than their inherited socioeconomic (i.e., environmental) opportunities - was the fact that so many people in his time and our own took it seriously as a study of hereditary human traits. After all, most literate people by 1869 were well aware of the total lack of significant contributions to the arts, the sciences, and the other cultural activities that make men human by the lineal ancestors and descendants of Shakespeare, Goethe, Beethoven, Aristophanes, Aristotle, Mozart, Shelley, Rembrandt, Cervantes, Harvey, Malpighi, Newton, Galileo, Lavoisier, Faraday, Priestley, Leeuwenhoek, and other great achievers. Just as most educated people were equally aware of the long line of incompetents, half-wits, psychotics, and wastrels who had succeeded to the thrones of great monarchs, the ownership of family banks and industries, and other social, military, and economic fiefdoms by virtue of being the biological descendants of exceptionally gifted and/or remarkably lucky parents." Ibid., 100}

As far as medical ethics is concerned, purveyors of a dubious science based upon Darwinist, social Darwinist, and Malthusian presuppositions gained ground among scientists and the community as a whole in Europe and the United States of America. The desire to improve \textit{racial hygiene} by the weeding out of the genetically defective, the feeble-minded, and weak stock saw the sporning of a number of eugenics societies. Some eugenicists opposed contraception because they feared that the wealthy classes would use contraceptives more effectively and assiduously than the poorer classes. They sought to encourage the 'fit' to have more children, positive eugenics, while discouraging or preventing the 'unfit' from having children, negative eugenics.

These eugenicists advocated voluntary or involuntary sterilisation for people they considered 'unfit': those suffering from 'inherited tendencies', including insanity, epilepsy, alcoholism, criminality, drug abuse, drunkenness, 'pauperism', 'sexual perversions', tuberculosis, and especially 'feeble-mindedness'. Negative eugenics was considered particularly important because it was believed there was no cure for these 'tendencies' and because 'degenerates' were believed to be particularly fertile.\footnote{Stefania Siedlecky & Diana Wyndham, Populate and Perish, (Sydney: Allen & Unwin, 1990), 106. Cf Daniel Kevles, op. cit., 11. Galton "indicted the Roman Church for its insistence upon celibacy for clerics and the Anglican Church for its strictures against marriage for Oxbridge dons, because these measures diminished the propagation of the intellectually able."}

Winston Churchill, for example, thought that, "while the thousands of feebleminded in Britain deserved 'all that could be done for them by a christian and scientific civilization now that they were in the world,' they should, if possible, be 'segregated under proper conditions [so] that their curse died with them and was not transmitted to future generations.'\footnote{Daniel Kevles, op. cit., 98}"
To Asquith, Churchill privately described the proliferation of the mentally deficient, combined with the 'restriction of progeny among all the thrifty, energetic, and superior stocks,' as a 'very terrible danger to the race.'

By the early twentieth century Galton's 'eugenics' had become acceptable to a wide section of the community despite the extreme and one-sided nature of that 'eugenics.' Galton and the eugenics movement urged on the scientific community and the wider community the view that human nature was entirely shaped and determined by inherited characteristics, allowing no room for the influence of the environment. So convinced was he that "nature was preponderatingly important in the formation of human character and civilization" that Galton devised "elaborate schemes" to improve the human race.

Paul Weindling has traced the influence of social Darwinism and eugenic thinking in Germany from its earliest roots in England and is at pains to demonstrate that most of the eugenic ideas characteristic of the Third Reich were already entrenched in the thinking of large sections of German society. This is not to suggest that those ideas had been left unchallenged. They were indeed challenged by Virchow, "the undisputed leader of German anthropology", and others. Franz Boas was deeply influenced by Virchow and carried the torch of ideas hostile to evolutionary thinking into the United States. Nevertheless the appeal of the "science of eugenics" was that it appeared to offer a way to improve the human race.

Weindling insists that 'eugenics' had a force and a direction of its own long before the emergence of Nazism and unrelated to specific theories about a super race.

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113 Ibid., 98-99

114 The eugenics movement was not without its critics. Kevles speaks of the "coalition of critics" on both sides of the Atlantic. G.K. Chesterton, for example, indicted the advocates of eugenics for "having discovered 'how to combine the hardening of the heart with a sympathetic softening of the head,' and for presuming to turn what common decency held to be commendable deeds - marriage to an invalid, for example - into 'social crimes.'" Daniel Kevles, op. cit., 120

115 Derek Freeman, Margaret Mead and Samoa: The making and unmaking of an anthropological myth, (Harmondsworth, England: Penguin Books Ltd., 1984), 10. Freeman devotes the first three chapters of this book to a discussion of the nature versus nurture controversy of the late nineteenth and twentieth centuries. He argues that neither extreme is correct, that the development of the human individual is influenced by both heredity and environment, with culture developing in relation to human choices.

116 "A liberal and secular cultural movement preceded the organization of special leagues and societies. Scientists such as Galton and Huxley in Britain, and Haeckel and Virchow in Germany, propagated scientific values as surrogates for Christianity. Discussions of the social implications of Darwinism had penetrated many aspects of middle-class culture and welfare provisions before the founding of the Racial Hygiene Society. The experience of industrialization and of demographic change meant that issues such as the declining birth rate, the hereditary consequences of chronic diseases, and the problem of the degenerate residuum in the population could be seen as of widespread international relevance. Negative eugenic measures, such as sterilization, were imitated in many countries. This was facilitated by hereditary principles becoming standard in medicine and the social sciences." Paul Weindling, Health, race and German politics between national unification and Nazism 1870-1945, (Cambridge: Cambridge University Press, 1989), 7

117 Derek Freeman, op. cit., 25. Freeman discusses Virchow's apostasy from Darwinian theory in the light of the "extension of evolutionary principles to the human species" by Ernst Haeckel. Loc. cit..
My interpretation stresses that eugenics was authoritarian in that it offered the state and professions unlimited powers to eradicate disease and improve the health of future generations. But it was neither a product of the theory of a superior Aryan race, and nor was it inherently Nazi. The synthesis between Nazism and eugenics was a process of adaptation and appropriation on both sides.\(^\text{118}\)

In so far as eugenics proclaimed that aspects of human personality were the consequences of heredity alone, it was unscientific. Charles Davenport, purporting to give "substance" to Galton's assumption that "mental qualities are inherited in the same way as bodily characteristics", concluded that

criminals, prostitutes, tramps, and other "defective" individuals lacked the gene or genes the appearance of which "through mutation in man's distant past had allowed him to control his more primitive asocial instincts, and thus develop civilization."\(^\text{119}\)

The failure of scientists to expose the unscientific nature of 'eugenics' is especially noteworthy in that it lays bare the variety of motivations which drive even those who claim strict adherence to scientific objectivity. This failure of scientists is accepted by Friedrich Vogel and Arno Motulsky in their text book on human genetics, although even then in a highly muted form referring only to 'worthy' if inappropriate motivations.

Most serious geneticists became disenchanted and privately dissociated themselves from this work. For various reasons, including those of friendship and collegiality with the eugenicists, the scientific geneticists did not register their disagreement in public. Thus the propagandists of eugenics continued their work with enthusiasm, and the field acquired a much better reputation among some of the public than it deserved. Thus, many college courses on eugenics were introduced in the United States.\(^\text{120}\)

Vogel and Motulsky go on to accept that there were unjust and negative consequences which came about as the result of the unwillingness of serious geneticists to insist on a more modestly stated account of inherited characteristics. These consequences included the passing of eugenics sterilisation laws in many states in the United States of America and restrictions on immigration into that country.\(^\text{121}\)

However, when it comes to the inadequacies of the German medical scientists, they are even more frank. The marrying together of eugenics with "mystical concepts of race, Nordic superiority, and the fear of the degeneration of the human race in general and that of the German Volk in particular by alcoholism, syphilis, and increased reproduction of

\(^{118}\) Paul Weindling, op. cit., 7

\(^{119}\) Derek Freeman, op. cit., 36. Cf Daniel Kevles, op. cit., 52-54

\(^{120}\) Friedrich Vogel and Arno G. Motulsky, Human Genetics, (Berlin: Springer-Verlag, 1986), 15-16

\(^{121}\) "By 1914 forty-four U.S. Colleges, including Harvard and Cornell, the Universities of California and Chicago, and the Massachusetts Institute of Technology, were offering lectures or courses about eugenics. G.H. Parker, of Harvard, in the influential journal Science pointed in 1915 to 'the elimination of the strikingly defective members of society' as 'a reasonable and a humane possibility,' and advocated enforced sterilization. A number of states adopted such policies.” Derek Freeman, op. cit., 37. Cf Daniel Kevles, op. cit., 109-116
feebleminded or people from the lower strata of society" was a feature of the Rasshygiene movement. The racial hygiene movement, so popular in the Weimar Republic, gained momentum as "prominent German human geneticists identified themselves with the use of human genetics in the service of the Nazi State." Of the "final solution" to the "Jewish problem", Vogel and Motulsky observe:

> While we have no record that human geneticists favored this type of solution, their provision of so-called scientific evidence for a justification of Nazi anti-Semitism helped to create a climate in which these mass murders became possible.\(^{123}\)

Allan Chase has traced the development of what he calls "scientific racism" from Thomas Malthus and Francis Galton's eugenics, which he calls the "Old Scientific Racism", through the Weimar Republic to the present day. While it is true that eugenics received a bad name because of its infamous associations, as I have shown the fundamental principles were accepted by "enlightened" men and women in the Weimar Republic, the United Kingdom, the United States and in many other places in Europe and around the world.\(^{124}\) Chase defines scientific racism as

> the perversion of scientific and historical facts to create the myth of two distinct races of mankind. The first of these 'races' is, in all countries, a small elite whose members are healthy, wealthy (generally by inheritance), and educable. The other 'race' consists of the far larger populations of the world who are vulnerable, poor or non-wealthy, and allegedly uneducable by virtue of hereditarily inferior brains.\(^{125}\)

There was some resistance to the old scientific racism and the use to which genetics was being put. However, the drawing up and signing of the *Geneticists' Manifesto* at the Seventh International Genetics Congress in Edinburgh in 1939, occurred too late to halt the full working out of the "Old Scientific Racism". Chase states that "nothing that has been discovered in genetics or biology in general since the historic Geneticists' Manifesto was signed in 1939 has altered any of its scientific premisses."

In particular, the Manifesto states that there is no valid scientific basis for estimating and comparing the intrinsic worth of persons outside of social and economic conditions, that the assertion that certain races or groups have a monopoly of good or bad genes is without

\(^{122}\) Friedrich Vogel and Arno G. Motulsky, *op. cit.*, 16

\(^{123}\) *Ibid.*, Suzuki and Knudtson have recently emphasised the dark side as well as "optimism's bright side" of the application of genetics. "History confirms that knowledge about heredity has always been vulnerable to exploitation by special-interest groups ... often for what seems to be the noblest of motives. Knowing this we must remain vigilant against future attempts to use genetics to reshape human heredity according to someone's idea of human perfection." David Suzuki & Peter Knudtson, *Genethics*, (Sydney: Allen & Unwin, 1989), 41

\(^{124}\) In 1958 Frederick Osborn, Chairman of the Executive Committee of the Population Council, said: "Government policies should be of a sort to equalize births between people at different socio-economic levels. They should discourage births among the socially handicapped who cannot give their children adequate opportunities. They should encourage large families among the specially gifted. Ultimately government policies may seek to encourage genetic improvement from one generation to another." Frederick Osborn, *Three Essays on Population*, *op. cit.*, 137

\(^{125}\) Alan Chase, *op. cit.*, xvii
scientific basis, and that the raising of children is connected to a whole range of factors, not just genetic inheritance.\textsuperscript{126}

Daniel Kevles identifies the continuance of the essential principles of eugenics into the contemporary era and freed from its associations with racism. Referring to Hermann Muller's work, Kevles is able to indicate the continuing preoccupation with the health of the human race. Drawing upon research available to him, Muller pointed out "that many mutant genes, although recessive, behaved as partially dominant genes." In human beings these "mutant genes might make for greater susceptibility to cancer, diabetes, hypertension, or any number of infections or mental disorders."

The gradual accumulation of these mutations, which would be spread through breeding, constituted the 'genetic load' of the human race - the total number of potentially lethal genes in the human gene pool.\textsuperscript{127}

For Muller, even though pre-reproductive death might diminish the genetic load, "the loss was constantly offset by fresh mutations."\textsuperscript{128} In "primitive man", he speculated, this would lead to the deaths of about "twenty percent of the human race in each generation."\textsuperscript{129} However, for "modern man" a significant difference is made to this death rate by "improved sanitation, nutrition, housing and medical care."\textsuperscript{130} The effect of these improvements is to increase the genetic load such that, eventually, future human beings "would be devoted chiefly to the effort to live carefully, to spare and to prop up their own feebleness, to soothe their inner disharmonies, and, in general, to doctor themselves as effectively as possible."\textsuperscript{131}

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\textsuperscript{126} "... the effective genetic improvement of mankind is dependent upon major changes in social conditions, and correlative changes in human attitudes. In the first place there can be no valid basis for estimating and comparing the intrinsic worth of different individuals without economic and social conditions which provide approximately equal opportunities for all members of society instead of stratifying them from birth into classes with widely different privileges.

"The second major hindrance to genetic improvement lies in the economic and political conditions which foster antagonism between different peoples, nations and "races." The removal of race prejudices and of the unscientific doctrine that good or bad genes are the monopoly of particular peoples or of persons with features of a given kind will not be possible, however, before the conditions which make for war and exploitation have been eliminated ..."

"Thirdly, it cannot be expected that the raising of children will be influenced actively by considerations of the worth of future generations unless parents in general have a very considerable economic security and unless they are extended such adequate economic, medical, educational and other aids in the bearing and rearing of each additional child that the having of more children does not overburden either of them. As the woman is more especially affected by child bearing and rearing she must be given special protection to ensure that her reproductive duties do not interfere too greatly with her opportunities to participate in the life and work of the community at large." \textit{Ibid.}, 614 [emphases added by Chase]
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\textsuperscript{127} Daniel Kevles, \textit{op. cit.}, 259
\textsuperscript{128} \textit{Ibid.}
\textsuperscript{129} \textit{Ibid.}, 260
\textsuperscript{130} \textit{Ibid.}
\textsuperscript{131} \textit{Ibid.}
Muller's belief that the therapeutic powers of modern civilization were working dysgenic effects echoed early-twentieth-century eugenics. ... His theory differed from the mainline creed in that it did not identify dysgenic trends with race or class - mutations occurred in all sectors of society - and was couched in socially antiseptic, genetic language.\textsuperscript{132}

According to Chase the new scientific racism was built upon the same Malthusian notion of the inability of the world to sustain large populations, and the benefits of famine, disease and the like in eliminating the less fit. People pollute. The less the number of people the less the pollution. The automation explosion means less jobs for the unskilled who must be persuaded to reduce their birth rate. In 1971 Edgar R. Chasteen, professor of sociology, proposed legislating to limit the number of children per family to two.\textsuperscript{133} Paul and William Paddock invoked the \textit{triage} model to assist the United States in determining who should receive foreign aid and who should not.\textsuperscript{134} Accordingly India, Egypt, and Haiti were to be abandoned as "can't-be-saved" nations.

Chase then refers to Paul Ehrlich as one who "accepted unquestioningly" the evaluations of the Paddocks. Ehrlich, whose own scientific work, says Chase, concerned insects, wrote "what was to become the popular handbook of the population explosion movement."\textsuperscript{135} Ehrlich endorsed the Paddocks' \textit{triage} policy as the "only realistic suggestion in this area".\textsuperscript{136} Food aid could be given to West Pakistan provided their Government presses home its population control policy. But what of those countries who "are so far behind in the population-food game that there is no hope that any food aid will see them through to self-sufficency. The Paddocks say that India is probably in this category. If it is, then under the \textit{triage} system she should receive no more food."\textsuperscript{137} On Ehrlich's endorsement of Paddocks' \textit{triage} policy, Chase argues that there is "nothing in biology in general, or in genetics and population genetics in particular, that gives a young, healthy, well-paid American ... the moral, scientific, or political right to blandly and not too blandly urge the termination of food, medicine, and all other aid to India and various other countries whose birth policies offend him."\textsuperscript{138}

Chase draws attention to Ehrlich's contention that America should diminish "medical assistance to the world's poor, and that health care priorities be reordered in terms of less support for investigations of the major cause of death and chronic diseases and more

\begin{footnotes}
\item[132] Ibid.
\item[135] Allan Chase, \textit{op. cit.}, 397
\item[137] Ibid., 100
\item[138] Allan Chase, \textit{op. cit.}, 402
\end{footnotes}
support for research into new techniques of birth control." There is nothing biological or scientific about these suggestions, they amount to "a program of political action". Ehrlich's programme amounts to "an open and blunt" advocacy "of genocidal political policies", he says. "Genocide remains genocide, whether advocated in a Munich beer hall in 1920 or in a Texas college auditorium in 1967 - and neither the brown shirts of its earlier German advocates nor the graduate degrees and academic posts of its latter-day American proponents make it any less a political rather than a scholarly proposal."141

The authoritarian nature of Ehrlich's proposals may be further seen in his suggestion that "the United States could take effective unilateral action in many cases." As an example he refers to the Chandrasekhar incident.

When he suggested sterilizing Indian males with three or more children, the US should have applied pressure on the Indian government to go ahead with the plan. It should have volunteered logistic support in the form of helicopters, vehicles, and surgical instruments. It should have sent doctors to aid the programme by setting up centres for training para-medical personnel to do vasectomies. Coercion? Perhaps, but coercion in a good cause.142 [my emphasis]

Ehrlich's penchant for imposing population control measures by force remains unabated. In his most recent book on population issues he is able to discuss China's population-control policy without in any way deprecating the violations of human rights which that policy entails.143 He refers to the abuse of rights as "sad", but goes on to say that the "Chinese Government, rightly or wrongly, concluded that there was too little time to change attitudes toward childbearing so that individual decisions would, collectively, produce a socially desirable result."144 No ethical evaluation is made of the practices of infanticide, forced abortion, forced sterilisation and the like. John Aird has published some of the official instructions to cadres of the Communist Party on the way in which the one-child policy is to be enforced.

Those who insist on having a second or excessive birth must be treated according to the prescribed policies. If they are Party members or cadres, it is proposed they be given Party and administrative discipline.

Birth control should be enforced ... measures to reward good and punish evil should be implemented.

139 ibid., 402-403
140 ibid., 403
141 ibid.
142 Paul R. Ehrlich, op. cit., 104
144 ibid., 207
All newly married couples who are expecting must show their planned birth certificates. Those who are unable to produce a permit will have to undergo birth control measures (abortions).

Illegal relationships (i.e. early marriages) which should be dissolved must be dissolved ... Those who are pregnant out of wedlock and have not reached the legal marriage age must undergo remedial operations.

If an unauthorised baby is the second, third or subsequent child in a family and sterilization has not been accepted, the family will be denied permission to build a dwelling, their water and electricity will be cut off ... grain coupons will not be issued ... drivers licenses and private business licenses will be revoked.145

Ehrlich has maintained his commitment to neo-Malthusian principles and his faith in himself in terms of his diagnosis of world population problems. However, not all would agree with Ehrlich's diagnosis. His prescriptions for public policy are noteworthy for their authoritarian disregard for human rights about which there is a consensus gentium.

That same authoritarianism has been well documented in the writings of contemporary population planners and neo-Malthusian eugenics in the democratic West and, as has already been indicated, in totalitarian regimes such as China .146 It is interesting to note the involvement of the Australian Government with the United Nations Population Fund (UNFPA) in Papua New Guinea (PNG). Documents provided to the Australian Senate's Estimates Committee show that "For the PNG project, UNFPA has set targets for contraceptive "acceptance" of oral contraceptives, condoms, and Depo Provera from an estimated 6% in 1989 to 35% by 1995; Depo Provera accounts for 63.3% of the total funds to be spent on contraceptive purchases for women by UNFPA for the PNG project. This indicates that UNFPA has decided that approximately six out of every ten "targetted" women will use Depo Provera." Senator Brian Harradine opposed the "use of Australian taxpayers money for an ill conceived project promoted by UNFPA, an organisation no longer funded by the United States due to UNFPA's support for China's coercive population control programme", stated that "PNG has been under constant pressure from the Australian Government and international population control organisations to conform to their views" and that" as far back as 1985 ... the Australian Foreign Minister urged PNG to implement population control measures”, and expressed astonishment that the Australian International Development Assistance Bureau would support "the widespread use of a controversial drug not officially approved for contraceptive use in Australia.”147 Thus a medically unacceptable


147 From a Media Release, Controversial Drug to be used on Papua New Guinea Women, issued by Senator Brian Harradine, Parliament House, Canberra, 15 May 1991. Senator Harradine cited the MIMS ANNUAL 1991, Australian edition on Depo Provera: "The use of Depo Provera for contraception is not an approved indication and such use is investigational since there are unresolved questions relating to its safety for this indication."
form of contraception becomes medically acceptable when applied to a Third World nation.148

The essential elements of eugenics have persisted into the late twentieth century, despite the disrepute into which the concept was brought following Hitler's linkage of it with the elimination of an unwanted race. Voluntary eugenics continues to be promoted by the medical profession, scientific establishments, and population control movements. To "improve the heritable traits of human populations" contemporary eugenicists promote widespread pre-natal diagnosis149 and genetic counselling, contraception to enable sexual intercourse to take place without reproduction, genetic engineering to eliminate defective genes, euthanasia, abortion, and "a medico-economic concept (the Quality-Adjusted Life Year) that grades patients on a cost-benefit 'quality of life' index that identifies the point at which the withdrawal of care is indicated. "150

Behind these programmes very often lurk negative views about human individuals with 'defects'. In its Discussion Paper On The Ethics Of Limiting Life-Sustaining Treatment, the National Health and Medical Research Council (Australia) [NH&MRC] proposes the "non-intervention" for "severely affected children".151 Christopher Newell has noted the failure of the NH&MRC "to provide an adequate definition of what this means despite referring to a particular case study and claiming that 'she fulfils the criteria for non-intervention as she will not survive with less than severe handicaps.'"152 Newell, noting that the NH&MRC characterised spina bifida children as "severely affected children [that] are at best wheelchair bound", comments:

Many people with disabilities in Australia use wheelchairs to enhance and enable their mobility and do not see utilising a wheelchair as being so inherently tragic, especially if it has a liberating effect.153

148 An account by Ubinig, of the trials of new contraceptive drugs and devices carried out by family planning associations on poor women in developing countries is revealing. Ubinig, based in Bangladesh, has alleged "gross violations of ethics ... an inadequate research practice and a lack of care for health of the women to whom Norplant was administered" in Bangladesh. This account further suggests that women were used as guinea pigs in medical trials without their knowledge and that they are further subjected to "an unsafe contraceptive as a means of population control." Ubinig, "Research Report Norplant, The Five Year Needle: An Investigation Of The Norplant Trial In Bangladesh From The User's Perspective", Issues in Reproductive and Genetic Engineering, 3:3, 211-228

149 The use of ultrasound screening and alfa-fetoprotein tests for pregnant women is routine in South Australia, backed up by amniocentesis. Cf Maternal Alpha-Fetoprotein Screening Test for Neural Tube Defects in Mid-Trimester Pregnancy for Medical Practitioners, (Adelaide: South Australian Health Commission, 1985)


151 Discussion Paper on the Ethics of Limiting Life-Sustaining Treatment, approved by the 106th Session of the National Health and Medical Research Council, Canberra, November 1988, 5


153 Christopher Newell, loc. cit., 48-9
It is the negative view of persons with physical or intellectual disabilities that has been a consistent feature of the eugenic and social Darwinist thinking from the nineteenth century to the present time. The drive to repress such individuals through abortion, infanticide, genetic counselling programmes and the like, referred to above, reinforces advocates of medical-social programmes to ensure the coming to birth only of the fit. Indeed John Pearn has predicted that the "newborn infant of the third millenium" will be "a planned, very much wanted, infant." His scenario for the next millenium is replete with eugenicist and humanist presuppositions.

What one will see in the future, is thus the removal of the natural selection which kills infants in the perinatal period - because almost all will be salvaged by better care and technology - and the replacing of this by a controlled selection at the time of conception or soon after. The whole of medicine has always followed this trend - the superimposition of control over natural selection; so in this context our instinctive disquiet about current trends is unjustified in any logical sense. But it does impose the greater ethical responsibility - indeed the greatest of ethical responsibilities - on parents and health givers alike. The control - of who will finally be chosen to embark on life's journey - will be in a sense even more discretionary than it is today.154

From Plato until the present time notions of 'superior' human beings have persisted. Plato argued for a positive eugenics through selective mating and breeding:

It follows from our former admissions that the best men must cohabit with the best women in as many cases as possible and the worst with the worst in the fewest, and that the offspring of the one must be reared and that of the other not, if the flock is to be as perfect as possible. And the way in which all this is brought to pass must be unknown to any but the rulers, if, again, the herd of guardians is to be as free as possible from dissension.155

In the contemporary era emphasis is placed not only on the life not worth living but also on the burdens of living that life, not only for the person with a disability but for the parents, family and the wider community. Helga Kuhse and Peter Singer have claimed that


there is a limit to the burden of dependence which any community can carry. If we attempt to keep all handicapped infants alive, irrespective of their future prospects, we will have to give up other things which we may well regard as at least as important.\textsuperscript{156}

In any case, infanticide is acceptable to Kuhse and Singer because it "cannot threaten anyone who is in a position to worry about it. Anyone able to understand what it is to live or die must already be a person and has the same right to life as all the rest of us. Disability which does not rule out self-awareness and a sense of the future is totally irrelevant to the possession of the right to life."\textsuperscript{157} Thus Hiram Caton's observation that the "notion that all human beings are of equal worth, or are entitled to the same rights, is inconsistent with eugenics" appears to be justified. Moreover, as Caton has observed about the many projects inspired by the aspirations of contemporary eugenicists to do it better than blind evolution:

Scientists seem to be unaware that the bid to preside over life and death lays claim to the most awesome power in human society. Medical interventions already practiced and those promised for the future do not inspire confidence that the wisdom of eugenicists is more than the mechanic's flair for stunning effects. The brief experience with handling truly awesome power, nuclear energy, resulted in weapons of ultimate destruction. Opening the human genome to manipulation is a comparable power whose effects may be other than those promised.\textsuperscript{158}

The same might also be said for bioethicists and moral philosophers whose thinking, consciously or unconsciously guided by the principles of eugenics, endorse as an ethical imperative human interventions whenever possible.

\textsuperscript{156} Helga Kuhse and Peter Singer, \textit{Should The Baby Live?}, (Oxford: Oxford University Press, 1985), 170. Kuhse and Singer acknowledge in the Preface to this book that they "think some infants with severe disabilities should be killed." They then go on to deny that there is anything in their views that "in any way implies a lack of concern for disabled people in our community." \textit{Ibid.}, v. Despite this disclaimer, people with disabilities in Germany saw in Peter Singer's expressed views the essence of eugenics, that distaste for lives afflicted by disability and a willingness to allow parents to have such children killed. Kuhse and Singer declare that they want improved services for "disabled people". It should be noted that such people prefer to be called people with disabilities, to emphasise their personhood rather than their disability. Given Kuhse and Singer's preference for defining personhood in terms of "self-awareness and a sense of the future" then there is reason to understand why there is a concern for at least some adult persons with disabilities. \textit{Cf. ibid.}, 138

\textsuperscript{157} Helge Kuhse and Peter Singer, \textit{ibid.}, 138. Cf. Jonathan Glover, \textit{op. cit.}, 137-169. Glover is of the opinion that "where the handicap is sufficiently serious, the killing of a baby may benefit the family to an extent that is sufficient to outweigh the unpleasantness of the killing (or the slower process of 'not striving to keep alive'). \textit{Ibid.}, 164. Thus, in the case of Glover's opinion, do utilitarian, humanist, and eugenic factors conspire to overturn the right to life of the newborn baby with congenital disabilities.

\textsuperscript{158} Hiram Caton, "Eugenics", in \textit{Dictionary of Theology and Society}, \textit{loc. cit.}
Our basic ethical choice as we consider man's new control over himself, over his body and his mind as well as over his society and environment, is still what it was when primitive men holed up in caves and made fires. Chance versus control. Should we leave the fruits of human reproduction to take shape at random, keeping our children dependent on accidents of romance and genetic endowment, of sexual lottery or what one physician calls "the meiotic roulette of his parents' chromosomes?" Or should we be responsible about it, that is, exercise our rational and human choice, no longer submitting submissively trusting to the blind worship of raw nature?159

5. PRINCIPAL THEMES IN HUMANISM

In the last chapter I referred to humanist thinking and its ambivalence to human rights when those rights stand in the way of humanist programmes and ambitions. Secular humanism, conceived and born in the challenge that science brought to religion in the seventeenth century, has permeated Western culture and thinking over the succeeding centuries. Francis Bacon's pronouncement that "human knowledge and human power meet in one; for where the cause is not known, the effect cannot be produced"160 - that knowledge is power - is fundamental to humanist thinking. For Bacon, the "fifth essence" is not to be found in Aristotle's "fantastic heaven" but in the "Eupolis" or "good city."161 Natural philosophy had been corrupted by the search for the "final cause" as the end for which all things exist. The final cause, for Bacon, is

the things which man makes, and the best thing that man can make is the best commonwealth, the commonwealth of the New Atlantis, the happy land, the land of all earthly things worthiest of knowledge.162

This "elevation of the man-made, the artificial, over the natural" is the basis of Bacon's materialist philosophy. The ideal state is realised through the conquest by humankind of nature in order to achieve the relief of those agonies which afflict the human condition. Some "Baconian enthusiasts during the Commonwealth period understood the new philosophy as benevolent and utopian", yet, says Hiram Caton, "the linkage between power

159 Joseph Fletcher, The Ethics of Genetic Control, (Garden City, NY: Anchor Books, 1974) cited in Daniel J. Sullivan, "Social Implications of Genetic Manipulation", Genetic Medicine And Engineering, ed. Albert S. Moraczewski, (St Louis, MO: The Catholic Health Association of the United States and The Pope John XXIII Medical-Moral Research and Education Center, 1983), 149. Joseph Fletcher's book has been republished as The Ethics of Genetic Control: Ending Reproductive Roulette, (Buffalo, NY: Prometheus Books, 1988). In reviewing the new edition George Annas notes that Fletcher is an act-utilitarian, and that Fletcher argues that "we should take as strong steps to protect future generations against genetic defects as we take to protect present people from infectious diseases." Journal of the American Medical Association, Jan 20, 1989, 261:3, 454. It is remarkable that Annas should note this neoeugenics without comment while later going on to characterise Fletcher as "the father of modern medical ethics". Ibid.


162 Ibid., 367
and goodness is riddled with difficulties, the most apparent being that the link is wholly contingent."163 Bacon's reply that everything can be abused is "hardly adequate", observes Caton, "since his proposal for unprecedented increase in human power opened the door to unheard-of abuses".164

Caton draws attention to "a second set of statements on the ends of power, hardly noticed today" in which Bacon "dropped the unconvincing appeal to charity and related power to the end it typically seeks in human life, greatness."165

My purpose is to try whether I cannot in fact lay more firmly the foundations, and extend more widely the limits, of the power and greatness of man.166

After an assessment of human ambition Bacon unveils "in a skyrocket of sparkling prose the grandest design of all: 'But if a man endeavour to establish and extend the power and dominion of the human race itself over the universe, his ambition (if ambition it can be called) is without doubt both a more wholesome thing and a more noble than the other two.'"167 Caton goes on to remark that ambition "in such Gargantuan excess" needs another name. "Hope of dominion over the universe bugles an assault on Mount Olympus to overthrow the kingdom of God."168

The link between science and life is power and greatness in Baconian philosophy, a link "forged in the first instance by his [Bacon's] methodological requirement of unified science, which demands that all inquiry search for the effective truth of efficient causes."169

David Ehrenfeld speaks of the arrogance of humanism. For Ehrenfeld, this "arrogance of the humanist faith in our abilities was nurtured by the late Renaissance triumphs of science and technology working in tandem."170 Ehrenfeld argues that the source of the problem is the doctrine of final causes, a doctrine which he says has "flourished since the rise of the sciences in the late sixteenth and seventeenth centuries." As Ehrenfeld formulates it, this doctrine asserts "that the features of the natural world ... have all been

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163 Hiram Caton, *op. cit.*, 42
164 Ibid., 43
165 Ibid., 44
166 Francis Bacon, *Great Instauration*, bk. 1, para 116 cited in Hiram Caton, *op. cit.*, 44
167 Francis Bacon, *Great Instauration*, bk. 1, para 129, cited in Hiram Caton, *ibid.*, 44
168 Ibid.
169 Ibid.
arranged by God for certain ends, primarily the benefit of humanity." The transition to humanism could occur in steps. Humans are made in God's image. God could then be retired and eventually abandoned. What remains is the god-like humanity of the Christian tradition for whose benefit the world exists. Ehrenfeld's account of the way the transition to humanism occurred is problematic. What is not problematic is that such a transition has occurred, and that humanist thinking has pervaded Western culture, including many of the contemporary Christian theologies, as well as those philosophies that appeared as a bridge between religion and political theory.

Leslie Stevenson has traced the development from Hegel to Marx. Hegel's theory of historical development suggests mental or spiritual laws which allow cultures to develop, since cultures and nations have "a kind of personality" of their own. The whole of reality is identified with God, what Stevenson refers to as "a pantheist rather than a Christian concept of God". For Hegel, human history is to be interpreted as "the progressive self-realization of this absolute spirit." In the application of Hegel's ideas to politics his followers divided between those who believed that "the process of historical development automatically led to the best possible results", i.e. the Prussian State, and those who thought that the nation states of their time were far from perfect, it being the duty of all to work towards the "development of the next stage of human history."

Feuerbach departed from Hegel on the matter of God progressively realizing himself in history. For Feuerbach "the ideas of religion are produced by men" who are "dissatisfied or 'alienated' in their practical life". Stevenson summarises Feuerbach thus:

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171 Ibid., 7. This formulation appears to me to be inadequate. A simple explanation of the doctrine may be found in Ralph McInerny, First Glance At St. Thomas Aquinas, (Notre Dame: University of Notre Dame Press, 1990), 82-89. Ehrenfeld appears to have confused the doctrine of ultimate causality with the principle of finality. The doctrine of ultimate causality or first cause states that God "is the unique first cause of all realities that exist outside himself." Ronda Chervin and Eugene Kevane, Love of Wisdom, (San Francisco: Ignatius Press, 1988), 186. The principle of finality "states that every efficient cause, namely, everything that acts for doing or making something, has a purpose in doing so ... An archer has a conscious purpose, and the arrows fly purposefully. But the arrow in itself has no conscious awareness of the purpose toward which it has been aimed. Another way of stating this is that everything exists for some good, namely, the purpose or end in view." Ibid., 134. The ultimate or final end of man is God who is also the first cause. [Unde dicitur quod finis est causa causarum] Cf Summa Theologiae, 1a, q. 5, a. 2, ad. 1; 1a, q. 105, a. 5. Some of the "features of the natural world", to which Ehrenfeld refers as having "been arranged by God", are due to human action. Other relevant references include 1 Contra Gentes, 13; Summa Theologicae, 1a-2ae, q. 109, a. 6; 1a-2ae, q. 70, ad. 2

172 Karl Rahner, the influential Jesuit theologian, reflects much of the Baconian humanist account in his essay, "The Experiment with Man". For Rahner "man has become what, according to the Christian understanding he is: the free being who has been handed over to himself." Triumphanty Rahner proclaims that "as a real partner of the God of the 'other world' man can and must stand over against this world as its lord." Karl Rahner, "The Experiment with Man", in On Moral Medicine, eds. Stephen E. Lammers & Allen Verhey, (Grand Rapids, Michigan: William B. Eerdmans Publishing Co., 1987), 232


174 Ibid., 47

175 Ibid.
Metaphysics is just 'esoteric psychology', the expression of feelings within themselves rather than truths about the universe. Religion is the expression of alienation, from which men must be freed by realizing their purely human destiny in this world.\textsuperscript{176}

Stevenson concludes that Feuerbach is "one of the most important sources of humanist thought."\textsuperscript{177} His influence on Marx was profound. Freed from the shackles of religion, the "opiate" of the masses, men and women could work towards the establishment of the successive stages of human history, the bourgeois capitalist phase, the socialist revolution, and finally to communism when the state would wither away, there being no longer any need for police or external coercion. Thus would human beings reach the humanist utopia, through the inexorable forces of human history in which human beings take matters into their own hands. No longer would human beings be alienated from society because all property would be held in common. Human effort would have wholly benign consequences, even though blood would need to be shed to reach this end point of human history.

In the twentieth century, the influences of Feuerbach, Hegel, Marx and Darwin have been felt in new Christian theologies which have been developed in response to the new human situation. The conduit of these influences has been the revival of hermeneutics and its central place in theological discussion. How can Christianity be interpreted in the light of the crises facing contemporary human cultures, and in such a way that theology is comprehensible to modern humankind? The powerful intellectual currents running through contemporary human societies include, according to Van A. Harvey, contributions from sociology, anthropology, history, literary criticism, philosophy, and religion. However, underlying all these currents is the assumption that human consciousness is situated in history and cannot transcend it - an assumption that raises important questions concerning the role of cultural conditioning in any understanding.\textsuperscript{178}

Hans Georg Gadamer "resumed the meditation of Martin Heidegger upon the crisis indicated by Nietzsche and formulated the issue as follows: since all normative traditions have been rendered radically questionable, hermeneutics ... has become a universal issue."\textsuperscript{179} According to Lawrence the responses to Gadamer were "fragmenting on the one hand, and totalizing on the other." These responses, he said, "bore the earmarks of that sort of interpretation that Marx in his famous eleventh thesis on Feuerbach, said needed to be supplanted by practice."\textsuperscript{180} The consequence of this was the development of "liberation theologies" and other political theologies. These theologies, were developed in the European theological schools by such leading proponents as the German Catholic J.-B. Metz and the

\textsuperscript{176} Ibid.
\textsuperscript{177} Ibid.
\textsuperscript{179} Frederick G. Lawrence, "Political Theology", The Encyclopedia of Religion Volume 11, 405
\textsuperscript{180} Ibid.
German Protestant Jürgen Moltmann, and in the *communidades de base* [basic communities] of Latin America by Gustavo Gutiérrez (Peru), Juan Segundo (Uruguay), José Miguez-Bonino (Argentina), John Sobrino (El Salvador), and Leonardo Boff (Brazil). Both styles are meant, according to Lawrence, "to come to terms with the universal hermeneutic problem as portrayed by Nietzsche, Heidegger, Gadamer, and Paul Ricoeur. But it is no less evident that they mean to follow Marx's imperative of changing, rather than merely interpreting, history."  

Building on the theory of evolution some new theologies see humankind as the "spearhead of evolution", and it is this, "from a phenomenological point of view ... that gives him his status of dignity and superiority over his natural surroundings."  

Denis Edwards, following Karl Rahner, sees "the human person ... as the cosmos come to consciousness of itself." Edwards acknowledges that this line of thought can be traced back to Julian Huxley via Teilhard de Chardin. This new anthropocentrism, says Edwards, "differs from traditional anthropocentrism because it is profoundly relational. It views human beings as intimately related to the Earth and as 'companions' to every other creature." Edwards does not develop the practical implications of this sort of theology, but he does note that some, "unjustly" in his view, "criticised the evolutionary work of Teilhard and Rahner as being naively optimistic." However Wildiers, in his introduction to de Chardin's work, contrasts the "gradual process of degradation (entropy) and disintegration" of matter, which radically affects the animal and plant kingdoms, with the evolutionary history of mankind. He notes the extinction of many species and that there is no sign of new species appearing.

Man, on the other hand, moves steadily onward and upward. As a species he shows no trace of any loss of vital energy. Numerically, he is still on the increase. His mental activity and his urge to expand are always intensifying. Of all sources of energy in the world he is the most dynamic ... Through man as the highest and central phenomenon that world evolution has produced that same evolution is bound to follow its ascending course ... Within the framework of the fundamental laws of nature man is the architect of to-morrow's world.

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181 Ibid.
183 Denis Edwards, *Jesus and the Cosmos*, (Mahwah, New Jersey: Paulist Press, 1991), 40
185 Denis Edwards, *op. cit.*, 43
186 *Ibid.*, 15
187 N.M. Wildiers, *op. cit.*, 82
Ehrenfeld identifies "absolute faith in our ability to control our own destiny" as "a dangerous fallacy". Humanism is based upon the "principal assumption, which embraces all of our dealings with the environment, and some other issues as well".

It says: All problems are soluble. In order to make its connection with humanism clear, just add the two words that are implicit; it becomes: All problems are soluble by people.

To this principal assumption Ehrenfeld adds five others:

Many problems are soluble by technology.

Those problems that are not soluble by technology, or by technology alone, have solutions in the social worlds (of politics, economics etc.)

When the chips are down, we will apply ourselves and work together for a solution before it is too late.

Some resources are infinite; all finite or limited resources have substitutes.

Human civilisation will survive.

Ehrenfeld is concerned about environmental issues and what he sees as the impact of humanist thinking on industrial societies as a root cause of our present environmental woes. His essential criticisms of humanism have a broader scope and certainly embrace optimistic ethical accounts of scientific achievements in the medical sciences. Joseph Fletcher, the American medical ethicist, reflects the humanist ethical account when he says:

A 'test tube baby', although conceived and gestated ex corpo, would nonetheless be humanly reproduced and of human value. A baby made artificially, by deliberate and careful contrivance, would be more human than one resulting from sexual roulette - the reproductive mode of the subhuman species.

188 David Ehrenfeld, op. cit., 9-10. Ehrenfeld does not argue that there is nothing of value in humanism. "Belief in the nobility and value of humankind and a reasonable respect for our achievements and competences are also in humanism, and only a misanthrope would reject this aspect of it." Ibid., 10. Cf"The better parts of humanism are not in question here; when the inappropriate religious elements have been removed, humanism will become what it ought to be, a gentle and decent philosophy and a trustworthy guide to non-destructive human behaviour." Ibid., 5. H. Tristram Engelhardt, Jr attempts a construction of bioethics on secular humanistic presumptions. In doing this he makes a distinction between Secular Humanism of the kind which Ehrenfeld describes as arrogant, and secular humanism as a "cluster of philosophical, philological, moral, and literary ideas, images, and commitments, which have been associated with the historical phenomenon of humanism in dissociation from particular religious or ideological commitments." H. Tristram Engelhardt, Jr., Bioethics and Secular Humanism, (London: SCM Press), 3. Nevertheless, as I have already observed, Engelhardt makes his own profession of faith: "Moreover, though faith in reason is largely lost, I have not lost the Faith." Ibid., xvii

189 David Ehrenfeld, op. cit., 16

190 Ibid.

191 Ibid., 17

192 Joseph Fletcher, "Indications of Humanhood: A Tentative Profile of Man", Hastings Center Report, 2:5: November, 1972
In 1984 Professor Carl Wood, reflecting a similar confidence in what medical science could achieve, claimed that "test tube babies were above average." He based the claim on a study being carried out by Dr David Mushin, clinical director of the Queen Victoria Hospital's child psychiatry department and psychologist Maria Barreda-Hanson. Addressing the possibility of congenital malformations in babies born from the in vitro fertilisation technique, R.G. Edwards stated that "the incidence of these disorders in cultured embryos in primates and non-primates appears to be exactly the same as that which occurs in natural pregnancy." He concluded that the "virtual absence of any documented record of malformations arising in a cleaving animal embryo \textit{in vitro} indicated that the procedure could be safely applied to the human." Generalising from the relatively few babies conceived and born using these laboratory techniques by 1980, Edwards confidently claimed that "The evidence from the liveborn children confirms observations in animals that the culture of preimplantation embryos \textit{in vitro} is safe and imposes no extra risks on the child, and indicates that the procedure could be introduced into clinical medicine with very few reservations, especially with the back-up screening provided by ultrasonic scans, amniocentesis and other tests in later pregnancy." 

This confidence in medical science's capacity to do things better than nature in the field of human procreation and reproduction has been significantly shaken in recent years. Evidence in Australia suggests that there might well be significantly increased risks to the children born as a result of reproductive technologies. Faced with this information Wood stated that scientists were "worried about the safety of drugs used on women in IVF procedures." Even more recently, Andrew Macnab and Christo Zouves have noted that while IVF "is an accepted treatment for infertility ... the risk of associated birth defects is as


194 Dr Mushin distanced himself from Professor Wood's interpretation of the results obtained at that stage, saying that it was too early to draw any definite conclusions from the research. \textit{Ibid}. 


197 Information from the National Perinatal Statistics Unit at Sydney University, after studies of IVF and GIFT pregnancies from 1979-85, found that there were 47 perinatal deaths per 1000 live births compared with 12 per 1000 in the general population. In the case of IVF perinatal deaths were three times the national average, but for GIFT (Gamete Intral Fallopian Transfer) it was almost five times the population figures. IVF babies have six times the national average for transposition (a congenital heart defect), and five times the average for spina bifida. \textit{Australian Dr Weekly}, 27 May 1988:15

198 John Fleming, "The Costs of IVF", in \textit{Trends In Biomedical Regulation}, ed. Hiram Caton, (Sydney: Butterworths, 1990), 220. Carl Wood thought that "these drugs might be responsible for increased abnormalities in IVF babies following reports in the \textit{New England Journal of Medicine} that 50% of the eggs produced by women undergoing chlomiphene stimulation were abnormal." \textit{Ibid}. and \textit{of The Age}, Melbourne, 8 June 1988, 5
yet undefined because the population of infants born as a result of IVF remains too small for conclusive epidemiologic analysis."199

Ehrenfeld's summary of the present mentality suggests that both "humanism and modern society have opted, albeit unconsciously, for the assumptions of human power." The choice, he says, "was understandable - the assumptions have long seemed, superficially, to work, and they certainly have been (and still are) gratifying to the ego."200 According to Ehrenfeld's analysis, our faith in what science can do is often unreal and misplaced. He gives many examples of this. One will suffice here.

Referring to a paper by Professor E.C. Zeeman, entitled "A Model For Institutional Disturbances", which appeared in the May 1976 issue of the British Journal of Mathematical and Statistical Psychology, he discusses the capacity of science to measure and predict the future. Zeeman argued that his advanced mathematical theory, applied to "catastrophe theory", would enable them to be able to predict, and therefore to prevent, prison riots.201 Ehrenfeld regards this paper as "a veneer of unusually sophisticated mathematics applied over the all-too-common base of ignorance and contempt of fellow human beings in trouble."202 What "catastrophe theory" does, he says, is to simplify a very complex set of events to two control variables. Quoting Jonathan Rosenhead in the New Scientist he notes that a "social system of quite remarkable complexity must be simplified almost out of existence."

This is reminiscent of Kraus's warning about simplified model systems, and about the tripartite absurdity of long-range predictions: we cannot know and gather in advance all the information that will be relevant, we cannot know what questions to ask of it, and if we did we could not make errorless deductions from what we know.203

Ehrenfeld insists that the appropriate word to describe the sorts of humanist themes to which he has referred is arrogance.

The claims of predicting the unpredictable and of knowing the unknowable, the absolute faith in procedures whose end-results can never be comprehended - these things appear repeatedly. We are dealing with the same phenomenon in psychological testing, in cliometrics, and in the psychosocial applications of catastrophe theory. Where does such arrogance come from? I can only think of the mass persistence into adult life of that state of mind known as "magical thinking."204

200 David Ehrenfeld, op. cit., 21
201 Ibid., 36-37
202 Ibid., 76
203 Ibid. Eric Kraus is a meteorologist. The reference here is to his "The Unpredictable Environment", New Scientist, 63, 1974, 649-52
204 David Ehrenfeld, op. cit., 77-78
Ehrenfeld accuses the humanist psychologist of just such "magical thinking". In the last chapter I referred to Skinner's ambitious programme to remake humankind using scientific methods. Operant conditioning enables us to redefine human behaviour in such a way that human beings conform to the environment, an environment made by human beings. Echoing the criticisms of Keller and Marian Breland, Ehrenfeld refers to the three major assumptions of conditioning theory and behavioural engineering, assumptions which are unwarranted by the facts and which help explain the failure of operant conditioning.205 The assumptions are "that an animal can be considered a tabula rasa prior to the start of conditioning, that all species are essentially alike as far as conditioning is concerned, and that 'all responses are about equally conditionable to all stimuli.'"206 These assumptions are the foundation of Skinner's magical thinking, according to Ehrenfeld, and they "constitute a denial of all biological reality."

For Skinner there are no fixed stars in the behavioural constellation of humanity - no evolved biology, no limit to the magical manipulations of pseudo-science. Even competition, which has been with us for good and evil since before the beginning, can supposedly vanish under the wand of the psychologist. "But when you come to apply the methods of science to the special study of human behaviour, the competitive spirit commits suicide." Here we have an arrogance so bloated that it has snapped every last strand that linked it, however tenuously, to reality. How can we possibly expect that a "behavioural engineering" incapable of making a pig let go of a piece of wood or a chicken refrain from pecking at a ball, can neatly excise the competitive spirit from an otherwise intact humanity?207

A persistent theme in humanist thinking is its assumption of responsibility for everyone on earth, which presumes that what is best for everyone can be known. Not all humanists take such a sanguine view of human nature. Paul Kurtz has observed that humanists are not immune to moral corruption either. I have learned from direct personal experience in humanist organizations that even so-called 'humanists' will at times use mendacious means to achieve their goals, and that they are as prone to vanity, jealousy, vindictiveness, and other foibles as other human beings. I was dismayed to discover that some so-called 'humanitarians' and 'philanthropists' make contributions or are devoted to a cause not for the good they will achieve, but for personal power and acclaim.208

Nevertheless, two years later, Lyle L. Simpson was quoting Abraham Maslow, "founder of humanistic psychology and the 1967 recipient of the Humanist of the Year Award", with approval. Having rehearsed Maslow's basic steps towards self-actualisation,
Simpson observes that "no country has reached this utopian state of actualization, and very few persons even understand its meaning." Not deterred by this unfortunate state of affairs, Simpson asserts that it is "the effort of organized humanism" to "bring about this understanding and fulfilment." Presumably humanists are among the few who have reached Maslow's utopia and are in a position to act as guides and instructors. "Although few may attain this level," says Simpson, then as Maslow himself reminds us:

The purpose of living is to become fully functioning human beings in resonance with the universe. For this reason, our principal concern is the quality of life for each person on earth.

The assumption of responsibility for the whole world is evident in the Humanist Manifestos I and II, and even more explicitly in the proposed Humanist Manifesto III:

The ultimate goal should be the fulfilment of the potential for growth in each human personality - not for the favored few, but for all of humankind ... We affirm a set of common principles that can serve as a basis for united action - positive principles relevant to the present human condition. They are a design for a secular society on a planetary scale.

Corliss Lamont also accepts that the "supreme ethical end for Humanists is the worldwide Community Good, that is, the welfare, progress, and happiness of the entire human race." Utopia must be built in this world or not at all, while "reason and scientific method" are to be relied on for the "working out [of] ethical decisions".

John Dunphy, too, believes that "all are responsible for all", a principle which he sees as the corollary of the proposition that God does not exist.

If God has failed in his role as cosmic policeman and if Christianity has failed to uphold the dignity of humankind and to protect the inalienable rights of all - and who can argue with either hypothesis - then a viable alternative to both must be sought. That alternative is humanism.

In his prize-winning essay Troy A. Jacobs depicts recombinant genetics as "an exercise in biology and humanism", and although it "can be used to change the evolution of a cell ... it can also change the attitude of the status quo religions" "because it is so intensely

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210 Ibid., 39
211 Ibid.
212 Lloyd L. Morain, "Humanist Manifesto II A Time For Reconsideration?", The Humanist, September/October 1980, 5
214 Ibid., 53
human". Jacobs asserts both his faith in science and in a humanism which enables rational and scientific programmes to improve the world.

Molecular biology, recombinant genetics, and other biological advances have shown that humans can tinker with the cell, with life, as if it were a machine. **Humans, too, are machines.** Still many years off, the New Biology offers the possibility of cloning and revitalizing humankind.217 [my emphases]

As if to offer the world some protection from this tinkering, Jacobs suggests that "the United Nations should start work on humanity's basic biological rights." His proposal is that:

1. Except in unusual cases, all human beings be allowed to be born free of a genetically engineered genome.218

It is interesting to note Jacobs' notion of human rights. Instead of the inherent and inalienable right to life and other rights we merely have a humanist "permission" to be born free of a genetically engineered genome, unless of course one fits into the category of an "unusual case". In which case:

2. Whenever recombinant genetics can knowingly (by experience on lower hominoids) improve the life and survivability of a developing zygote, applied genetics technology may be used.219

It is not clear who or what are to be regarded as the "lower hominoids". It is also noteworthy that genetics technology may be done merely to "improve life". This catch-all term need not necessarily carry only a benign meaning.

216 Troy A. Jacobs, "The Role Of Recombinant Genetics In Humanism", The Humanist, January/February 1983, 20

217 Ibid.

218 Ibid., 19

219 Ibid.
6. CONCLUSION

While a consensus gentium exists on fundamental human values expressed as inviolable and inalienable rights, a number of factors militate against the strict protection of those rights. A range of attitudes abound in the culture which are hostile to a strict protection of human rights and which affect the determination of societies and individuals to honour their human rights obligations. These attitudes are to be found in the post-Enlightenment culture which has been so profoundly influenced by humanist and social Darwinist assumptions about the nature of humankind, human society, science, religion, and reason, together with a belief in the inevitable progress of human society towards a more moral society under the influence of science, reason and progressive education.220

Most moral philosophers typically proceed on the basis that reason is the norm, that human moral behaviour should conform to reason. The presumption is, of course, that reason itself can be mastered and controlled by the human intellect. Even more importantly, moral philosophy tends to overlook what human beings actually do and think. It is the failure of most moral philosophers to connect what they say with human practice which ensures a continuing estrangement between moral philosophy and the moral decisions people actually make as individuals and collectively.221 A good example of this concerns the right to life and killing. Many moral philosophers discuss treatment/non-treatment questions and euthanasia outside of the human relationships that have been built up over many years. Moral philosophy simply lacks the words and concepts to describe the relationship between a child and parents that has been built up over 40 or more years. That relationship may be a loving relationship, one of estrangement and hostility, or some mixture of the two. When people talk of withdrawing treatment from a parent, it is a decision made in the context of a web of human relationships which have evolved over time.

In a similar way philosophers who advocate abortion and infanticide place no emphasis on the attachment to the child which begins at conception. To speak as if the attachment or bonding process begins only at birth or even a month or more later is unreal. The whole phenomenon of "childlessness" suggests a bonding to a child that is, as yet, no more than "a gleam in the parents' eyes". To be "child-less" may mean that one does not have a child, but it also means that the couple does not have the child they already desire. The real

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220 Vid. chapter II, pages 74-76 supra. The striving for progress, assuming we can agree on what progress means, may well be a healthy thing. In practice, the two may become indistinguishable unless great care is exercised.

221 Exchanges between Peter Singer and members of the Australian Senate Select Committee on the Human Embryo Experimentation Bill 1985 are instructive. In a discussion on whether embryos have intrinsic value, Singer asserted that an object or a person has intrinsic value if it is valued by someone else. Senator Crowley expressed surprise at this way of explaining intrinsic value. Singer observed that "it is always difficult, as a philosopher, to appreciate whether the way one is using terms is the way that they are used outside a discipline." Senator Crowley replied: "I thought it was fairly clear that philosophers do not use words like most everybody else in the community does or the community does not use them in the way philosophers do." Senate Select Committee on the Human Embryo Experimentation Bill 1985, Official Hansard Report, 4 volumes, (Canberra: Australian Government Printing Service, 1986), 495. Later Senator Walters found herself in difficulties. "I do not know where to begin. I really did not know that philosophy was so far distant from community values, but I am learning." Ibid., 501
lived experience of love, marriage and procreation out of which, no doubt, the universally held conviction of the inalienability and inviolability of human life has emerged, seems to have no place in much of what passes for moral philosophy. This may well explain why moral philosophies so often find themselves in opposition to, even hostile to, those universal convictions.

By abstracting from the real human experience moral philosophers may find themselves at odds with the human conviction that there is, indeed, something special about human life as distinct from animal life. If the major impulse to vegetarianism is that the means of obtaining the flesh meat of animals is immoral, then there is, in principle, no reason why the flesh meat of animals and humans may not be eaten if they die of natural causes. The idea of sending human bodies to be recycled as pet food offends the human conviction that the human body is to be treated with respect even after death, and properly cremated or buried according to local custom. If, however, the only morally relevant issues are sentience and certain other capacities experienced and in place, then as the animal liberation philosophy indicates, it is speciesist to imagine that there is something special about being human. If other dead animals can be recycled as pet food, then there is no reason, in principle, why dead human beings cannot be used in the same way.

The humanist trust in reason and science allows the abstraction of moral problems from their full human context. The solving of moral problems becomes a technical construct in which full credibility is given to the pretence that all relevant factors may be identified and in some way scientifically quantified.

Utilitarianism is attractive to those minds which reflect these assumptions because it appears to be 'scientific', 'rational', and 'certain'. It appears to offer a scientifically safe method of computing morally good acts while at the same time appealing to the pragmatism of scientific elites who identify the public interest with the successful outcomes of their scientific protocols. Utilitarianism is able to simplify complex interactions brought about by human actions into the categories of pleasure and pain. What utilitarian philosophy does is to create a philosophical smoke-screen for inhuman behaviour by providing a philosophical and quasi-scientific justification for the elimination of human ballast, and for the imposition of a sectarian ethics on those who will be its victims.

As a back-up to these 'scientific' calculations in the event that they should fail to convince, utilitarians and, for that matter, many deontologists, with supreme confidence in reason, science and philosophy attempt to break the human consensus gentium about human rights by dividing the world into persons and non-persons. To be sure the elimination of persons may be justified by utilitarian calculations [pace human rights]. It is important to recognise this fact about utilitarianism, that the killing of innocent human beings may be justified in the interests of utility even if the ones to be killed are unarguably human persons.

An exception to this is the natural law philosophy of John Finnis, [Germain Grisez and Joseph Boyle]. In his explication of the basic value of human life, Finnis includes "the transmission of life by procreation of children". John Finnis, *Natural Law and Natural Rights*, 86
If, however, the expendable ones can be shown to be non-persons then we have a bioethics that is not the enemy of human rights, since, on this account, non-persons cannot be the bearers of human rights. In this way those moral philosophers who can justify killing human beings avoid the clash between their philosophies and the *consensus gentium* by defining some human individuals or classes of humans out of moral consideration.
CHAPTER IV
HUMAN RIGHTS FOR "PERSONS" ONLY

1. PHILOSOPHICAL AND SOCIAL VINCULA

The point of departure used in this study is the universal acceptance of fundamental human rights which are seen as inviolable and inalienable. No attempt has been made to "prove" that human beings have rights, nor even to establish that human rights are "true" because of the universal agreement. Indeed it always remains possible that a human consensus may change. The fact is, however, that there is a consensus gentium on human rights, that human societies have bound themselves to fundamental human rights. Even those societies which are communitarian societies, such as China, have committed themselves to the rights of the individual over and against the State. The tension between the ethos of such communities and the human rights they claim to espouse has not yet been resolved. In those countries such as the United States of America, Australia, and the member States of the European Community human rights of individuals have been much more explicitly claimed and enshrined in civil legislation. However, these countries, too, have tensions between what is claimed and preached, and what is actually practised, yet it is philosophers, bioethicists, and theologians from these countries which have provided most of the bioethical justifications for the setting aside of human rights.

As far as the practice of medicine is concerned, the tension between the right to life of individuals and the reality of medical practice needs to be addressed. It is not unreasonable to expect that those countries which are so explicitly in the human rights tradition should be bound by their own human rights commitments, that the practice of medicine should not be such as to violate fundamental human rights, and that the newly emerged discipline of bioethics should seek to serve the consensus gentium on human rights rather than seek to undermine it by providing intellectual justifications for violations of human rights, justifications which moral philosophy is in no position to assert are objectively true.1

In the previous chapter, attention was paid to those "ways of thinking philosophically", and "those habits of mind", which have profoundly influenced contemporary Western culture.2 These influences have contributed to the habit of dividing the world into the fit and the unfit, the worthy and the unworthy, the wanted and the unwanted, and the acceptable and the degenerate. In some situations, these divisions have come about in order to promote a particular social programme. An example of this is the feminist

1 The natural law philosophy of John Finnis, Germain Grisez, and Joseph Boyle does claim that the basic human values are 'self-evident' and objectively true. While I find this position attractive, there are difficulties with 'per se nota' such that this philosophy has not yet attracted a consensus among moral philosophers. The tradition of natural law emanating from Thomas Hobbes sees the right to life as resulting from an objective truth about human nature's drive to survival.

2 Supra, 95
movement. For women to achieve social, economic and political equality with men they must be able to compete on an equal basis. Child-bearing and child-rearing represent significant handicaps for women. Women need, therefore, to have control over their own fertility. Easy access to contraception and abortion allows women to have such control over their own bodies, over their own fertility. The link between contraception and abortion and eugenics is when reproductive choice is a eugenically directed choice, the avoidance of giving birth to a child with disabilities. This may be achieved by avoiding pregnancy through contraception, or discontinuing a pregnancy through abortion.

The moral justification for abortion is that it gives women control over their own fertility, and, in the case of eugenic abortions, deliverance from the burden of care of a child with disabilities. The slogan, "every child a wanted child", encapsulates this moral justification and divides children and fetuses into the wanted and the unwanted. Siedlecky and Wyndham describe the ideological difference between 'pro-life' and 'pro-choice' positions on abortion in this way:

The argument is therefore on two irreconcilable ideological levels: an argument about women's right to control their reproduction versus an argument about the human status of the foetus.  

The moral justification for abortion carries with it, then, ideas of the wanted and the unwanted, and in the case of fetuses with disabilities, the fit and the unfit, the worthy and the degenerate. The rights of the unborn, and newborn children with disabilities, are hostage to the fortunes of the rights of women to control their own fertility. It should be noted in passing that the right of a woman to control her own fertility does not meet the criteria of the consensus gentium outlined earlier in this work. In order to complete the argument for abortion as a method of fertility control, the categories of the unwanted and the 'degenerate' are further defined in terms of non-personhood.

The justification for eugenic abortions and eugenic infanticide may be founded in the assertion of the non-personhood of fetuses and newborns, about which more will be said later. Its prior justification is purely eugenic, that such fetuses and newborns with disabilities are 'unacceptable', that it is reasonable to replace them with a 'normal' child.

Stefania Siedlecky, who was the first doctor in the Leichhardt Women’s Health Centre in the Australian Capital Territory, a Centre in which up to ten abortions per week were performed, expresses astonishment that opponents of abortion could disagree with eugenic abortions.

3 Stefania Siedlecky & Diana Wyndham, Populate and Perish, (North Sydney: Allen & Unwin Australia Pty Ltd, 1990), 66
4 Vid., supra 63-68
5 Stefania Siedlecky & Diana Wyndham, op. cit., 87
6 Ibid., 88
Some do not even agree with abortion in the case of ... risk of serious congenital abnormality.\footnote{Ibid., 66}

De Witt Stetten deals with the matter of eugenic abortions by reconceptualising a pregnancy as a "tumor", and a fetus with a disability as a "malignant tumor". Amniocentesis only has a point as a diagnostic procedure if women are prepared to accept the logical consequence of it, the removal of "the malignant tumor". It is worth quoting him \textit{in extenso} to get the full flavour of the eugenic assumptions on which he works.

Pregnancy may be regarded as a tumor. It differs from most other tumors in two important regards. In the first place, it is normally a self-terminating disease; in the second place, it is traditionally assumed to be caused by the invasion not of a virus but rather of a protozoal flagellate. If for the moment we accept pregnancy as a tumor, then amniocentesis becomes a biopsy. As with other biopsy procedures there is little purpose served in undertaking this procedure unless one is willing to subscribe to the consequences which its study indicates. In other words, just as the frozen section of a nodule in the breast connotes mastectomy if the reading of the frozen section indicates this, so does amniocentesis connote abortion if the tumor under scrutiny proves to be malignant.\footnote{De Witt Stetten, "Center for Genetic Disease Study, Genetic Counselling and Amniocentesis", in \textit{Amniotic Fluid: Physiology, Biochemistry, and Clinical Chemistry}, eds. Samuel Natelson, Antonio Scommegna, and Morton B. Epstein, (New York: Wiley, 1974), 277}

Mary Anne Warren, addressing the question of infanticide, sees newborns as non-persons. A neonatal non-person is allowed to continue its existence because it is wanted. To kill a wanted newborn is "wrong for reasons analogous to those which make it wrong to wantonly destroy natural resources, or great works of art." Warren goes on to say that "it follows from my argument that when an unwanted or defective infant is born into a society which cannot afford and/or is not willing to care for it, then its destruction is permissible."\footnote{Mary Anne Warren, "On the Moral and Legal Status of Abortion", \textit{The Monist} 57 (January 1973), 135-136 cited in Robert Weir, \textit{Selective Nontreatment of Handicapped Newborns}, (New York: Oxford University Press, 1984), 156-157}

Thus being wanted, being "defective", and being a nonperson are interrelated factors in the moral justification for eugenic infanticide.

According to Robert Weir, Peter Singer can justify infanticide, but finds that "terminating the lives of birth-defective infants" to be "far less problematic than the larger issue of infanticide."\footnote{Robert Weir, \textit{op.cit.}, 158} Indeed Peter Singer's \textit{Practical Ethics} provides the essentially eugenic thrust of his approach to both abortion and infanticide. He asks us to consider the case of a haemophiliac child. According to one account of utilitarianism, since such a child already exists, and since "his life can be expected to contain a positive balance of happiness over misery", it follows that killing this child "would deprive him of this positive balance of
happiness" and so would be wrong. However if one takes what Singer calls a "total" version of utilitarianism the position changes.

This total view treats the infant as replaceable. Singer describes this approach thus:

When the death of a defective infant will lead to the birth of another infant with better prospects of a happy life, the total amount of happiness will be greater if the defective infant is killed. The loss of a happy life for the first infant is outweighed by the gain of a happier life for the second. Therefore, if killing the haemophiliac infant has no adverse effect on others, it would, according to the total view, be right to kill him.

A number of questions immediately arise. How can the calculations that Singer refers to be made? How can we ever know if "killing the haemophiliac infant has no adverse effect on others"? Singer argues that there is no reason why such a doctrine of replaceability should not be acceptable for newborn infants since we have already accepted it for fetuses. Yet the abortion of fetuses on eugenic grounds is flawed because we cannot predict exactly who is disabled and who is not. "Regarding newborns as replaceable" has "considerable advantages over amniocentesis followed by abortion". Not only would diagnosis be more accurate, we can diagnose all disabilities.

If defective newborns were not regarded as having a right to life until, say, a week or a month after birth it would allow us to choose on the basis of far greater knowledge of the infant's condition than is possible before birth.

Just what is the principle issue for Peter Singer? If it is the non-personhood of fetuses and newborns, a position for which he argues earlier in his book, then questions about total utilitarianism need not be entertained. The likely explanation is that it is his eugenic view of the disabled and the not-yet-abled, the wanted versus the unwanted, linked with a utilitarian and nominalist philosophy which evaluates even human individuals in terms of the benefits and deficits of their continued living, which drives his division of humanity into persons and non-persons.

The book, Should The Baby Live?, which Peter Singer coauthored with Helga Kuhse, carries the sub-title, The Problem of Handicapped Infants. Handicapped infants are a problem, not just the handicaps that infants, or anyone else for that matter, might have. It is, then, the impulses to eliminate unwanted humanity, and to establish fertility control which, in a world that recognises the human rights of the human individual, requires the ultimate justification for killing - that in abortion and infanticide we kill no person.

11 Peter Singer, Practical Ethics, (Cambridge: Cambridge University Press, 1989), 134
12 Ibid.
13 Ibid., 137
14 "If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not have either, and the life of a newborn baby is of less value than the life of a pig, a dog, or a chimpanzee." Ibid., 122-123
James Lachs exhibited the synthesis of eugenics, non-personhood and compassion when he suggested that "the only way to treat" hydrocephalic children "humanely" is to "mercifully" put them to death.\(^{16}\) Mary Anne Warren deplored the practice of starving handicapped new-born children to death. Instead she advocated "the kind, quick, painless, and direct method of lethal injection."\(^{17}\) William Brennan has referred to the similarity in the views of the German, Ernst Haeckel, in 1904, and that of the American, Mary Anne Warren, in 1982. Haeckel likened those "who are born every year with an hereditary burden of incurable disease" to horses which are "rightfully put to death and relieved from pain when they fall hopelessly ill."\(^{18}\) Mary Anne Warren "compared the severely disabled newborn child to a horse with a broken leg which should be killed to spare it from the agony of a slow death."\(^{19}\)

The linking of the virtue of 'compassion' with killing is a feature of the arguments used by Karl Binding and Alfred Hoche in *The Release of the Destruction of Life Devoid of Value* (1920). Karl Binding was an eminent professor of law specialising in jurisprudence and philosophy, while Alfred Hoche was a leading German psychiatrist. Binding saw the killing, without consent, of a "tortured sick person" as a granting of "death with dignity", a "healing intervention".\(^{20}\) Binding believed that "we are spending lots of time, patience and care on the survival of life devoid of value ... To deny the incurable patient the peaceful death he so much desires is no longer compassion but the opposite."\(^{21}\) Hoche refers to the mentally ill as "idiots" who are a "financial burden" on the community. These are "ballast type persons of no value".\(^{22}\) Of "all the different kinds of ballast life" he proposes only to kill the "mentally dead".\(^{23}\) Hoche and Binding are at one with Haeckel and Mary Anne Warren, that there is human life "which has lost so many human characteristics [that] the continuation of the life for the person as well as society has lost all its value."\(^{24}\)


\(^{17}\) William Brennan, *op. cit.* This occurred on the Donahue television talk show of March 10, 1982 and was reported in Nancy Koster, "An Open Letter to Abortion Advocates", National Right To Life News, April 22, 1982, 2


\(^{19}\) William Brennan, *op. cit.*, 88


\(^{21}\) *Ibid.*, 27

\(^{22}\) *Ibid.*, 36

\(^{23}\) *Ibid.*, 37

\(^{24}\) *Ibid.*, 17, 33
The Danish Council of Ethics expressed the opinion that fetal diagnosis should not be "used to pursue eugenic or economic objectives". Notwithstanding that opinion, the Council immediately went on to say that "parents may understandably feel entitled to opt for abortion" in cases "where the birth of a child with a severe handicap and/or serious disease may be presumed to imply a serious complication of the parents' family life".

Yet there are other forms of congenital ailment the nature of which provides no ethical grounds for abortion. In the view of the Council, however, these ethical misgivings must not lead to the public sector denying women, or couples, the right to be informed of such abnormalities or the right to have abortion performed. Here, it is the parents' - or woman's - right to self-determination which weighs heaviest.

John Robertson, Professor of Law at the University of Texas, argues in favour of preimplantation genetic screening. He recognises that such a course of action "raises troublesome ethical and legal issues and is likely to be controversial." He solves those ethical issues by denying any moral status, in the sense of the right to life, to the embryo on the grounds that it is "a minority view" to treat the embryo as a person, and that the consequences of treating the embryo as a person would threaten other practices which are widely approved, such as eugenic abortions and IVF technology. The danger of "eugenics" is similarly wished away with the observation that people want eugenic abortions. "Surely couples do not have an obligation to have genetically affected offspring if reasonable means of avoidance exist." There are no dangerous slippery slopes with eugenic screening of embryos, and "nor have efforts to minimize the incidence of handicapped births been shown to devalue the lives of already existing handicapped children." This latter observation is more an article of faith than an empirical observation, especially in the light of increasing pressure to give legal approval to the infanticide of children with serious defects.

The categorisation of humanity into persons and non-persons is fraught with difficulty, not the least being the consequences of such a categorisation. Non-persons are not bearers of human rights and therefore may be, with good conscience, killed. It might be thought that such a final fate for human non-persons who are unwanted should lead to caution. Are we justified in having that degree of confidence in the capacity of human reason

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25 The Danish Council of Ethics, Fetal Diagnosis and Ethics. A Report, (Copenhagen: The Danish Council Of Ethics, 1991), 58
26 Ibid., 59
27 Ibid.
28 John A. Robertson, "Ethical and legal issues in preimplantation genetic screening", Fertility and Sterility, 57:1, January 1992, 1
29 Ibid., 4
30 Ibid., 5
31 Ibid.
32 The bioethical literature is replete with arguments advanced for infanticide as well as eugenic abortion. Those references may be found in this work passim.
to decide such an issue, free from all malice and perverse motivation? Earlier I referred to Paul Kurtz's assessment of the actual behaviour of humanists based on his own experience. He recognised that "even so-called 'humanists' will at times use mendacious means to achieve their goals", that humanists "are as prone to vanity, jealousy, vindictiveness, and other foibles as other human beings." Kurtz was dismayed that some humanists "make contributions or are devoted to a cause not for the good they will achieve, but for personal power and acclaim.”

[I am] even more distressed that others will stand by and allow the rape of the moral dignities to occur, on the mistaken assumption that sin is always committed by nonhumanists (bishops, divines, and other such personages), not by the emancipated. The result is often that the emancipated, bereft of all conventional standards, are left without any viable principles of ethical conduct at all. The human predicament, what Hobbes called the "perpetual and restless desire of power after power, that ceaseth only in death", and what Christian orthodoxy has described as "original sin", makes a difference to the human capacity to deal with reason. Finnis et al have remarked that "human life in this world would ... be very different had humankind lived as a community in the friendship with God which at the beginning he proposed and made possible."

The distraction of fleeting gratifications and the false security of possessing things and dominating other persons would not have the appeal they now have. But as it is, fear and conflict, self-indulgence, avarice and exploitation pervade human history. In this world, noble and generous self-sacrifice, true freedom, justice, brotherhood, and peace will always be exceptional, limited, and fragile.

It is a fact of human experience that, even those of our goals which can reasonably be described as praiseworthy, may be so attractive that all other considerations become obscured. Reason is used to justify such actions as may be necessary to achieve those ends even if those actions involve direct and willed damage to other human goods. Even otherwise laudable goals may be sought for purely selfish and even malign intentions, as Kurtz has observed. Finnis et al, with the modalities they propose for the making of morally right choices, anticipate these possibilities, the modalities or principles of practical reasonableness providing a natural law method for participation in the basic pre-moral goods. Reason is an ambiguous thing that may be put to whatever purposes we choose. Hobbes, for example, saw

34 Ibid.
the role of reason as the slave of the passions providing the way for persons to get what they want.38

Finnis et al have referred to the "exceptional, limited and fragile" nature of pure intentions. Nevertheless, the evidence is that many bioethicists are indeed so confident in the power of reason to decide on this matter, free from perverse and selfish motivation, that they proffer conclusions upon which they think it proper for the state, the medical profession, scientists, and parents to act. Despite the fact that all other discriminations against specific sections of humanity have been found to be both intellectually without safe foundation and inhuman, in this area of human personhood the humanist confidence in reason's capacity to decide remains definitive for many ethicists.

After the experience of the German Weimar Republic and its aftermath39 the world reacted sharply against any discriminations between human individuals. Racial, religious, political, sexual and social discrimination is rejected by the Universal Declaration on Human Rights. In its place discrimination between persons and non-persons has been prescribed as a rational basis for bioethical decision-making, by-passing the presumption of human rights for all members of the human family. Later in this chapter I shall evaluate the various criteria of human personhood and then argue that this confidence in human reason to determine persons from non-persons is misplaced, since those who propose this distinction disagree among themselves what criteria are determinative of human personhood, and at what stage in the human life cycle one becomes a person or ceases to be a person.

Apart from the eugenic mentality, and the confidence in reason to determine who are the persons, there are two other major factors or habits of mind referred to in the last chapter which contribute to the perceived need to discriminate between persons and non-persons. It should be noted here that discrimination between is not necessarily the same as to discriminate against. It is useful to make distinctions for morally legitimate reasons. Thus distinctions are made between children and adults, and between the competent and the incompetent in ways that favour the protection of children and the incompetent from exploitation. Discrimination becomes discrimination against when distinctions are used precisely to exploit or by-pass the legitimate human rights and interests of others. Thus racial discrimination becomes racist when it is used to injure the human rights of one race in the interests of another race.

The first of these factors refers to the existence of prior notions of what constitutes better and worse human beings. The second reflects the need to discount some citizens as being sensible recipients of medical care because such care is not cost effective in terms of utilitarian calculations. Both factors are allied to the previously discussed eugenics, but may be presented independently of the eugenics agenda.

38 Thomas Hobbes, op. cit., 46
39 The essential elements of eugenics leading to the discounting of some human individuals from full participation in the human family had been embraced by large sections of the health professions in the Weimar Republic, were inherited by the Third Reich and given a racial twist. The same attitudes were also present in other countries in Europe and elsewhere.
In the last chapter I identified ideas of the 'life not worth living', 'degenerate' human lives, and the 'unfit'. These eugenic ideas rest upon prior notions of what is 'good' and what is 'bad'. It may be that these terms of 'good' and 'bad' as applied to human beings may have a purely eugenic content as already discussed. That there are certain "members of the human family" who do not have that "inherent dignity" and those "equal and inalienable rights" of which the Universal Declaration of Human Rights speaks. As we have seen, such forms of human life are then defined as non-members of the "human family". This attitude towards the mentally and physically handicapped is widespread and appears to drive the need to discriminate between persons and non-persons. However, ideas of the 'good' and the 'bad' may also owe much to utilitarian calculations.

Utilitarianism allows a calculation of nett benefit over deficit to determine whether the birth of an individual, or the continuing existence of an individual should be permitted. It presumes that the continued existence of human individuals is rightly to be understood in terms of the permission of others who may be affected by that individual's continuing existence. Each of us is entitled to make choices on the basis of greater pleasure over pain. In the end those choices can only be made by individuals since the perception of pleasure and pain is personal, is subjective. We do not take our point of reference from 'nature'. Marx sees the socialist state as the point of reference, but for Mill it is located in individualism. There is no hierarchy of ends, no fixed points in nature because these constrain choice. This individualism leads to Hobbes' war of all on all, in this case the war of competing moral regimes. Your liberty represents my shackles. Utilitarianism presumes that individuals will act benevolently towards each other once they have been appropriately educated, that they will have regard for others in the acts they choose, because individuals will want to act so as to maximise pleasure over pain.

However, experience tells us about self-interest, that one's person's pain is another's pleasure, and that people often take pleasure in the discomfort of others. Utilitarians such as Bentham and Peter Singer present the idea that the good is pleasure as a dogma, but are unable to show why. This dogma takes no account of the way that the ascetic, for instance, finds pleasure in a physically harsh and demanding life-style. Pleasure and pain may be so intertwined that no separation is possible. Parachutists find ultimate pleasure in taking risks, in feeling real fear. Athletes break the pain barrier and speak of the "bitter-sweet" pain of sheer physical exhaustion. And the dogma assumes that we take pleasure only in benevolent things. Yet people take pleasure in causing harm, in inflicting pain on others even if it is no more than the pain of humiliation. Bernard Williams has put it this way:

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40 "Preamble", Universal Declaration of Human Rights, 1948

41 In the case of abortion and infanticide, the liberty of the fetus or newborn child to continue to live is a burden on those affected, parents, other children, society as a whole.
No doubt some possible projects [utilitarianism] will want to discourage, on the grounds that there being pursued involves a negative balance of happiness to others: though even there, the unblinking accountant's eye of the strict utilitarian will have something to put in the positive column, the satisfactions of the destructive agent.42

When many people take satisfaction from the humiliation of another or others, then the utilitarian calculation may find that there is more weight in the "positive column" than utilitarians themselves might like to see and believe. Examples of this include lynchings, public executions, public exposure of private lives, and the pleasure in seeing "tall poppies" cut down to size. Even good and noble projects may be engaged in for reasons of "personal power and acclaim", as Paul Kurtz has observed.43

Mill assumed that people would choose the higher intellectual and aesthetic pleasures rather than short term vulgarities. In chapter II, Mill's elitist argument on which pleasures are to be seen as the more preferable was discussed. Connections between nature and human beings, and between human beings themselves, are loosened by calculations of pleasure over pain, calculations which are essentially individualistic. Bernard Williams' two test cases of the utilitarian calculation serve to make the point.

Williams describes two cases in which the utilitarian answer to the moral dilemma appears obvious enough. In one of those cases Jim faces the prospect of having to kill one man to save nineteen others from being killed by another. The relatives of the otherwise doomed men will want Jim to kill the one in order that nineteen others will be saved. But what, says Williams, of the psychological effect on Jim. This effect, according to utilitarian thinking is irrational and ought not to form part of the utilitarian calculation. It is not necessary here to rehearse the whole argument. Williams' conclusion, though, is important because it makes clear the threat inherent within utilitarianism to moral agents.

Because our moral relation to this world is partly given by such feelings, and by a sense of what we can or cannot 'live with', to come to regard those feelings from a purely utilitarian point of view, that is to say, as happenings outside one's moral self, is to lose a sense of one's moral integrity; to lose, in the most literal way, one's integrity. At this point utilitarianism alienates one from one's moral feelings; we shall see ... more basically, it alienates one from one's actions as well.44

Another example of this detachment between human individuals brought about by utilitarianism may be seen in R.M. Hare's evaluation of human personhood in the context of human embryo experimentation. Hare ultimately rejects any marker event for the establishing of when a human embryo is a person. He makes virtually no distinction between sperm and eggs and embryos. The question of whether or not to use embryos and fetuses for experimentation is to be decided purely on the grounds of a cost/benefit analysis.

42 Bernard Williams, "A Critique Of Utilitarianism", in J.J.C. Smart and Bernard Williams, Utilitarianism For & Against, (Cambridge: Cambridge University Press, 1990), 113
43 Paul Kurtz, loc. cit., 23
44 Ibid., 103-104
The best law ... would ... grade the harms done by experimentation from zero in the case of sperms to a very high figure in the case of viable infants (one that would forbid all but negligible harm), and balance these against the good expected from experiments. Lockwood is quite wrong to say that 'From a purely practical standpoint ... one cannot apply different cut-off points to different lines of research.' This is exactly what all ethics committees do, or ought to; they ask how much good the research is likely to do, and balance this against the expected harm to the subject. Some harm may be done by experiments at any stage except possibly the sperm; and ethics committees should estimate its magnitude and probability.45

One way of reducing any possible harm or suffering to the subject is by the use of anaesthesia, says Hare.46 He then appears to contradict himself by saying that no harm could really be done to the subject "by destroying it, but only to the person that it might turn into; and this might be compensated for by the bringing into being of some other person."47 In the end, though, as I have already indicated, Hare is not so much interested in just when the embryo "turns into a person",48 but in the net benefits over harms to adult persons. Thus does his version of preference utilitarianism lead to a detachment from any firm commitment to the human individual per se who becomes disposable, if the utilitarian calculations indicate it. Hare is, of course, unable to give anything but the vaguest idea of how these calculations are to be made, and no justification at all for imagining that we can commensurate the incommensurable.

In an extraordinary twist to risk/benefit analysis, Hare claims that human persons who do not yet exist but who might exist in the future should have their interests and preferences counted.49 If there had been a ban on embryo experimentation "IVF could not have been invented" and "all the people who have been produced by IVF would not have existed". Likewise, "those in the future whose existence improved methods might make possible will not exist if a ban prevents the improvement." He makes a similar point about those who "fail to come into existence because of chromosomal abnormalities, but who might come into existence if ways were discovered by research on embryos of detecting and even correcting these abnormalities, [but] will have their existence precluded by a ban [on human embryo experimentation]."50 Where the fate of human embryos and fetuses is concerned, Hare sees them only as "possible persons". Thus when Hare appeared to contradict himself

45 R. M. Hare, "When Does Potentiality Count? A Comment On Lockwood", Bioethics, 2:3, July 1988, 224-225. It is instructive to note just how clearly Hare's formulation of the utilitarian case for human experimentation is in opposition to the Nuremberg Code and the Declaration of Helsinki 1964 and 1975. In the Declaration of Helsinki 1975, in the case of non-therapeutic biomedical research involving human subjects, "3. The investigator or the investigating team should discontinue the research if in his, her or their judgment it may, if continued, be harmful to the individual. 4. In research on man, the interest of science and society should never take precedence over considerations related to the well-being of the subject."

46 Ibid., 224
47 Ibid.
48 A consideration of what it means for a non-person to turn into a person will be made later in this chapter.
49 Hare has argued this point in more detail in a later article, cf R.M. Hare, "Possible People", Bioethics, 2:4, 279-
50 R.M. Hare, "When Does Potentiality Count? A Comment On Lockwood", loc. cit., 223
by wanting to avoid "harm" or "suffering" to "the subject", he just means "possible persons". By a "subject" apparently he does not mean a "real person".

The term, "possible persons", covers sperm, eggs, fetuses, and newborns, even when the "embryo ... is only a gleam in it's parents' eyes". Dianne Nutwell Irving refers to the difficulties involved in knowing "how exactly does an embryo, fetus or newborn turn into something which it seems it isn't already", and then goes on to argue that Hare's "tenseless" possible persons only have "real existence ... as concepts existing in the mind of Hare or other quantifying logicians."

Eventually he will include in his hypothetical realm of abstract logical possibles such various items as sperm, ova, embryos, neonates, adult (normal) people and finally even sets of the best possible people! Hare's claim that there is or are such "tenseless" possibles in reality are nowhere justified, explained or otherwise argued for ... He constantly shifts the meanings of potential, possibility and possible persons.

In order to meet his utilitarian desire to maximise utility for all persons, including "possible persons" who might exist as adults in the future, Hare discounts the interests of other "possible persons" such as fetuses, embryos and newborns. He gets over this difficulty by saying that "the potentiality of the embryo to develop into someone who can enjoy the listed benefits ... is important just because, if it does, that grown person will benefit. The benefit is not to the embryo." In this form of preference utilitarianism the destruction of newborn infants and contraception are wrong "because they prevent the existence of a grown person who has an interest in existing." And, though from this point of view contraception and infanticide may be equally wrong, their wrongness is, as I said, defeasible. By "defeasible" Hare means that the wrongness of contraception and infanticide may be "capable of annulment, liable to forfeiture" if utility requires it. Thus even on Hare's own account of what would be ethically wrong, such wrongness can be set aside for utilitarian reasons. Thus does Hare's account of utilitarianism lead to a detachment from any firm commitment to the

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51 Ibid., 224
52 Ibid., 216
53 Dianne Nutwell Irving, Philosophical and Scientific Analysis of the Nature of the Early Human Embryo, (A Dissertation for the degree of Doctor in Philosophy, Georgetown University, Washington D.C. April, 1991), 7
54 Ibid., 9
55 Ibid.
56 R.M. Hare, "When Does Potentiality Count? A Comment On Lockwood", loc. cit., 216
57 Hare continues to refer to a person who might exist in the future as if he or she existed now when he says that the future person "has an interest in existing."
58 Ibid., 220
human individual per se who becomes disposable if the utilitarian calculations indicate it. And, as I have already remarked, Hare is unable to give anything but the vaguest idea of how these calculations are to be made, and no justification at all for imagining that we can commensurate the incommensurable.

Since the calculations of pleasure over pain are essentially individualistic, there being no objective calculation possible, the individualistic demand to have one's own needs met leads to the articulation of a multitude of grievances, each demanding that the Government do something about it, even when what is being demanded has a negative impact on the pleasures of others. Competing moral regimes require funding and changes to the law to meet their demands. Although utilitarians assure us of solutions to moral problems, solutions which are rational and objective, what in fact we have is the individual's right to "do their own thing", even when that threatens the consensus on agreed values such as the right of every person to live. In the last chapter I referred to the development of the doctrine of personal autonomy in just such a one-sided way. Thus the repression of the "degenerate" is morally permissible not just because they are "degenerate", but because they represent a burden to themselves, their parents and the community.

The notion of a 'good' person or a 'bad' person is necessarily subjectively assessed in terms of the impact that fetus or newborn child has on others, that is, in terms of burdens and benefits. The 'bad' may be repressed so that they may be replaced with the 'good'. Since this still leaves the uncomfortable intuition that it is wrong to kill persons, personhood and rights possession is reserved until later in the human life cycle, and to such a time that will not interfere with the happiness of others or the scientific projects which, it is claimed, will advance humanity both now and in the future.

In so far as utilitarianism prescribes actions as being morally good on the basis of utility, it provides a moral justification for actions that would, in other sets of circumstances, be intolerable. Nevertheless a precedent is set. Bernard Williams discusses the precedent effect in detail. The utilitarian response, that the precedent effect can only be due to a "confused perception" that the situation and the "agent's course in it" is the same as another situation which is, in reality, quite different, is noted.

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[60] The inability of utilitarians to face the fact of what their calculations indicate has been well shown by John Finnis. In discussing R.M. Hare's account of why "the tortures laid on to entertain the Roman populace at the arena" were morally wrong, Hare engages in what Finnis calls a "mere rationalization". "The wrongfulness of such practices does not depend," says Finnis, "on the question whether those watching get sufficiently or insufficiently exquisite satisfactions from these compared with other entertainments. When homicides are painless, utilitarians have always found themselves obliged to say that the wrong consists in the apprehension caused to the survivors who henceforth have to worry about being killed off privily. Once more, they mislocate both the harm and the wrong. The person really harmed and wronged is, of course, the victim, not the survivors. But of that wrong, proportionalism new or old has no coherent account." John Finnis, Fundamentals of Ethics, 104-105

[61] Supra 95-106
However, the fact that the precedent effect, if it really makes a difference, is in this sense based on a confusion, does not mean that it is not perfectly real, nor that it is to be discounted: social effects are by their nature confused in this sort of way.\(^\text{62}\)

The confident prescription of euthanasia according to 'strict medical guide-lines' in the Netherlands is instructive. In chapter III (pages 78-83) I assembled evidence of how the precedent effect actually works. This is not surprising since the precedent to legally kill provides a powerful outlet for the eugenic division of humanity into the wanted and the unwanted, the fit and the degenerate, and ultimately into persons and non-persons. Allied to the precedent effect are two other matters arising from Bernard Williams' case involving Jim, and which affect the practising physician in the cases of euthanasia, abortion, infanticide, and embryo experimentation.

Firstly, Williams points out that Jim's personal projects and commitments are discounted against the interests, projects and commitments of others. Nineteen of the twenty who will be saved, and their relatives, are judged as having cumulatively more interests and satisfactions than the one to be killed and the one who kills. Even the undesirable project of Pedro, who has resolved to kill all twenty, unless Jim kills one, affects the utilitarian calculation by which Jim is bound in the interests of utility.

On the utilitarian view, the undesirable projects of other people as much determine, in this negative way, one's decisions as the desirable ones do positively: if those people were not there, or had different projects, the causal nexus would be different, and it is the actual state of the causal nexus which determines the decision. The determination to an indefinite degree of my decisions by other people's projects is just another aspect of my unlimited responsibility to act for the best in a causal framework formed to a considerable extent by their projects.\(^\text{63}\)

The point here is that utilitarianism breaks the connection between me as a person and what I actually have to do if I am to act ethically. Williams argues that it is absurd for a person to have to step aside from their own projects and decisions "and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his action in his own convictions."\(^\text{64}\) Thus utilitarianism encourages physicians to act contrary to their own fundamental projects and commitments as physicians, and to see themselves as dispensers of services, even the administration of death, on the basis of the projects and commitments of others which, according to the utilitarian calculations, produce the most utility.

The second further thing to note is the connection between the humanist commitment to "the quality of life for each person on earth" and the utilitarian commitment to maximising total utility. This in large measure explains the humanist and utilitarian hostility to the principle of the "sanctity of human life", which I have referred to as the

\(^\text{62}\) Bernard Williams, op. cit., 107

\(^\text{63}\) Ibid., 115

\(^\text{64}\) Ibid., 116
"inviolable and inalienable right to life", in favour of the "quality of life". Yet the notion of the "quality of life" is elusive, subjective, and ultimately tyrannical when decisions are made to kill some people on the grounds that others would not like their quality of life, or on the grounds that others believe that their continuing existence represents a burden not only to themselves but also to their family and the wider community.

The second of the remaining factors arising from the previous chapters concerns the use of quality-adjusted-life-years (QALYs) as a means of ethically justifying the non-treatment of certain classes of people. The context in which the concept of QALYs has been developed is one of increasing expectations of health care provision coupled with a decreasing capacity to fund such services. The promise of medical science to develop ever more sophisticated technologies to ward off death has come at a financial cost. The capacity of governments to make available all possible treatments to those who demand them founders on the rock of inadequate funding. These expectations from the community are fuelled by the "impulses and values fundamental to our scientific and humanistic culture. They are the impulses to progress, to improvement." The utopian urge thus encouraged, we succeed only to create new problems, as Hiram Caton has pointed out.

The recent history of medical progress illustrates this callow belief that we may, by dint of intelligence and courage, create and control our futures. The ventilator saves the lives of those in crisis; but it also extends the lives of those unable to benefit from service and in that way creates ethical dilemmas and funding burdens. Transplantation is a stunning feat that was once hailed as a giant step to immortality. Today we are more impressed by the utter insupportability of transplants for all who need them.

65 Cf for example Helga Kuhse, The Sanctity-of-Life Doctrine in Medicine, (Oxford: Oxford University Press, 1987). Kuhse starts "with the assumption that conscious life has value because it enables the existence of pleasurable states of consciousness ... I am suggesting that life is not an intrinsic good, not a good in itself, but rather a means to something else - for example, pleasurable states of consciousness." Ibid., 213. It should be noted that Kuhse's "assumption" is in direct contradiction to the working assumption of the "inherent dignity" of all "members of the human family" of the international community, and the codes of ethics of the medical profession, an assumption which is shared by nearly all human beings. Kuhse's humanistic and utilitarian assumptions are partial. A sectarian moral philosophy does not seem to me to be a safe basis upon which to build a medical ethics, especially when that philosophy acts upon assumptions not shared in the wider community.

66 Robert Pollnitz has noted the difficulties in determining the quality of life. "Now you might expect a doctor to regard quality of life as an attractive partner, a large house, two cars in the garage, the kids at private schools, and a holiday each year on the ski slopes - whereas an Ethiopian refugee probably thinks of quality of life as a full belly and a blanket to sleep under. I am not trying to be facetious, but rather to make the point that quality of life judgements are inherently based (biased?) on the personal values of whoever presumes to make the judgement." Dr Robert Pollnitz, "Quality of Human Life and the Demand for the Administration of Death", (Adelaide: March 16, 1990), para 12

67 Hiram Caton, "Equity Goals and Quality of Life Issues", paper delivered to the 9th Annual Conference of the St. Vincent's Bioethics Centre, Melbourne, Victoria, May 6, 1991, 2

68 Ibid.. The difficulties involved in matching the supply of organs with demand can be seen in a paper publishing the results of an "audit of all deaths in intensive care units in England (except those for coronary care only and neonatal intensive care) in 1989 and 1990" carried out at the request of the Department of Health in the United Kingdom. Sheila M. Gore, Deborah J. Cable and Annabel J. Holland, "Organ donation from intensive care units in England and Wales: two year confidential audit of deaths in intensive care", British Medical Journal, 304:6823, February 8, 1992, 349-355
The belief that the problems created by scientific achievement can be themselves solved by a further application of scientific endeavour finds its expression in ethics as well as in technology. Economics is presented as a reservoir of expertise fit for the resolution of the problem of supply and demand. The QALY has been developed to provide a way out of the dilemma, an ethically appropriate way to achieve cost containment.

The QALY is received and used in both Britain and the United States.\(^69\) The QALY is "a numerical index of the net change in quality of life added by a service."\(^70\) A year of healthy life has a value of one, with illness or incapacity being assigned values of less than one. These values are declared to be community values after surveys and interviews determine "an average community valuation of life for a range of conditions that are costly to service or are accompanied by substantial deficits of pain, encumbrance of movement, dependency, and so on."\(^71\) These measurements are developed into the Rosser Index, the index for a specific "condition" being its QALY. This in turn is used to compute the "health output or effectiveness (E) of a given service " in terms of the "value it adds to the patient."\(^72\)

The economist J. Richardson is frank about the way in which the value of life should be measured. "Lives must be treated as having different values when the quality of life differs."\(^73\) The natural corollary of this is that the lives of those persons with significant disabilities are ipso facto of less value than the able bodied, the lives of the elderly are of less value than younger adults, and the lives of the sick and enfeebled of less value than the well. Richardson builds his case on the "normative principle in Economics", that "an activity will increase welfare if the benefits that result from it exceed the costs."\(^74\) By "costs" he means "opportunity costs". Thus, "the opportunity cost of an activity is the loss of human welfare (however measured) that occurs elsewhere as a result of the activity, that is, it refers to the benefit of the foregone opportunities." Accordingly Richardson asserts that the "opportunity cost of a deformed baby may be the life of a normal child"\(^75\) in the case of an abortion for eugenic reasons.

The justification for measuring the value of human life in terms of benefits, is that human beings do not treat their lives as having infinite value. People take risks by smoking and eating fatty foods, risks of an early death for the sake of an enjoyable life. The

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\(^70\) Hiram Caton, "Equity Goals and Quality of Life Issues", op. cit., 4

\(^71\) Ibid.

\(^72\) Ibid.

\(^73\) Ibid.

\(^74\) Ibid., 227

\(^75\) Ibid., 228
community "demand(s) the good life and not simply life at any cost." Thus, for Richardson, "the true issue is not whether life is of infinite value but rather what is the price we are prepared to pay for it in terms of a reduced quality of life?" However the *consensus gentium* establishes the equal importance of all human lives simply because they are human lives. It does not follow from the observation that individuals take risks with their own lives that they are entitled to take risks with the lives of others. The whole notion of quality of life is a "rubbery" one, depending on what it is that is taken into account, and what method of computation is used.76

The choice between these methods is based on logistic considerations of convenience and efficiency, but at the bedside there is a patient who will or will not receive treatment. For the patient it is pure chance if the Rosser index of their quality of life matches their own feelings about their quality of life - if indeed they think of their lives in "quality" terms.77

John Harris rejects the whole notion of QALYs as a basis for health care allocation. He argues that each individual has an equal claim on health care resources, that all people are entitled to be treated as equals.

Indeed I believe with Hobbes and many other political theorists, that any nation State's claim to the allegiance of its citizens is contingent upon it being willing and able to protect the lives and liberties of its citizens.78

John Cubbon, however, defends the unequal treatment of patients, and observes that "discrimination loses some of its sting if those who are less favourably treated are not members of a clearly defined group with a corporate sense." Indeed, he avers that "people needing coronary artery bypass grafting for mild angina with double-vessel disease - which is expensive in QALY terms - feel much less affinity for one another than members of ethnic minorities."79 However John Harris continues his rejection of QALYs and Cubbon's subsequent further justification for them in terms of triage in time of war.

Echoing Hobbes again, triage and QALYs are part of the philosophy of permanent war in which the good guys are the fortunate for whom long and healthy life-expectancy can be cheaply provided. The enemy are those unfortunates who stand between the fortunate and their survival by daring to make rival claims on our concern and our resources.80

76 Hiram Caton has noted that the "quality of life of a Downs Syndrome child with no other complications may be, say, 0.02; by another, 0.07" since "different methods produce different Rosser index values." Hiram Caton, "Equity Goals and Quality of Life Issues", op. cit., 6

77 Ibid.

78 John Harris, "Unprincipled QALYs: a response to Cubbon", *Journal of Medical Ethics*, 17:4, 1991, 186

79 John Cubbon, "The principle of QALY maximisation as the basis for allocating health care resources*, loc. cit., 182. Harris' rejoinder to this remark is that "nothing builds corporate identity and a sense of solidarity faster than unjust discrimination." John Harris, "Unprincipled QALYs: a response to Cubbon", loc. cit., 187

80 John Harris, "Unprincipled QALYs: a response to Cubbon", loc. cit., 187
QALYs have become accepted in many quarters as an objective and scientific means of determining who will or will not be treated. QALYs appeal because they speak to the scientific and humanist faith in science and reason to solve all human problems, and because they are in harmony with utilitarian presuppositions about the way in which ethical problems are solved. As I have remarked earlier, such solutions fly in the face of the *consensus gentium* about the equal and inalienable rights of all members of the human family. The disconnection between doctors and patients is complete as treatment decisions become based on criteria other than the rights, duties and obligations of patients and physicians. The State, as represented by the medical bureaucracy, interposes itself between the physician and the patient. The poor, the elderly, people with disabilities, and the very sick have their right to medical treatment curtailed in favour of the rich, the young, the abled and the less sick.

Of course there is a discussion that has to go on in the light of the finitude of health care budgets and the principle of distributive justice. QALYs, however, as a solution to the problem of limits to health care budgets in the light of increasingly expensive treatments, offends the fundamental rights of citizens, particularly those whose quality of life is judged by others to be too low. QALYs reflect the eugenic impulse to reject the 'unfit', the scientific and humanist faith in reason and science to 'solve' problems by 'scientific' means, and the utilitarian preoccupation with maximising pleasure over pain, benefits over burdens. The criticisms of utilitarianism by Bernard Williams, referred to above, stand as criticisms of QALYs.

To get around such criticisms Cubbon notes that "the doctor-patient relationship is, and should be, an individual and personal one. It does not rest on mathematical calculations." QALYS should be reserved for policy decisions of what is available to particular classes of patients, but should not be used in the ordinary clinical encounters with patients. Doctors cannot decide on the basis of QALYs which patients will get their time and effort. In any case, "the bundles of rules followed by doctors in clinical situations, though some may lead to actions that do not in every case maximise QALYs, produce more QALYs overall than would be the case if they were universally replaced by the principle that everything should always be done to maximise QALYs."

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81 Even in a system of rationing using QALYs, the rich will always be able to afford treatments that most of the community could not afford without State subsidy.


83 John Cubbon, "The principle of QALY maximisation as the basis for allocating health care resources", *loc. cit.*, 183-184
John Harris' rejoinder is instructive.

Cubbon rightly believes that using QALYs to discriminate between patients would undermine the doctor-patient relationship. He doesn't however consider the possibility that a public policy based on QALYs might, for analogous reasons, undermine public confidence in and respect for government and health-policy makers. But more important, it is simply an article of faith that avoiding QALYs in clinical situations will in fact maximise QALYs overall. If QALYs represents a defensible (even mandatory) way of allocating resources then we surely should use them everywhere and rely on education of the sort Cubbon goes in for, to convince people that this is right and fair.84

2. CRITERIA FOR HUMAN PERSONHOOD - A CRITICAL EVALUATION

The ultimate justification for the administration of death by the medical profession is that when they kill a human individual they kill a non-person. The only exception to this is voluntary euthanasia where human persons killed because they voluntarily and competently asks to be killed. Embryos, fetuses, newborns, and the severely physically or mentally handicapped are not, on this account, persons, they are human non-persons. The impulse to kill these classes of human "entities" has been discussed in detail. The justifications mounted for the exclusion of some members of the human species from moral consideration will now be examined. I shall argue that there is no agreed standard for the recognition and the ascription of personhood and non-personhood, that the justifications offered for various standards rely on different marker events in the human life cycle, and that in the face of our common humanity it is unsafe to exclude any human being from membership of the human family.

The consensus gentium is that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world",85 and that "everyone has the right to recognition everywhere as a person before the law."86 In my view the onus of proof is on those who wish to kill a member of the human species that the ones they seek to kill are not members of "the human family". The evidence will show that there is no agreed basis for excluding some human beings from membership of the human family, that all of the justifications so far promoted are problematic, and that there exist very powerful reasons for supposing that it is unreasonable to exclude some human beings from membership of the human family.

The human life cycle clearly begins with the fertilisation of a human egg with a human sperm. In a statement to the Australian Select Committee on the Human Embryo Experimentation Bill 1985, John F. P. Kerin, then head of the Reproductive Medicine Unit of the Queen Elizabeth Hospital, Adelaide, South Australia, said:

84 John Harris, "Unprincipled QALYs: a response to Cubbon", loc. cit., 187
85 Preamble of the Universal Declaration Of Human Rights Approved By The General Assembly Of The United Nations , (Paris, 10 December, 1948)
86 Universal Declaration of Human Rights 1948, Article 6
In simple and realistic terms it is clear that a biological entity capable of unique human development has not arisen prior to fertilisation of the egg with the sperm. Therefore neither the egg nor the sperm have a special significance in terms of their individual capacity for a separate human being. From the time of fertilisation onwards the embryo has the capacity for further development as an individual human being provided this is not interrupted by natural intervention such as spontaneous abortion, a major complication of pregnancy or interruption of the pregnancy by artificial means which threatens the well-being of the foetus. Therefore it would seem logical to infer that another human life begins at the time of fertilisation. If this proposition is accepted then the next point of consideration relates to the rights and status of the human embryo from the point of fertilisation.\[87\] [my emphasis]

Fertilisation is "the process by which the male and female gametes fuse".\[88\] The main results of fertilisation are:

(a) **restoration of the diploid number of chromosomes**, half from the father and half from the mother. Hence, the zygote contains a new combination of chromosomes, different from both parents; (b) **determination of the sex** of the new individual. An X-carrying sperm will produce a female (XX) embryo, and a Y-carrying sperm a male (XY) embryo. Hence, the chromosomal sex of the embryo is determined at fertilization; (c) **initiation of cleavage**. Without fertilization the oocyte usually degenerates 24 hours after ovulation.\[89\]

Anthony Fisher has assembled other citations from a number of medical and biological textbooks, all of which underscore the scientific consensus that "the human embryo is a genetically human, discrete and alive unit, organically single and individual, with a self-contained power to organise his or her own growth, multiplication and differentiation in a way that ordinarily leads to a human adult."\[90\] R. Yanagimachi begins his essay on "Mammalian Fertilization" with the statement: "Fertilization in mammals normally represents the beginning of life for a new individual."\[91\]

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89 Ibid., 30


On the basis, then, of this standard textbook definition of fertilisation, John Kerin's assessment of what happens at fertilisation appears to be fully justified. The embryo\(^\text{92}\) is a "new individual", genetically different from his or her parents, and containing all the necessary genetic information for further development. This embryological understanding of the beginning of human life has been expressed in various formulations. The Senate Select Committee On The Human Embryo Experimentation Bill 1985 [Australia] defined the human embryo:

The Committee, in adopting the usage 'embryo' to describe the fertilised ovum and succeeding stages up to the observation of human form, means to speak of genetically new human life organised as a distinct entity oriented towards further development.\(^\text{93}\)

The Parliament of West Germany defined the human embryo in its *Embryo Protection Act 1990*.

An embryo within the meaning of this Act is defined as the fertilized human egg which is capable of development from the time of nuclear fusion onwards, and also any totipotent cell taken from an embryo which, by providing all necessary conditions, is capable of dividing and developing into an individual.\(^\text{94}\)

The Swiss Academy of Medical Sciences has defined the human embryo as "the fruit of fertilisation up to the end of organogenesis."\(^\text{95}\) The Academy's "Medical-Ethical Instructions For Medically Assisted Procreation ... relate to the earliest stages preceding

\(^{92}\) It is interesting to note that Langman's *Medical Embryology Sixth Edition* does not use the term "pre-embryo", a term which is meant to refer to the entity up to 14 days. The comparative lawyer Albin Eser has suggested that "the naive (speaking from a normative-theoretical perspective) and rather simplistic efforts to get rid of the basic value problem through terminological 'degradation' of the pre-implantation embryo to the status of 'pre-embryo' or even to simple 'seed' or 'germ' should be abandoned. Rather than prejudicing the value questions involved through conceptual-terminological game-playing it would be better to concentrate on the question that is lastly decisive: To what extent does or should a species-specific human (since originating from human gametes) new entity of life - i.e., at least genetically capable of achieving the full potential of a human being - possess sufficient value to make us unwilling to allow for total freedom of choice with respect to maintaining or destroying this life?" A. Eser, "Experiments with embryos: legal aspects in comparative perspective", UK National Committee of Comparative Law 1987 Colloquium *Legal Regulation of Reproductive Medicine* (Cambridge) cited in Anthony Fisher, op. cit., 173-174

\(^{93}\) *Human Embryo Experimentation In Australia*, Senate Select Committee On The Human Embryo Experimentation Bill 1986, (Canberra: Australian Government Printing Service, 1986), xiii


\(^{95}\) "L'embryon est le fruit de la fécondation jusqu'à la fin de l'organogénèse." *Directives Médico-Éthiques Pour La Procréation Médicalement Assistée*, (Bâle: Académie Suisse Des Sciences Médicales, 1990), 1.5. (My translation) Organogenesis is the period from the fourth to the eighth week during which all major organs and organ systems are formed. Jan Langman, *Medical Embryology*, (Baltimore: Waverly Press Inc., 1983), 71.
implantation." The British *Human Fertilisation and Embryology Act 1990*, defines the embryo as "a live human embryo where fertilisation is complete, and ... references to an embryo include an egg in the process of fertilisation and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote." The Western Australian *Human Reproductive Technology Act 1991* defines the embryo as "a live human embryo, in the stage of development which occurs from - (a) the completion of fertilisation of the egg; or (b) the initiation of parthenogenesis." Many other countries refer to an embryo [in some cases a pre-embryo] in similar terms.

In the light of what appear to be the scientific facts of the matter, and the way those facts have generally been received by a wide range of legislatures and scientific bodies, it is interesting to note that some scientists have denied that there is anything special about the time of fertilisation. Robert Edwards, a pioneer in *in vitro fertilisation* (IVF) technology claims, following C.R. Austin, that "fertilization is only incidental to the beginning of life, for the processes essential to development begin long before ovulation." Hiram Caton has referred to this remark as "a magisterial annihilation of textbook embryology." C.R. Austin concedes that "the most obvious event to pick" as the beginning of "a person's life" is fertilisation. He then asserts that "for biologists the preceding and succeeding cellular processes are equally important" while conceding that the "august World Medical Association" accepted in 1949 that life begins "from the time of conception". He then begins a search for "a generally acceptable 'beginning' for human life." What follows is an argument of some complexity, but there is nothing in it to suggest that the textbooks are wrong when they see in the process of fertilisation a decisive change such that both sperm and egg cease to exist as separate entities and combine to form a new entity, the human embryo. It is this entity alone which has the capacity for continuous development to birth and beyond.

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97 *Human Fertilisation and Embryology Act 1990*, 1.(1)(a)(b). Unlike the Germans and the Swiss Britain nevertheless allows embryo experimentation until "the end of the period of 14 days beginning with the day when the gametes are mixed, not counting any time during which the embryo is stored." 3(4).

98 *Human Reproductive Technology Act (WA) 1991*, 3(1). The Western Australian Act forbids any "project of research" upon "any egg in the process of fertilisation" and "any embryo". 14(1)(e)(iii)(iv)


103 Of course if the embryo has a genetic defect then it may die sooner rather than later, just after birth or prior to birth.
To be sure all the events leading up to fertilisation are important. Without them the main event would not occur. But no one who follows sport would deny that all the preparations for an event are important, that if the sporting stadium were not built and prepared, that if the athletes did not learn the rules of the game, and if no umpires or referees were prepared and made available, then the event would not occur. Nevertheless a game of football is a game of football and is in every way different and distinct from the preparations. If despite all the preparations the footballers do not come together on the field there is no event to watch. If, as in the case of a tennis match, one of the players becomes ill or gets injured, the game is aborted. The same may be said for fertilisation. If, despite all the preparations, the sperm and egg do not meet, the event does not occur. If the embryo is sick then the pregnancy may be spontaneously aborted. Equally, though, the preparations without the event are without much meaning. What is so singular about fertilisation is that a new human life has begun. Neither sperm nor egg is a new human life.

Austin then shifts his ground away from a question of when does human life begin, a biological question, to "is the being at this stage sufficiently 'human' to qualify as the start of a person?"\textsuperscript{104} This latter question is a philosophical question and the answer to it will turn on how Austin defines the terms 'human' and 'person'. Appearing to depend only on scientific data he concludes from the fact that at "about 12 weeks, electrical activity can be detected in the brain of the fetus, which could signal the dawn of consciousness" then "we would seem to have a very logical stage marking the start of a person."\textsuperscript{105} The basis for this conclusion is the contemporary legal and medical convention that "cessation of electrical activity in the brain ('brain death')" marks the "termination of a person."\textsuperscript{106} However, according to Andrew Varga

The difficulty with this position is that brain death indicates the end of human life as we know it, the dead brain having no capacity to revive itself. But the developing embryo has the natural capacity to bring on the functioning of the brain. The two stages of human life are, then, entirely different from the point of view of brain functioning. The embryo contains the natural capacity to develop all the human activities: perceiving, reasoning, willing and relating to others. Death means the end of natural growth, the cessation of these abilities.\textsuperscript{107}

Austin seems to be unsure as to whether or not human personhood and human life are the same thing. In some places these terms appear to be interchangeable, in others not. He denies that fertilisation is the beginning of human life, claiming that it "obviously begins before fertilisation", and he dismisses the appearance of the embryonic disk as the "start of a

\textsuperscript{104} C.R. Austin, \textit{op. cit.}, 28

\textsuperscript{105} \textit{Ibid.}, 29

\textsuperscript{106} \textit{Ibid.}. Hans-Martin Sass also uses brain birth as the criterion for the beginning of human life based upon the analogy with brain death. He claims that this fits both "basic Judaeo-Christian and Graeco-Roman traditions" and that "its moral benefits far outweigh probable moral costs." This latter justification is, of course, both utilitarian and eugenically inspired. Hans-Martin Sass, "Brain Life and Brain death", \textit{The Journal of Medicine and Philosophy}, 14:1, February 1989, 45-60. The same issue of this journal contains a variety of articles about birth criteria and canvassing the use of fetal and anencephalic tissue for transplantation.

\textsuperscript{107} Andrew C. Varga, \textit{The Main Issues in Bioethics}, (New York: Paulist Press, 1980), 42.
person" because it "is just a collection of similar cells, virtually undifferentiated, poorly
delineated from its surroundings, about a fifth of a millimeter long, non-sentient, and without
the power of movement."\textsuperscript{108} As I have already shown he then says that "at about 12 weeks",
when electrical activity can be detected in the fetuses brain, we have "a very logical stage ,
marking the \textit{start} of a person". His ultimate conclusion appears to give the lie to this "very
logical stage"\textsuperscript{109}

At about 24 weeks, the fetus reaches a state in which it can commonly survive
outside the maternal body, with assistance, and at 28 weeks it achieves protection in
England under the Infant Life Preservation Act of 1929. \textit{Just which stage marks the
start of a person's life is a matter of personal opinion}.\textsuperscript{110} [my emphasis]

This observation, that it is a matter of personal opinion as to "just which stage marks
the start of a person's life", as distinct from the start of a "human life", appears to be right.
Different people propose different definitions of "personhood", and assume that there is a
morally relevant disjunction between human life and personhood, that personhood is
achieved some time later in the human life-cycle than fertilisation. Discussing the notion that
life begins at fourteen days, Elizabeth Anscombe \textit{et al} make this observation:

This argument comes perilously close to self-contradiction. Fourteen days from what?
If the answer is "fourteen days from fertilisation", this burkes the question "why
measure development from fertilisation if fertilisation is not the start?" If whatever is
supposed to happen at fourteen days marked the start of life, surely \textbf{this} would be
called day zero, and development would be measured from this point.\textsuperscript{111}

Very often the definition of personhood is not explicit, but based upon assumptions
of what we mean when we use the term "person". I shall discuss, firstly, attempts by
scientists to distinguish persons from non-persons, and then later deal with the arguments
proposed by philosophers. I recognise that the proposals by scientists in this matter are
replete with philosophical assumptions, usually undeclared, as to what constitutes a person.
"The simplistic dichotomy between fact and interpretation, objectivity and subjectivity, is
illusory", says Fisher.\textsuperscript{112} Alasdair MacIntyre puts it this way:

\begin{itemize}
\item \textsuperscript{108} C.R. Austin, \textit{op. cit.}, 28
\item \textsuperscript{109} \textit{Ibid.}, 29
\item \textsuperscript{110} \textit{Ibid.}, 31
\item \textsuperscript{111} Elizabeth Anscombe \textit{et al}, \textit{Destructive Research Upon Human Embryos}, (March 1990), 1
\item \textsuperscript{112} Anthony Fisher, "Individuogenesis and a Recent Book by Fr Norman Ford", \textit{Anthropotes}, 7:2, Dicembre, 1991.
\end{itemize}
'Fact' is in modern culture a folk-concept with an aristocratic ancestry. When Lord Chancellor Bacon as part of the propaganda for his astonishing and idiosyncratic amalgam of past Platonism and future empiricism enjoined his followers to abjure speculation and collect facts, he was immediately understood by such as John Aubrey to have identified facts as collectors' items, to be gathered in with the same kind of enthusiasm that at other times has informed the collection of Spode china or the numbers of railway engines. The other early members of the Royal Society recognized very clearly that, whatever Aubrey was doing, it was not natural science as the rest of them understood it; but they did not recognize that on the whole it was he rather than they who was being faithful to the letter of Bacon's inductivism. Aubrey's error was of course not only to suppose that the natural scientist is a kind of magpie; it was also to suppose that the observer can confront a fact face-to-face without any theoretical interpretation interposing itself.\textsuperscript{113}

MacIntyre concludes that it "is now largely agreed upon by philosophers of science" that "this was an error, although a pertinacious and long-lived one".\textsuperscript{114}

\textbf{2.1 Biology And The Concept Of Personhood}

There exist four principle objections by scientists to the idea that the early human embryo is a person in the sense of having an unambiguous destiny to continue development towards birth, childhood and on into adulthood. The "mole argument", the "wastage argument", the "recombination argument", and the "twinning argument".\textsuperscript{115}

The mole argument refers to the possibility of the "fertilization of a faulty egg, the embryo developing only under the influence of the sperm chromosomes."\textsuperscript{116} It may also refer to the possibility of a normal egg being penetrated by two spermatozoa or by a single one with an abnormal set of chromosomes. A complete hydatidiform mole (CHM) refers to the fertilisation of a faulty egg with a normal sperm. A partial hydatidiform mole (PHM) refers to the abnormal fertilisation of a normal egg.\textsuperscript{117} However, as Albert S. Moraczewski points out, "this is not a question about a normal zygote or embryo subsequently becoming a hydatidiform mole (complete or partial)." The question as to whether or not a hydatidiform mole is a person is a separate question which Moraczewski answers in the negative since it

\begin{footnotesize}
\begin{itemize}
\item[113] Alasdair MacIntyre, \textit{After Virtue}, Second Edition, (London: Duckworth, 1982), 79. Cf Anthony Fisher: "Among important critics of the assumptions operative in the sciences have been Polanyi, Kuhn, Lakatos, Hanson and Feyerabend. They have exposed some of the assumptions behind naive inductivism and the positivist distinctions between fact and interpretation, neutral objective science and committed subjective metaphysics and religion." "Individuogenesis and a Recent Book by Fr Norman Ford", \textit{loc. cit.}, 203-204
\item[114] Alasdair MacIntyre, \textit{op. cit.}, 79
\item[115] The terms "mole argument" and "wastage argument" I have borrowed from H. Caton, \textit{Scientists Advocate Policy: In Vitro Fertilization in Australia}, \textit{op. cit.}, 10
\item[116] C.R. Austin, \textit{op. cit.}, 28
\end{itemize}
\end{footnotesize}
does not, in his terms, have the "apt matter (since it lacks the biological capacity for proper development) for receiving a soul."118

The point of the mole argument is that fertilisation is not to be seen as the beginning of human life. The Australian Academy of Science has stated that "scientific evidence provides no support for the concept of fertilization as the beginning of life"119 because what is formed might turn out to be a hydatidiform mole or, alternatively, might twin. On the basis that fertilisation might not lead to an embryo, (the Academy preferred to call it a 'pre-embryo'), the Academy wanted no embryos to be considered as the beginning of human life. However, all that is claimed in the textbooks for the beginning of human life is fertilisation as defined above, not defective fertilisation as in the case of hydatidiform moles. The hydatidiform mole is not the biological equivalent of a fertilised egg with a defective gene. It is a special case where the fertilisation process itself is so abnormal that it can be said not to have occurred at all.

The *wastage argument* refers to the high rate of wastage of embryos and fetuses in mammals. Carl Wood and John Kerin stated in 1984 that "at least 20% and most likely 40%-60% of embryos abort naturally. The difficulty in determining the figure ... [is that] there is no method of detection of these pregnancies in the human."120 Clifford Grobstein has claimed that "of any 100 human eggs exposed to sperm at an appropriate time in the course of natural fertilisation, about 84 will be fertilised but as few as 69 will implant in the uterine wall. Of these 69 only 42 will survive the first week in this environment, that is, until after the first missed menstrual period. However, from then onwards the foetal survival rate improves dramatically with ... about 30 being born alive."121 Grobstein's post-implantation survival rate is 30 out of 69, or 43.5%. However, Whittaker *et al* have suggested an unsuspected pregnancy loss incidence of 8%, that 92% of post-implantation embryos survive.122

Notwithstanding the difficulties involved in assessing embryo loss referred to by Wood and Kerin, and the great variations in estimates that have been proposed, Harry Kannegiesser has concluded that the "evidence ... would seem to indicate that nature does not place a high value on the early embryo but does value the embryo that establishes a stable

118 Ibid. Moraczewski's reasoning here is open to question. What is "proper development"? Does a trisomy 21 embryo lack the capacity for proper development? Perhaps Moraczewski might have been on safer ground had he argued that the CHM lacked the genetic identity for a human individual having only male chromosomes, and that the PHM with its 69 chromosomes may pose at present irresolvable difficulties.

119 Senate Select Committee On The Human Embryo Experimentation Bill 1985. Official Hansard Report, 2132

120 Carl Wood and John Kerin, "Ethics", in Clinical In Vitro Fertilization, eds. Carl Wood and Alan Trounson, (Berlin: Springer-Verlag, 1984), 181


implantation." Apart from the conceptual difficulties in the usage of "nature" as a moral agent making conscious value choices, and the problems of moving so easily from 'is' to 'ought', this kind of logic leads to some very interesting conclusions. Does the low life expectancy of some nations, tribes and races allow us to conclude that those nations, tribes and races are of less worth? Are those human beings who have a genetic predisposition to heart disease and an early death to be counted as less worthy because "nature" culls them earlier than others?

John Kerin et al, defending the high wastage rate of in vitro fertilisation techniques, and in the context of a discussion on the rights of embryos, have said that "Nature itself is very prodigal with respect to embryo loss following natural conception ... Therefore about 60% of human embryos fail to be recognised as individual entities by their biological parents." Is it the alleged high wastage of human embryos or their failure to be recognised by their biological parents which makes a moral difference? The truth is that nature is 100% prodigal with respect to human life. It does not follow from the fact that we all will some day die that human life is without moral significance, or that we would be entitled to kill another human being. It is never really explained just why greater vulnerability to death is a compelling reason why the more vulnerable should be seen as being less worthy, or of a reduced moral significance. Anthony Fisher puts the position thus:

The number of embryos who die naturally tells us nothing about their nature and is no indication of how much or little respect we should give them. Until recently (and still today in some parts of the world) a large proportion of newborn babies died. Geriatrics and the terminally ill also have a short life expectancy. For that matter, all adults die too! No one pretends that nature’s ‘carelessness’ in such cases is any example to us of how we should behave or tells us that babies or geriatrics are not persons.

The recombination argument and the twinning argument may be taken together. According to these arguments we cannot be sure that there exists an individual human being until 14 days after fertilisation because of the possibility of twinning or of two embryos fusing to become one.

The recombination argument is problematic. It is extremely rare in humans, so rare that some writers doubt its moral relevance, seeing it as something more likely to occur in laboratory conditions. Norman Ford claims that “animal experiments suggest absence of

123 Harry Kannegiesser, op. cit., 28


125 Anthony Fisher, IVF The Critical Issues, op. cit., 153. Nicholas Tonti-Filippini has also argued that "there is a lot of difference between somebody dying naturally and somebody being killed." Tonti-Filippini believes that what is "of concern to a moralist or a lawyer is what wastage is a result of human intervention, what wastage is directly caused by somebody with mens rea ... It is not a question of how many eggs are lost naturally and how many eggs are lost in IVF." Senate Select Committee on the Human Embryo Experimentation Bill 1985, Official Hansard Record, op. cit., 281
unity and actual determination for the ontological human individual in the early embryo."\(^{126}\) The animal experiments to which he refers concern the creation of chimeras. Ford's assumption "that the results of animal experiments are simply transferable to human embryology" has been challenged.\(^{127}\)

The twinning argument has been advanced by many writers.\(^{128}\) The essence of the argument is that the embryo cannot be said to be an individual while there remains the possibility for twinning, an event which can occur until the appearance of the primitive streak. For some writers, proceeding on the basis of Aristotelian metaphysics, epistemology and anthropology, this is connected with the time of the reception of the soul. Norman Ford, acknowledging "Aristotle's biological errors", has nevertheless asserted that Aristotle's "philosophical principles remain valid when applied to the relevant facts of modern embryology."\(^{129}\) He later concludes, on the basis of such metaphysics, that the phenomenon of twinning excludes the possibility of an individual human being present from fertilisation.\(^{130}\) After the fertilisation process the cell divides to give "two new distinct individuals ... held in close contact with each other by the zona pellucida."\(^{131}\) And later he concludes "that the early human embryo is really a cluster of distinct individual cells, each of which is a centrally organized living individual or ontological entity in simple contact with the others enclosed in the protective zona pellucida."\(^{132}\) Norman Ford's account of the biological data, including the possibility of twinning, comes to this conclusion:

A determinate, actual human individual gradually emerges and develops from what is potentially human and indeterminate in relation to its ultimate fate.\(^{133}\)

Fisher, however, sees a mismatch between Ford's professed Aristotelianism, his account of the biological facts, and this conclusion of a delayed hominisation. Ford does not deal with the question of "what it is that informs the embryo (or each distinct organism of the "cluster of cells") before hominization at two to three weeks ... The theory of delayed

\(^{126}\) Norman M. Ford, *When Did I Begin?*, (Cambridge: Cambridge University Press, 1988), 139

\(^{127}\) J. Billings, "When Did I Begin?", *AD2000*, (March 1989), 12-14. Braude *et al* have said that although results from animal models help, "information directly relevant to the human will be obtained only by examining human pre-embryos themselves." P.R. Braude *et al* "The use of human pre-embryos for infertility research", in *Human Embryo Research: Yes or No?* (London: Tavistock Publications, 1986), 63-82. Cf also J.M. McLean, "The embryo debate", *Tablet*, April 7, 1990, 449-450


\(^{129}\) Norman M. Ford, op. cit., 21

\(^{130}\) Vid for example *ibid.*, 120 where Ford says that "it would seem absurd to suggest that at the same time it could both be one and more than one human individual, granted that each must be a distinct ontological individual."

\(^{131}\) *Ibid.*, 125

\(^{132}\) *Ibid.*, 139

\(^{133}\) *Ibid.*, 162
hominization presumed a succession of souls, and did not allow for one human soul to unite and replace several vegetative or animal souls (each informing a distinct body), or no souls at all as F.'s account assumes; rather, one higher soul replaced one lower soul." This all leads to a further difficulty for Ford, says Fisher.

For Thomas the development of the embryo towards that stage at which it could fittingly receive a rational soul required that it have a single (non-rational) soul already present from fertilization directing its gradual development for that purpose. F. denies that there is any such principle of unity and thus of coordinated development.134

The interpretation of the biological facts which suggests that "from the time cell division first occurs until implantation, a colony or army of biologically identifiable human individuals exists" and that "from this colony one ontologically distinct human individual ultimately emerges" has been criticised not only by Fisher135 but also by William E. May. May begins his critique by referring to some "very pertinent observations" made by the embryologist Joachim Huarte concerning the concept of "totipotentiality" as it applies to the cells of the preimplantation embryo.136 Huarte agrees that each cell, in a sense, can be considered totipotent. However, it would nonetheless be false to consider them as if each were embryos. They can become embryos only if they are separated from the original embryo and become independent biological units or if they are artificially severed from it [the original embryo] and are surrounded with a new zona pelucida. It is thus false to say that 'the unicellular or pluricellular embryo is a potential individual or totipotent,' because an embryo is always already an individual of an animal species [the human] from the earliest stages of its development."137

May then goes on to refer to Germain Grisez's essay, "When Do People begin?"138 which in turn begins with Yanagimachi's "masterful summary of what is currently known about mammalian fertilization."139 That summary, already cited above is worth recalling here: "Fertilization in mammals normally represents the beginning of life for an individual."140 Grisez observes that the evidence does not support Ford's theory that cell division "gives rise

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135 Fisher's criticisms of Ford's scientific interpretation of the biological facts, his philosophical interpretation of the facts, and the use to which the twinning phenomenon has been put are far reaching and beyond the scope of this work to fully consider. The strength and weight of his objections are sufficient to cast doubt on the twinning argument as a sure basis for the rejection of the idea that at fertilisation there is, as the textbooks assert, a new individual member of the human species orientated towards further development.
138 Germain Grisez, "When Do People Begin?", Proceedings of the American Catholic Philosophical Association, 63. 1990, 27-47
139 William E. May, op. cit., 4
140 Vid footnote 91 supra
to really distinct individuals until a small army of them form the true human individual." Grisez notes Ford's remark that human individuals can form groups which can function toward a common end and that, therefore, "the small army of genetically identical cells assembled in the preimplantation embryo can do so too." Grisez then goes on to say that Ford simply ignores a fact about a group of individuals which prevents us from considering the group as a single individual, namely, the fact that they do not even form a physical whole. But, as everyone knows, the developing preimplantation embryo is a physical whole, undivided in itself.\footnote{William E. May, \textit{op. cit.}, 4 and citing Germain Grisez, \textit{loc. cit.}, 37-38}

Grisez denies that twinning and recombination show \textit{by themselves} that the "ontological human individual comes to be by a substantial change at the primitive streak stage."\footnote{William E. May, \textit{op. cit.}, 4}

If all zygotes had an active potentiality to become twins, they would do so unless some accident prevented it. Thus, contrary to what Ford asserts (without argument), in those zygotes which develop continuously as individuals, the facts do not evidence an \textit{active} potentiality to develop otherwise. Rather, at most the facts show that all early embryos could \textit{passively} undergo division or recombination.\footnote{Germain Grisez, \textit{loc. cit.}, 38 cited in William E. May, \textit{op. cit.}, 4}

Ford's claim that "it would be absurd to suggest that at the same time it could both be one and more than one individual"\footnote{Norman M. Ford, \textit{op. cit.}, 120} is seen by Fisher to be both obvious and beside the point since, says Fisher, "no one says this."\footnote{Anthony Fisher, \textit{Individuogenesis and a recent book by Fr Norman Ford}, \textit{op. cit.}, 29} Alternative explanations better fit the facts, claim Ford's critics. The individual embryo could, by a process of asexual reproduction, give rise to another embryo. In this case the original embryo still continues even though we would be unable to show which embryo was the parent of the other. In a lengthy criticism of the Ford thesis Nicholas Tonti-Filippini makes the case for asexual reproduction against Ford's assertion that the "zygote is not the same ontological individual as either one of the eventual twins that result from its development, notwithstanding its genetic identity continuing throughout all its subsequent stages."\footnote{Norman M. Ford, \textit{loc. cit.}, 230}
One can either hold that in identical twinning the original individual dies and two new individuals come into existence, or that the one individual remains throughout, but that a new individual is reproduced in the same way that a tree may be replicated by taking a cutting. In either case, the explanation does not establish a discontinuity in an individual who was never twinned and who has persisted as the same individual from the earliest stage at which he or she was a zygote. The latter describes the majority of human individuals. For the majority of human individuals, the answer to the question "When Did I Begin?" is not "when I lost the ability to form an identical twin". That I might have formed identical twins (but did not) and in the process have ceased to exist, does not alter the case that as an individual who was not twinned, I began as a possibly twinnable but nevertheless individual zygote.\(^{147}\)

The ambiguous conclusions to which Ford is drawn by his particular method of interpreting the facts, and his individualised application of Aristotelian philosophy has been well drawn out by Fisher's interpolation of numbers in this passage from Ford's book.

With (i) the appearance of the primitive streak after (ii) the completion of implantation and about 14 days after fertilization (iii) identical twinning can no longer occur. This is when the human body is first formed with (iv) a definite body plan and (v) definite axis of symmetry ... (vi) most certainly by the stage of gastrulation when the embryo's primitive cardiovascular system is already functioning and blood is circulating.\(^ {148}\)

Ford in fact offers six different 'marker events' "which do not in fact coincide."\(^ {149}\) Ford's chief scientific advisers included "Professor Roger Short in particular".\(^ {150}\) Ford's confidence that the scientific data provides clear and objective answers to the question "When Did I Begin?" lies in sharp contradistinction to Short who advised the Australian Senate Select Committee On The Human Embryo Experimentation Bill 1985 in these terms:

\begin{quote}
We are looking for a benchmark ... The reason why there is so much scientific appeal - but it is still prejudice - in 14 days is that that is the first moment that you can be sure whether there is going to be an embryo there or not at all ... That is, I think, why the scientist finds it appealing to make an arbitrary - I stress it is purely arbitrary - benchmark at around 14 days, when we can first be sure whether you have a single primitive streak with one embryo or, like the Dionne quins, five primitive streaks with identical quintuplets, or nothing and a hydatidiform mole.\(^ {151}\)
\end{quote}

Short's "purely arbitrary" benchmark, his "prejudice" in favour of 14 days, was based on his belief in the impossibility of ever determining "objectively the moral status of

\(^{147}\) Nicholas Tonti-Filippini, "A Critical Note", The Linacre Quarterly, 56:3. August 1989, 42


\(^{149}\) Anthony Fisher, "Individuogenesis and a recent book by Fr Norman Ford", loc. cit., 212

\(^{150}\) N.M. Ford, op. cit., xviii

\(^{151}\) Senate Select Committee on the Human Embryo Experimentation Bill 1985, Official Hansard Report, op. cit., 2161-2162. Professor R.V. Short was Chairman, Working Party on Human Embryo Experimentation, Australian Academy of Science, Canberra, Australian Capital Territory.
the human pre-embryo." In the light of Short's admissions and the problematic nature of the Ford thesis (and similar theses based on twinning and delayed hominization) one can reasonably conclude that the *twinning argument* has not yet been shown to be a convincing and sure basis to move the beginning of individual human life to 14 days after what is generally agreed to be the beginning of human life.

According to Alan Trounson, the principle motivations for doing experiments on embryos is to improve *in vitro* fertilisation technology, and to eliminate defective embryos. Susan Downie has summarised the reasons for allowing destructive research on human embryos: "Supporters cite four main reasons for allowing research: to improve IVF and other infertility treatments; to improve understanding of natural conception and why it sometimes fails; to detect genetic diseases; and to develop contraceptives." The elimination of defects requires a prior determination of what is normal, thus the need for embryo experimentation. What the Australian Academy of Science argued in its submission to the Select Committee was that tests for abnormalities "presuppose a knowledge of normality, which can only be obtained by performing experiments on normal pre-embryos." In reply to a question Short averred that "if you are to avoid producing abnormalities in the in vitro system, to define abnormality you must have defined normality first." Given that the line being drawn at 14 days is purely arbitrary, perhaps that arbitrariness is itself a function of scientific projects, goals and ambitions. According to Karen Dawson we need not be too concerned that experiments on human embryos will lead to "nightmarish consequences".

Whether human breeding using genetic engineering or cloning, or whether the creation of human-non-human hybrids or chimeras will be undertaken ... [in the future], will depend on the ethical mores at that time, rather than on continuing human pre-embryo experimentation now.

Hiram Caton, however, has drawn attention to remarks from two advocates of embryo experimentation which suggest concern for "nightmarish consequences" may not be entirely inappropriate. In an aside at the ANZAAS Congress in January 1987, Russell Scott

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152 Ibid., 2135


154 Sue Downie, "Testing Times For IVF", *The Australian*, 24 June 1988, 8

155 Ibid., 2129

156 Ibid., 2166. Professor Short later went on to remark that experiments were done on humans rather than on other primates such as gorillas, chimpanzees, and orang-utans because they are endangered species. *Ibid.*, 2168, 2178-2179. In an astonishing reversal of normal scientific procedures Short agreed that such experiments on humans would then serve as a model for animal experimentation. *Ibid.*, 2179


158 Karen Dawson, "A scientific examination of some speculations about continuing human pre-embryo research", *loc. cit.*, 33
observed that a ban on genetic engineering was the logical corollary to a ban on manipulations of the human genome.

To be truly logical and effective prohibition of IVF research should be complemented by prohibition of research on gene therapy and genetic manipulation because the latter will be able to alter permanently the physical and emotional features of our descendants. But surely such a prohibition is undesirable.\textsuperscript{159}

Carl Wood later acknowledged "the itch to change the human species" and advised "that the time for public discussion of this interesting matter had come."\textsuperscript{160}

\textbf{2.2 PHILOSOPHY AND THE CONCEPT OF PERSONHOOD}\textsuperscript{161}

The concept of person is one of the most difficult concepts to define - even though it is always burdened with hopes and revendications. It is neither a simple fact, nor evident throughout history.\textsuperscript{162}

In this way Michel Meslin directs our attention to the complex difficulties involved in defining human personhood. He is joined in this assessment by Andy F. Saunders who, in his reflections on the heuristic difficulties with the the concept of person, advises that, "as with other basic things ... this concept is highly complex and therefore difficult to analyse."\textsuperscript{163}

In Western philosophical thought, human personhood has been defined in terms of human capacities already evident in the human individual or, alternatively, as a "dynamic substrate, an animated foundation, from which the human characteristics are developed."\textsuperscript{164} The latter understanding is based upon the definition of personhood formulated by Boethius, that a person is "an individual substance with a rational nature."\textsuperscript{165} However, it is not only those who adopt the ancient metaphysics of Boethius who are wary of those philosophers who, following John Locke, claim to be able to divide the world into persons and non-persons, those with rights and those with none. It is sufficient to note the \textit{consensus gentium} about the inherent dignity or worth of every member of the human family, and to set the

\begin{itemize}
\item \textsuperscript{159} Russell Scott, "Regulating Biomedicine by Law - Delusions at the Epicentre", paper presented at the 56th annual ANZAAS Congress, Palmerston North, New Zealand, 1987, 26 and cited in Hiram Caton, \textit{Scientists Advocate Policy: In Vitro Fertilization in Australia}, op. cit., 35-36
\item \textsuperscript{160} Hiram Caton's summary of an article in \textit{The Australian}, 13 May 1987, 1 and cited in \textit{Scientists Advocate Policy: In Vitro Fertilization in Australia}, op. cit., 35
\item \textsuperscript{161} The consideration of the concept of personhood in the traditions of Judaism, Christianity, and Islam will not be considered since the theological discussions involved rest upon prior notions of revelation and sacred traditions. This does not imply either that the theological discussions are insignificant, or that account will not be taken of writers from religious traditions who have contributed to the historical and contemporary philosophical debate.
\item \textsuperscript{162} Michel Meslin, "Religious traditions and the Human Person", in \textit{Concepts of Person in Religion and Thought}, eds. Hans G. Kippenberg, Yme B. Kuiper, and Andy F. Sanders, (Berlin: Mouton de Gruyter, 1990), 67
\item \textsuperscript{163} Andy F. Saunders, "The Concept Of Person: Some Heuristic Notes", in \textit{Concepts Of Person In Religion And Thought}, op. cit., 51.
\item \textsuperscript{164} Albert S. Moraczewski, "Personhood; Entry And Exit", loc. cit., 96
\item \textsuperscript{165} "Naturae rationalis individua substantia." Boethius, \textit{Lib. Pers. Duab. Nat.} cc. 2,3
\end{itemize}
agreed benchmark as common humanity. That common humanity takes serious account of the biological facts of human existence, of fertilisation as the beginning of the human life-cycle, and of the fact of our genetic patrimony. Those who hold to the idea of a human being as being 'animated' will see in the genetic structure evidence of the existence of the rational soul, because the human individual has, from the beginning, all of the human capacities which will unfold as the human individual grows and develops. Teresa Iglesias affirms this philosophical position when she says: 

All the potentialities which one needs if one is to acquire the mental and spiritual activities of the human person are inextricably bound up with the embryo's potential to develop all organs including the brain; in this sense the human conceptus is 'organically complete', nothing can be added to it. Why then is it that the human conceptus is not 'personally complete'?166

Albert S. Moraczewski expresses the position in a similar way when he asserts that "science has shown this organism is already a complex being with the necessary inner dynamism to allow its specific development to an adult ... This organism is driven from within, absorbing nutrients and other factors from the maternal blood stream and directing its own progressive development to one goal - the adult human person."167 Moraczewski acknowledges that it might "be difficult to imagine that first cell of the developing human embryo radically has all the essential power of the adult", yet all that is required "is time and the appropriate psychosocial environment for the organism to develop so that those powers can be exercised through the appropriate bodily organs."168

The principle objections to the defence of the personhood of the human individual from fertilisation come from those who base their objections on scientific and biological grounds, the essential elements of which were referred to in the last section, or from those who have adopted a definition of personhood which excludes embryos, fetuses, and, in some cases, newborns and children and adults with severe mental or physical disabilities. Given the consensus gentium in favour of including all human individuals in the human family, those who wish to exclude some as not yet persons must prove their case. There have been many attempts to do this, a major difficulty being that there is no agreement among moral philosophers as to how to make the distinction between personhood and non-personhood, and accordingly no agreement as to when human non-persons become persons, and persons become non-persons.

Patrick Derr's overview of the history "of the Intension of the Concept of the Person" is instructive. Derr correctly identifies the Mosaic concept of the person as "a living

167 Albert S. Moraczewski, "Personhood; Entry And Exit", loc. cit., 87
168 Ibid.
body”. This living being, according to the book of Genesis, is matter infused with the breath of life, a fleshly body with a sexual identity which is alive by virtue of the divine breath.

The Lord God formed man of dust from the ground, and breathed into his nostrils the breath of life; and man became a living being.  

In the Biblical tradition taken as a whole, and certainly in the Mosaic tradition, "man is seen as a psychosomatic unity ... Man is not an ensouled body but an animated body.” On this view, the human body is not seen as a receptacle for the soul, rather the soul is seen as the dynamic life force of the individual human being such that the word "soul" really refers to the person, the individual, the whole human being.

Aristotle's philosophical view of the human person is remarkably similar to the Biblical account. Aristotle says that

we should not inquire whether the wax and its body are one thing, any more than whether the wax and its imprint are, or in general whether the matter of each thing is one with that of which it is the matter.

Later in the same chapter of De Anima, Aristotle argues that "just as pupil and sight are the eye, so, in our case, soul and body are the animal." For Aristotle the soul is "the cause and principle of the living body". It is not possible to extract the soul from the body. With Aristotle we find in Greek philosophy a break from the dualism of Aristotle's teacher Plato, and Socrates before Plato. With Aristotle we arrive at the doctrine of the substantial unity of body and soul.

Plato, on the other hand, depicted the person as essentially a mind or soul. Plato sees the body "as an impediment which by its presence prevents the soul from attaining to truth and clear thinking." Patrick Derr draws our attention to four passages from the Phaedo.

169 Patrick Derr, "The Historical Development Of The Various Concepts Of Personhood", in The Twenty-Fifth Anniversary of Vatican II A Look Back and a Look Ahead, ed. Russell E. Smith, 18
170 Genesis 2:7, cf Psalm 139:6-7
172 In Hebrew the word nephesh means a living being and comes from the word neshama which means breath. Thus God breathed into man the breath (neshama) of life and man became a living being (nephesh). The Greek word psyche is used both in the Septuagint and in the New Testament to translate nephesh.
173 Genesis 2:7; 1 Peter 3:20, 4:19; Psalm 35:13; Psalm 107:4,9
175 ibid., 158
176 ibid., Book II, Chapter 4, 165
So long as we keep to the body and our soul is contaminated with this imperfection, there is no chance of our ever attaining satisfactorily to our object, which we assert to be truth.\(^\text{178}\)

We are in fact convinced that if we are ever to have pure knowledge of anything, we must get rid of the body ...\(^\text{179}\)

... so long as we are alive ... [let us] avoid as much as we can all contact and association with the body, except when they are absolutely necessary, and instead of allowing ourselves to become infected with its nature, purify ourselves from it until God himself gives us deliverance.\(^\text{180}\)

The philosopher's occupation consists precisely in freeing ... the soul from the body.\(^\text{181}\)

On the basis of these texts Derr is able to conclude that Plato sees the person as "some sort of disembodied ego" and the body as "a bad and contaminated thing, utterly different than our true being."\(^\text{182}\) Aristotle's idea of the human person was further articulated and enriched by Aquinas, while Plato's ghost was never to be far away. For Aristotle the human person is a single fleshy being which "can no more be divided into a body and a soul than the Pieta can be divided into a stone and a shape."\(^\text{183}\) Aquinas, following Aristotle, rejected the Platonic account in clear and unmistakeable terms.

If the soul, according to the Platonists, were united to the body merely as a motor, it would be right to say that some other bodies must intervene between the soul and body of man, or any animal whatever ... Now all this is fictitious and ridiculous.\(^\text{184}\)

Echoing the opinion of Aristotle Aquinas continues:

But inasmuch as the soul is the form of the body, it has not an existence apart from the existence of the body ...\(^\text{185}\)

Derr completes his account of Aquinas' teaching on the soul by referring to his often quoted dictum: "Anima mea non est ego!". I am not my soul.\(^\text{186}\) The Aristotelian and Mosaic

\(^{178}\) Phaedo, 66b
\(^{179}\) Phaedo, 66d
\(^{180}\) Phaedo, 67a
\(^{181}\) Phaedo, 67d
\(^{182}\) Patrick Derr, op. cit., 19
\(^{183}\) Ibid., 21
\(^{185}\) Ibid. "Sed inquantum anima est forma corporis, non habet esse seorsum ab esse corporis."
\(^{186}\) Commentary on 1 Corinthians, cited in Patrick Derr, op. cit., 22
accounts of the nature of man harmonise in Aquinas' teaching and were dominant throughout the Western world until the 16th century. The Renaissance of the preceding centuries brought with it humanism, a renewed interest in the philosophies of Greece and Rome, and a revival in Platonism. Not all Platonists were "determined haters of Scholasticism". Nevertheless by the 17th century René Descartes’ rejection of the Aristotelian view of the human person had become very influential.

Descartes' philosophy of the human person is strongly influenced by Plato. The human individual is an ego, one who thinks, different from the animals. So sure was Descartes of the fact of the mind and its indisputable significance for defining the human person that he concluded that the "first principle of philosophy" is contained in the truth, "I think, hence I am". His position is summarised thus:

I know certainly that I exist, and ... I rightly conclude that my essence consists solely in the fact that I am a thinking thing (or a substance whose whole essence or nature is to think). And although possibly (or rather certainly, as I shall say in a moment) I possess a body ... it is certain that this (that is to say, this soul by which I am what I am) is entirely and absolutely distinct from my body, and can exist without it.

Derr opines that Cartesian philosophy, far from saving "man from the new sciences ... dissolved man in a bath of sulfuric acid, leaving nothing behind but a ghost inside a machine." This complete alienation of personhood from the body, "of man from nature is wholly modern ... this modern understanding of the human person, which alienates man from his body, must a fortiori alienate man from nature generally, and, indeed, even from other men."

John Locke rejected Cartesian dualism because it attributed too much to the mind. For Locke "man" and "person" are distinct. Man belongs to the human species as one animal among others.

An animal is a living organized body ... And whatever is talked of other definitions, ingenuous observation puts it past doubt that the idea in our minds of which the sound man in our mouths is the sign, is nothing else but of an animal of such a certain form.
The idea of "man" and the idea of "person" are different ideas, says Locke. Personal identity is not coterminous with being "man". *Person* stands for a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and essential to it: it being impossible for anyone to perceive without perceiving that he does perceive ... And as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that *person*: it is the same *self* now it was then, and it is by the same *self* with this present one that now reflects on it, that that action was done.\(^\text{193}\)

Personhood, then, is limited to the time back to which one still has memories of actions to be considered, and finishes when one is no longer able to consider oneself. But persons are not bodies or souls, they are streams of consciousness. As Patrick Derr puts it, persons are simply continuous streams of rational consciousness. And where consciousness or reason is interrupted, there ends the person.\(^\text{194}\)

If Locke thought that Descartes attributed too much to the human mind, preferring to see the mind's role as one of comparison and combination of the sensations we passively receive, David Hume would take Locke to his "logical conclusion" and reduce the human person to "nothing but a bundle or collection of different perceptions."\(^\text{195}\) In his *Treatise of Human Nature* we find Hume's reductionist account of the human person.

I can never catch *myself* at any time without a perception, and never can observe any thing but the perception. When my perceptions are remov'd for any time, as by sound sleep; so long am I insensible of *myself*, and may truly be said not to exist. And were all my perceptions remov'd ... I shou'd be entirely annihilated, nor do I conceive what is farther requisite to make me a perfect non-entity. If any one upon serious and unprejudiced reflexion, thinks he has a different notion of *himself*, I must confess I can reason no longer with him. All I can allow him is, that he may be in the right as well as I, and that we are essentially different in this particular. He may, perhaps, perceive something simple and continu'd, which he calls *himself*; tho' I am certain there is no such principle in me.\(^\text{196}\)

The identity, which we ascribe to the mind of man, is only a fictitious one, and of a like kind with that which we ascribe to vegetables and animal bodies.\(^\text{197}\)

\(^{193}\) *Ibid.*, 162  
\(^{194}\) Patrick Derr, *op. cit.*, 24  
\(^{195}\) *Ibid.*, 24-25  
\(^{197}\) *Ibid.*, 259
Hume concludes that "all the nice and subtile questions concerning personal identity can never possibly be decided, and are to be regarded rather as grammatical than as philosophical difficulties."198

To the question, who are the persons who have human rights it is possible to see the two major approaches which owe so much to Moses, Aristotle and Aquinas on the one hand, and to Plato, Descartes and John Locke on the other hand. In earlier work I have referred to the endowment model of human personhood and the achievement model of human personhood.199 The former refers to the tradition which treats all human beings as human persons, that personhood is indistinguishable from being human. The latter refers to the ascription of human personhood to some stage later in the human life cycle than fertilisation, the marker event depending upon biological and philosophical factors. Patrick Derr makes the distinction between the "inclusivist tradition" and the "exclusivist tradition". The inclusivist tradition treats all members of the human family as persons, making no distinctions between humans on the basis of age, sex, race, religion, wealth, class, ability or any other factor. The exclusivist tradition makes the distinction between being human and being a person, of excluding "from recognition as persons" "at least some human beings."200

As I have indicated earlier there is a connection between the self-interest of communities and the line drawn between persons and non-persons. That self-interest may be driven by eugenic, economic, social and political factors such that those a society wishes to exclude are deemed to be non-persons. History is replete with examples of this phenomenon, according to Derr.201 Thus could Chief Justice Taney of the United States Supreme Court exclude Dred Scott from personhood,202 could the Egyptian Pharaohs exclude the Israelites, could Hitler exclude Jews, Gypsies, the 'degenerate' and the asocials from personhood, could the British tolerate the slave trade, and could the European Australians liquidate and repress the Aborigines.

In contemporary philosophy and bioethics there are any number of individuals willing to argue for a line to be drawn between persons and non-persons. There are those like Peter Singer and Helga Kuhse, whom I have shown to be very much driven by considerations of eugenics, who are confident enough in their own ability to define personhood as to recommend the killings of certain types of human individuals. Others may not be quite so

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198 Ibid., 262
200 Patrick Derr, op. cit., 28
201 Ibid., 29-31
clear in their impulses. I shall very briefly consider the opinions of a number of philosophers and bioethicists to make clear the dangers and difficulties in what they propose.

Jonathan Glover, for example, casts doubt on the whole project of discerning who are the persons and develops his theory of progressive personhood.

The prospect for drawing a satisfactory line round 'being a person' is poor. There is no single feature whose emergence is in question. We think of people as being conscious, having the ability to form relationships with others, being capable of some degree of thought, having some kind of emotional response, having some sense of their own identity. But any attempt to pick out one of these features as the person's essential ingredient is implausible. And if a whole cluster of different factors is involved, there is no special reason to think that they all emerge over the same period or at the same rate. It seems more defensible to abandon the view that there is an abrupt transition to the status of a person and to replace it by the view that being a person is a matter of degree. A one-year-old is much more of a person than a newborn baby or a foetus just before birth, but each of these is more of a person than the embryo.203

Glover's position is one which recognises the difficulties in defining personhood, embraces a Lockean view of human personhood, then recognises the conceptual difficulties in having non-persons turn into persons, and finally opts for a progressive personhood. Glover does not deny that an embryo is a person, it is just that it is less of a person than older persons. Nevertheless, he is able to justify the killings of persons on the grounds of lesser personhood.204 His discussion of infanticide reveals that he supports the impulse to kill on eugenic, and utilitarian grounds.

It has been argued here that the moral issues involved in a decision about the life or death of a seriously abnormal baby are complicated. The predicted quality of life has to be considered, along with a mass of side-effects both on those closely involved and on the wider society.205

Peter Singer's approach to personhood begins with his notion of "sentience" as the "only defensible boundary of concern for the interests of others."206 He cites Jeremy Bentham with approval.


204 "There is not much wrong with an early abortion, but abortions become increasingly wrong later on, and killing a month-old baby more wrong still." *Ibid.*, 128. On the matter of infanticide Glover is not adamantly opposed, "has nothing to contribute to the emergence of ... policy" on the matter "beyond the attempt ... to undermine some of the general views (the sanctity of life, the acts and omissions doctrine) that at present obstruct it." *Ibid.*, 168

205 *Ibid.*, 168

The day may come when the rest of the animal creation may acquire those rights which never could have been withheld from them but by the hand of tyranny ... It may one day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week, or even a month, old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but, Can they suffer? 207

Bentham's assertions about the rationality of animals and children appear as just that, assertions. He does not refer to any of the literature of his day, and invokes no data to support his contentions. How then does he know that a "full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal" than a new born child? 208 He does not tell us, and nor does Peter Singer. In his written submission to the Australian Senate's Select Committee On the Human Embryo Experimentation Bill 1985 Peter Singer avers that the "point at which the embryo develops a capacity to feel pain ... is not really philosopher's territory." Undeterred he reports that from his "reading of the literature" he "would say that it cannot possibly be earlier than six weeks, and it may well be as late as eighteen or twenty weeks." 209 It should be noted that it is simply not permissible to conclude from the fact that we cannot prove that fetuses or embryos feel pain that they do not in fact feel pain.

Bentham and Singer further suggest that the interests of sentient beings lie in the "capacity for suffering and/or enjoyment of happiness." 210 What lies behind the assertion of sentience as the benchmark for equal treatment is the utilitarian preoccupation with the calculation of pleasure and pain. As I have already shown, the separation of pain and pleasure into discrete categories simply does not work. Human beings do not necessarily make choices to avoid pain. Indeed choices are often made which involve finding pleasure in pain by directly choosing a very painful activity, such as the "bitter-sweet" sensation of breaking the pain barrier. Where duty is concerned, we often do our duty even if it be a mainly painful thing to do, such as enlisting with the army in time of war. Childbirth euphoria, commonly experienced, occurs at the time of acute physical suffering. The capacity to suffer and to feel pleasure is not obviously something which defines beings as persons, as having the "right to equal consideration" because all have an interest in maximising pleasure and avoiding pain.

207 Jeremy Bentham, Introduction to the Principles of Morals and Legislation, chapter XVII cited in Peter Singer, op. cit., 221

208 Is it entirely irrelevant that Bentham was a bachelor who may have spent little or no time dealing with newborns? The experience of parenthood for many people suggests that newborns are indeed different from the picture that Bentham appears to describe. And as I have already suggested, the attachment to children by parents begins prenatally, even when the child is no more than a gleam in the parental eye.

209 Senate Select Committee on the Human Embryo Experimentation Bill 1985, (Official Hansard Report, 1986), 489

210 Peter Singer, op. cit., 221
Since human beings do not choose always to avoid pain, it is not possible to set a benchmark of equal treatment as the avoidance of suffering or the maximisation of pleasure over pain as the utilitarians imagine.

Nevertheless, Peter Singer, on the basis of "sentience" as the benchmark for equal treatment, discounts species membership as definitive for equal consideration of interests. Just as the racist "violates the principle of equality by giving greater weight to the interests of members of his own race, when there is a clash between their interests and the interests of those of another race" so it is speciesist to allow the interests of one's own species "to override the greater interests of members of other species." Speciesism is, on this account, prejudice in the same way that racism is prejudice. Singer (and Kuhse) acknowledge that "the most grossly deformed infants born of human parents [are] ... in the strict biological sense of the term ... human beings." However, the infant that lacks the qualities and characteristics proper to a human person "is more like a vegetable than a human being."

Bernard Williams, in addressing the question of "speciesism" as argued for by Peter Singer as a basis for his assertion of animal rights, makes three points. Firstly, he agrees that there are "good reasons for not inflicting pain on animals" but sees no reason to ground this in rights. "Rights are a distinctive kind of ethical reason, and they are best explained in terms of assuring expectations, a consideration that does not apply to animals." Secondly, Williams takes the logic from the simple utilitarian basis "of keeping down the level of pain" to conclude that we should "spend any time that we can spare on policing nature". Finally, he takes account of the different line of argument that "grounds our relation to animals in a general teleology, which encourages us to see them not as a resource but as sharing the world with us." However, Williams sees no reason why, "on any realistic view of our and other animals 'natural' relations to one another, it should be thought to exclude our eating them."

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211 Ibid., 222. Singer acknowledges that the term 'speciesism' was introduced by Richard Ryder, cf Richard Ryder, Victims of Science: The Use of Animals in Research, (London: Davis-Poynter, 1975)

212 Cf Helga Kuhse and Peter Singer, Should the Baby Live?, op. cit., 121-123

213 Ibid., 121

214 Ibid. The use of the the word "vegetable" is noteworthy. It is a thoroughly eugenically inspired usage meant to depict the severely disabled as non-human, non-person, to be treated as one might treat a cabbage.


216 Bernard Williams, op. cit., 216 n 20

217 Ibid.
Williams rejects the charge that "speciesism" is just another prejudice.

To see the world from a human point of view is not an absurd thing for human beings to do. It is sometimes said that such a view implies that we regard human beings as the most important or valuable creatures in the universe. This would be an absurd thing to do, but it is not implied. To suppose that it is, is to make the mistake of identifying the point of view of the universe and the human point of view. No one should make any claims about the importance of human beings to the universe: the point is about the importance of human beings to human beings.\footnote{Ibid., 118}

Peter Singer, following the lead of Joseph Fletcher, looks to extrinsic criteria to determine the value of what he acknowledges to be a human being.\footnote{Helga Kuhse and Peter Singer, \textit{Should the Baby Live?}, op. cit., 118-139 passim} He is not interested in biological marker events as the beginning of human personhood, when the individual would have the right to life.

I think, in the end, I would not really place weight on the argument about twinning.\footnote{Senate Select Committee On The Human Embryo Experimentation Bill 1985, \textit{(Official Hansard Report, 1986)}, 510}

Singer's position is, following that of Michael Tooley, that one becomes a human person when one has "started to have desires and awareness."\footnote{Ibid., 130. The principle promoted by Kuhse and Singer is that the right to life is present [even though it can in particular cases be discounted on utilitarian calculations] at "the point at which there is self-awareness and a sense of the future." Ibid., 138. This means that the right to life is not present until personhood is reached at "somewhere between three months and a year, perhaps." Senate Select Committee On The Human Embryo Experimentation Bill 1985, \textit{(Official Hansard Report, 1986)}, 511. Senator Walters remarked, on the basis of the observation, "that a new-born baby, because of the lack of awareness, also has no right to live", that she had been "unaware that philosophy was so far distant from the community values." Senate Select Committee On The Human Embryo Experimentation Bill 1985, \textit{(Official Hansard Report, 1986)}, 501} This of itself does not mean that such a being could not be killed if eugenics and utilitarian calculations indicate it. Singer and Kuhse put it like this:

Does consciousness make the difference? It certainly makes some difference. Once a being is conscious, there are certain things we ought not to do to it. We ought not to cause it to suffer, or at least not without a sufficient reason. It is also true that to kill a conscious being is to prevent it from having any future experiences. If these experiences might have been pleasurable ones, this may be enough ground to say that it would have been better not to kill. Of course, if the future experiences of the conscious being were likely to consist of unredeemed suffering, that would be a reason for killing.\footnote{Senate Select Committee On The Human Embryo Experimentation Bill 1985, \textit{(Official Hansard Report, 1986)}, 501}

In his review of the opinions of Singer and Kuhse, Tom Daly contends that they have to rely on "magic" to get from non-personhood to personhood.
The problems which they, in their denial that the human embryo is a person, have to rely on magic to solve, is how growth alone was able to produce this sort of capacity, and what agent, when the embryo itself has been excluded, was responsible for this sort of growth. Why doesn't every embryo end up as a tumour or a hydatidiform mole? 

Daly drives home his point when he insists that he relies on science and not on magic when he claims that "the capacities already possessed by the human embryo differ from the capacities of a dog embryo to precisely the same extent as the capacities of a human adult differ from those of a grown dog. These capacities are written in the sequence of the nucleotides of the DNA. This message is determinate as soon as a sperm has penetrated into the cytoplasm of an egg, and was not determinate beforehand." 

Joseph Fletcher's indicators for human personhood are well known. Fletcher's original list of indicators for human personhood was meant to be "tentative", to begin a discussion. Many of those indicators reflect a Lockean view of human personhood, something that can only be present in a human being when they are sufficiently well developed, such as "minimal intelligence, self-awareness, self-control." He argued at that time that of all the criteria he proposed, neocortical function "is the cardinal or hominizing trait upon which all the other human traits hinge." Three years later Fletcher reviewed the discussion and concluded that "there are now four contenders in the running" to be considered as "the sine qua non, the essential one without which no combination of the others can add up to humanhood." The advantage of his cardinal criterion is that it is "medically determinable".

In his discussion of the three rival cardinal criteria for humanhood, Fletcher singles out Michael Tooley and Richard McCormick as being "on sound ground, so far." Tooley's "self-consciousness requirement" matches number two on Fletcher's original list. "Once a growing baby's neurological 'switchboard' gets hooked up, allowing consciousness of self to emerge, he or she is a person." Richard McCormick, on the other hand, says "the meaning, substance, and consummation of life is found in human relationships," so that when quality of

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224 Ibid.


226 Ibid.. Fletcher had 15 positive human criteria and 5 negative human criteria in his original list.


228 Ibid., 277

229 Ibid., 275

230 Ibid.
life judgments are made as in the cases of diseased or defective newborns, "life is a value to be preserved only insofar as it contains some potentiality for human relationships." This accords with Fletcher's optimal traits number seven and number eight. Fletcher reminds Tooley and McCormick, however, that neocortical death is what determines that both "self-consciousness and other-orientedness have gone." Fletcher is concerned that, on the criteria advanced by Tooley and McCormick, amnesia victims and radically autistic and schizophrenic patients might be determined as non-persons. He sees his neocortical death criterion as a more certain basis for determining human personhood than the rival criteria which he agrees are crucial, but not as crucial as neocortical death.\textsuperscript{232}

Michael Tooley defends the following proposition:

\begin{quote}
An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.\textsuperscript{233}
\end{quote}

Patrick Derr has observed about this definition of personhood that it has the "extremely unfortunate consequence of excluding David Hume, who ... most certainly did not conceive of himself as the \textit{subject} of experiences or mental states (his 'theatre'), but, rather, just as the states and experiences (his 'perceptions') alone."\textsuperscript{234}

In the context of his discussion about the defects of \textit{person} as a theoretical category, Bernard Williams deals with Michael Tooley as "the theorist who wants us to get used to the idea of infanticide." With Tooley's classification of personhood "infants fall out of the favored class at one end, and the senile fall out at the other." The concept of personhood is deceptive.

The category of person, though a lot has been made out of it in some moral philosophy, is a poor foundation for ethical thought, in particular because it looks like a sortal or classificatory notion while in fact it signals characteristics that almost all come in degrees - responsibility, self-consciousness, capacity for reflection, and so on. It thus makes it seem as if we were dealing with a certain class or type of creature, when in fact we are vague considering those human beings who pass some mark on a scale.\textsuperscript{235}

\begin{thebibliography}{9}
\bibitem{231} R.A. McCormick, "To Save or Let Die: The Dilemma of Modern Medicine", \textit{Journal of the American Medical Association}, 229, 8 July 1974, 172-176 and cited by Joseph Fletcher, op. cit., 275
\bibitem{232} Joseph Fletcher, \textit{op. cit.}, 277. Fletcher's point is that "the amnesiac has lost his identity, his selfhood, and the psychotic is still \textit{thinking}, no matter how falsely and in what disorder."
\bibitem{233} Michael Tooley, "Abortion and Infanticide" in \textit{Applied Ethics}, ed. Peter Singer, \textit{op. cit.}, 64. Tooley's fuller account of the basic thrust of this article may be found in Michael Tooley, \textit{Abortion and Infanticide}, (Oxford: Oxford University Press, 1983)
\bibitem{234} Patrick Derr, \textit{op. cit.}, 29. Hume said: "The mind is a kind of theatre, where several perceptions successively make their appearance ... [But] the comparison of the theatre must not mislead us. They are the successive perceptions only, [and not the building] that constitute the mind." David Hume, \textit{Treatise of Human Nature}, \textit{op. cit.}, 253
\bibitem{235} Bernard Williams, \textit{Ethics and the Limits of Philosophy}, \textit{op. cit.}, 114
\end{thebibliography}
Williams notes that the "pass mark" is suitable for some purposes but not for others.

If person implies something called "full moral responsibility," the lowest age for entry to the class that has traditionally been entertained is seven, but anyone who has lived with a six-year-old, or a two-year-old, has vivid reasons for thinking of them as persons. Not even Tooley regards them as prepersonal enough to license their being killed.\textsuperscript{236}

\section*{3. CONCLUSION}

The bioethical and philosophical literature contains many different attempts to determine who are the persons and who are not the persons. I have referred to a selection of them as representing where the debate is. However, what appears clear to me is that there is no agreed definition among moral philosophers of what constitutes a person, or even an agreement that the concept of person is a reliable and safe category to apply to humans for life and death purposes. Moral philosophers and bioethicists propose a wide variety of times and dates, marker events, when they imagine the human entity becomes a person with a right to life although, as I have already shown, utilitarians are not deterred from killing purely on the basis of a right to life. These marker events include syngamy, 14 days [primitive streak], 56 days [brain birth], 24-28 weeks [viability], birth, three months after birth and so on.

Against this variety of opinion about the beginning of human life and human personhood the witness of modern embryology, as I have indicated before, is signal. The summary account of the meaning of human origins by the German embryologist, Erich Blechschmidt, is indicative.

\textit{Whoever has really seen only once a human embryo knows that in this original appearance the human shows a degree of order such as is not even thinkable elsewhere, especially not in inorganic nature ... The question as to when in the biological sense man arises in the human ovum is already wrong in its beginning. Man does not become man, but he is man during the whole ontogenesis from the beginning. In other words: during the whole development the essential remains; only the outer appearance changes.}\textsuperscript{237}[\textit{my emphasis}]

Are we right to attempt to value human life on the basis of what an entity can actually do or is it the genetic capacity to do those things in the fullness of time that counts? Does nature revolve around function or function revolve around nature? Human beings do human things because they are human. A non-human animal that does some of the things that humans do is not a human being. A robot that mimicks human functions is still a robot. Does there exist any objective way by which it will be safe for us to determine who are the persons with a right to life, and which human beings are non-personal members of the human species and who may be safely killed?

\textsuperscript{236}Ibid.

\textsuperscript{237}From a lecture by Erich Blechschmidt, "Human from the beginning", (Ulm, 7 February 1975); also cf his \textit{Wie beginnt das menschliche Leben}, (Stein am Rhein: Christiana-Verlag, 1976), 30. "Ein Mensch \textit{wird} nicht Mensch, sondern \textit{ist} Mensch und verhält sich schon von Anfang an als ein solcher."
What is to happen to those persons who through sickness, old age, or accident loses one or more of the functions held to be essential for human personhood? Do they lose their right to life? May they be killed? Should we not all be worried about such an eventuality? Peter Singer and Helga Kuhse seek to reassure us:

This fear is based on a misunderstanding of the theory of rights. Once a being with a sense of the future exists, that being can have an interest in her or his future existence. This interest should be respected. Obviously no plausible theory could condone the random killing of people while they are asleep.238

But who is talking about sleeping? If one loses the functions held to be necessary to human personhood is not one already a non-person? Kuhse and Singer already accept that killing infants and foetuses is not morally wicked because "neither is a person, as Locke and Tooley define the term."239 The same could be said of a comatose or severely brain damaged adult. It also raises the question, why should a definition proposed by Locke or Tooley be seen as definitive for my life or yours?

It is my conclusion that there is no agreed basis for the division of human beings into persons and non-persons. What we do have as an agreement from science is that we all share a common humanity, a point conceded by Peter Singer, Michael Tooley, and Helga Kuhse. We also have an agreement that every member of the human family has certain inviolable and inalienable rights including the right to life.

The reinforcement of the philosophical validity of the consensus gentium on human values and human rights is greatly advanced by the reassessment of natural law theories to which a number of contemporary philosophers is making significant contributions. In the final analysis the task of bioethics is to find coherent and rational ways, taking into account the realities of human nature, to participate in the human values without directly acting against any of the basic human rights, and in a way that safeguards the common good.

238 Helga Kuhse and Peter Singer, *Should the Baby Live?*, 138
239 *Ibid.*, 137
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